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

July 16, 2014

RE: Freedom of Information Act (FOIA) Request #14-F-00471: Request a copy of each response to a Question for the Record (QFR) provided to Congress by the CPCS (Date Range for Record Search: From 01/01/2009 To 06/17/2014)

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Enclosure

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT HEARING ON THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT AND SMALL BUSINESS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

HEARING HELD
May 14, 2009

Small Business Committee Document Number 111-023
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SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT HEARING ON THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT AND SMALL BUSINESS

Thursday, May 14, 2009

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 10:00 a.m., in Room 2360 Rayburn House Office Building, Hon. Jason Altmire [chairman of the Subcommittee] presiding.

Present: Representatives Altmire, Ellsworth and Fallin.

Also Present: Representatives Dahlkemper and Thompson.

Chairman ALTMIRE. Thank you all for being here. And as we discussed, there are going to be votes called on the House Floor probably in 20 minutes or a half hour, so we're going to try to get through Ms. Nord's testimony, first, before we have those votes. And I will now call the meeting to order.

This Subcommittee hearing is now called to order. When it comes to protecting our children Americans take every possible precaution. We strap our kids into car seats when we're driving. We insist on training wheels when they're learning to ride a bike. We vaccinate them against chicken pox, polio, and countless other illnesses. In other words, we do everything we can to make sure our children are safe. That's why it's so distressing when threats to their health go undetected, particularly when those threats come from inside our own homes.

In 2007, excessive lead levels were detected in a wide variety of children's toys. Up until that point, those products which ranged from Thomas the Tank Engine toys to Winnie the Pooh playset were assumed to be safe. But when it turned out they were not, the Consumer Product Safety Commission launched a massive recall. All tolled 17 million products were collected and entrepreneurs played a critical role in getting them off the shelves. Needless to say, these small business owners wanted to protect their customers. However, what they didn't want—and what they couldn't afford—were the economic consequences of doing so and in the end they suffered heavy losses and economic consequences they could not afford.

To help ensure this type of massive recall never happens again, President Bush signed the Consumer Product Safety Improvements Act into law in August 2008. While the law was intended to protect

our children, it has done less to accomplish that than to hurt small businesses all across our country. In today's hearing, we are going to examine the impact of that law on entrepreneurs and discuss ways to ease that regulatory burden.

Now recalls are never easy. Small firms already operate on tight profit margins and additional outlays for destroying products and reimbursing retailers can often be devastating. Under the new law, small businesses are required to conduct costly product testing and use pricey new tracking labels. These requirements are well intended and good in concept, but their utility has yet to be seen. And what's more, they are extremely expensive for small businesses to comply with.

Even the Consumer Product Safety Commission has admitted that the cost to small business might be crippling. In fact, the Commission estimates entrepreneurs will end up paying billions of dollars just to comply with the new regulations. For small manufacturers, product testing alone can cost hundreds, if not thousands of dollars, per item. The process of testing the 233 various components in a child's bicycle, one bicycle, might run close to $14,000 for one.

Manufacturers are nnt alone in shouldering these costs. Small retainers—from toy stores to clothing shops—have also been affected. They are now saddled with countless items that they can't sell and according to the Toy Industry Association, the new law has led to inventory losses which will reach close to $600 million.

At a time when with the retail and the manufacturing industries are struggling these outlays might very well be the straw that breaks the camel's back. Obviously, we need to protect our children. We all support that. But we need to do it in a way that makes sensc and doesn't cripple our small businesses.

Fortunately, the Consumer Product Safety Commission, we believe, does have the authority to be flexible with these small firms. This is critical, particularly when it comes to product testing. For instance, it allows the rubber for a toy doll to be pretested at the rubber plant rather than the doll factor. This would go a long way. This kind of component analysis could reduce costs without compromising safety.

Protecting our children is all of our top priority. It is extremely important to consumers to have confidence in the products they buy, and the Consumer Product Safety Act was intended to provide that confidence. But rather than streamlining and improving the process, it's added a crippling new level of complexity. As small firms continue to grapple with obstacles like restricted lending and tightening credit, we shouldn't be creating more roadblocks for those same small businesses.

I'd like to thank all of today's witnesses in advance for their testimony and when—unless—Mr. Thompson, do you have an opening statement? I will, without objection, allow Ranking Member Fallin the opportunity to provide her opening statement when she arrives.

So at this point I will turn to the witnesses and our first witness, thank you for being here is the Honorable Nancy A. Nord. She's the Acting Chairwoman of the United States Consumer Product Safety Commission. She was appointed by President Bush for a term that expires in October 2012. Ms. Nord formerly served as General

Counsel of the White House Council on Environmental Quality and is counsel to the House Commerce Committee. Thank you for being here, Ms. Nord, and welcome.

STATEMENT OF NANCY A. NORD, ACTING CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Ms. NORD. Thank you, Mr. Chairman, for calling this important hearing. I'm delighted to be here to talk with you about the efforts that my Agency has made to implement the CPSIA. My written statement provides an overview of the Agency and the details of the Agency's activities in implementing the new statute. So therefore, what I'd like to do with my time that I have with you is to first of all tell you what we did to inform the public about the new law. Second, what we learned along the way. And third, what we see as the issues going forward, especially as they impact small businesses.

First, what we did. I first have to say that the CPSC staff has just been tremendous since the Act was signed into law last August and I can't praise their work highly enough. But they were operating in an extremely difficult environment right from the start. The Act was a very significant rewrite of our statutes and it required that we begin promulgating regulations very quickly. The first rule had to be finally promulgated within 30 days of enactment. So we really had to begin our implementation with absolutely no time to train our employees into the nuances of the new statute.

Even though the Act doubled the workload of the Agency, we began with no additional funds, no new resources for a period lasting over seven months which was the critical first period of implementation of the Act. We also already had a very full safety agenda that had been planned for this coming year. So the new Act's requirements were layered on top of that important safety agenda.

We took very seriously our obligation to educate stakeholders about the requirements of the new law. In the first month alone, we began a series of public meetings first providing an overview of the Act with later ones addressing specific topics that had fast-approaching deadlines, the testing and certification requirements, the phthalates ban, the lead ban, altering vehicles, books, apparel, to give you just some examples.

We developed a special website dedicated to the Act which includes automatic updates to the public. We developed a plain English summary of the law's most relevant provisions and posted that summary on the website. We began what is now a list of over 100 plain English answers to Frequently Asked Questions.

We've also issued guidance documents on numerous topics. Some of those that are particularly targeted to small businesses, resellers, and home crafters. Our small business guide got 365,000 hits on our website the first month that it was put up. Okay, so what have we learned? As we worked to educate both consumers and businesses, it became apparent that many—is this on?

It became apparent that many of those impacted—somebody does not want me to talk. It became very apparent that many small businesses, in particular, were not well aware of the requirements of the law, the implications for the businesses, or the fast-ap-

proaching deadlines. And throughout the fall and the winter, as we heard more and more from small business people and learned about the problems that they were encountering with the law, the staff really did search for ways to provide some relief for them. But we were hamstrung by the law's sweeping reach and the inflexibility of the law.

Just to give you a couple of examples, first of all when the House passed HR 4040 which is your version of the bill, you had a small business exemption in your legislation that allowed us to push back dates. That provision was taken out in the conference. Hence, we lost our ability to be flexible with respect to small business implementation.

Perhaps the most onerous impact on small businesses, resellers, and thrift stores is caused by the lead and phthalates ban being retroactively applied to inventory. What I mean by that is that the law impacts not only products manufactured after the effective date, but it impacts products sold after the effective date. And this retroactive effect makes illegal on February 10 of 2009, inventories sitting in warehouses, products sitting on store shelves, that were perfectly legal when they were made and that nobody has alleged to be unsafe.

The staff tried to address the retroactive effect of the law with respect to phthalates where the law, we thought, gave us a little bit of wiggle room, but we were overturned by the Courts just before the effective date of the law. The law also gives us very little ability to grant exclusions from its provisions, even for products that are scientists do not believe present risks of injury.

Because we don't have the ability under the law to craft common sense solutions to the problems that we are now seeing, the Commission has used stays of enforcement as pressure valves to provide some relief for certain products and for the testing and certification requirements of the law.

But we know that these stays of enforcement are now solutions. Instead, they are time outs for everyone. Businesses, consumers, the CBSC and also for Congress, and these time outs are meant to allow the CBSC and the Congress to address the growing list of unintended consequences that we are seeing coming out of this law. But it is important to remember the stays of enforcement are not solutions, permanent solutions to problems. Even if a provision, if the enforcement is stayed, the underlying liability stays in effect.

Okay, so what do we see going forward? Having met every single deadline that was in the statute over the last, over the first six months of implementation, having advanced over 40 rulemaking activities to date, we do know that much work lies ahead of us. And let me just give you a bit of a flavor of some of the problems that we see on the horizon as they impact small businesses.

The first is August 14th of 2009 when the issue of retroactivity will occur again as even lower limits on lead content go into effect pulling into the law's reach, even more children's products. And this is where you're going to see the impact on books and bicycles. Permanent tracking label requirements also go into effect on August 14th which will have a particularly hard impact on home crafters. Next February, small businesses will be facing testing and certification requirements when the stay of enforcement ends.

What can be done to improve the situation to still protest consumers which is what the law was intended to do and the mission of our Agency, and yet help small business owners survive under the law? Attached to my written statement is a list of legislative recommendations from the CPSC career staff that would go a long way towards helping small business people while maintaining the health and safety standards and enforcement activities that are at the core of our safety mission.

Thank you for holding this hearing today. This is the very first hearing on the Act's implementation and I want to have a dialogue with the Congress so that we can work together to address the law's real-world problems by finding common sense solutions.

Thank you so much.

[The prepared statement of Ms. Nord is included in the appendix.]

Chairman ALTMIRE. Thank you, Chairwoman Nord, and we know that you, like every Member of Congress have been inundated with questions about this and impact statements and we're very happy to have you here to have this discussion.

At this point I would yield to the Ranking Member, Ms. Fallin, from Oklahoma, for her opening statement, following which we'll do the questions.

Ms. FALLIN. Let me just say thank you to our Chairman Altmire for holding this hearing and working with us on the issue that's very important to our small businesses around the United States. And Chairwoman Nord, I appreciate your comments today. I appreciate the awareness that you have of the situation facing so many of our businesses throughout our nation and the challenges that this Congress have given you with the law itself and some of the recommendations that you've made to try to resolve this issue. And hopefully, within this panel and this group and our legislative body, we'll be able to draft some legislation. That's my hope, Mr. Chairman, that we'll be able to address these issues.

We have called this hearing, of course, to examine the Consumer Product Safety Improvement Act on small business and it is a very important issue for all our manufacturers, distributors, and sellers of goods aimed at children under the age of 12. The federal law and regulations adopted last year were meant to ensure that our children were safe from toys that they play with and clothes that they wear, however, there are unintended consequences that this well-meaning legislation that do severely impact many of our small businesses that produce children's products, not only overseas in factories, but also right here in the United States.

I'd like to extend a personal thank you to all of our witnesses that have joined us here today on our Subcommittee and to welcome you and we look forward to hearing all of your testimony and your personal experience with how this all has affected your small business and manufacturing and especially to give a welcome to David McCubbin who is from my home state, my home town, a long-time personal friend of mine and he is the owner and operator of McCubbin Hosiery in Oklahoma City.

In 2007, toy manufacturers had to recall over one million toys that violate the standards concerning lead-based paint. The toys re-

called included well-known children's products associated with things like Thomas the Tank Engine, Barbie Doll, Dora the Explorer, and obviously parents were rightfully outraged about the danger to their children and prompted Congress to pass a Consumer Product Safety Act in 2008. Most of the lead in these cited toys came from overseas toy manufacturers and although the law harshly affects many of the American businesses that also produce toys, the CPSIA prohibits the sale and distribution of a product for children under the age of 12 if it contains more than 600 parts per million, as we've talked about, of lead in February of 2009. And of course, that will drop to 300 parts August 14th. And to ensure this compliance the Act requires the manufacturers to certify their products meet these standards through independent lab testing.

Given the many concerns of small businesses across the country and their ability to meet these strict requirements in a short time frame, the Commission did ease the enforcement of the regulations for one year, but it ended February 10th—it will end February 10, 2010. This stay, as you mentioned, is intended to ease some of the problems facing our small businesses, but it is by no means a cure-all. We do need a resolution to this and though the Consumer Product Safety Commission may not take punitive action against anyone selling the product with more than 600 parts of lead, others may choose to enforce the law, as you also stated. So there's still liability to many of our manufacturers and small businesses. An example of that is that a State Attorney General may take legal action of they find a business has produced, distributed, or sold a product for a child that exceeds the lead limit. So small businesses and owners are thus forced to incur large costs of testing their products or risk punishment in the future if their products do not conform to these standards and that has been exacerbated for small business retailers who, unlike manufacturers, are not yet required to certify lead content of products. So the retailers who do note test for lead are still subject to these restrictions on selling a product containing lead, even though they lack the ability and resources to determine if their products contain it.

So cost of testing is going to be upwards of tens of thousands of dollars for small retailers and just to make sure that only a few of their products don't fall below the minimum requirements. And of course, at a time when our economy is suffering and a recession is here and people watching their bottom line trying to make a profit, keep their employees employed, this is certainly not good news for small businesses. So I think it is very imperative that we look at federal law changes to ensure that we do have a healthy environment for our children and their products and their toys, but also to have a regulatory structure that can co-exist and does not have unduly burdensome regulations upon our small businesses and especially our manufacturers.

So I look forward today to having our witnesses and their testimony and hearing their recommendations, Mr. Chairman, that they have. Thank you so much and once again, I look forward to working with you on legislation and I'll yield back my time.

Chairman ALTMIRE. Thank you, Ms. Fallin. We should be able to get through the four of our questions. We each have five minutes before the vote is called, which is good. I want to note the presence

of Congressman Ellsworth from Indiana and Congressman Thompson from Pennsylvania. I thank each of you for being here as well.

I just first wanted to ask your opinion as someone who is literally at the tip of the sphere on this issue something that we've all heard so much about. And you think about this and work on this every day. Is it your opinion that the impact that this law has had on small businesses, the issue that we're talking about today, is this an unintended consequence of the law that was passed or is this what we were trying to achieve in passing the law?

Ms. NORD. I cannot for a moment believe that Congress intended to make billions of dollars worth of products that were sitting on store shelves, sitting in warehouses, on container ships illegal even though nobody is alleging that they are unsafe.

The biggest problem I think for small retailers and for resellers of products is the retroactive effect of the law that sweeps into its effect, products that were manufactured well before the effective date and were manufactured to meet the laws as they existed at that point.

Chairman ALTMIRE. And we believe that the law specifically gives the Commission the authority to exclude products from the lead limits that clearly do not pose lead ingestion risks. So do you agree with that, and if so, why hasn't the Commission taken specific action to exclude more products?

Ms. NORD. I wish that the law did give us that flexibility. I think that flexibility is needed. Unfortunately, the law was written in a very deliberate way not to give us that flexibility. We brought this to the attention of Committee staff during the conference drafting process and were told very specifically that that flexibility was not intended.

The way the law is written, we do not have the flexibility to exclude many products that our health scientists really feel do not pose a risk of injury, but which may have lead above 300 parts per million content.

Chairman ALTMIRE. The small businesses, as we all know, bear disproportionate share of federal regulatory burdens to begin with, before discussing this law and they don't have the compliance resources of their larger counterparts and I was wanting your opinion, Chairwoman, on this law. Is it placing small businesses at a disadvantage compared to their larger competitors? And if so, is the Commission doing anything to level the playing field, given what you have to work with the letter of the law?

Ms. NORD. I do think that this law is putting small businesses at a disadvantage. I have had informal conversations with many, many companies around the country. I do hear from large businesses, that they are changing their ways to try to accommodate the law. I am hearing from large retailers that they are sending back product early to make sure that everything on store shelves complies with the law. So those bigger companies are working to accommodate themselves to the law, but there are some things in the law that have a particularly adverse impact to small businesses, the retroactivity provision that I just mentioned, the fact that we cannot really do risk assessments and tailor our regulatory approaches to look at real risks. I think that impacts small businesses as well. There are a number of other things that are set out

in my written testimony, but yes, I do think we need to figure out a way to make sure that this law fulfills its objective to help consumers without undue adverse impact on small businesses.

Chairman ALTMIRE. Thank you. I will not turn over to Ms. Fallin.

Ms. FALLIN. I appreciate your comments about the lack of flexibility to exclude products. Does the Commission have the sufficient authority under the law to exempt producers of textiles and textile products from the lead testing requirements in the Act? It's your opinion that you do not?

Ms. NORD. Well, what we have done with respect to a category of products that includes natural textiles like wool and virgin wool and cotton and that kind of thing is we have rather pushed the limits of the law and said we are going to exclude them from the testing requirements. So that's natural fabrics.

We've also included certain kinds of other products that by definition don't and cannot have lead, but that's really as far as we can go.

Ms. FALLIN. Okay, and how does the stay of enforcement on testing and certification requirements help the retail and wholesale industries since they are so liable under this Act, if they do have goods that exceed the lead limits and are subject to the enforcement actions say of Attorney Generals?

Ms. NORD. Well, as I mentioned stays of enforcement are not the optimal way to regulate or to enforce laws, but it was really the only technique that we had available to us. We were hearing from many, many small businesses that they just were not ready to start issuing certifications, especially certifications based on the testing requirement of the law. That is a very stringent requirement. It is going to be very expensive. And it was just very clear that people were not ready to meet the requirements and the time lines in the law. So we did a stay of enforcement, but we made very clear that we don't have the authority to stay the underlying requirement of the law. So they are still liable, potentially, if they sell something that has more than 600 parts per million of lead in it.

Ms. FALLIN. Madam Chairman, according to the authors of the legislation, the authors believe that the Commission has sufficient authority to rectify the concerns of small businesses. What is the legal basis for the Commission to arrive at a different conclusion than this?

Ms. NORD. I've heard that said. What isn't said is any examples of where in the law we have that flexibility. Instead, we can point to many examples where we explicitly don't have the flexibility. And again, as we worked through the drafting process during conference, it was made quite clear that flexibility was not what was being granted to the Commission. I can go through and give you any number of examples of where the Commission's authorities have been cabined so tightly that we really cannot respond to the real world situations that are coming up. And I think that is unfortunate. It is impacting small businesses much more adversely than others and it really doesn't advance product safety.

Ms. FALLIN. Would you please provide the Committee examples in writing where these restrictions keep you from doing that?

Ms. NORD. I would be delighted to do that.

Ms. FALLIN. That would be great for us to have it in this Committee. Thank you.

Thank you, Mr. Chairman.

Chairman ALTMIRE. Mr. Ellsworth.

Mr. ELLSWORTH. Thank you, Mr. Chairman, for holding this extremely important hearing. And I thank Ms. Nord for being with us here today. If my information is correct and we're talking about unintended consequences, if my information is correct, all but one Member of the House of Representatives voted for this legislation, so I would have to assume that minus Dr. Paul, we all didn't have the intended consequence of hamstringing small businesses and large businesses as a matter of fact. I know that it wasn't directly after this vote that I went home and met with folks in my District from shoe distributors that were concerned that children were going to be chewing on their parents' shoes, from a sporting goods company that made foosball tables that the little men on the foosball table were afraid a two-year-old was going to crawl up there and chew on the foosball men, and many other examples of that. That's not the intended consequence of this legislation, like you said. Everyone wants to protect our children, but we have hamstringed many businesses.

One of the things that concerns me, Ms. Nord, is what you said earlier, and it seems to be rampant here is that we implemented this legislation and gave you no time to train and I applaud you for doing the plain English explanation because that's another thing I hear a lot about is that when people deal with the Federal Government, our regulations, it is less than understandable terms, so I appreciate that.

I'd like you, at some point to look at House Bill 1465. We filed that in March and look at that, if you would and see if that answers some of the questions and concerns. We filed that with the help of the NFIB to address some of these concerns and I would encourage the Members of the Committee, if they haven't looked at that already to look at that. It has not received a hearing, but we hope to forward that.

What are some of the things again, in plain English, if I can speak plain English, that you're hearing from small businesses and large businesses, just bullet point the biggest concerns and how we might rectify that. If it's top three, top five, whatever you think you can do.

Ms. NORD. The top thing that we hear is the rather perverse effect of the retroactivity provisions which renders existing inventory illegal. And we are then forcing people to either destroy inventory, test and determine what its contents are, or violate the law. And I think that is just—you shouldn't be putting business people in that position.

Secondly, the law does not really give us the flexibility to respond to real-world situations and real-world problems that we are hearing. Our flexibility was removed. We asked, for example, certification and testing authority, but what we got was something so constricted that we really don't have the ability to move within the provisions of the law to structure something that makes sense for business sellers and small business people in this country.

So more flexibility needs to be given.

I think if you address those two things, as well as several of the other things that are in my written statement, you can have a law that really carries forward the principles that you wanted when you passed the CBSIA and that the Agency wants. Our mission is to protect consumers. That's what we're about, but we don't want to be putting people out of business for selling water wings with excess amounts of lead when we all know that nobody is getting lead poisoning from swimming in a pool with water wings. Or bicycle tire valvesthat have excess amounts of lead, excess above the law limits, but where nobody is getting lead poisoning by filling their bicycle tires with air. These things are preposterous. The law shouldn't operate in that way. And I think if Congress would give us back the flexibility that was removed from the expert Agency here, we could craft this in a way that makes some sense. I'd like to work with you on your legislation.

Mr. ELLSWORTH. That would be great. And could you touch, briefly, I know they're getting down to that where we can run over there in a few minutes, they might hold it open just a little bit longer than 15 minutes. I've seen that done.

Touch on the secondhand shops, I guess the chain, when we're going to secondhand shops, flea markets, if you could touch on that and the implications there as it goes down the chain what your views are on that?

Ms. NORD. The secondhand shops, charity shops, provide such a value to our society, especially right now. And they have been impacted by this law in a rather unique way and again it's because of the retroactive effect, making it illegal to sell things that don't meet the lead limits as opposed to manufacturing products after the effective date that don't meet the lead limits.

So you've got charities and thrift shops that bring in unique products. They don't have any way of knowing if those products have lead or phthalates. We've given some guidance, but it has to necessarily be general guidance. So they are in the really unfortunate position of either having to decline to sell these things, remove them from inventory and destroy them, or take their chances and possibly break the law. And we're talking about useful products. We're talking about children's clothing.

Nobody has ever brought to my attention a child being poisoned by wearing a pair of kid's dungarees with a metal zipper or wearing a shirt with a pearlized button. These things may have more than 300 parts per million of lead. They don't necessarily pose a risk of injury. And we have put resellers at legal risk because of the retroactive effects of the law. I think that's wrong.

Chairman ALTMIRE. Let me cut it right there, so we can give Mr. Thompson from Pennsylvania the opportunity.

Mr. Thompson.

Mr. THOMPSON. Well, first of all, thanks, Chairman Altmire, Ranking Member Fallin for putting this into the Subcommittee for this very, very important discussion and Chairwoman Nord, we really appreciate your being here, your testifying and frankly, your remarks reflecting on kind of a common sense attitude with this. I find that refreshing for this town.

I do have—you talk within your top five issues that were brought to you and one of those was existing inventory in terms of problems

faced by small businesses. The folks I've been hearing from, however, in fact is that a problem that's being raised by a number of small businesses, in fact, many on the next panel, I believe, that the biggest problem involved the testing of components that have no lead in them, or affixing permanent labels to children's headbands and hosiery.

How would you respond to those businesses, any thoughts on that issue? The inventory, obviously, is significant, but frankly, this is a problem going forward as well.

Ms. NORD. Yes, I think component testing could be a very, very useful tool for us and for small businesses. The problem is that the way the law is written, the testing requirement falls on the producer of the children's product, not on people that make the component parts because buttons, by their nature are not necessarily children's products. When you put them on a child's dress, then they become a child's product. So the person who makes the dress is the person who is under the law required to do the testing.So I think that's one area where we could do some fine tuning of the law to clarify how we're doing to deal with component testing.

The other issue is permanent tracking labels. The law does require that they go on all children's products on August 14th. Now the law was written in a very interesting way because it interjected a bit of ambiguity into it because it says that they need to be put onto to the extent practicable. The Agency had a hearing yesterday. We are in the process of developing guidance. I know it's somewhat late, but we are doing the best we can to get it out, but again, we want to be reasonable here. I want to be focussing with respect to the tracking labels on products that are dangerous; that we've had a history of recalling, like baby cribs. We're frankly not real interested in kids' headbands or stockings, but the law doesn't allow us to make those cuts and that's really what we need.

Mr. THOMPSON. Thanks very much. I yield back the balance of my time, Mr. Chairman. Thank you.

Chairman ALTMIRE. Thank you. I recognize the gentle woman from Pennsylvania, Ms. Dahlkemper.

Ms. DAHLKEMPER. Thank you, Chairman. In the interest of time and the fact that votes are being called I have a statement that I would just ask that there be unanimous consent to place in the record, along with a letter that I have written to Chairman Waxman and the Honorable Joe Barton.

Chairman ALTMIRE. Without objection, thank you.

Thank you, Ms. Nord, for being here.

Ms. NORD. Thank you.

Chairman ALTMIRE. We are going to adjourn for a vote. We have a series of five votes, so we're going to recess the Committee until 11:30 a.m.

Thank you.

[Off the record.]

Chairman ALTMIRE. We will reconvene the hearing. I ask the witnesses for the second panel to come forward. To explain the voting system, you will each have five minutes to give your remarks. As indicated by the lights that are in front of you, when you see the yellow light come on, you will have one minute, so please start to summarize your remarks at that point and the red lights means

you have exceeded your time, please wrap up your thought at that moment and then we will move to questioning after all of you, as a group, have spoken.

So I will introduce the first witness, Ms. Laurel Schreiber, who is my constituent and friend. Ms. Schreiber is owner of Lucy's Pocket in Allison Park, Pennsylvania. Lucy's Pocket sells a variety of children's clothing, as well as embroidered baby items such as bibs and blankets. Ms. Schreiber sells her products both online and in her store. Welcome, Ms. Schreiber. Please turn your microphone on.

STATEMENT OF LAUREL SCHREIBER

Ms. SCHREIBER. Thank you for the opportunity to speak before you today about the effects of the CPSIA on business. My name is Laurel Schreiber and I have a small home-based business called Lucy's Pocket. I sell monogrammed gifts for children through my website.

As the CPSIA now stands, I as well as thousands of crafters, seamstresses, artists and others who market safe, hand-made items for children under the age of 12 will be put out of business. As small business owners, we are looking to you to make legislative changes that will allow those of us who have been creating safe items to continue doing so.

As it relates to my business, there are two major and substantial problems with the CPSIA as written: the redundant testing requirements and the comprehensive labeling mandates. All of the items I sew onto, or make myself, are made from commercially-available textiles, ribbons, threads, and other materials. They come from wholesale suppliers as well as retail stores. A majority of the items I purchase from wholesale suppliers have General Certificates of Conformity which attest that the items have been tested for lead and/or phthalates and have passed those tests. I also purchase items from large retail stores who are unable to provide GCCs, altbough they have tested their products prior to placing them on their sbelves.

Due to the CPSIA, I will have toe test each individual item prior to selling it. And though an enforcement stay for testing has been issued for textiles, there is no guarantee it will not be rescinded at a later date. The enforcement stay does not include items with buttons, snaps, zippers, or other non-textile parts.

In order to have my one-of-a-kind items tested, I will need to create two identical items, the wet method used to test for lead destroys the original. From the testing companies I have contacted, the cost to me is about $75 per component. A component includes the fabric, and thread and any other material that makes up that product.

I have brought several examples of my work to show you how this expensive redundant testing will put me and those like me completely out of business for good.

One of the most popular items is an appliqued bib and bloomer set. The basic set contains at a minimum 12 components. The components include four threads, two dyed fabrics, a two-part Velcro closure, elastic, poly cotton fabric, 100 percent terry cotton fabric, and 100 percent cotton binding.

To test those 12 components will cost me $900 to prove that the bib and bloomer set don't contain lead. If I use a plastic-backed bib purchased from a retail store then I will need to add an extra $375 to prove that it doesn't contain illegal phthalates. So testing for that set will range from $900 to $1275. It sells for $20.

I also create monogrammed hairbows. They consist of a metal clip, two types of thread, and ribbon. I have GCCs on file showing that the importer has tested the clip and it is free from the lead level. It will cost $300 to test that bow which sells for $5.

I create monogrammed headbands which we had talked about earlier. The headband is made of plastic so it had to be tested for phthalates as well as the other components for lead. As with my other items, I have GCCs on file from the importer showing the headband does not contain the illegal phthalates. To test the components of the headband, plus the phthalates, will cost $675. It sells for $9.

Because each of my items is unique, I'm unable to batch test. Redundant testing is not necessary. The air in my house, the sewing table I work at is not lead infused. It's not lead filled. Items coming out of my home will not be contaminated with lead. I say material coming in will go out as a safe product.

If the redundant testing requirements will put me out of business, the labeling mandates would. As of this August, each and every item going out of my studio must contain a permanent label that contains information like the source, date of manufacture, and batch. For a business that creates one of a kind items and less thao 5,000 or so a year, this is an unnecessary hardship. Permanent labels are not technically feasible for many of my items. And procuring permanent labeling supplies is an incredibly expensive proposition.

My business is a way if I were to find out there were problem issue, I could pick up the phone and call my customers.

I and many others like me started creating hand-made items as an antidote to mass-produced, possibly unsafe toys and clothing originating from China. Many of us have young children. We are very aware of the dangers of lead poisoning, but we use safe materials and we create safe products. We're willing to alter our methods to ensure compliance, but with the way the law is written we'll be forced to shut down completely.

We're asking for common sense of the law. We've written letters and faxes, made calls. We're safe. We just want to be legal. But the unintended consequences of the CPSIA are showing that this would be absolutely impossible. I'll have to close my doors and once I close I'll not be supporting my suppliers or other businesses and they may not be affected hugely by my loss, but there are a lot of businesses like me. So once you start multiplying the effects it becomes fairly apparent that CPSIA is going to absolutely kill the hand-made industry and the ramifications are going to be beyond definition.

[The prepared statement of Ms. Schreiber is included in the appendix.]

Chairman ALTMIRE. Perfect timing. Thank you, Ms. Schreiber.

The next witness will be introduced by Representative Thompson.

Mr. THOMPSON. Thank you, Chairman. Actually weeks after I came to Congress I had a meeting in my District Office in Bellefonte, Pennsylvania and the woman that I met with described her entrepreneurial aspirations in really a unique and innovative start-up company she created. And while her company was growing there was an unfortunate setback that had her doubting the future of her business. And it was brought to my attention that the Consumer Product Safety Improvement Act which passed unanimously in the 110th Congress as a result of lead contaminants in children's toys had unintended regulatory consequences that placed undue restraints on everything from product development to expansion.

And my constituent went on to explain that if thee materials she used to make her products were not tested by a third-party laboratory, she could be in violation of the law and this testing would have grave financial ramifications on her product line.

This seems to be counter-productive, mainly because her source material was purchased from retail outlets that already certified the goods. My constituent explained as a mother, she wanted our children to be safe and she did everything to ensure that with her business.

I'm certainly confused as to how this law, and in turn, regulation set into place by the Consumer Product Safety Commission could place such a burden and disincentive on a budding entrepreneur and Mr. Chairman, I really appreciate your assistance in having Suzi Lang, owner of Starbright Baby teething giraffes join us today, one of my constituents. Suzi Lang is a former kindergarten through 12th grade art teacher, also trained as a graphic designer, a photographer, and she produces she's stuffed teething and toddler giraffes that are sold online and wholesaled to baby boutiques in both the United States and Canada.

Welcome, Ms. Lang, and we look forward to your testimony.

STATEMENT OF SUZI LANG

Ms. LANG. Thank you very much for having me here today. As the mother of a 2-year-old, I admire Congress' efforts to draft a law that protects children from excessive amounts of lead in toys. Unfortunately, the law, as it is currently written, will heavily danger small businesses and entrepreneur who make and sell items for children in this country. I do not believe the law is fatally flawed, however, I think the injection of some common sense provisions would more effectively ensure safe products for children and prevent irreparable damage to small business.

The reason I am going my testimony is because that I, along with several business owners, are afraid for what the CPSIA means for our business and the important amount of income it brings into our families. Specifically, my business consists of fabricating and selling these soft little teeth giraffes for babies. I'm not affiliated with any groups. I'm here on behalf of my own business, however, I'm using the resources that I have to advocate for small businesses, many of whom rely on this income to sustain their families.

A few of the major problems that this law presents to my business are unit testing, the tracking and labeling requirement and the fallacy of assuming that everything is toxic until proven safe.

Unit testing is cost prohibitive for many small businesses, including my own. I make very small batches of these giraffes, usually about ten per fabric choice. I also make one-of-a-kind and custom items for my customers, using their own fabric or fabric from my collection. My giraffes would be required by this law, as of February 10, 2010, to be tested for both lead and phthalates. I contacted a research, a lab close to my home in Harrisburg to quote for lead and phthalate testing. For the lead testing I was quote $50 per component and for each giraffe there are four to five components. Cumulatively the total cost for testing one fabric line of giraffes would be anywhere from $1800 to $2200. That's also adding in the $400 per component for the phthalate testing. My giraffes usually sell for about $14 to $18 each, depending on the kind of fabric that I use and the added cost of testing would add another $180 to $225 per giraffe. For a one-of-a-kind item, the price would have an additional $1800 to $2200 price tag tacked on to a $14 charge. This is extremely cost prohibitive for my customers.

Considering that the law specifies that if I change any component, it would need to be tested again. I created 36 different patterns of giraffes in 2008. So the total cost of lead and phthalate testing would be $64,000 to $81,000. I actually only made $4500 gross last year. The deficit the testing would create would more than put me out of business. It would bankrupt my family.

Another aspect of the law that affects my business is the tracking and labeling. The law says that it is to be to the extent practicable, but I question how this could be done by any home craft seller or small business. Each lot needs a new tag and it would force me to have to make my own labels because I would never be able to meet the minimum for the label companies that I use to print the labels that I have now. Because my giraffes are only ten or fewer or sometimes only one, it would never be practical.

The most disheartening thing for me as a small business is the assumption that the law is everything bad and dangerous until proven safe. Especially since many of the materials I use are proven to have no phthalates, no lead, fabric is all I'm using, quilt fabric, cotton fabric. Many small businesses do not purchase their fabric wholesale, but instead buy it from local fabric or quilting shops. In this setting I can buy one yard of fabric from my local shop, make my giraffes, have to have them all lead and phthalate tested and my neighbor can go buy the very next yard off the bolt of fabric, make baby bibs, try to sell them, and she would also have to lead and phthalate test the very same fabric from this very same bolt which is not very—pretty much nonsense.

The most problematic thing for me is to have to phthalate test this item since it's a teething item. It's required under the law to be phthalate tested, but it's entirely made out of cotton fabric. When I contacted the lab to get quotes, they asked me how they would have to be able to do this since the CPSIA said to grind the toy to get a sample to test, but there's no grinding on a fabric giraffe. I don't think he would survive.

There are so many unintended consequences of this law that thousands of small businesses and crafters will be put out of business in this already tough economic climate.

Thank you very much.

[The prepared statement of Ms. Lang is included in the appendix.]

Chairman ALTMIRE. Thank you, Ms. Lang.

Ms. Susan Baustian is Director of the franchise Once Upon A Child located in Minneapolis, Minnesota. Once Upon A Child are independently-owned resale businesses that purchase and sell used and new children's clothing and merchandise. Franchised in 1993, these stores have become a rapidly-growing component of the Winmark Corporation family of brands.

Welcome, Ms. Baustian.

STATEMENT OF SUSAN BAUSTIAN

Ms. BAUSTIAN. Thank you, Chairman Altmire for having me to testify today.

My name is Susan Baustian and I am the Director of Once Upon A Child Stores for Winmark Corporation. Today I'm speaking on behalf of our hundreds of stores in what we call the industry of gently-used products.

Winmark Corporation owns two franchises that have been in business for over 20 years; Once Upon A Child, a store selling used children's goods and Play It Again Sports, they sell new and used sporting goods, that have been significantly impacted by this bill. Although our company headquarters are based in Minnesota, we have over 520 franchises across the country. What that amounts to is over 500 store owners worrying about whether or not they comply with the law, 5000 employees scrambling to figure out how to comply and over 200 vendors feeling they do not have the resources to test their products to ensure that they comply with these new standards. Last year alone, our two brands serviced over 7 million parents that are now confused as to what is safe or not for their children.

The ill-executed implementation of this legislation has brought fear into the industry, and that fear, especially in economic times like these, can bring a half to successful and productive businesses. Our franchises have a lot on the line that is driving this fear. Most of them have business loans where their homes on the line. They have a family in which their business provides for, and they have a strong sense of giving back to the community in that they are being at the forefront of recycling. They buy and sell product that children no longer use or have outgrown. They are fearful that the CPSIA will force them to give up their American dream which is owning their own business.

I think what is really unfortunate about this debate over the CPSIA has lead to finger pointing on an issue that we really all agree, that we want to ensure the safety and protection of our children.

Our store owners have dedicated their lives to providing safe, fun, and educational products for children of all ages, and are now

having to rethink how they can continue to offer these products without violating the law.

We want to work with the Consumer Product Safety Commission to comply with this law, but the guidance issued thus far has been difficult to understand for many of our store owners. We do not want to have to shut our doors over legislation that we all agree could help children if implemented in an effective and productive way, but we need the help of the CPSC and Congress to clarify what is required for our store owners.

The CPSC has come out and stated that resellers such as Once Upon A Child and Play It Again Sports, as well as Goodwill, Salvation Army, ARC, Church organizations, garage sellers, consignment stores, anybody that has a small business that does resell items, do not have to test products, but our businesses are still liable if those products with banned substances are sold.

The CPSC recently produced a Handbook for Resale Stores and Product Resellers with the purpose being and I quote, "to help identify the types of products that are affected and to understand how to comply with the law, so you can keep unsafe products out of the hands of consumers." Unlike the information that the CPSC supplies regarding recalls which is a very specific list by brand and model number, the handbook is too general to effectively determine which products are safe to buy and sell.

For example, on page seven of the handbook, it indicates and I quote that "items made of wood (without paint, surface coating or hardware) are OK to sell." It also indicates that and I quote again, "clothes with rhinestones, metal or vinyl/plastic snaps, zippers, grommets, closures or appliques are best for us to test. We can either contact the manufacturer or we should choose to not sell them." Unlike retailers of new products, our franchisees across the country really have no idea how to determine if the painted blocks, toy trucks, dolls, stuffed giraffe, or anything else that they're bringing in and they're buying and reselling contains lead paint or are made up of dangerous lead components or toxic plastics.

It will be a violation of the Act to sell an item that is known to have more than the acceptable limit. This violation can be a fine of $5000 for each violation, and that fine increases to $100,000 on August 14. Being that the handbook gives us only guidance on determining which items are safe, the only way to be certain would be to test the product. However, being each piece that is bought and sold is unique, it would be very costly to do that. With a house on the line, a family to care for, and a potential liability to deal with, fear has really taken over for many of our retailers.

Last year alone, Once Upon A Child paid families $45 million for children's items that we purchased for resale which generated $120 million in sales for our franchisees. For families, the money that they receive from selling these children's items can be used to supplement the parents' income or maybe used to buy items for their children that they may otherwise can't afford. For business owners, this income helped provide for their family. But now, many business owners and parents are worried they won't know when a snap or zipper contains lead, and like toys, they have no way to test these items.

If there's really one thing that's become clear through this process is that we as an industry need more guidance and we need more time to sift through inventory, understand the new regulations and find cheaper, more efficient ways of testing products. For my industry, it's critical that we are able to understand how we can better sort through the inventory and confidently buy and sell children's items without fear of selling something that is unsafe for a child or facing consequences of violating the Act.

We need to know specifically what items are deemed unsafe for our children. I thank you for calling this hearing today on the impact of this bill.

[The prepared statement of Ms. Baustian is included in the appendix.]

Chairman ALTMIRE. Thank you. Mr. Anthony Vittone is Vice President and General Counsel of Swimways Corporation in Virginia Beach, Virginia. Swimways Corporation manufacturers leisure and recreational water products. The Swimways brand has been around for over 35 years and can be found at major retailers and individual pool dealers alike.

Welcome, Mr. Vittone.

STATEMENT OF ANTHONY VITTONE

Mr. VITTONE. Mr. Chairman, Ranking Member Fallin, Members of the Committee, thank you for holding this hearing and giving me the opportunity to talk with you about the issues small businesses are facing as a result last year of the passage of the Consumer Product Safety Improvement Act.

My name is Anthony Vittone. And I am the Vice President and General Counsel of Swimways. Swimways is a small, privately-held, family-owned company headquartered in Virginia Beach where we employ about 70 hardworking Americans.

Swimways designs and makes pool toys for the water. We offer 120 different products to customers ranging from nine months through adulthood. The Swimways brand of products is sold in 40,000 storefronts with major retailers and individual pool dealers alike.

For the past 15 years, Swimways has enjoyed an average rate of growth of 15 percent a year until 2008. Unfortunately, we took a step backwards last year and that was directly attributable to two factors, the state of the economy and the passage of the CPSIA.

The CPSIA, together with the economy, created a perfect economic storm for us. Swimways' main issue with the CPSIA involves the phthalate restrictions. While we would agree that there are issues with other provisions in the Act, I plan to focus my testimony today on four issues regarding the CPSIA and the new phthalate restrictions.

The first issue that we have is the timing of the phthalate ban was in our opinion the single biggest disaster in the CPSIA. When the European Union and the State of California passed a similar phthalate ban, they gave manufacturers and retailers 13 months and 15 months, respectively, to move through their inventories. Conversely, the CPSIA, as written, only gave manufacturers and retailers five months.

For any consumer product company this would be wholly inadequate. For a seasonal company, like Swimways, the time frame was essentially nonexistent. I am sure that the Members will understand that there are not a lot of pool toys being sold in the fall and the winter. People buy pool toys when it's hot.

Furthermore, whatever time was granted in the CPSIA was completely wasted by the back and forth interpretation of the Act's retroactivity on existing inventory. The industry relied on the CPSC's General Counsel's opinion that the new regulations would only apply for inventory manufactured after February 10th. When the New York Court in February overruled that interpretation, the retailers went into a complete panic. They had four days to review their inventory to determine which products were compliant with the CPSIA and remove that merchandise from the shelves. As a result of the severely compressed time line, broad-brush reactionary decisions were made and manufacturers like Swimways were expected to absorb the cost.

The same product, if sold by a retailer on February 9, 2009, was perfectly acceptable and safe by Government and industry standards. The next day, that same product became a toxic and dangerous weapon of mass destruction.

Our second issue with the phthalates restrictions is the CPSIA included a specific legislative exemption for embedded lead. However, no such exemption was given for the significantly more benign phthalates. Swimways makes a number of products where there is no ability to access the phthalates unless the customer essentially destroys the product. These products present no risk to the consumer and should be available for sale.

Third, both the CPSIA and the California legislation permit the use of three phthalates DINP, DIDP, and DNOP, depending on the age grade of the product. The California legislation only prohibits these three phthalates for child care articles and toys that are capable of going in the mouth if they are intended for children three and under while the CPSIA forbids them for children up to 12 years.

We manufacture a product called the Rainbow Reef fish. These are battery-powered fish that swim in a swimming pool. We've sold over 7 million units of this product. Prior to 2009 the fins of these fish were made with phthalates. Even those this Rainbow Reef fish is age graded five plus, there are nearly 15,000 units of this product that are now useless and will have to be destroyed. The only reason is because those fins are capable of going into a child's mouth. They're not going to come off, but they're capable of being chewed on.

Adding further confusion to the marketplace is the exemption for sporting goods in the CPSIA. It is not clear what the definition of sporting good is and what the definition of toy is. The CPSIA has offered limited guidance, but more detailed criteria are needed. In our experience retailers are not willing to take a chance of using a broad-brush approach if it's for a kid, it's a toy.

We manufacture another product called the Spring Jam basketball and have sold over 750,000 units of this product since 2005. A large retailer had approximately 10,000 units of this product on their store shelves and they immediately removed them on Feb-

ruary 10th. We reviewed the item with them, argued that it was a sporting good, offered to sort through the inventory because some of the inventory was 2009 inventory and was phthalate-free. They destroyed it all, all 10,000 units, even though less than 15 percent of that inventory of those 10,000 units had phthalates in them. All of them were put into the shredder.

Under the California Act, these goods would have been compliant. If there had been an embedded phthalate exemption, these goods would have been compliant. Had the CPSIA allowed more time to move through existing inventory, this problem would not have occurred. The retailer is now insisting on $100,000 credit for the destruction of the Spring Jam inventory and other retailers have destroyed other lots of the same.

I'll wrap up. I'm already over, but suffice it to say, Mr. Chairman, Swimways Corporation has incurred about $1 million in expenses as a result of this legislation. We ask for your help. Thank you.

[The prepared statement of Mr. Vittone is included in the appendix.]

Chairman ALTMIRE. Thank you and for the video record of the proceedings for our colleagues who can't be here, can you hold that basketball up again, just for the camera?

Mr. VITTONE. Sure.

Chairman ALTMIRE. And that's what you were talking about with the 10,000 units?

Mr. VITTONE. Yes, 10,000 units of this.

Chairman ALTMIRE. Thank you. I would yield now to the Ranking Member to introduce our final witness.

Ms. FALLIN. Thank you, Mr. Chairman. It's my pleasure to introduce a gentleman from my home state, David McCubbin, who is the President of McCubbin Hosiery in Oklahoma City. He's been President of that company since 1982, but it is a family-owned business. It's been in business for 57 years, so that's a long time. They design, market, and distribute children's and ladies' hosiery and their products are sold in a number of national and regional retail outlets including Nordstrom's, Dillard's, Stride Rite, K-Mart, Payless Shoe Source and many other small, independent retailers. Mr. McCubbin started emailing me as a fellow parent, both of our children go to school together, and said Mary, you've got to help me on this. This is really hurting my business and I'm scared to death about the laws that have been passed here in Congress. Help us out.

We were able to do something, David. It's fun when you can complain to your Congressman and we can actually have you up here and hear from you and try to resolve the issues. So thank you all for coming and David, we're pleased to have you here.

STATEMENT OF DAVID McCUBBIN

Mr. MCCUBBIN. I want to thank you for inviting me to address this Committee. The Consumer Product Safety Improvement Act of 2008, well intentioned to enhance the level of safety in the products Americans purchase for our children has had massive consequences. The legislation's broad scope has impacted thousands of

products for which the measured concerns are not material. Your willingness to review the implications for small businesses, in particular, is very much appreciated.

I was specifically asked to comment in regard to the impact of the law on our business today, the implications we anticipate in upcoming year, and recommendations I would have regarding the CPSIA.

Thus far we have been most impacted by the lead content testing requirements. Initially, we were told by industry experts, both in the U.S. and internationally, that there was no reliable lead content test for textiles engineering a scramble to execute any test that would work or be considered reliable. Reputable testing labs throughout the U.S. and Asia differed on their interpretations of what should be tested, consequently we tested all yarns and every sock at considerable expense. A sudden overwhelming demand in the testing labs resulted in delayed shipments, increased transportation costs, and strained relations with customers and suppliers.

The implications for the upcoming years, staying on Section 101 which is the lead content limits, this section classifies children's products containing more than the allowable limit of lead as banned, hazardous substances. This is a worthy and reasonable proposition, however, it has been laid upon the apparel industry in such blanket fashion without regard to any historical evidence or suggested likelihood that harmful amounts of lead are found in the products. In short, we are asked to search at considerable expense for something that does not exist, nor has been alleged to exist. We anticipate this redundant testing will cost in excess of half a million dollars to our company in the first 12 months.

Section 102, General Conformity Certification, also known as GCCs. This section of the law has been interpreted to mandate that every time we make a shipment, each article contained therein must be accompanied by a GCC identifying each rule, ban, standard or regulation applicable to the product and certifying each product complies with our regnlations. Ensuring accuracy and availability for the GCC for every incoming order from our factories and matching that information to the GCC for every item on every order shipped to our customers will result in the creation of tens of thousands of certificates annually. This is a daunting prospect for any small business.

Section 103 on tracking labels. The apparent intent of this section provides for the identification of the specific manufacturing facility for every given item, and to maintain transparency through to the end-consumer. While this goal appears innocuous, we believe actually it will be harmful for our business. Most hosiery is exempt from the care labeling rules enforced by the Federal Trade Commission due to utility or appearance be substantially impaired by a permanently attached label.

My recommendations are as follows regarding Section 101 on the lead contents, I believe based on the evidence a move should be made to exclude textile products from lead testing requirements. At the CPSC's public hearing in January credible and overwhelming evidence was presented demonstrating statistically negligible levels of lead existed in textiles.

Our industry has done its due diligence on lead and textiles. The only possible outcome is higher cost to the consumer. We can't make the product any safer.

Section 102 on the GCCs, allowing this document to be prepared on an annual basis for each style in a company's offering would vastly simplify compliance with the law.

Regarding Section 103 on the tracking labels, the CPSC should follow precedence established by the FTC with regard to consumer labeling laws. We move that all hosiery items be excluded from tracking label requirements. Socks are a low-risk item. The country of origin and the company's RN number are already on the packaging of the item. There's no need for any additional information.

Small businesses applaud the efforts of the United States Congress to ensure the safety of all citizens. In this instance of the CPSIA, however, unclear and belated interpretation is causing unintended punitive consequences for our business and thousands like us. Children's products existing in commerce for years should be judged based on the history of the consumer safety. Where there is no history of problems, common sense exclusions from the regulations should apply.

Your willingness to review the implications for small businesses, in particular, is very much appreciated. My comments today are very consistent with the sentiments expressed last week by the distinguished Chairwoman of the House Small Business Committee, the Honorable Representative Nydia Velasquez. All too often, federal agencies overlook the unintended impact that regulations have on small businesses, she said, to create an environment that fosters entrepreneurship, the regulatory system must be responsive to small business needs.

I hope you agree my testimony underscores her message. Thank you.

[The prepared statement of Mr. McCubbin is included in the appendix.]

Chairman ALTMIRE. Thank you. We'll now move to the questioning. Each Member will have five minutes to question the witnesses. I will begin with Ms. Lang. Thank you for being here again.

I know you talked about in your testimony that your business makes very small batches of the particular product line that you sell and with this limited quantity, testing each line is obviously very expensive and if you could rely on tests conducted by your component suppliers, rather than by you, would that provide significant relief and can you give me an example of the cost reduction that you would see?

Ms. LANG. If I could rely on component testing and just getting GCCs from my suppliers, that would significantly reduce the cost of testing for my product. I wouldn't need to send it for the three-party wet lab lead testing and the phthalate testing. I am unsure, however, if since fabric is an item that is not intended always for a teething item, I'm not sure if that would be tested for phthalates, however, since there aren't any in fabric, it's not a plastic, if there could be an exemption for items that aren't plastic, written into the law or exempted by the CPSC would be wonderful.

Chairman ALTMIRE. Thank you. Ms. Schreiber, the product testing requirements of the law are obviously some of the most burdensome for small businesses and the tests can be very expensive. Can you quantify for us how much exactly would it cost you to test your products?

Ms. SCHREIBER. If just this set would cost up to $1200, with what I make it would be conservatively in the hundreds of thousands of dollars. I mean because I use, everything I use is made once. It's a one-off item. Everything is personalized. So therefore, everything I make would have to be tested. So it would actually boggle the mind how much it would cost to test.

Chairman ALTMIRE. So it's an amount that you couldn't even consider.

Ms. SCHREIBER. I couldn't quantify it. I wouldn't be able to. It would be 75 times the number of threads I have in my house, the number of ribbons I have, the number of products I have, the number of products that make up the products I get from my wholesalers.

Chairman ALTMIRE. Would anybody else on the panel like to comment on that issue? Okay.

Ms. Baustian, secondhand stores like Once Upon A Child are generally selling items manufactured years earlier, long before the new law was even considered by Congress and I know the Consumer Product Safety Commission guidance has been vague to resellers. Do you feel that there's any economically feasible way for resellers to determine which products could be legally sold, lawfully sold?

Ms. BAUSTIAN. Economically, I believe there is not. For us to test the product, if we so chose that, you can purchase an XRF technology type gun. The cost of that for an individual owner would be around $20,000. Let alone the labor included to be able to test each of the components of each of the unique items that they are purchasing for resale in their store.

Chairman ALTMIRE. Thank you. For Mr. Vittone and Ms. Schreiber, overly burdensome regulations can place small businesses on an uneven playing field. Small businesses simply don't have the compliance resources that their larger competitors do. So could each of you talk about how this, from a business perspective, these regulations have put you at a competitive disadvantage?

We'll start with Mr. Vittone.

Mr. VITTONE. Sure. Thank you. I would say they do put us at a competitive disadvantage, not just with our other competitors, but also with the retailers that we sell to. We sell to large box retailers and when a large box retailer tells us that they just shredded 10,000 units of our product and wants $100,000 credit, we don't have much choice but to comply. We have to sell to that retailer next year if we want to stay in business.

So it puts us at a competitive disadvantage not just to them, but those resources take us away from growing our business and hopefully selling more product the next year.

Ms. SCHREIBER. And for me, the competition I have, it would really fall under who is going to try and be legal under the law and who is not. Many of my competitors probably feel the same way that I do, that we are making safe products. We want to be legal.

There's also many people that believe it doesn't apply to them. They're not going to follow the letter of the law. So at that point the competitive difference goes from zero to 60 because I'm done. I'm closing my doors. I'm selling off my sewing machines and they're continuing to make what they already have on the assumption that they're never going to catch me. So I don't know if that clarifies.

Chairman ALTMIRE. It does. Thank you very much.

Ms. Fallin?

Ms. FALLIN. Thank you, Mr. Chairman. I just have a question for any of you to answer and maybe I'll start with Mr. McCubbin. How does the stay of the enforcement and the testing and certification requirements on the retail and wholesale industry, how does that affect you since you still could be liable under the Act by like Attorney Generals. Does the stay really help or are you still worried about the liability under some other area of enforcement?

Mr. MCCUBBIN. Honestly, I'm not that worried because our products are so low risk and there are no lead in our products so I'm not that worried and I'm not testing currently. However, a lot of my—like Towle and Associates, they sell children's clothes. Well, they're still having to test and they are concerned. They've got lead in the zippers and he can change a button, he can have new buttons flown over from Asia and he can change, but the zippers, he's going to have to cut them out and that ruins the product. So our business is okay, until the stay goes away. And then that's when our costs would be just on the lead half a million dollars.

Ms. FALLIN. Okay.

Mr. VITTONE. Speaking on behalf of Swimways, we appreciate Chairman Nord's efforts. She has done as best she can to reduce the effects of this legislation, but the stay really hasn't affected us, frankly. We've gone ahead and moved forward with compliance. We're really more trying to deal with the aftermath of what to do with the products that we have sold to our retailers that are still on their shelves or that is still in our warehouse or in the warehouses of our manufacturers overseas.

Ms. FALLIN. Anybody else want to add anything?

Ms. BAUSTIAN. Certainly from a resell standpoint for us it doesn't really affect us because either way we will have to comply on the sales side that all items are deemed safe. So our owners certainly are very concerned, but have no way to really ensure that they're doing that.

Ms. LANG. The stay has kept me in business. I was going to shut down on February 10th of this year. It kept me in business until February 10th of next year. If it expires, I'm out of business. The thing that concerns me the most is that since it is a one-year stay, I'm not putting the money into my business that I would if I knew that I was going to be able to continue to grow my business. I'm not probably making the efforts that I would as far as on the wholesale side of selling my product and growing my business. But I would if I knew that I was going to be able to keep operating.

Ms. SCHREIBER. And I think I'm in a sort of a similar situation as Mr. McCubbin, because I work mostly in textiles. I've had to discontinue some products because those wholesalers won't provide me with a GCC because it's a bib that doesn't contain lead, so

they're not going to test for it because it doesn't contain lead. So I've dropped them because I want to have prove products. So it's affected me a little bit, but again, if it's not sort of re-upped, I'm done.

Ms. FALLIN. So all of you are saying basically that if nothing changes in the law and the stay and the one-year moratorium runs out, that there's a possibility that you could shut down your business.

Ms. LANG. It's not only a possibility, it's a given.

Ms. FALLIN. You will.

Ms. LANG. I can't afford $84,000 in testing when I make $4500 a year.

Ms. FALLIN. And I thought, Mr. Chairman, the other comment that she just made was that she could be investing more money and adding to her product line and creating more opportunities and buying more products, but she's decided to hold back and that's what we see a lot in our economy right now, especially during this recession time. People who have money are scared to invest, and so here we have one more thing that's causing concern for investment.

I have another question for Mr. Vittone.

Mr. VITTONE. Yes.

Ms. FALLIN. You said you took a step back because of this Act. In taking a step back, what did you do?

Mr. VITTONE. What I meant was is that we had a rate of growth about 15 percent a year for the last 10 years and we went backwards last year and our profitability for 2008 was reduced by about 46 percent as a result of all of the inventory and the chargebacks from the retailers. So it was a significant impact last year.

Ms. FALLIN. And you talked about the one company with the hoop that you showed them a minute ago about how they destroyed their products, are they coming back after you to get a credit?

Mr. VITTONE. Yes, $100,000.

Ms. FALLIN. $100,000, and so—

Mr. VITTONE. They want credit not only for the price they paid for the inventory, but also for the destruction to it.

Ms. FALLIN. Are you in a legal matter with them on that?

Mr. VITTONE. No, no. Like I mentioned, we're in discussions with them on how to resolve it.

Ms. FALLIN. That's tough.

Mr. VITTONE. Yes.

Ms. FALLIN. Well, thank you all so much for coming today. We sure appreciate you.

Thank you, Mr. Chairman.

Chairman ALTMIRE. Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman. First question I have for Ms. Schreiber, if one of the problems that the CPSIA tried to resolve was lead in toys from overseas manufacturing, does it make sense to you that most of the laboratories that can your testing are overseas?

Ms. SCHREIBER. It doesn't. That's a little ironic, isn't it? And that's where some of the most cost-effective testing goes to. But I have people that order things for a specific occasion and with my time frame to get things done, between family issues and every-

thing else, and then you're tacking on another two weeks to get it shipped to China to have them test it, when maybe the clip originated from China six months ago and I have testing that says it's good, so I'm sending it back and it's sort of an Alice fell down the rabbit hole sort of situation, really.

I won't be sending it to China, but I quite frankly won't be sending it anywhere because I can't afford it.

Mr. THOMPSON. It's unaffordable to do it. Thank you.

Ms. Lang, the Food and Drug Administration has manufacturing guidelines that accepts certain food additives and chemicals to be generally recognized as safe. Would a similar generally recognized as not having any lead content standard be useful to your business in the implementation of the CPSIA?

Ms. LANG. I think it would probably be useful if it were written into the law or if it were—the thing that I'm afraid of is that the 50 State Attorney Generals are each deputized to go after businesses. I sell in every state and so I would hate to not know if I am going—if somebody is going to come after me for my product.

I would need something more cut and dry, I think. I think it would need to be more set in stone than just a wavy guideline.

Mr. THOMPSON. Okay, thank you.

Mr. McCubbin, in your opinion, has the Commission provided sufficient guidance to the industry on how to implement this CPSIA?

Mr. MCCUBBIN. No, it has not. I think that's a lot of the problem is the confusion that all companies have as to what the guidelines are. And our customers, as Ms. Fallin mentioned, you've got Dillard's. You've got Nordstrom. You've got Kohl's. We've got K-Mark. We've got Payless. They all interpret it differently and so as I said, we're going forth with that the stay is good for the socks, but let's just say K-Mart says no, but it's the law and you have to abide by the law, forget the stay. So we'd have to test the products for K-Mart. It's very confusing.

Mr. THOMPSON. Mr. McCubbin, how will your firm ensure the suppliers meet the certification requirements of the Act?

Mr. MCCUBBIN. Is that addressed to me?

Mr. THOMPSON. Yes, please.

Mr. MCCUBBIN. Say that again, please, I'm sorry.

Mr. THOMPSON. How will your firm ensure that its suppliers meet the certification requirements of the Act?

Mr. MCCUBBIN. We actually have the products tested over in Asia. After they're made, they have to be sent off and as I said you might have a children's tight that six different colors in it at $40 a color, it gets tested for $240. The whole section of tights for K-Mart, I got 49 now, do a quick math on that, that's very expensive, just for that one run. So they'll tell us that it's passed. They'll send us the certificate and we're trusting it's accurate.

Mr. THOMPSON. Seems like this Act has been a good economic stimulus for China.

Mr. MCCUBBIN. It's been good for the testing labs, I'll say that.

Mr. THOMPSON. Mr. Vittone, do you have an estimate, in terms of numbers, do you have an estimate of the total number of employee hours devoted to the implementation of this, rather than

more productive work associated with growing the Swimways business?

Mr. VITTONE. It would be hard to count them all up, but it's been thousands upon thousands of hours, just spent on complying with this Act. It touches everybody in the company, so everybody has to deal with it from the art department to the product development department to the finance department to sales, everybody has been having to work to comply with this Act and with the tracking labels and that brings in IT and then all of our manufacturers in China. It's hard to put a number on it.

Mr. THOMPSON. It's pretty fair to say though it's had a pretty significant negative impact on productivity?

Mr. VITTONE. Absolutely.

Mr. THOMPSON. And efficiency.

Mr. VITTONE. One of the points of my written testimony is that all of the time that was spent on complying with this could have been spent on us growing our business.

Mr. THOMPSON. Very good. Mr. Chairman, I think I'm out of time.

Chairman ALTMIRE. Thank you. Thanks to everybody. Thank you for the audience for sticking it out through the long vote series.

Before we adjourn, I just want to make a point about what we've done here today. You heard the Chairwoman say that this is the first hearing that's been held on this issue in Congress and this came about because each one of you took the time to contact your representative as thousands like you have done, all 435 of us have heard from small businesses and you're the reason that this happened. You're the reason that we held this hearing. This is just the first step. We're going to adjourn the hearing now, but we're going to continue to work to try to find a solution to this problem, but I just want to thank you for taking the time, making the trip, all the expenses and the time commitment that that entails. You made a big difference with your advocacy, both today and leading up to today. So be proud of what you've done and we're going to try to carry forward and get a solution to this problem.

So with that, I ask unanimous consent that Members will have five days to submit statements and supporting materials to the record. Without objection, so ordered. This hearing is now adjourned.

[Whereupon, at 1:01 p.m., the hearing was concluded.]

JASON ALTMIRE, Pennsylvania
Chairman

MARY FALLIN, Oklahoma
Ranking Member

Congress of the United States

U.S. House of Representatives

Committee on Small Business

Subcommittee on Investigations and Oversight

2361 Rayburn House Office Building

Washington, DC 20515-0515

STATEMENT
Of the Honorable Jason Altmire, Chair
Subcommittee on Investigations and Oversight
United States Representatives, Committee on Small Business
"The Consumer Product Safety Improvement Act and Small Business"
Wednesday, July May 14, 2009

When it comes to protecting our children, Americans take every precaution. We strap our kids into car seats when we're driving. We insist on training wheels when they're learning to ride a bike. We vaccinate them against chicken pox, polio and countless other illnesses. In other words, we do everything we can to make sure our children are safe. That's why it's so distressing when threats to their health go undetected. Particularly when those threats come from within our very own homes.

In 2007, excessive lead levels were detected in a wide variety of children's toys. Up until that point, those products--which ranged from toy cars to Winnie the Pooh playsets-- were assumed to be safe. When it turned out they were not, the Consumer Product Safety Commission launched a massive recall. All told, 17 million products were collected, and entrepreneurs played a critical role in getting them off the shelves. Needless to say, these small business owners wanted to protect their customers. However, what they *didn't* want--and what they *couldn't* afford-- were the economic consequences of doing so and in the end they suffered heavy losses that they could ill afford.

To help ensure this type of massive recall never happens again, President Bush signed the Consumer Product Safety Improvements Act, or CPSIA, into law in August, 2008. While that law was intended to protect our children, it has done less to accomplish that than it has to hurt small firms all across the country. In today's hearing, we are going to examine the impact of the CPSIA on entrepreneurs, and discuss ways to ease their regulatory burden.

Recalls are never easy for entrepreneurs. Small firms already operate on tight profit margins, and additional outlays for destroying products or reimbursing retailers can be devastating.

Under the CPSIA, small businesses are required to conduct costly product testing, and use pricey new tracking labels. These requirements are well intended and good in concept, but their actual utility has yet to be seen. What is more, they are extremely expensive for small firms to comply with.

Even the CPSC admits that the cost to small businesses will be crippling. In fact, the commission estimates entrepreneurs will end up paying billions of dollars just to comply with the new regulations. For small manufactures, product testing alone can cost hundreds -- if not thousands of dollars -- per item. The process of testing the 233 various components in a child's bicycle, for example, runs close to $14,000.

Manufacturers are not alone in shouldering these costs. Small retailers--from toy stores to clothing shops-- have also been affected. They are now saddled with countless items that they can't sell. According to the Toy Industry Association, CPSIA-inventory losses will reach close to $600 million.

At a time when both the retail and manufacturing industries are struggling, these outlays could be the straw that breaks the camel's back. Obviously, we need to protect our children. But we need to do so in a way that doesn't handicap small businesses.

Fortunately, the CPSC *does* have the authority to be flexible with small firms. This is critical, particularly when it comes to product testing. For instance, allowing the rubber for a toy doll to be pre-tested at the rubber plant--rather than at the doll factory--would go a long way. This kind of component analysis could reduce costs without compromising safety.

Protecting our children is a top priority. It is extremely important for consumers to have confidence in the products they buy, and the CPSIA was intended to provide that confidence. But rather than streamlining and improving the process, it has added a crippling new level of complexity. As small firms continue to grapple with obstacles like restricted lending and tightening credit, we shouldn't be creating more roadblocks for them.

Opening Statement for Hearing on
"The Consumer Product Safety Improvement Act and Small Business."
Mary Fallin
Ranking Member
Subcommittee on Investigations and Oversight
Committee on Small Business
United States House of Representatives
Washington, DC
March 25, 2009

Good morning. Thank you, Chairman Altmire for calling this timely hearing to examine the impact of the Consumer Product Safety Improvement Act on small businesses. This is an important issue that affects manufacturers, distributors and sellers of goods aimed at children under the age of 12. Federal law and regulations adopted last year were meant to ensure that our children are safe from the toys they play with and clothes they wear every day. However, the unintended consequences of this well-meaning legislation may severely hurt many of our small businesses, including small businesses that produce children products, not in overseas factories but right here in the United States.

I'd like to extend a special thanks to each of our witnesses who have taken the time to provide this subcommittee with their testimony. Welcome to the Small Business Subcommittee on Investigations and Oversight. I am sure we will find your expertise on small business and manufacturing extremely helpful. I would especially like to welcome David McCubbin, the owner and operator of McCubbin Hosiery from Oklahoma City.

In 2007, toy manufacturers had to recall over a million toys that violated standards concerning lead-based paint. The toys recalled included well-known children's products associated with Thomas the Tank Engine, Barbie Doll, and Dora the Explorer. Obviously, parents were rightfully outraged about the danger to their children, prompting Congress to pass the Consumer Product Safety Improvement Act or CPSIA, in 2008.

Most of the lead in these cited toys came from overseas toy manufacturers, though the law harshly affects many American businesses. The CPSIA prohibits the sale or distribution of a product for children under the age of 12 if it contains more than 600 parts per million of lead after February

10, 2009 and that will drop to 300 parts per million on August 14 of this year. To ensure this compliance, the Act requires manufacturers certify their products meet those standards through independent lab testing.

Given the many concerns of small business across the country and their ability to meet these strict requirements in such a short time frame, the Commission eased enforcement of the regulations for one year, ending February 10, 2010. Though this stay was intended to resolve the CPSIA problems facing small businesses, it is by no means a cure-all. Though the CPSC may not take punitive action against anyone selling a product with more than 600 ppm of lead, others may choose to enforce the law. For example, a state attorney general may be able to take legal action if they find a business has produced, distributed, or sold a product for a child that exceeds the set lead limit.

Small business owners are thus forced to incur the large cost of testing their products or risk punishment in the future if their products do not conform to CPSC standards. The problem is exacerbated for small retailers, who, unlike manufacturers, are not yet required to certify lead content of products. The retailers who do not test for lead are still subject to these restrictions on selling a product containing lead, even though they lack the ability and resources to determine if their products may even contain lead. The cost of testing may be upwards of tens of thousands of dollars for small retailers, just to make sure only a few of their products fall below the maximum requirements. In a time where our economy is going through enough turbulence, this added stress and cost on small businesses may put many more small retailers and manufacturers out of business forever.

With the passage of the CPSIA last year, we in Congress created unforeseen consequences that could significantly harm the backbone of our economy, small business.
It is imperative we look to changes in federal law to ensure a healthy environment for our children can coexist with a regulatory structure that does not unduly burden our American small businesses.

Without permanent changes to the CPSIA, small businesses will remain encumbered with objectives that they may not be able to meet. I look forward to hearing first hand from our witnesses about the state of this law, and to listen to any recommendations you may have. Mr. Chairman, I look forward to working with you on this important issue. Again, I thank each of you for being here today and I yield back the balance of my time.

U.S. Consumer Product Safety Commission

TESTIMONY OF
THE HONORABLE NANCY A. NORD
ACTING CHAIRMAN OF THE
U.S. CONSUMER PRODUCT SAFETY COMMISSION

SUBMITTED TO
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

May 14, 2009

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Testimony of the Honorable Nancy A. Nord
Acting Chairman, U.S. Consumer Product Safety Commission

Hearing on
"The Consumer Product Safety Improvement Act and Small Business"

Committee on Small Business
U.S. House of Representatives
May 14, 2009

Good morning, Mr. Chairman, and thank you for this opportunity today to report to the committee on the progress of the U.S. Consumer Product Safety Commission (CPSC) in implementing the Consumer Product Safety Improvement Act (CPSIA) and to discuss the significant impact of this new law on the nation's small businesses.

The Mission of the CPSC

By way of introduction, the CPSC is a small, independent and bipartisan federal commission charged with protecting the public from unreasonable risks of injury and death associated with thousands of consumer products. With a national workforce of approximately 450 individuals, the CPSC is tasked by its governing statutes with three main missions:

1. To identify existing and emerging product hazards that create an unreasonable risk of injury or death and to address those hazards by developing mandatory safety standards when consensus standards fail to do so;
2. To investigate and respond to product-related incidents and conduct recalls of defective and unsafe products; and
3. To alert and educate consumers about product-related safety issues.

Since its establishment in 1973, CPSC's work has contributed substantially to the decline in the rates of death and injury related to the use of consumer products. These reductions include:

- An 84 percent reduction in crib-related deaths;
- An 83 percent reduction in poisoning deaths of children from drugs and household chemicals;
- A 74 percent reduction in product-related electrocutions;
- A 43 percent reduction in consumer-related residential fire deaths; and
- A 41 percent reduction in consumer-related carbon monoxide deaths.

While we are proud of these and the agency's many other achievements over the years, consumer product safety is never a completed task but always an ongoing process of research, standards development, enforcement and public education. Ever more technologically complex products, expanding retail sales over the Internet, and the increasing significance of imported products are examples of the many dynamics that continuously challenge the agency.

The Consumer Product Safety Improvement Act

In response to the dramatic changes in the marketplace since the CPSC was last reauthorized in 1991, Congress enacted the Consumer Product Safety Improvement Act ("CPSIA") in August of 2008 to modernize and strengthen the agency's authorities. The CPSIA is the most far-reaching and comprehensive overhaul of the agency's statutes since its establishment in 1973, and implementing the new law over these past nine months has been a tremendous challenge to the staff as we redirected our available resources to meet the aggressive and ambitious timetable that Congress mandated.

This challenge was exacerbated by a serious lack of funding to implement the CPSIA along with new Congressional directives on nanotechnology and CPSC staffing in China, as well as two other recently enacted laws, the Children's Gasoline Burn Prevention Act and the Virginia Graeme Baker Pool and Spa Safety Act. This last act sets Congressionally-mandated safety standards for swimming pools and brings the approximately 300,000 public swimming pools under the jurisdiction of the CPSC.

Because a reasonable implementation program for these new laws and directives could not be absorbed within CPSC's original fiscal year 2009 budget request without serious disruption

of mission critical activities, my colleague Commissioner Thomas Moore and I submitted an emergency budget request to Congress immediately following passage of the CPSIA. That request was in the amount of $29,048,000.

While Congress subsequently approved $25,404,000 for the agency, regretfully that approval occurred in March of 2009 after the first seven critical months of CPSIA implementation had passed. During that critical period much of CPSC's on-going safety work was adversely impacted as the agency had to delay or defer projects in other important product safety areas, such as rulemaking activities on portable generators and standards work on electrical, fire, mechanical and chemical hazards.

Since the time that the CPSIA was first being considered in Congress in 2007, I have fully supported the goal of modernizing the agency and, in fact, originally suggested a number of improvements that found their way into the final legislation. These improvements include enhanced tools for enforcement and greater ability to deal with imported products.

While I appreciate these new tools, there were certain provisions of the legislation that have proved to be especially problematic to implement, both for the agency and for the regulated community. Of special concern are those provisions regarding retroactivity and the ability of the Commission to make decisions about the safety of products based on scientific risk assessments.

CPSIA Implementation

This is the CPSC's first Congressional hearing since passage of the CPSIA, and I am pleased to have this opportunity today to discuss the consequences of these provisions with the committee. They have had a particularly severe impact on many of the nation's small businesses.

In implementing the CPSIA over these past nine months, the agency has been truly prolific in its output. The Commission has initiated and advanced over 40 rulemaking activities required by the Act and published enforcement guidelines and policies to enhance compliance with the new law.

We are especially committed to educating both consumers and businesses as to the requirements of the new law and therefore have developed a special website dedicated to the CPSIA, issued various guidances, and responded to questions from the public numbering in the thousands. The staff has held public meetings to elicit comments and respond to

questions about how the new law impacts or regulates all-terrain vehicles, books, apparel, bicycles, phthalates, lead, X-ray fluorescence technology, testing and certification, and tracking labels.

Because it is important that our overseas trading partners also understand the new law, I have taken CPSC technical experts to both China and Vietnam to hold training sessions and to discuss implementation of both existing agreements and the new requirements of the CPSIA. We have worked closely with foreign government officials and product manufacturers to help them understand their requirements under the Act.

While the CPSIA mandated a number of ambitious deadlines, during the first six months of implementation the agency met each mandated deadline. For example, the Commission, within 30 days of enactment, approved final requirements for accreditation of third-party conformity assessment bodies and began rolling out testing requirements for various children's products, including full-size and non-full-size cribs, pacifiers, small parts, lead paint and lead in children's metal jewelry; on a schedule as set out in the law. In addition we have issued Final Rules on:

- labeling requirements for toy and game advertisements;
- all-terrain vehicle mandatory safety standards;
- certification and electronic certificates; and
- procedures and requirements for manufacturers seeking an exclusion from the law's lead mandate.

Furthermore, since enactment of the CPSIA, the Commission has issued:

- an advance notice of proposed rulemaking on crib durability;
- a notice of proposed rulemaking for mandatory recall notices;
- guidance regarding which children's products are subject to the ban on phthalates;
- a request for comments and information on tracking labels for children's products;
- a proposed interpretative rule providing guidance on inaccessibility for lead in children's products;
- a notice of proposed rulemaking and an interim final rule on exemptions for certain electronic devices containing lead;
- a notice of proposed rulemaking on proposed determinations regarding lead content limits on certain materials or products;
- instructions on general certification of conformity; and

- data collection procedures to establish the mandated Chronic Hazard Advisory Panel that will study the effect's on children's health of certain phthalates as used in children's toys and child care articles.

As we have worked through this process, we have encountered a number of problems where the law does not give us the flexibility to respond to unanticipated but real world problems that have been presented. In these instances we have had to resort to issuing stays of enforcement in order to avoid disruptions of the market that would be counter to the purposes of the new law. Among others, we have issued:

- a stay of enforcement of certain testing and certification requirements;
- a stay of enforcement of lead content limits for certain youth motorized recreational vehicles, and
- a stay of enforcement of lead content limits for children's bicycles.

We anticipate issuing additional stays of enforcement as specific problems present themselves even though we recognize that this is not the optimal way to address these problems. Nevertheless, it is the only means we have to avoid the damaging consequences that would result from application of the law as written.

Impact of the Law on Small Businesses

I know that the Committee members have heard from their constituents who have been negatively impacted by various provisions of the CPSIA, and I can assure you that the Commission has heard from them as well. Small business men and women, charity volunteers, arts and crafts people who work at home, thrift and consignment shop owners and customers, ATV sellers and enthusiasts, and many other individuals have been in contact with us regarding the often unexpected consequences of the new law. Many of their problems have resulted from the retroactivity of the lead provisions in the law and the lack of flexibility provided to the Commission to regulate based on thoughtful risk assessments. The problems that have been reported to us have been further exacerbated by the nation's economic downturn. While the agency does not have the capability to compute the economic toll that the new law has taken, we are aware of estimates that place the cost of compliance in the billions of dollars.

The Commission has attempted to ease the burden on these individuals by developing common sense enforcement policies (including stays of enforcement) to the extent that the law allows, issuing comprehensive guidance, identifying certain materials that do not need to

be tested, finalizing exemptions for electronics and inaccessible parts, and putting in place a formal process for exclusions. While the Commission has placed a high priority on processing exclusion requests as quickly as possible, the new law is very restrictive on this point. We have not yet been able to identify any products that would meet the law's requirements for exclusions, and the Commission lacks the authority to change the essential requirements of the underlying statute. Only Congress can do that.

To assist small businesses, in January the CPSC issued a guide to the new law aimed specifically at small businesses. Recently, we published an updated guide for resellers of children's products, including thrift and consignment stores. Both guides are designed to help small businesses, including sellers of used products, in identifying products that may violate the new law or are otherwise unsafe and try to dispel confusion regarding the requirements of the CPSIA.

New Lead Requirements: The CPSC has a long history regulating lead starting with a ban issued on lead-based paint in 1977 under the Consumer Product Safety Act. In more recent years, the CPSC has identified and taken action on a range of different products that presented a potential lead health risk from sources other than paint. Those products have included imported vinyl mini-blinds, crayons and chalk, figurines used as game pieces, toys and children's metal jewelry.

New limits for lead content in children's products and the amount of lead in paint used on those products are set out in Section 101 of the CPSIA. The Act reduces the current lead in paint limit from 600 ppm to 90 ppm for products sold or otherwise distributed in commerce after August 14, 2009.

With regard to lead content, the limits are phased in over the course of three years. As of February 10, 2009, products designed or intended primarily for children 12 years of age and younger may not be sold or otherwise distributed in commerce if they contain more than 600 ppm of lead. As of August 14, 2009, this limit is reduced to 300 ppm of lead, and the limit goes down further to 100 ppm as of August 10, 2011, unless the Commission determines that that limit is not technologically feasible.

New Phthalates Requirements: Turning to phthalates, the CPSC has traditionally had regulatory authority over phthalates under the Federal Hazardous Substances Act (FHSA), and since the early 1980's, the CPSC has researched, and monitored phthalates used in children's products under the agency's jurisdiction. The agency conducted comprehensive behavioral observations and laboratory analysis on phthalates in toys and other products that small children could be expected to mouth in 2000 and 2001.

The CPSIA has permanently prohibited three phthalates, DEHP, DBP and BBP, in concentrations of more than 0.1 percent in children's toys or child care articles. However, since these three phthalates are generally not used in toys or child care articles, the impact of this permanent ban is negligible. Three additional phthalates, DINP, DIDP and DnOP, have been prohibited pending further study and review by a Chronic Hazards Advisory Panel of outside experts convened by the Commission. These interim prohibitions, which took effect on February 10, 2009, apply to any child care article or toy that can be placed in a child's mouth or brought to the mouth and kept in the mouth so that it can be sucked or chewed and that contains a concentration of more than 0.1 percent of these particular phthalates.

Section 108 of the CPSIA applies the prohibition on phthalates to all parts of a children's toy or child care article, not just the plastic parts likely to contain phthlates, and the law does not provide for an exception or exemption for inaccessibility for phthalates as is the case for lead in children's products under Section 101. In addition, because there is no screening test for phthalates (like there is for lead) and because the test requires destruction of the product sample, the test is expensive, especially for a small business or a crafter.

Impact of Requirements: The CPSIA's bans on lead and phthalates are retroactive, rendering illegal inventory on store shelves and in warehouses that was perfectly legal and considered safe when manufactured. This sweeping retroactive application of the lead and phthalates provisions has caused most of the problems that you are hearing from your small businesses, since these businesses may very well have violative product but have no way to make that determination without incurring significant testing costs. The CPSC has never in its history been presented with such a broad based principle of retroactivity. In the 35 year history of the agency, it has been well understood that regulations apply on a prospective basis. The economic damage being done to many small businesses testifies to the wisdom of applying requirements prospectively.

Additionally, CPSIA's lead and phthalates provisions have effectively eliminated the concepts of risk and exposure which had been at the core of U.S. safety laws. For lead and phthalates, the new law revokes the Commission's historic ability to make decisions based on risk and exposure and very tightly restricts the Commissions ability to grant exclusions, even in those situations where the CPSC's health scientists do not believe that there is a safety problem.

Off-road ATVs and motorized bikes designed for children 12 years of age and younger are examples of this new policy. These are products that contain lead above the prescribed limits of the law, although no one has ever seriously suggested that their normal use would expose

children to danger of lead poisoning. In addition, lead is needed to maintain the structural integrity of the metal used in the product. We are seeing the same issue with respect to children's bicycles.

The law as written virtually denies the Commission the ability to grant an exclusion for these products so we are now having to resort to the device of enforcement stays to address the inflexibility of the law. I would strongly urge the Congress to revisit the language for exclusions and retroactivity and return to the agency its discretionary authority to make risk-based assessments on a prospective basis.

I would also like to call your attention to Section 218 of the CPSIA that gives state attorneys general the authority to enforce certain federal product safety laws, including those regarding the limits on lead and phthalates. This state authority to enforce CPSC's statutes compromises the ability of our agency's Office of Compliance to engage in reasonable enforcement discretion. For example, the CPSC is powerless to require state attorneys general to join in the agency's stay of enforcement of certain testing and certification requirements. That is regrettable because, as discussed above, enforcement discretion is an important tool that is needed to reach thoughtful and effective outcomes that enhance consumer safety. While we are reaching out to state attorneys general to educate them about our enforcement policies and try to engage them as our partners in safety, the law does limit our ability to exercise enforcement discretion.

Recommendations for Improvements

On March 4, 2009, Congressman John D. Dingell, chairman emeritus of the House Committee on Energy and Commerce, wrote to the Commission and posed ten questions having to do with CPSIA implementation. Congressman Dingell, one of the authors of the original Consumer Product Safety Act, expressed his concern that the CPSIA "includes unrealistic deadlines for rulemakings and compliance, as well as too little implementation discretion for the CPSC, both of which are exacerbated by the CPSC's lack of adequate resources, both in terms of funding and staff." I would like to submit for the record Congressman Dingell's letter and the responses of career agency staff to his questions, which are attached to this statement.

In those responses, staff noted that the deadlines in the CPSIA have proven to be impracticable to meet and are presenting significant problems for the agency to solve. Staff requests that the CPSC be allowed to use risk assessment methodology to establish priorities for common sense exemptions and be given the discretion to move CPSIA effective dates.

With regard to small business relief, I endorse the staff recommendation that the agency be allowed to develop a robust component certification program so that companies would not need to test a product if the components of that product had already been tested and shown to be compliant. Additionally, Congress could choose to apply the new lead and phthalate limits prospectively to ease the impact on inventory existing prior to the effective dates. If the Congress chose to apply the law prospectively, the Commission still retains the ability to removed unsafe products from the store shelves so consumer safety would not be impacted.

The staff response further states that "the CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks, and the actual consequences of the hazard."

CPSC staff concluded with three recommendations:

1. "Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children;
2. Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household; and
3. Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities, and a phase-in schedule."

I concur with these recommendations. They would go a long way toward helping the agency help your small business constituents and do so without reducing the health and safety standards and enforcement activities that are the core of CPSC's safety mission.

Mr. Chairman, I want to thank you again for holding this important hearing today. The U.S. Consumer Product Safety Commission is a small agency, even with our new funding, and we have a large and important mission to accomplish on behalf of the American public. I am committed to that mission and to efficiently, effectively and aggressively implementing the nation's laws that are designed to provide for the health and safety of consumers. We appreciate your support for CPSC's mission of protecting our nation's families, and particularly our nation's children. I look forward to answering your questions.

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

NANCY A. NORD
ACTING CHAIRMAN

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

March 20, 2009

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

Dear Representative Dingell:

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

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

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

Sincerely,

Nancy A. Nord
Acting Chairman

Enclosure

cc: Commissioner Thomas Moore

Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon
Representative Bobby L. Rush
Representative Anna G. Eshoo
Representative Bart Stupak
Representative Eliot L. Engel
Representative Gene Green
Representative Diana DeGette
Representative Lois Capps
Representative Mike Doyle
Representative Jane Harman
Representative Jan Schakowsky
Representative Charles A. Gonzalez
Representative Jay Inslee
Representative Tammy Baldwin
Representative Mike Ross
Representative Anthony D. Weiner
Representative Jim Matheson
Representative G. K. Butterfield
Representative Charlie Melancon
Representative John Barrow
Representative Baron P. Hill
Representative Doris O. Matsui
Representative Donna Christensen
Representative Kathy Castor
Representative John Sarbanes
Representative Christopher Murphy
Representative Zachary T. Space
Representative Jerry McNerney
Representative Betty Sutton
Representative Bruce Braley
Representative Peter Welch
Representative Joe Barton
Representative Ralph M. Hall
Representative Fred Upton
Representative Cliff Stearns
Representative Nathan Deal
Representative Ed Whitfield
Representative John Shimkus
Representative John B. Shadegg

Representative Roy Blunt
Representative Steve Buyer
Representative George Radanovich
Representative Joseph R. Pitts
Representative Mary Bono Mack
Representative Greg Walden
Representative Lee Terry
Representative Mike Rogers (MI)
Representative Sue Wilkins Myrick
Representative John Sullivan
Representative Tim Murphy
Representative Michael C. Burgess
Representative Marsha Blackburn
Representative Phil Gingrey
Representative Steve Scalise
Senator Harry Reid, Majority Leader
Senator John D. Rockefeller, IV
Senator Daniel K. Inouye
Senator John F. Kerry
Senator Byron L. Dorgan
Senator Barbara Boxer
Senator Bill Nelson
Senator Maria Cantwell
Senator Frank R. Lautenberg
Senator Mark Pryor
Senator Claire McCaskill
Senator Amy Klobuchar
Senator Tom Udall
Senator Mark Warner
Senator Mark Begich
Senator Kay Bailey Hutchison
Senator Olympia J. Snowe
Senator John Ensign
Senator Jim DeMint
Senator John Thune
Senator Roger Wicker
Senator Johnny Isakson
Senator David Vitter
Senator Sam Brownback
Senator Mel Martinez
Senator Mike Johanns

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

Date: March 20, 2009

TO : Acting Chairman Nancy Nord
Commissioner Thomas Moore

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

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

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

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

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

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

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

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

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

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

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

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

Mandated Deadlines: Effect on Safety Priorities and Staff Workloads

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

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

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

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

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

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

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

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

Practical Solutions: Prioritizing Workload Based on Risk or Extending Deadlines

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

- Use of Risk Assessment to Establish Priorities

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

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

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

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

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

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

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

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

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

- Extend Deadlines

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

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

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

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

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

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

Industry Estimates

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

CPSC Testing Estimates

CPSC staff has estimated that the cost for third-party testing of product for lead and phthalates would range from several hundred dollars to several thousand dollars per product tested.

depending on the number of product components requiring testing. Based on information obtained from testing laboratory price lists and quotes, the cost to test for the lead content of a substrate appears to range between about $50 and $100 per tested component. In a recent public meeting, industry representatives stated that testing of the 233 various components of a bicycle, valued at $50, cost one of their members approximately $14,000. Less information is available about the cost of testing products for phthalates, but the limited information obtained from price quotes and laboratory presentations to CPSC staff suggests the best estimate for the cost of phthalate testing at this time ranges from $300 to $500 per tested component. The cost to test for phthalates appears to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant told of receiving quotes for the testing of a product ranging from $7,000 in Asia to $22,000 in the United States. Because these tests tend to be destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.

Economies of scale provide an advantage to larger volume manufacturers, relative to their smaller volume counterparts, as they can absorb these testing costs over a larger production volume. Spread over this larger volume, the incremental increase to the cost of each product is much smaller for the large manufacturer versus the much smaller manufacturer. In short, the heavier burden falls to the smaller volume business. When the Commission establishes random sampling requirements (as part of the required rulemaking on periodic testing in Section 102(b)), testing costs will increase over current levels for manufacturers of all sizes.

The exclusion of most fabric from the third-party testing requirements will provide only limited relief for apparel manufacturers, including small manufacturers. In a public meeting with CPSC staff, several apparel retailers reported finding virtually no lead in fabric, but they did find lead in about 2% of the tests on hard items, such as buttons, zippers, snaps, and fasteners. Since most apparel items have some non-fabric items, there will still be testing requirements for most apparel items. Moreover, under the new restrictions the presence of lead in fasteners used on clothing has had a negative impact on the second-hand market for children's clothing in the United States.

Although testing children's products, as applicable, for lead and phthalates has received the most attention, many products will be subject to additional third-party testing requirements. For example, cribs must be tested for compliance to the crib safety standards at 16 CFR part 1508. Toys are also subject to testing for compliance to applicable provisions of the Toy Safety Standard, including testing for additional heavy metals, such as arsenic, cadmium and chromium. We have no quotes for these tests; however, it is probable that the major factor in the cost of the tests will be the labor time required to conduct the tests. Once again, given the destructive nature of the testing, the manufacturer will also bear the expense of lost material, labor, and overhead.

It is important to keep in mind the wide expanse of goods falling under the definition of "children's products" and subject therefore to third-party testing requirements. Beyond toys and durable infant and toddler products, items such as books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies, and Scout equipment and accessories are subject to lead and/or phthalates testing. Likewise, all products for children 12 years of age or younger that are made by crafts people, stay-at-home moms or dads, charitable church groups and the like,

must meet the new limits and be tested for compliance or their products are banned. This has completely upset the business model for many of those small businesses and charitable organizations. Because of the retroactive nature of the regulations, many retailers began turning back product with more than 600 ppm well in advance of February 10, 2009, in order to ensure their shelves were free of non-compliant product. As a result, many small manufacturers, who failed to recognize the true scope of the law or were unprepared for the retailers' reaction to the CPSIA, now find they have inventory they cannot sell.

Retailers Accelerating Deadlines

Retailers continue to move well ahead of the deadlines established in the CPSIA. For example, it is staff's understanding that Wal-Mart stopped receiving product with more than 300 ppm lead in January 2009. These actions have stranded inventory that may be compliant today but will be banned in August as the lead limit drops to 300 ppm. In addition to the risk that these products may become obsolete and will need to be reworked or destroyed, manufacturers of all sizes are incurring expenses to hold this inventory while they decide how to move their product. The cost to carry this inventory varies by business, but typically runs about 25% of the on-hand inventory value.

As retailers pull product from their shelves, many consumers have also been negatively impacted. For example, CPSC staff have received numerous emails from consumers stating they could no longer purchase parts for their child's youth model motorcycle because of retailer concerns over the lead content of the parts. More than one consumer has noted the possibility of consumers' purchasing vehicles sized for older children or adults if they could no longer service their current motorcycle or ATV. This reaction potentially places these children in a situation of increased risk of injury or death.

Solution: Risk-based Assessments That Consider Age and Exposure

It may be too late to mitigate the significant economic impact of the February 10, 2009, ban on children's products containing more than 600 ppm total lead content, by weight, for any part of the product. However, some relief could be provided to deal with the impact on thrift shops and second-hand sales, and Congress still has time to act to prevent the even greater impact that will occur when the lead limit drops to 300 ppm in August 2009. For example, toxic substances limits are better regulated based on the possibility of exposure in relation to age. Foreseeable use data, combined with mouthing and ingestion data at various ages, would define the group at risk for any given product.

This approach would exclude items such as bikes and ballpoint pens from the discussion and we could focus on items like metal jewelry and other objects likely to be mouthed or ingested. By granting the CPSC the flexibility to determine the relevant hazards, flexibility in determining exemptions based on assessment of risks, and the discretion to adjust the age limit for certain groups of products where the exposure is low, resources can be properly focused on areas of greater risk, yielding maximum reductions in consumer risk of death and injury.

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

In light of the concerns expressed by small business owners and employees, CPSC staff has been considering what relief might be provided for them without compromising safety. The first challenge was to define what is meant by "small business" in the context of the manufacture of children's products.

For example, with regard to children's apparel, there are not good statistics differentiating those firms that make all apparel versus those firms that make apparel intended only for children 12 years of age or younger. With regard to toys, the analysis of those businesses that are focused on the manufacturing of products solely for children is more reliable. Bureau of the Census (2006) data shows that there are 776 firms that manufacture dolls, toys, and games (NAICS 33993); 403 of those firms (51.9%) have fewer than 5 employees, 632 (81.4%) have fewer than 20 employees, and 963 (98.3%) have fewer than 500 employees which is the standard definition of a small business. Only 13 of the firms (1.7%) that produce toys would not be considered small businesses by the Small Business Administration. All (or almost all) of these firms are likely to produce children's products and all are affected by the current economic downturn.

Another group significantly impacted by the CPSIA is small crafters of products for children, many of whom work out of their homes. Based on a 2000 survey conducted by the Craft Organization Directors Association, there were an estimated 106,000 to 126,000 craftspeople in the United States. Additionally:

- The average gross sales revenue was $76,000 per craftsperson.
- The median household income of craftspeople was $50,000 per year, with about half coming from craft activities.
- 64% of craftspeople worked alone, 18% work with a partner or family member, and only 16% had paid employees.

Component Certification

The cost of testing and certification is a huge burden on these small businesses and a robust component certification program would be extremely helpful. However, any component testing rule would have to apply across the board to all businesses, small and large, and to our global trading partners in compliance with international trade laws. Furthermore, we have to design a program we are confident will avoid the switch of components during manufacture which is the very problem that Congress was intending to fix by requiring testing of children's products in the CPSIA. Component testing presents real challenges since many of the components used in children's products are not children's products on their own and do not require third party testing. Snaps could be used on a hand knitted sweater that were not produced primarily for use in children's products, and we cannot be sure given the expense of testing, that a market will develop for certified compliant materials for use by crafters.

Potential Solutions

Recognizing that the Commission always has the ability to take action to address unsafe products in the marketplace, Congress could take many different approaches to mitigate the effects on small businesses. Congress could apply the new lead and phthalates limits prospectively to mitigate the impact on inventory existing prior to enactment. It could allow for a more flexible exception process based on balancing of risks against the burdens of the costs of testing and certification but that could overburden staff. Another option would be to allow the Commission the flexibility to decide what children's products require testing and certification.

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

CPSC staff has only limited, anecdotal information concerning the impacts of the Act on second-hand stores. Major resellers such as Goodwill Industries and the Salvation Army have estimated impacts, including both lost sales and disposal costs, totaling hundreds of millions of dollars. Many smaller resellers have indicated that under present circumstances, they cannot afford to continue selling children's toys or apparel, which account for much of their revenues. Even church bazaars and neighborhood yard sales are adversely affected.

The major problem for second-hand stores and other resellers is that the CPSIA prohibits the sale, distribution or export after February 10, 2009, of any children's products exceeding the applicable lead or phthalate limits regardless of when they were made. Second-hand stores are typically selling items that were manufactured years earlier. Thus, a large percentage of a reseller's current inventory of children's products may have been manufactured long before the stringent new limits took effect, and it may now be impossible to dispose of such items lawfully except by destruction (which itself may be costly, particularly for non-profit organizations). To make matters more difficult, there is often no cost-effective way to determine which products can lawfully be sold and which cannot.

Unlike other retailers, resellers generally have little or no control over the compliance of the goods that they obtain. Most are donated. Even where they have regular donors, resellers cannot practically establish specifications for children's products as major retailers can for their regular suppliers. Testing everything they receive is not a practical solution either. Like small, home-based manufacturers, resellers cannot spread testing costs across many units of the same type; at any given time, they would usually have on hand no more than a few items of the same type. The standard tests for lead and phthalate content are destructive, so if one tests a single item to determine whether it can be sold, one no longer can sell that item.

Screening devices, such as x-ray fluorescence (XRF) machines, can help in weeding out children's products that have excess lead, without destroying products that comply, but the new technology is still expensive. No such screening device yet exists for identifying phthalates. Even if such technology can be developed quickly, it remains a disproportionate burden to test every unique item in inventory. Some internet resellers and auctioneers do not even have access to the products that are offered for sale by third parties on their website and so could not feasibly test them by any method.

The second-hand store problem will get worse for several years before it may ultimately get better. The lead content limits will drop to 300 parts per million in August 2009 and to 100 ppm in August 2011 (unless the Commission determines that such limit is not technologically feasible for a class of products). Products manufactured after these dates will be in use for some years before they are donated to second-hand stores. So, it will probably take many years before children's products that comply with these stringent limits make up a sizable majority of the products for sale at second-hand stores.

Potential Solutions

Under the circumstances, merely postponing the effective date of the lead or phthalate limits for everyone, while this would help alleviate some problems we are seeing, would not be very helpful to resellers because it would allow products with excess lead and phthalates to continue being made, and thus add to the number of noncompliant products that may eventually find their way to resellers and so postpone the day of reckoning.

The most effective way to help resellers is to address the issue of retroactivity, requiring that manufacturers meet the statutory limits for products manufactured after the effective date but that retailers and resellers be allowed to continue sale. If this suggestion were adopted, it would be important to note that resellers could not sell recalled products and that the Commission retains its authority to stop sale of any product if it finds an exposure that presents an unreasonable health and safety risk to children.

A law like the CPSIA that outlaws sales of previously lawful products will, by its nature, hurt retailers more than manufacturers and hurt resellers even more than other retailers (given the fact that products are typically in consumers' hands for several years at least before they reach second-hand stores). While dealing with retroactivity across the board would be the most effective way to deal with the inequities presented by the current law, other suggestions include such things as establishing a separate rule for resellers. For example, the ban on selling children's products with excess lead or phthalate content could take effect at a later date for second-hand sellers than for retailers generally. Or, resellers (or some subset of them, such as individual consumers or non-profit resellers) could even be exempted entirely from the provision that makes it a prohibited act to sell products containing more than trace amounts of lead or phthalates. Children's products that would have been banned under prior law should not be exempted in any case, and there may be categories of products, for example, children's metal jewelry, that should be handled more strictly. While consumers are accustomed to the notion that used goods are sold "as is," it might be appropriate to require a label or other type of

warning at the point of sale if resellers are allowed to continue to sell older children's products that do not comply with the new limits.

Lest there be any question, CPSC staff does not favor exempting second-hand sellers from the prohibition against selling recalled products (including children's products that are recalled for excess lead paint, or excess lead or phthalate content). The staff believes that resellers can reasonably be expected to keep abreast of CPSC recalls by signing up to receive CPSC's recall press releases and to remove any recalled products from their shelves. Similarly, where Congress has unambiguously directed application of new regulatory requirements to a discrete class of used children's products, such as cribs, CPSC staff believes that resellers no less than others must take steps to comply, even if that means deciding not to sell the products in question.

The Commission has adopted an enforcement policy on lead limits and has issued other guidance to second-hand stores to address many of the recurring issues. In the staff's view, however, the core problem is caused by the retroactive nature of the law and is beyond the agency's authority to solve.

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

The term "children's product" has significance for several different provisions of the CPSIA. It specifies which products are subject to the lead content limits. Indirectly, it plays a role in defining which products are subject to the phthalate limits. It governs the scope of products that require certification based on third-party testing and those that will require tracking labels "to the extent practicable."

CPSC staff believes that for purposes of defining which products are subject to lead limits, the boundary age could reasonably be lower than 12, at least in most cases. The Senate bill (S. 2045) deemed age 7 a satisfactory upper limit. CPSC staff understands that the conferees ended up agreeing to age 12 primarily because of the so-called "common toy box problem" – *i.e.*, the concern that a product intended primarily for older children might nonetheless be available to younger ones in the same home. This choice had the effect, however, of applying the lead limits to a much larger population of products, including many that are not toys and even including outdoor products such as dirt bikes or ATVs that would rarely be accessible to younger children under any circumstances.

CPSC's Regulations Established Age Limits by Product Class

CPSC's own regulations have used a variety of different ages to define what group of children's products will be subject to a standard or ban, and these precedents may be useful to consider. For example, the small parts ban applies to products that are intended for children under 3. Toys that are intended for ages 3 through 5 are allowed to have small parts, provided that they have

cautionary labels to warn that they are not suitable for youngsters under 3. In general, toys that are intended for children 6 and older do not require cautionary labeling except in a few specific cases such as balloons and small balls. The lead paint ban (16 CFR part 1303) applies to children's products without a specific age definition. Despite this broad applicability, the scope of the lead paint ban has rarely if ever, generated controversy. This is probably so because it is limited to children's products that have paint or similar surface coatings, and such products are much fewer in number and more easily identified than children's products generally.

Both the likelihood of exposure and the route of exposure are factors to consider in deciding what products should be subject to lead limits. Lead presents an acute hazard when direct ingestion is possible. For this reason, CPSC staff has long treated children's metal jewelry as warranting special concern. In other applications, brass and many other metals often have some lead content, particularly to improve workability, corrosion resistance and other properties. Where such objects can be mouthed but not swallowed, they generally pose a lesser risk, and objects that can be licked but not mouthed pose still less risk. There are some products where mouthing or licking is unlikely but where some lead exposure may result from touching and inadvertent transfer of lead from hand to mouth. A child's exposure to lead from zippers and snaps will depend on the type of garment and the child's age, among many other factors.

Practical Solution: Commission Discretion

One way to address these issues would be to give the Commission more discretion to grant exclusions from the lead or phthalate limits. Under the law as currently written, a material having more than 600 parts per million lead cannot be excluded unless touching the product will not result in the absorption of *any* lead. Taken as a whole, the language of section 101 appears to rule out treating even very low levels of absorbable lead as negligible. Congress could modify this exclusion criterion to allow *de minimis* levels of absorption or to change the focus to preventing any significant increase in blood-lead levels of a child, particularly for children who are of the age of the intended user.

Giving the CPSC discretion to lower the age limit for certain classes of products might be more efficient than dealing with many requests for exclusion, which is a resource-intensive process. Another resource conserving approach would be for Congress to lower the age limit across the board and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

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

CPSC staff is aware that many different parts of youth ATVs and youth motorcycles have lead content, some of which may exceed the 600 or 300 ppm level. Some of these parts are inaccessible, and some parts may qualify for the higher limits applicable to certain electronic components. Other parts, however, appear to be accessible and may not qualify for any

exclusion under section 101 of the CPSIA. These youth vehicles may also have some phthalate content, but they do not appear to be covered by the section 108 bans, which are limited to certain toys and child care articles.

The possibility that children will suffer significant lead exposures from these classes of vehicles appears to be remote at best. First, the vehicles are generally stored outside the home, where younger children would rarely be allowed unsupervised access. The vehicles are generally designed for children of at least 6 years of age and older. These children are far less likely to ingest or mouth components of a motorized vehicle – even those that are physically exposed – than something that fits readily in the mouth, such as a jewelry chain or charm. Children may still be exposed to some lead as a result of touching seats, handle bar grips or other places and then inadvertently transferring some of the lead to their mouths from their hands, either directly or indirectly, as for example while eating. For most children, however, this type of exposure is not likely to result in significant absorption of lead. This is particularly true where children are wearing appropriate protective riding gear, such as gloves and helmets.

Broadening the Exemptions for Metals

In section 101(b)(4), Congress recognized that it might not be technologically feasible for certain electronic devices to meet the lead limits applicable to children's products generally and gave the CPSC authority to adopt other requirements for such devices. The Commission has exercised this authority on an interim basis and established higher limits for certain electronic components where it concluded that such parts cannot be made inaccessible and it is not technologically feasible to substitute other materials at this time. These include metals such as steel, aluminum and copper alloys as used in electronic devices. In adopting these alternative limits, the Commission made reference to exemptions recognized elsewhere, such as the European Union directive 2002/95/EC known as RoHS. It is worth noting that in Europe, the RoHS exemptions are equally applicable to non-electronic uses of these metals, but the staff believes that section 101 gives us no flexibility to apply the same exemptions outside the realm of electronics. This means that children's products containing these metals and metal alloys manufactured for the U.S. market cannot employ recycled metal to the same extent as they can in Europe; rather, the manufacturers for the U.S. market must obtain supplies of primary metal, forcing vastly higher energy consumption and higher costs, or they must quickly switch to substitutes whose properties are poorly understood and may even pose more significant safety risks to children.

Under the current law, CPSC staff believes that an exclusion for youth ATVs would be very difficult to justify. Some have argued that if youth-sized ATVs cannot be sold for an extended period of time, owing to lead limits, then more children may end up riding adult-sized ATVs. A child using an adult ATV as a substitute would face a far graver and more immediate risk than that of the possible lead exposure from the youth ATVs.

Potential Solutions

The ATV situation is illustrative of a number of product classes that may not qualify for an exclusion. Congress could moderate this situation in several different ways. These include one or more of the following (not in priority order): (1) postponing the deadline for sales (not

manufacture) of children's products containing lead above the new limits; (2) lowering the age limit for children's products (as discussed in the response to question 6); (3) exempting some or all children's products that are usually not kept in the house, such as bicycles and ATVs; (4) giving the CPSC greater discretion to exclude from compliance with the lead limits any materials or products that pose a negligible risk to children (as discussed in the response to question 6); or (5) allowing materials that are eligible for special treatment when used in electronic devices to receive similar treatment in other children's products when the justification is equally compelling.

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

This issue lies within the authority and expertise of the Environmental Protection Agency (EPA).

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

Lead Testing and Printing Ink: The Publishing Industry's Challenge

Given the breadth of the definition of children's product in the CPSIA, the Commission received thousands of questions over the past six months regarding the scope of applicability of the retroactive lead limits and the required third–party testing of such products. At the same time, retailers began demanding certificates of compliance for products likely to be on their store shelves on February 10, 2009. The publishing industry claimed to have been unaware that the definition of children's product would encompass books until retailers started asking for certificates of compliance and we posted a response to one of the frequently asked questions regarding the application of the CPSIA to books intended or designed primarily for children. Because of the variety of colors of inks used in making children's books printed on paper and cardboard, the requirement of testing for compliance to the new lead limits proved costly and onerous. Some retailers were demanding separate certificates of compliance for each book title.

The issue of lead in printing ink and other products used to make a book is not new. Indeed, in 2007 the publishing industry issued a statement on lead in books to respond to any concerns

raised about books related to that year's toy recalls for excessive lead in paint. (See American Booksellers Association statement of November 29, 2007, Bookselling this Week: Getting the Lead Out: Consumers Question Books Made in China, found on March 15, 2009 at http://news.bookweb.org/news/5695.html.) The Commission has occasionally recalled such products for excess lead; for example, a recall was conducted in February 2008 for excess lead in paint on the colored spiral metal bindings of several sketchbooks. In July of 2004, the Commission issued a warning regarding the hazards of lead in candy wrappers that contain lead or bearing lead-containing ink.

The "Ordinary Book" Exemption

The Commission staff wanted to provide some relief to the book publishing industry given the extraordinary impact of third-party testing for lead and because the publishing industry maintained that the Commission had never considered ordinary children's books to be a health hazard. However, given the requirements of the CPSIA, the staff felt that they needed some representative data upon which to base a decision to exempt children's books from the requirements. The number of requests for relief from the retroactive effect of the CPSIA was so high that the staff felt that in fairness, any determination that the law did not apply to a material or class of products should be based on science and supported by test results.

It is not the case (noted in your question) that the Commission staff has had access to a "large number of tests on finished 'ordinary books'," but rather we have had access to a very limited data set on which the publishers have based their request for an industry-wide exemption from testing to the new lead content limits. The publishing industry association provided the staff with 152 separate entries representing testing done on approximately 157 books conducted anywhere from 2004 to 2009. The books tested range from the ordinary books to books with handles, stickers, kits or other accessories. The staff reviewed those test results, and initially concluded that many of the tests were done for European standards and/or did not test for total lead content as required by Section 101 of the CPSIA. The staff of the CPSC asked the industry to provide more data for total lead content and demonstrate that the data submitted was representative of all of the millions of ordinary books sold to children 12 years of age or younger.

The additional data submitted suggests that modern book publishing using offset lithography does not result in books with lead levels in excess of the 300 ppm limit that goes into effect in August of 2009. However, the Commission staff has not had the time or resources to look at the issue completely or comprehensively and has been hopeful that more data would be submitted by industry particularly with respect to books published in the 1960s and 70s. The Commission staff has been assured that the publishers now all use inks that result in children's books that fall below the statutory limits for lead. While the staff does not have a statistically valid basis for a wholesale exclusion of children's books at this time, its determination to exclude them from testing and certification does not mean that any children's book can exceed the lead limit. All children's books must meet the lead limit.

Making a determination that ordinary books cannot and will not exceed the lead limits appeared to be the only means of providing immediate relief. Such an exemption from testing also should

provide relief from the retroactive application of the standard to all books in schools and libraries that are provided to children for their use. In the meantime, the publishing industry was given a conditional enforcement waiver on the testing and certification requirements for lead, pending staff's review of the data and any additional data that may be submitted. That exemption was limited to books manufactured after 1985 because the publishing industry has not provided any test data on books published in the 60s and 70s. Instead, the industry has pointed to the fact that lead was removed from printing operations in this country due to federal statutory restrictions on worker exposure to lead in printing operations which went into effect in the late 70s. The very limited testing the Commission staff has done indicates that the lead content of these older books can occasionally exceed the 300 ppm limit that goes into effect in August 2009 but that data may not be representative. At this time the Commission staff has not had the time or resources to prove that books made more than twenty years ago do not exceed the lead limits as staff has needed to focus its resources on its investigations of deaths and injuries to children and other emerging risks and health hazards.

Library Books and Used Book Resellers

The retroactivity of the lead provision is particularly problematic in the area of books and other printed materials. We have done very limited testing of books from the 60s and 70s. It suggests that the lead content hovers around the 300 ppm mark. Anecdotal evidence received by the agency suggests that on occasion books from this earlier period may contain lead in excess of the lead limits in their binding materials. The only way to determine the total lead content in these books is to test them.

Under the CPSIA, however, sellers of used children's books, including used book stores and thrift shops, are not required to test or certify that children's books meet the new lead or phthalates limits. The CPSIA does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's books intended primarily for use by children that exceed the lead limit.

The Commission had hoped that an exemption for "ordinary books" plus its announced enforcement policy for lead would alleviate this situation. Based on information received from the trade associations with information regarding books in libraries and schools, the Commission staff understands that most textbooks in schools are less than ten years old. Likewise, the information received suggests that most library books lent to children are recycled approximately every 18 lending cycles or three years. Thus, it appears that few of the books being provided to children in their schools and from libraries would be more than 20 years old.

Potential Solutions

Staff has considered children's behaviors with books and concluded that after about 19 months of age, children may occasionally put part of a book in their mouths, but they typically are taught to care for their books so that they can continue to be used for reading and learning. This information suggests that any exposure to lead from contact with books diminishes as children age. We believe an exemption is the only way to provide relief under the CPSIA. Congress could limit the testing of books to only those picture books provided to children much younger

than 12 since this is the population of children that would be most likely to interact with their books in a way that could expose them to inks with higher lead content. Lowering the age limit would be extremely helpful to staff in dealing with books and many other products by narrowing the scope of products covered. Lowering the age limit would also provide relief to schools who face retroactive application of the lead provisions not just with regard to books but also the wide variety of other educational materials they provide to school-aged children.

The CPSIA establishes that any children's product no matter when it was made is a banned hazardous product if it exceeds the lead limits and the law does not have an exemption procedure other than one based on scientific proof that there will not be absorption of any lead. One solution would be for Congress to create a waiver process allowing the Commission to "grandfather" in products made prior to the date of enactment if the Commission concludes those products present only a *de minimis* exposure level and, therefore, a negligible risk. This could be used to solve the problem of used books as well as other products commonly sold second-hand such as used clothing or youth bicycles. It creates an administrative burden that the Commission may not be able to handle without some delay, but it would provide relief without having to undo the retroactive effect of the law altogether.

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

The CPSIA provides too little implementation discretion for the agency. One of the major problems with implementation has been the statute's reach across a variety of industry sectors quickly and simultaneously by virtue of its broad definition of "children's product." The lead limits reach literally every product intended or designed for a child 12 or younger. The breadth of the statute's reach has made it difficult for the Commission to address industry specific concerns in the few areas where the agency has discretion. The Commission needs room to address toy industry concerns separately from those of the apparel industry, from those of the publishing industry, and separately again from those of industries that make outdoor products for children such as motorized recreational products, playground equipment and bikes.

The lead limits and testing and certification provisions could be implemented much more smoothly if the Commission had the discretion to roll out those requirements on a product class basis. The same will soon be true for tracking labels where each industry has specific concerns about how additional labeling requirements will work given existing and multiple other labeling requirements. Congress can direct the agency as to how to determine priorities and work to a specific schedule as evidenced by section 104 which gave some flexibility to the Commission in pursuing the congressional mandates for new durable infant product standards. A similar approach to implementing all of the Act's new rules and requirements would ease the implementation burden. Indeed, the stay of enforcement of certification and testing was the agency's only means to get the breathing room it needed to deal with the various unanticipated issues that arose given the breadth of the industries affected.

Some have argued that the Commission should have a more relaxed approach to exclusions from the lead limits. However, the lead provision of the CPSIA restricts the agency's discretion at a variety of points in the statute. It allows for exemptions in three limited circumstances described in section 101(b). That section allows exclusions for inaccessible component parts of children's products and also allows the Commission to exempt electronic devices where lead is necessary for their functionality and cannot be made inaccessible. Beyond those exclusions, however, the statute leaves very little flexibility. Section 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material that exceeds the lead limits established for children's products under § 101(a) of the CPSIA if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will "neither result in the absorption of any lead into the human body," given reasonably foreseeable use and abuse of such product, including swallowing, mouthing, breaking or other children's activities or the aging of the product, "nor have any other adverse impact on public health or safety." (Emphasis added.)

The clear language of the statute is rigid; an assessment of whether there is absorption of "any lead" cannot be based on a risk based assessment because that language does not appear to allow any amount of lead, no matter how insignificant, to be absorbed in the human body. While the courts have occasionally upheld agencies applying a *de minimis* standard and exempting trivial risks from regulation, that has been permitted only when Congress has not unambiguously denied agencies that authority.[1] Here the act specifically limits the exclusion to an application supported by peer reviewed science supporting a demonstration that there cannot be absorption of *any* lead. Moreover, section 101(e) appears to restrict the agency's ability to use enforcement discretion while exclusion requests are pending, by stating that a pendency of a rulemaking to consider a request for exclusion "shall not delay the effect of any provision or limit . . . nor shall it stay general enforcement" of the lead limits.

Those who argue that common sense exclusions are permitted by the CPSIA would have to ignore sections 101(b)(1) and 101(e). Yet as the unanticipated consequences of the retroactive effect of the law have demonstrated, some ability to provide for *de minimis* exclusions would be helpful in implementing of the Act. The effort to deal with the *de minimis* risks given the speculative yet conceivable routes of exposure presented by certain products such as bike tire valve stems distracts attention from more serious health and safety problems that the agency must address. Recently proposed legislation banning BPA recognizes the need for such flexibility to provide relief when a manufacturer cannot comply because it is not technologically feasible to do so in the timeframes permitted. Yet such a waiver or exemption process could prove to be too resource intensive and divert agency resources to handling thousands of exemption requests when staff should instead be dealing with other risks that deserve attention such as identifying emerging hazards.

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[1] *Compare Les v. Reilly*, 968 F. 2d 985 (9th Cir 1992) and *Public Citizen v. Young*, 831 F 2d 1108 (D.C. Cir. 1987) with *Ohio v. EPA*, 992 F 2d 1520, 1534-35 (D.C. Cir. 1993). *See also* Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, U Chicago Law & Economics, Olin Working Paper No. 150. This paper can be downloaded without charge at: http://www.law.uchicago.edu/lawecon/index.html.

The CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks and the actual consequences of the hazard. Congress should permit the agency to exempt certain products from the limits established by the CPSIA, to ease the burdens of testing and certification on products unlikely to present more than a negligible health risk, and to regulate on a timetable influenced by the seriousness of the actual risks not artificial deadlines. A more flexible exception process would avoid regulation of *de minimis* problems both prospectively and retroactively.

Moreover, this would allow the CPSC to consider the impacts of the regulatory requirements of the CPSIA, like the balance between the adverse effects on second-hand sales of children's clothing or bicycles and the potential risks from exposure in such products, which is especially important during the current economic crisis. It should also allow the Commission to balance risks such as balancing the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV. Given that exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions will be public allowing for transparency and accountability. Finally, relaxing certain deadlines in the Act will allow for better priority setting which will allow Commission resources to be put towards the most serious health risks first.

* * *

CONCLUSION

The staff has set forth in its answers to specific questions above numerous approaches to dealing with the issues raised. In our view, we have been confronted with three major issues in implementing the CPSIA: (1) the retroactive application of requirements to inventory; (2) the broad reach of the legislative mandates given that "children's product" is defined as a product for children 12 years of age or younger; and (3) the impact of the new testing and certification requirements for all consumer products and the third-party testing requirements for children's products. You have asked us to consider possible solutions to the problems raised in the letter, and make our best recommendation as to productive solutions recognizing that these are ultimately policy decisions for others to make. We concluded that the following three changes would resolve many of the major difficulties identified above:

- Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children.

- Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

- Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities and a phase-in schedule.

As discussed above, there are many ways to address the challenges of implementation and meet the important goals of the statute. Regardless of the path chosen, some legislative changes would be helpful to allow the agency to set risk-based priorities given the finite resources available to the Commission.

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MIGRATORY BIRD
CONSERVATION COMMISSION

Congress of the United States
House of Representatives
Washington, DC 20515–2215

March 4, 2009

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

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

Dear Acting Chairman Nord and Commissioner Moore:

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

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

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

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

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

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

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

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

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

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

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

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

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

With every good wish,

Sincerely yours,

John D. Dingell
Chairman Emeritus
Committee on Energy and Commerce

cc: Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon

Representative Bobby L. Rush
Representative Anna G. Eshoo
Representative Bart Stupak
Representative Eliot L. Engel
Representative Gene Green
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Representative Gregg Walden
Representative Lee Terry

Representative Mike Rogers (MI)
Representative Sue Wilkins Myrick
Representative John Sullivan
Representative Tim Murphy
Representative Michael C. Burgess
Representative Marsha Blackburn
Representative Phil Gingrey
Representative Steve Scalise
Senator Harry Reid, Majority Leader
Senator John D. Rockefeller, IV
Senator Daniel K. Inouye
Senator John F. Kerry
Senator Byron L. Dorgan
Senator Barbara Boxer
Senator Bill Nelson
Senator Maria Cantwell
Senator Frank R. Lautenberg
Senator Mark Pryor
Senator Claire McCaskill
Senator Amy Klobuchar
Senator Tom Udall
Senator Mark Warner
Senator Mark Begich
Senator Kay Bailey Hutchison
Senator Olympia J. Snowe
Senator John Ensign
Senator Jim DeMint
Senator John Thune
Senator Roger Wicker
Senator Johnny Isakson
Senator David Vitter
Senator Sam Brownback
Senator Mel Martinez
Senator Mike Johanns

TESTIMONY

Laurel Schreiber, Lucy's Pocket

House Small Business Committee; Subcommittee on Investigations and Oversight

May 14, 2009

Unintended Consequences of the CPSIA as it Relates to Small Business.

Mr. Chairman and members of the Committee, thank you for the opportunity to speak to you today about the effects of the CPSIA on small businesses. My name is Laurel Schreiber and have a small home-based business called Lucy's Pocket. I sell monogrammed gifts for children through my web site, on eBay, and at etsy.com

As the CPSIA now stands I - as well as thousands of crafters, seamstresses, artists and others that market safe, handmade items to children under the age of 12 - will be put out of business. It is only through congressional intervention that we will be able to continue building our businesses. As a small business owner I am looking to you to take the lead and re-establish legislation that will allow those of us that have been creating safe items to continue creating them.

As it relates to my business, there are two major and substantial problems with the CPSIA as written:

- **redundant testing requirements**
- **comprehensive labeling requirements**

All of the items I sew onto - or make myself - are made from commercially available textiles, ribbons, threads and other materials. They come from wholesale suppliers as well as retail

stores. A majority of the items I purchase from wholesale suppliers have **General Certificates of Conformity** (GCC) which attest that the items have been tested for lead and/ or phthalates and have passed those tests. I also purchase items from large retail stores that have also tested the products but are unable to provide GCCs.

As the CPSIA now stands, I will have to test each individual item prior to selling it. And though an enforcement stay has been issued for textiles, there is no guarantee it will not be rescinded at some later date. The enforcement stay does not include items with buttons, snaps, zippers or other non-textile parts.

Because I sell one of a kind items, I will need to create two identical items—the wet method used to test for lead destroys the original item. From the testing companies I have contacted - many of whom are located overseas - the cost to me is about $75 per component. (A component includes fabric and thread and any other material that makes up the product.)

I have brought four samples of my work to illustrate the ramifications and the unintended consequences that the law will have on my business.

One of my most popular items is an appliqued bib and bloomer set. The set contains (at a minimum) 12 components

- four threads
- two dyed fabrics
- a two part Velcro closure on the bib
- elastic
- 100% poly cotton fabric
- 100% terry fabric
- 100% cotton binding

To test those 12 components it will cost me $900 to prove that the bib and bloomer set does not contain lead. If I use a plastic-backed bib purchased from a retail store then I will need to add an extra $375 for phthalate testing. Testing costs for a two piece set will range from $900 to $1275. It sells for $20.

I also create monogrammed hairbows - they consist of a metal clip, two types of thread, and ribbon. I have GCCs on file from the importer showing that the clip meets the lead guidelines. Because it contains metal, it does not qualify for the enforcement stay. It will cost at least $300 to test each bow. It sells for $5

My third example is a monogrammed bow holder. It consists of one metal ring, 3 types of grosgrain ribbons, thread, and hot glue. It hangs on a wall in a child's room. It is not a toy. Because there is a metal ring it will not currently qualify for the enforcement stay. It will cost $450 to test. It sells for $12.

Finally, I create monogrammed headbands. The headband is made of plastic so it must also be tested for phthalates. As with my other items, I have GCCs on file from the importer showing that the headband does not contain the illegal phthalates. To test the four components of the headband (ribbon, 2 types of thread, headband) plus phthalates will cost $675. It sells for $9.

Redundant testing is unnecessary. The air in my house, the sewing table I work at is not lead infused nor lead filled. Items coming out of my home will not be contaminated with lead.

Sadly, if the redundant testing requirements do not put me out of business—then the **comprehensive labeling mandates** certainly will.

As of this August each and every item going out of my workroom must contain a permanent label that contains information such as the source of the product, the date of manufacture and batch or run number. For a business that creates one of a kind items –and less than 5000 or so a year --

this is an unnecessary hardship. Permanent labels are not technically feasible for many of my items and procuring permanent labeling supplies is an expensive proposition -- and one without a value add to my customers and which does nothing to increase the safety of the product.

I, and many others like me, started creating handmade items as an antidote to mass produced, possibly unsafe toys and clothing originating from China. Many of us have young children - we are very aware of safety concerns relating to lead. But, we use safe products and we create safe items. We are willing to change the methods we use to insure compliance but with the way the law is written we are simply unable to continue building our businesses.

I am asking for consideration. I have written letters, sent faxes, made calls. I want to be safe. I want to be legal. But the unintended consequences of the CPSIA are showing that this will be impossible. I will have to close my doors. And, once I close I will not be supporting my suppliers or other local businesses- - all of which qualify as **small businesses.** And they may not be affected hugely by me - but there are a lot of businesses like me out there. So once you start multiplying the effects it becomes overwhelming and will ultimately affect tens of thousands of small businesses across the country.

It saddens me, terrifies me, and disheartens me that my ability to build a business creating safe items for children can be taken away by the **unintended effects of the CPSIA**.

I thank the committee for listening to how the CPSIA affects me—and others like me. I'm happy to answer your questions.

CPSIA and my Small Business
Suzanne Lang
Starbright Baby Teething Giraffes
www.starbrightbabyonline.com

As a mother of a 2-year-old, I admire Congress' efforts to draft a law that protects children from excessive amounts of lead in toys. Unfortunately the law, as it currently is written, will heavily damage the small Businesses and entrepreneurs who make and sell items for children in this country. I do not believe the law is fatally flawed; however, I think the injection of some common sense provisions would more effectively ensure safe products for children and prevent irreparable damage to small businesses.

The reason that I am giving my testimony is because I, along with several other small business owners, am afraid for what the current draft of the CPSIA means for my business and the important amount of income it brings to our family. Specifically, my business consists of fabricating and selling soft stuffed teething giraffes. My husband is a Ph.D. student, and after being laid off this spring, my primary focus is caring for my child as well as working on growing my business. Furthermore, I do not have a large amount of money and I am not affiliated with any lobbying groups. However, I am using the resources that I can to advocate for small businesses, many of whom rely on this income to sustain their families.

A few of the major problems that this law presents to my business are 1) unit testing, 2) the tracking and labeling requirement, and 3) the fallacy of assuming everything is toxic until proven safe.

Unit testing is cost prohibitive for many small businesses, including my own. I make very small batches of usually 10 or fewer giraffes per fabric choice. I also make one of a kind items and custom items using my customer's own fabric, or fabric taken from my collection. My giraffes would be required by this law as of February 10th, 2010 to be tested for both lead and phthalates. I contacted Elemental Research, LLC (4601

Devonshire Rd, Harrisburg, PA, 17109; Phone 717-540-0212; www.ElementalResearchLab.com) to quote lead and phthalate testing for my business. For lead testing, I was quoted $50 per component. There are 4-5 components per giraffe. For phthalate testing, I was quoted $400 per component. Cumulatively, the total cost for testing one fabric line of giraffes would be anywhere from $1,800 to $2,250. The giraffes sell for $14-$18 each depending on the fabric. The added cost of testing would add an additional $180-$225 per giraffe (based on 10 giraffes per fabric line) For a custom one of a kind item, the price would have an additional $1,800-$2,250 tacked onto the $14 I charge for customs. Obviously, this is extremely cost prohibitive for the customer.

Considering that the law specifies that if I change any component, the unit would need to be tested again. I created 36 different fabric patterns of giraffes in 2008 (not counting custom giraffes). The total cost of lead and phthalate testing my items would have been $64,800-$81,000. I made $4,500 gross last year. The deficit the testing creates would more than put me out of business, it would bankrupt my family.

Another aspect of the law that directly affects my business is the tracking and labeling requirement. According to the CPSC website FAQ (http://www.cpsc.gov/about/cpsia/faq/103faq.html), "Section 103 of the CPSIA provides that the tracking label must contain information that will enable the manufacturer to ascertain the location and date of production of the product and cohort information (including the batch, run number, or other identifying characteristic) and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks."

Even though the law says "to the extent practicable," I question how this could be accomplished by a home craft seller or small business such as mine. Keeping in mind that each lot requires new testing, then each lot requires a different label. That would mean that for each giraffe fabric style that I create, including custom work, would require a different label to attach. Consequently, that would force me to start making my own labels because it would be cost prohibitive for me to meet the quantity minimums of a

label printer when my lots are 10 or fewer giraffes. My labels would need to say something to the effect of: "Made by Starbright Baby at Boalsburg, PA July 4, 2009 Batch 15 Run 1, Teething Giraffe Pattern Toy 1." Thus, I would have to change the date, the batch, the run and the name of the toy on each lot I made. It is possible to buy printer-friendly fabric labels; however, after a few washes the ink is gone or faded making it difficult to ascertain what the label originally said. Another way to make the labels would be with a permanent fabric pen and fabric. However, manually creating each label would likely take longer than fabricating the giraffe itself. This labeling standard will be crippling for small business in added cost and time.

The most disheartening thing for me as a small business owner is the assumption of the law that everything is bad and dangerous until proven safe especially since fabric and many natural materials (now exempt but set to expire on Feb 10, 2010) are lead free or have infinitesimally small lead levels; well within the acceptable range. The fabric exemption should be made permanent. Many small businesses do not purchase their fabric wholesale but instead buy from local fabric or quilting shops. In this setting, I can buy one yard of fabric off the bolt to make giraffes that I have to lead and phthalate test. My neighbor could then buy the very next yard on the bolt to make bibs for her small business and she too would have submit for lead and phthalate testing. The upshot is that provides work for a few laboratories but at the expense of many more small business owners.

Another aspect of the testing that is problematic is the broad definition of what needs to be tested for phthalates. According to the CPSC guide for Small Businesses, all "Child Care Articles" need to be tested for phthalates. "A 'child care article' is a product that a child 3 years of age or younger would use for sleeping, feeding, sucking or teething. Bibs, child placemats, child utensils, feeding bottles, cribs, booster seats, pacifiers and teethers are child care articles that are covered by the law and might contain phthalates." (http://www.cpsc.gov/ABOUT/Cpsia/smbus/cpsiasbguide.pdf) As it is written, the law would currently require me to test my teething giraffes for phthalates. The problem is that my teethers are made from cotton fabric, cotton thread, stuffed with PLA fiber made from corn, and a cotton label. According to Test Method: CPSC-CH-C1001-09.1

(http://www.cpsc.gov/about/cpsia/phthalatesop.pdf) the lab is to "grind" the toy to get a sample to test. Being that the giraffes are cotton fabric, it will prove to be difficult to "grind" off anything. When I spoke to Elemental Research Lab about phthalate testing on my item, they were unsure if they could effectively test my giraffes. Interestingly phthalates are found only in plastic. So requiring testing on cloth items, even if they are intended to go in the mouth of a child under 3, does not make sense.

There are many unintended consequences of this law. If it is kept as-written, thousands of small businesses and crafters will be put out of business in this already tough economic climate. The only products consumers will have to choose from are mass produced items from huge corporations; many from the same companies that imported the lead tainted toys that prompted Congress to take action on this issue. In effect, the companies that irresponsibly imported tainted toys will be rewarded with a larger market share.

The unintended consequences of this law are not just for small businesses. Although these consequences do not directly affect my business, they affect me as a parent and are concerning.

Books: No child has ever proven harmed by a book yet countless books will go into trash/landfills for no reason. Pre-1985 books are not old enough to be vintage or collectible, but so many not reprinted, virtually destroying history and culture.
Libraries: If this law holds, children under 12 will not be able to use libraries. Libraries will have to test books or remove them from the shelves.
Schools and Homeschoolers: Almost everything in a building housing the under 12 crowd will need to be tested or thrown out. Imagine the needless expense for school systems already strapped for resources to teach our children.
Low Income Families: (like mine) in these hard economic times who depend on resale shops and garage sales to provide for their families.
Charities: Project Linus and other hospital charities plus shelters that accept donations will have a difficult time keeping up their good works.

Resale Shops: like Goodwill etc. are all devastatingly affected. Many resellers are pulling children's items from their shelves.

Although recent rules released by the CPSC state that charities and resale shops are exempt from testing, they are still liable if anything is sold that is above the lead and phthalate levels. Many will chose to not carry the items rather than take the risk of running afoul of the law.

There are some very simple ways that this law can be amended to be more practical for all businesses involved in making items for children under 12. (Handmade Toy Alliance http://sites.google.com/site/handmadetoyalliance/Home/our-proposal-to-modify-the-cpsia).

- Component-based testing so that suppliers of our raw materials could provide the children's product manufacturer with certification of compliance within the law, which would eliminate the need for redundant and costly unit-based testing. Safety would be improved by driving compliance upstream in the supply chain, catching non-compliant materials prior to distribution, practically eliminating the chance that any given finished unit would be non-compliant.
- Exemptions from testing for materials known by science not to pose a lead or phthalate contamination hazard such as fabrics, certified organic materials, and many natural materials such as wood, paper and bamboo. Manufacturers would be spared the costs of testing these materials and testing labs and the CPSC could better focus their efforts on high-risk materials such as metals and paints.
- Harmonization with European Standards. Accepting the stringent EU standards in the United States as sufficient for the requirements of CPSIA would save countless US businesses that import from or export to the EU from the costs of performing multiple tests. US and EU regulators would be able to work together to oversee the global marketplace.

- Exempt permanent batch labeling of products for hand crafted and micro businesses that have small batch runs. While permanent labeling may be efficient with large runs of plastic products, it would be extremely difficult and cost prohibitive for small batches made from wood or fabric.. The US Small Business Adiuinistration Office of Advocacy has backed the Handmade Toy Aalliance position on tracking labels, citing the Regulatory Flexibility Act, a federal law designed to protect small businesses.
- Revisit the retroactivity of the CPSIA based on a risk-based approach.

I applaud Congress for trying to pass legislation that will keep our children safe from dangerous toys. I want safe toys in the hands of my little boy just as much as any parent would. I don't think that the CPSIA as-written will help make that happen. The suggested changes mentioned in this document along with the problems highlighted for small businesses, I hope that Congress, the Small Business Committee, and the Subcommittee on Investigations and Oversight can amend the CPSIA in order to keep our children safe and keep our small businesses in business and strong.

U.S. House of Representatives Committee on Small Business
Testimony before Subcommittee on Oversight and Investigation

Susan Baustian, Winmark Corporation
Thursday, May 14, 2009

Thank you, Congressman Altmier, for inviting me to testify today, and to all the Committee members for taking the time to talk about this very important—and very timely—issue. I thank my fellow panelists for their thoughts and comments on the impact of the Consumer Product Safety Improvement Act on small businesses across the country, and thank acting Chairwoman Nord for her willingness to answer today's critical questions.

My name is Susan Baustian, and I am the Director of Once Upon A Child stores for Winmark Corporation. Today, I am speaking on behalf of our hundreds of stores in, as we call it, the industry of "gently used" products.

My company, Winmark Corporation, owns two franchises that have been in business for over 20 years, Once Upon A Child (a store selling used children's goods) and Play it Again Sports (selling new and used sporting goods), and have been significantly impacted by this bill. Although our company headquarters is in Minnesota, we have over 520 franchises across the country. What that amounts to are 500 store owners worrying about whether or not they comply with the law, 5000 employees scrambling to figure out how to comply, and 200 vendors feeling they do not have the resources it takes to test their products to ensure that they comply with these new standards. Last year alone, our two brands serviced over 7 million parents that are now confused as to what is safe or not for their children.

The ill-executed implementation of this legislation has brought fear into the industry, and that fear—especially in economic times like these—can bring a halt to successful and productive businesses. Our franchisees have a lot on the line that is driving this fear. Most of them have business loans where their homes have been used as collateral. They have a family in which their business provides for, and they all have a strong sense of giving back to the community by being at the forefront of recycling – they buy & re-sell product that children no longer use or have outgrown. They are fearful that the CPSIA will force them to give up their American dream – owning their own business.

I think what is really unfortunate is that this debate over the CPSIA has lead to finger pointing on an issue on which we all agree: ensuring the safety and protection of children.

Our store owners have dedicated their lives to providing safe, fun, and educational products for children of all ages, and now are having to rethink how they can continue to offer these products without violating this law.

We want to work *with* the Consumer Product Safety Commission to comply with this law, but the guidance issued thus far has been difficult to understand for many of our store owners. We do not want to have to shut our doors over legislation that we all agree *could* help children if implemented in an effective and productive way, but we need the help of the CPSC and Congress to clarify what is required of our store owners.

The Consumer Product Safety Commission has come out and stated that resellers such as Once Upon A Child and Play It Again Sports—as well as Goodwill, the Salvation Army, ARC, Church organizations, Garage sellers, consignment stores, sellers on ebay and any other small business reseller—do not have to test products, but our businesses are still liable if those products with banned substances are sold.

The CPSC recently produced a Handbook for Resale Stores and Product Resellers with the purpose being, "to help identify the types of products that are affected and to understand how to comply with the law, so you can keep unsafe products out of the hands of consumers." Unlike the information that the CPSC supplies regarding recalls—a very specific list by brand & model number—the handbook is too general to effectively determine which products are safe to buy & sell.

For example, Page 7 of the handbook indicates that "items made of wood (without paint, surface coating or hardware) are OK to sell." It also indicates that "Clothes with rhinestones, metal or vinyl/plastic snaps, zippers, grommets, closures or appliqués are best to test, contact the manufacturer or not sell." Unlike retailers of new products, our franchisees across the country have no idea how to determine if the painted blocks, toy trucks, dolls or even clothing they are buying and reselling contain lead paint or are made up of dangerous lead components or toxic plastics.

It will be a violation of the Act to sell an item that is known to have more than the acceptable limit. This violation can be a fine of $5000 for each violation, which increases to $100,000 on August 14, 2009. Being that the handbook gives us only guidance on determining which items are safe, the only way to be certain would be to test the product. However, each piece that is bought & sold is unique, and it would be too costly to test each item. With a house on the line, a family to care for, and a potential liability to deal with, fear has taken hold for many of these resellers.

Last year, Once Upon A Child paid families $45 million for children's items that we purchased for re-sale, generating $120 million in sales for our franchisees. Of that, $23 million worth of clothing items were purchased, generating $68 million in sales for our franchisees. For families, the money they receive from selling children's items can be used to supplement a parent's income, or may be used to buy items for their children that they otherwise couldn't afford. For business owners, this income helped proved for their family. But now, many business owners and parents are worried they won't know when a snap or zipper contains lead, and like toys, they have no way to test these items.

The guidance issued on the sale of books has been equally frustrating. Last year, our stores paid families $500,000 for books that we purchased for re-sale. This generated $1.5 million in sales for our franchisees. I understand that there are certain bathtub books that may contain excessive amounts of phthalates [THAL-ates] and I would hope our industry will move away from selling these products, but most books—even if they contain trace levels of lead—are innocuous and should not be banned under this legislation. The American Library Association has done a tremendous job sorting through fact and fiction on the production of books in this country, and I commend their efforts to publicize what the industry has done since the 1970s to stop using metal-based paint in their books. But their work was not enough to get books excluded from the Act, and now we are all faced with how to sort through the books on our shelves. The clarification that books printed after 1985 will be considered "safe" was helpful, but it was not enough to ease the fear and frustration with the law.

It is because of the obstacles our business owners and families face that we need the Consumer Product Safety Commission to clarify the law so that parents aren't afraid to sell their children's items, or buy used clothing for fear that it might be banned by this legislation.

If there is one thing that has become clear through this process it is that we, as an industry, need more guidance and need more time to sift through our inventory, understand the new regulations, and find cheaper, more efficient ways of testing products. For my industry, it is critical that we are able to understand how we can better sort through our inventory and confidently buy & sell children's items without fear of selling something that is unsafe for a child, or facing consequences for violating the Act.

Changes like this do not happen overnight, and we need the help of the Consumer Product Safety Commission, as well as members of Congress, to ensure that we can continue to provide families with a resource to provide products at a value by being at the forefront of recycling. We need to know specifically what items are deemed unsafe for our children.

I thank you for calling this hearing on the impact of this law on small businesses, and particularly the thrift industry, and look forward to answering any questions you may have.

GP 2573639 v1

Hearing Before the

House Small Business Committee,
Subcommittee on Investigations and Oversight

Entitled

"The Consumer Product Safety Improvement Act and Small Business"

Written Testimony of:

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May 14, 2009

Mr. Chairman, Ranking Member Fallin and Members of the Committee: Thank you for holding this hearing and giving me the opportunity to talk with you about the issues small businesses have faced and continue to face as a result of the passage last year of the Consumer Product Safety Improvement Act of 2008.

Swimways Overview

My name is Anthony Vittone, and I am the Vice President & General Counsel of Swimways Corp. Swimways is a small, privately held, family owned company. We are headquartered in Virginia Beach, Virginia where we employ approximately 70 hardworking Americans. In addition, we provide seasonal and temporary employment to an additional 25 employees throughout the year. Our offices consist of manufacturing facilities for our rotational molding equipment, inventory space and office space.

Even if you do not know Swimways by name, I suspect you know our products. In the water products category, Swimways offers 120 different products to customers ranging from 9 months through adulthood. Swimways' brands include many products that consumers ask for by name, including Spring Float®, Toypedo®, Subskate™, Rainbow Reef®, Swim Sweaters™, and the Safe-T-Seal™ swim teaching system just to name a few. The Swimways brand of products has been around for over 40 years and is sold in 40,000 storefronts with major retailers and individual pool dealers alike.

Swimways prides itself on continuing to bring innovation and design to the marketplace. Constant market research and product development allows us to provide the features that have made us a leader in the industry. Our goal is to continue to

provide customers with the most entertaining and fun products, featuring only the very best value, quality, style and innovation.

For the past 15 years Swimways has enjoyed an average rate of growth of 15% a year – until 2008 when we took a step backwards. Unfortunately, this step backwards is directly attributable to two factors: (1) The state of the economy; and (2) the passage of the CPSIA.

CPSIA Introduction

The CPSIA, together with the economy, has essentially created a 'perfect economic storm'. Like most consumer product companies, Swimways is already experiencing a reduction in sales as a result of the state of the national economy. Individual consumers are buying less; therefore, the retailers we sell to are buying less. At the end of 2008 and beginning of 2009, orders from major retailers for the 2009 summer season were being cancelled or reduced. As a result of the CPSIA, inventory had to be scrapped and orders cancelled.

Swimways' main issue with the CPSIA involves the phthalate provisions. I understand that other toy companies and consumer product companies may have problems with the other provisions, such as the new requirements on lead or tracking labels. While we do not believe those provisions were very well thought through, the primary impact on Swimways involves the new restrictions on the use of phthalates.

I will not revisit in detail the need for these phthalate provisions since Congress has decided that some legislation was needed. However, it is worth pointing out that up until the passage of this Act, the Consumer Product Safety Commission has

consistently opined that oral exposure to DINP phthalates is not likely to present a health hazard to children. In light of the CPSC's conclusions, we would submit that some reasonable accommodations to the businesses that make these products would not be disastrous to Congressional intent.

Phthalate Timing

The timing of the phthalate ban was, in our opinion, the single biggest disaster in the CPSIA.

The European Union began the phthalate craze by passing European Directive 2005/84/EC. The EU passed this law in December 2005 and gave manufacturers and retailers until January 2007 to move through their inventory (i.e., 13 months).

The State of California kicked off the phthalate issue in the United States by passing the so called "California Toxic Toys bill". This bill was signed by the Governor of California in October 2007 and gave manufacturers and retailers until January 1, 2009 (i.e., 15 months) to clear through their inventories.

Conversely, the CPSIA was signed into law in August 2008, but as written it only gave manufacturers and retailers 5 months to clear through their inventory. For any consumer product company, this would be wholly inadequate. For a seasonal company like Swimways, this timeframe was essentially non-existent. I am sure the Members will understand – there are not a lot of pool toys being sold in the United States in the fall and winter. People only buy pool toys when it is warm enough to go to the swimming pool or a natural body of water; that occurs in the summer long after the time period for the CPSIA had long since run out.

Furthermore, whatever time was granted in the CPSIA was completely wasted by the back and forth interpretation of the Act's retroactivity on existing inventory. In November, the General Counsel of the CPSC in a well meaning opinion threw a life-line to the industry by indicating that the phthalate restrictions would only apply prospectively. Ms. Falvey's rationale was reasonable and supported under the law. Manufacturers and retailers breathed a collective sigh of relief and relied on this position. However, the U.S. District Court for the Southern District of New York's reversal of that decision, just 4 days before the enactment was to take place, created a firestorm of irrational behavior in the toy industry. Manufacturers struggled with what to do with their inventories and existing orders for their goods. Retailers scrambled to pull merchandise off their shelves calling Swimways for guidance, chargebacks, destruction orders, re-shipping mandates, etc.

The same product if sold on February 9, 2009 was perfectly acceptable and deemed safe by government and industry standards. The next day that same product became a toxic and dangerous 'weapon of mass destruction.' I would ask Congress to consider this simple question: If the use of phthalates is such a hazard to American children, why has Congress not ordered the CPSC to do an industry-wide recall of all products that contain phthalates, regardless of when they were sold from the beginning of time?

Congress wants children's consumer products to be made without phthalates. That is an understandable objective, but that guideline could have been adopted without further burdening an industry already struggling with the retraction of the American

economy. Swimways urges Congress to amend the CPSIA to make the phthalate restrictions prospective and apply to goods manufactured after February 10, 2009.

Imbedded Phthalates

The CPSIA includes a specific legislative exemption for imbedded lead. However, no such exemption was given for the significantly more benign phthalates. As the Members know, under standard statutory construction, the courts will interpret the CPSIA to mean that Congress intended no imbedded phthalate exemption to exist.

Swimways manufactures products which only contain phthalates on the plastic that surrounds the wires in the battery compartment for the product. The only way to access the phthalates is to take the product completely apart. We offer inflatable products which contains phthalates in the PVC, but the PVC is completely covered with fabric. Again, there is no ability to access the phthalates unless the customer essentially destroys the product. These products present no risk to the consumer and should be available for sale. We request that an imbedded phthalate exception be added to the CPSIA.

Age Requirement for P6 v P3 Compliance

Both the CPSIA and the California legislation prohibit 3 phthalates (DEHP, DBP and BBP) from being used in the manufacturing process of all toys and childcare articles. However, the two legislations differ on their treatment of the other 3 phthalates (DINP, DIDP, DnOP) with significant consequences.

The California legislation only prohibits the second 3 phthalates for childcare articles and toys intended for children 3 and under. The federal legislation forbids them for children up to age 12 and under if they are able to be put in the mouth. I am sure the Members would agree that a 10 year old child has long since passed the period when they are putting things in their mouth out of curiosity and sucking on them to relieve teething or coax themselves to sleep. Yet, this small and presumably inadvertent change in the law has made it unlawful for Swimways to sell a large quantity of goods that should be available for sale.

Swimways manufactures a product called the Rainbow Reef fish, which are battery powered to swim like a fish in a swimming pool.

We have sold over 7,000,000 units of this product. Prior to 2009, the fins of these swimming fish were made with phthalates. Even though Rainbow Reef fish are age graded for children 5+, there are nearly 15,000 units of this product that are now useless because the fins 'can be placed in the child's mouth.'

That is not the intent of the product and I will go out on a limb to say that that is not what happens with the product. We have no reports of children sucking on the fins to relieve teething or to help a child go to sleep. The CPSIA should be amended to

allow products not intended for children 3 and under to be manufactured using certain phthalates.

Sporting Goods v. Toys

Adding further confusion to the marketplace is the exemption of sporting goods from the CPSIA. It is not clear what is defined as a sporting good and what is defined as a toy. The CPSC has offered limited guidance but more detailed criteria are needed. In our experience, retailers are not willing to take a chance and are using a broad brush approach – 'if it's for a kid, it's a toy.'

A Representative Example: Spring Jam Basketball

Soon after the New York Court's ruling in February, retailers went into a complete panic. They had 4 days to review their inventory, determine which products were compliant with the CPSIA and remove the merchandise from the shelves. As a result of the severely compressed timeline, broad-brush reactionary decisions were made and manufacturers, like Swimways, were expected to absorb the cost.

Another product we manufacture is called the Spring Jam Basketball. This product is essentially an inflatable floating basketball goal covered in fabric and includes a basketball. We have sold over 750,000 units of this product since 2005. A picture of the product is included below:

In February, a large retailer had approximately 10,000 units of this product in their stores and distribution centers. This inventory was a mixture of products from 2008 that contained the DINP phthalate and 2009 product that is phthalate free. Nevertheless, the retailer immediately removed all of the Spring Jam inventory from their shelves.

We reviewed the item and explored with the retailer whether the product was a sporting good or a toy. We offered to send a team to sort through and separate the 2008 non-compliant inventory from the 2009 phthalate free product.

None of these efforts helped. It eventually came to light that the retailer had destroyed the goods shortly after the February 10th deadline. What was even more tragic was that less than 15% of the 10,000 units contained phthalates. But under the hysteria of February and the compressed timeline, the retailer chose not to sort through the products and merely trashed all of the goods. I would make the following observations:

- Under the California Act, these goods would have been compliant.

- If there had been an imbedded phthalate exception in the CPSIA, these goods would have been compliant.
- Had the CPSIA allowed for a greater timeframe to move through existing inventory, this problem would not have occurred.

The retailer is now insisting on a $100,000 credit for the destruction of the Spring Jam inventory. This is one example with Spring Jam Basketball. Other retailers have destroyed other units of this product. Regrettably, by the destruction of these products, the landfills have been filled but the cause of consumer safety has not been advanced.

Effect of Phthalates on Swimways

The effect of the CPSIA and its phthalate restrictions for Swimways has been profound.

(1) A large portion of the inventory in our VA Beach warehouse (approximately 37,000 units) was rendered obsolete and had to be written off. This write-off resulted in a 47% reduction in our profitability for 2008.

(2) Swimways was required to spend additional resources to rework other inventory in order to make it compliant with the CPSIA's phthalate requirements.

(3) We received significant chargebacks, returns, destruction charges, re-delivery expenses from retailers that insisted that we credit them for Swimways inventory that was rendered obsolete by the CPSIA.

(4) Orders were cancelled because we could not fulfill the purchase orders with compliant goods (even though non-compliant goods existed in our warehouse).

(5) We will have destruction costs for inventory that will have to be trashed.

The collective financial expense of the CPSIA for Swimways has exceeded $1,000,000.

In addition to these direct financial hits, Swimways has seen other indirect effects. Hiring at Swimways has been put on hold. Our bank that finances our operations is currently reevaluating its relationship with us because we have not hit our profitability covenant for 2008. Resources that would be spent in growing our business had to be used on compliance with the CPSIA. Personnel have been redirected from the core business to dealing with the aftermath of the CPSIA. Finally, the manpower by Swimways personnel to sort through and comply with the Act and various interpretations and deadlines of the Act reduces our ability to focus on growing the business.

The toy industry is overwhelmingly made up of small businesses like Swimways. The Toy Industry Association has estimated that the cost of this legislation to the toy industry has been $2,000,000,000. We all need some relief from this Act and we trust that Congress will respond.

Thank you for your time and attention to these matters.

Testimony for U.S. House of Representatives Committee on Small Business,
Subcommittee on Investigations and Oversight
The Consumer Product Safety Improvement Act and Small Business
May 14, 2009

Presented by: David McCubbin, Partner; McCubbin Hosiery LLC; Oklahoma City, OK;
405-236-8351; dmccubbin@mccubbin.com
At the request of The Honorable Mary Fallin, Oklahoma's 5th District

First, please accept my sincere gratitude for inviting me to address this committee. The Consumer Product Safety Improvement Act of 2008 (CPSIA), well intentioned to enhance the level of safety in the products Americans purchase for our children, has had massive consequences. The legislation's broad scope has impacted thousands of products for which the measured concerns are not material. Your willingness to review the implications for small businesses in particular is very much appreciated. Indeed my comments today are very consistent with the sentiments expressed last week by the distinguished Chairwoman of the House Small Business Committee, the Honorable Representative Nydia Velázquez. In her letter to the Director of Office of Management and Business, Peter Orszag, last week she wrote, "All too often federal agencies overlook the unintended impact their regulations have on small businesses. To create an environment that fosters entrepreneurship, the regulatory system must be responsive to small business needs." I hope you agree my testimony underscores that message. It is an honor to be included in your esteemed roster of witnesses.

Our company, McCubbin Hosiery, is a family business started by my grandfather 57 years ago. We design, market, and distribute children's and ladies hosiery. Our products are sold in a number of national and regional retail outlets. Our customer base includes Nordstrom, Dillard's, Stride Rite, Kmart, and Payless ShoeSource, as well as hundreds of small independent retailers. McCubbin Hosiery has weathered changing consumer trends, economic volatility, and numerous changes to federal, state and local laws throughout the many years. The CPSIA has the potential to be more devastating to legions of small and medium sized American companies than the challenges we have endured over our past five decades.

I was specifically asked to comment regarding the impact of the law on our business to date; the implications we anticipate in the coming year; and recommendations I would make regarding the CPSIA. Therefore, I will focus on the three aspects of this law we expect affect us most:

Section 101 - Lead content limits; lack of demonstrated necessity for testing textile products
Section 102 - General Conformity Certification; impractical expectation of one certificate per style per shipment on a replenishment/high SKU count business
Section 103 - Tracking label requirements; contrary to rulings of other federal agencies, and potential disclosure of confidential information

IMPACT TO DATE

Since the act's passage many of the problems we have encountered are due to ambiguities and differing interpretations of this law. The Consumer Product Safety Commission (CPSC) is facing a daunting task answering the deluge of questions from companies doing business across the supply chain. While we appreciate the enormity of the task they are being asked to coordinate we await guidance and rulings that are not keeping pace with deadlines. Retailers very quickly responded to the legislation's implications immediately pushing back on suppliers. Without clear and uniform standards retailers expect suppliers to conform with numerous and individualized requirements formulated from their own interpretation of the CPSIA. We have received dozens of different forms, letters, and guides from our customers asking us to demonstrate our compliance with the laws according to how each retailer has interpreted the legislation. This lack of standardization and fear based on what may happen if they, the retailers, are found to be non-compliant has forced us to undertake a number of different testing and certification measures as we try to respond on-the-fly. The resulting confusion on the part of our staff and our suppliers has caused delays and expenses beyond our budget expectations.

With any legislation as sweeping as CPSIA it is imperative each party has sufficient time to review and digest the changes. Parts of the CPSIA provided only 90 days from publication to implementation; simply not enough time to make intelligent decisions.

Thus far we have been most impacted by the lead content testing requirements.

- We were told early on by industry experts both in the United States and internationally that there are no reliable lead content tests for textiles engendering a scramble to execute any test that would work and could be considered "reasonable".
- Reputable testing labs throughout Asia and the United States differed on their interpretations of what specifically should be tested. Consequently, for a period of about three months we tested all yarns used in every sock at tremendous expense.
- The overwhelming demand on lab time at our origin locations resulted in delayed shipments, increased transportation costs to expedite goods, and strained relations with both customers and suppliers.

The CPSC's decision to issue a one year stay from the lead content testing and certification requirements was tremendously welcomed by the industry; however, according to the retailing community the stay changes nothing. There remains no standard and retailers continue to ask us to test. More definitive relief must be communicated from CPSC to retailers on this issue.

The Hosiery Association, The Hosiery Technology Center and industry executives met with 22 Congressional Offices in March to ask for a decision on excluding unembellished hosiery from lead content testing due to the exhaustive analysis which has been exercised at the request of the CPSC. To date, we have not received a response to our request. Consequently, we continue to spend unbudgeted dollars testing for lead that is not in our products to begin with. We believe this exclusion and other common-sense refinements will enable the CPSC to better serve the public interest.

IMPLICATIONS IN THE COMING YEAR

Section 101 - Lead Content Limits –

This section classifies children's products containing more than the allowable limit of lead as banned hazardous substances. This is a worthy and reasonable proposition. However, it has been laid upon the apparel industry, in blanket fashion, without regard to any historical evidence or suggested likelihood that harmful amounts of lead are found in the products. In short, we are being asked to search, at considerable expense, for something that does not exist nor has been alleged to exist. We anticipate this redundant testing will cost us in excess of $500,000 in the first 12 months.

Further, the current understanding of the law allows for application of this standard to goods already in stock at the retailer's locations as of the effective date. This interpretation would open an avenue for retailers to destroy or return this stock and demand reparations due to non-compliance. Returns of this magnitude could be ruinous to both small and large business owners. In our case, this would all be for products that have never been shown to pose a danger in the first place.

Lead is known to be harmful when ingested or inhaled; neither of which is a concern when discussing hosiery (or textiles in general). In January the CPSC held a public meeting for the Apparel industry to share its findings surrounding lead testing. Attendees included representatives from: The American Apparel and Footwear Association; Wal-Mart; JC Penney; The Children's Place; the National Cotton Council; the Hosiery Technology Center; and the Retail Industry Leader's Association. The presenters offered the results of their exhaustive textile testing over the preceding months. The overwhelming evidence presented demonstrated zero failures of textile items tested. Further, the Hosiery Technology Center's comprehensive testing consistently demonstrates, across the spectrum of hosiery content from diverse origins, lead content test results of less than 63ppm.[i] Simply stated, it has not been demonstrated that lead content in hosiery products poses any manner of safety concern. Yet this law mandates the industry establish an on-going testing process for a non-existent concern. The financial burden is both immediate and ongoing; it unnecessarily impacts business, and ultimately the consumer.

1) Due to retroactive application of the standard if we are unable to prove the goods we have already shipped comply with the lead content limits retailers will return the goods from their floors and their warehouse. Across the industry the consequence to the supplier community will be so devastating many will be forced shutter their doors. Understand the inventory, perfectly good in every respect and completely safe, would be instantly relegated unmarketable. It is doubtful any suppliers have built into their budgets the anticipation of taking back a season's inventory from every one of their retail outlets. Also bear in mind retailers will suffer from bare shelves; their customers denied access to products until the pipeline is recharged.

2) As currently interpreted, testing is required on each color of yarn used in each style of sock each and every time we purchase the item (even if purchased from the same yarn supplier in the same colors previously used and successfully tested). In a replenishment-driven industry such as

hosiery this expense may add 20% to the base cost of the product; again testing for a condition that frankly does not exist.

Section 102 – General Conformity Certification

This section of the law has been interpreted to mandate that every time we make a shipment each article contained therein must be accompanied by a General Conformity Certificate (GCC) identifying each "rule, ban, standard, or regulation applicable to the product" and certifying each product complies with all regulations. This certification is independent of testing. Even if none of the products in the shipment require testing, a GCC must be available.
Our active customer list contains over 7,000 unique entries. Each of our retail customers strives to keep as little inventory as possible; they want to replenish it as often as they can. This results in multiple shipments to them throughout the year. Conversely, manufacturers demand orders in large quantities as infrequently as possible. Distributors like us are caught in the middle of these two opposing forces.
Keeping this balance means we ship small orders to individual store locations across the US on a weekly basis; and we buy from our suppliers in bulk, tens of thousands of pieces at a time. Further, as we are a fashion driven enterprise our active item list could total as many as 3,000 different products at any given time. Ensuring accuracy and availability of a GCC for every incoming order, and matching that information to a GCC for every item on every order shipped to our customers will result in creation of tens of thousands of certificates annually. This is a daunting prospect for any small business.

Section 103 – Tracking labels

The apparent intent of this section provides for the identification of the specific manufacturing facility for every given item, and to maintain transparency through to the end-consumer. While this goal appears innocuous we believe it would actually be harmful for our business.
The relatively short window leading up to this requirement and the other changes mandated by CPSIA in the interim have resulted in some confusion regarding the final requirement. We have seen opinions from the CPSC that marking only the packaging of items will not meet the requirement of the law as packaging does not allow for "permanent" marking. However, the nature of our products does not allow for sewn in or printed on labeling. As you may know, most hosiery is exempt from the Care Labeling Rules enforced by the Federal Trade Commission (FTC) due to the "utility or appearance" being "substantially impaired by a permanently attached label". We believe it is reasonable to expect the CPSC to come to a similar conclusion, regarding tracking labels, however, even with the deadline looming we can not be certain of that.

As we experienced last year with the uncertainty surrounding the lead content testing, retailers are pressing suppliers for an immediate resolution to the tracking label demand. We are hopeful the outcome of the CPSC's May 12th public hearing regarding this requirement will resolve the concerns and answer the questions we all seem to have. Until there is consideration how permanent tracking labeling for hosiery can (or should) be executed we cannot predict the financial impact.

RECCOMENDATIONS

I respectfully submit the following recommendations to help alleviate the unintended and damaging consequences of the CPSIA on our country's Small Businesses. I will limit my comments to the three areas discussed above.

Section 101 - Lead Content Limits

I believe based on the evidence presented above, a move should be made to exclude textile products from lead content testing requirements. At the CPSC's public hearing on textiles in January credible and overwhelming evidence was presented demonstrating statistically negligible levels of lead exist in textiles. Over the course of thousands of tests performed by different companies on different fiber contents from diverse countries none were found to exceed the lowest limit established in CPSIA.

Section 102 – GCC

Allowing this document to be prepared on an annual basis for each style (and each supplier of said style) in a company's offering would vastly simplify compliance with this law without changing the intent. Retailers would still be confident their suppliers are sending them goods that are in full compliance with all standards and regulations under this system. Suppliers would still be responsible for certifying their adherence to the law. And, ultimately the consumer will purchase items with the full confidence the products are safe and risk free. As a matter of practice, when changes are made to the source content of the product or to the manufacturing facility used the products should be recertified.

Section 103 – Tracking labels

The CPSC should follow the precedence established by the FTC with regard to consumer labeling laws allowing legally required labels for hosiery to be included on the packaging only. In September 2008 the FTC confirmed their earlier position in a letter to the Hosiery Association; they stated, "attaching a label to a hosiery item such as a sock or stocking would result in an uncomfortable, unattractive or damaged article". They confirmed labeling of such articles is impractical because the items don't have waistbands, are too fragile, or are sold in pairs.
Further, the tracking information should be acceptably presented in a manner that allows the importer or domestic manufacturer to internally identify the specific factory or mill used without revealing confidential sourcing information.

SUMMARY

Small businesses applaud the efforts of the United States Congress to ensure the safety of all citizens. In the instance of the CPSIA, however, unclear and belated interpretation is causing unintended, punitive consequences for our business and thousands like us. Children's products existing in commerce for years should be judged based on their history of consumer safety. The CPSC has expressed severe doubt about their ability to implement the "vast expansion" of

oversight called for in this law given the "extremely short deadline".[2] Where there is no history of problems, common sense exclusions from the regulations should apply. These exclusions will allow the CPSC to focus their enforcement efforts in areas that yield the greatest return for the public good. When the CPSC is expected to enforce these limits on every children's product in the country, whether or not it poses a viable threat to safety, their enforcement ability is diluted to the point that the overall marketplace ultimately becomes less safe. There is, as detailed above, sufficient evidence to withdraw the lead content testing requirement from all textile articles.

Retroactive application of these safety standards could ruin hundreds of small businesses that have acted responsibly throughout their history of manufacturing and distributing products with no suspicion of deleterious lead content. Importers and wholesalers will be forced to prove the innocence of their products despite the reality there is no evidence these goods have ever posed a safety threat. And, ultimately, it is the American consumer who will pay the price through higher prices and the limited selections manufacturers will be forced to pass along due to increased production costs.

Let me assure you we intend to fully comply with this legislation. But, we are imploring you to do all in your power to ensure the laws are clear, effective, and do not cause an unreasonable burden to commerce. You can astutely enhance the provisions of the CPSIA to address the economic concerns of thousands of reputable small business owners without endangering the safety of our children.

1 Hosiery Technology Center's presentation to the CPSC, January 22, 2009; http://www.cpsc.gov/about/cpsia/hosiery.pdf
2 Federal Register Vol 73, No 223/ November 18, 2008; pgs 678328-68332

KD Statement

Thank you, Chairman Altmire, for holding this important hearing. In 2007, more than 17 million toy units were recalled by the Consumer Product Safety Commission (CPSC) on account of excessive lead levels. The issue became a major public health concern and led to the passage of the Consumer Product Safety Improvement Act. Unfortunately, in the rush to pass a strong bill to safeguard our children, Congress has created unintended, negative consequences on businesses.

One of the areas that concern me with this Act is the application of lead limits for manufacturers and sellers of all-terrain-vehicles (ATVs) and motorbikes for children. It is now illegal to sell off-road machines designed for children 12 and younger if their parts exceed lead limits, which is unfortunately very common. Although the ATV and motorbike industries have petitioned the CPSC for an exemption to this lead requirement, their request has not been granted. I recently wrote a letter to

Energy and Commerce Chairman Henry Waxman and Ranking Member Joe Barton asking them to review this issue. At a time when our economy is struggling, I am concerned that without this needed exemption, ATV and motorbike manufacturers will lose an important segment of their market.

Let me be clear: I strongly favor limits on lead and phthalates on products sold to children. In fact, I will soon be introducing a companion bill to Senator Gillibrand to examine lead, phthalates and other chemicals in cosmetics sold to children. However, I think that the CPSC should be more flexible with the application of the Consumer Product Safety Improvement Act. When the CPSC can reasonably assess that the risk posed by a product is very minimal, exemptions can be made.

COMMITTEE ON AGRICULTURE
COMMITTEE ON SMALL BUSINESS
COMMITTEE ON SCIENCE AND TECHNOLOGY

Congress of the United States of America
House of Representatives
Washington, D.C. 20515

March 24, 2009

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman and Ranking Member Barton:

I am writing to you concerning an issue about the application of the Consumer Product Safety Improvement Act of 2008, P.L. 110-314 (the Act).

Certainly the Act was an important advance in product safety law; however, I have received a number of complaints about how it works in practice with regard to the youth motorbike and ATV industry. Industry advocates have appareutly filed a petition with the Consumer Product Safety Commission, seeking an exemption from coverage under the Act. While they await a ruling, they have also argued that a potential $1 billion industry is being threatened.

I am respectfully requesting that your committee evaluate the application of the Act to Youth motorbikes and ATV's and determine if the Act can be better tailored to advance the important interests of childrens' safety.

Sincerely,

Kathy Dahlkemper

May 14, 2009

The Honorable Jason Altmire
Chairman
Subcommittee on Investigations and Oversight
Committee on Small Business
U.S. House of the Representatives
2360 Rayburn House Office Building
Washington, DC 20515

The Honorable Mary Fallin
Ranking Member
Subcommittee on Investigations and Oversight
Committee on Small Business
U.S. House of the Representatives
B363 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Altmire and Ranking Member Fallin,

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I want to thank you for holding today's hearing on the Consumer Product Safety Improvement Act of 2008 (CPSIA) and how the Consumer Product Safety Commission can reduce regulatory burdens on America's small businesses.

According to the NFIB 2008 Small Business Problems and Priorities publication, small business owners agreed that "Coping with Government Regulation" is one of their most formidable business problems, ranking it sixth out of 75 small business problems they face. Small businesses lack specialized regulatory compliance staff. Therefore, compliance falls on the owner, in addition to their other responsibilities.

While our members understand that the intent of the 2008 law is to protect children, small businesses are concerned that the law's lead testing policy could cause serious economic hardships for many law-abiding small businesses that manufacture and sell safe children's products. During a time of economic uncertainty, new costs and mandates inhibit economic growth and may force small businesses to raise prices, cut jobs or shut their doors. Given that the maximum penalties for noncompliance are $100,000 and $15 million, we believe a delay in implementation and enforcement of this law is reasonable request to ensure that the impacts on small business are thoroughly examined.

NFIB is pleased that the CPSC has acted to clarify the compliance requirements for resellers of children's products, thrifts and consignment stores. Additionally, we are pleased the Commission is taking initial steps to help the small business community. For example, the publication of a small business guide is helpful to the small business community and we encourage the Commission to continue to update these compliance guides as new information becomes available.

NFIB is optimistic regarding the stays of enforcement the Commission has put into effect. For example, the Commission issued a stay of enforcement for children's off-road motorcycles, all-terrain vehicles and snowmobiles. This stay is effective until May 1, 2011. These are good examples of products that pose an insignificant threat of lead poisoning to children and should be exempt from the CPSIA. NFIB is concerned, however, that small business may still face costly lawsuits. These independent actions signify the Commission's commitment to protect and recognize small business as our nation's job creators. While these actions are a good start, we are hopeful that Congress and the Commission can begin to work together to address additional burdens that may be fixed through the regulatory and legislative process.

NFIB urges Congress to act on legislation that will alleviate the burdens the CPSIA has imposed on small business. In particular, NFIB strongly supports allowing for "component part testing" which is necessary to prevent duplicative and expensive testing. Small manufacturers would be permitted to use the testing and certification that are obtained by their component suppliers (if all components are certified, the final product is certified). NFIB also supports the following legislative proposals: H.R. 968, H.R. 1027, H.R. 1046, H.R. 1465, H.R. 1510, H.R. 1692, H.R. 1815, S. 374, S. 389 and S. 608.

Thank you again for holding this hearing. I look forward to working with you on this issue as the 111th Congress continues.

Sincerely,

Susan Eckerly
Senior Vice President
Public Policy

cc: Members of the House Committee on Small Business

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Statement of Sean Hilbert
President
Cobra Motorcycle Manufacturing

U.S. House of Representatives Subcommittee on Investigations and Oversight of the Committee on Small Business

Hearing on
"How the Consumer Product Safety Improvement Act Impacts Small Businesses"

May 14, 2009

Chairman Altmire, Ranking Member Fallin and members of the Subcommittee, thank you for the opportunity to provide comment on the Consumer Product Safety Improvement Act of 2008 (CPSIA).

Founded in 1993, Cobra Motorcycle Manufacturing is the world's premier manufacturer of youth competition motorcycles and all-terrain vehicles (ATVs). Cobra moved to Michigan in 2006 with the aid of a Michigan Mega Grant through the Michigan Economic Development Corporation (MEDC). We proudly design, develop, and manufacture our products in the USA using over 150 local companies to supply services, components, and raw materials. Additionally, Cobra has grown considerably over the past five years, and we currently export our products to fourteen countries. For the sake of our employees, suppliers, and customers, we urge Congress to amend the CPSIA to exclude products like ours that pose absolutely no lead risk to children.

As you know, the CPSIA was signed into law on August 14, 2008 and went into effect February 10, 2009. It subjects any consumer product that is designed or intended primarily for a youth age 12 years or under to the new limits on lead content (Section 101). While the CPSIA was passed with laudable intent, it has created, according to House and Senate bipartisan letters dated April 2 to the Consumer Product Safety Commission (CPSC), "a well-documented safety hazard for children, a severe and unwarranted disruption to families who recreate together, and a deleterious effect on youth amateur racing. Additionally, the inclusion of OHVs has created an economic disaster for an industry which is already reeling from the recession, is facing countless lay-offs and is estimated to be losing three million dollars per day due the Act."

If large companies like Honda are being dramatically affected by the CPSIA, then small businesses are experiencing hemorrhages that are unrecoverable. In the case of Cobra, the most damaging part of this law is the cost of compliance. We

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are facing a price tag of nearly half of one year's revenue to comply, and that is estimating initial testing costs only. This equates to adding roughly $2,000 to the price of a $3,500 unit and doubling the cost of spare parts, which the market will simply not bear. Furthermore, the administration of continually testing approximately 4,000 separate components is a task we have not even begun to get our arms around. As with other small companies, we fear that the burden of compliance will simply cause us to close our doors. This means, in the case of Cobra, I must lay off 35 full-time and 4 part-time employees from our factory located in Michigan, which has the unfortunate distinction of already having the highest unemployment in the Union.

In an effort to alleviate some of the devastating effects of the CPSIA, the youth-model motorcycle and ATV industry sought an exclusion from the Lead Content Limits under Section 101. While the CPSC voted unanimously to deny the request for exclusion they ultimately voted on May 1, 2009, to support a stay of enforcement of Section 101 of the CPSIA regarding youth-model off-highway motorcycles and ATVs. The stay of enforcement is effective from May 12, 2009 through May 1, 2011.

Acting Chairman Nancy Nord stated on April 3, 2009, that she could not support an exclusion "because the clear language of the law requires this result, not because it advances consumer safety." In fact, Acting Chairman Nord said that the "application of the lead content mandates of the CPSIA to the products made by the petitioners may have the perverse effect of actually endangering children by forcing youth-sized vehicles off the market and resulting in children riding the far more dangerous adult-sized ATVs."

While the CPSC Commissioners' vote to stay enforcement of the law, this does not solve the real issue, which is the law itself. Despite the stay, it is unclear whether state attorneys general will also decline to enforce the CPSIA. The sale of youth-model motorcycles and ATVs is still technically illegal. Even though a stay means that small business owners will not be subject to fines or penalties imposed by the CPSC, state attorneys general can still prosecute violators if they chose to do so. Youth-model motorcycles and ATVs should be exempt from the law, and Congress needs to act to make that happen.

The most sensible way forward for Congress to help small companies like Cobra is to have the law repealed or to somehow exclude youth-model motorcycles and ATVs from the law. H.R. 1587, introduced by Rep. Denny Rehberg (R-MT), will do just this and I urge any Representative that has not yet cosponsored this bill to please do so. By cosponsoring H.R. 1587, you will send a clear message of your support for small businesses and youth safety.

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Finally, it is my sincere hope that this Subcommittee continues to engage the public in their deliberations regarding the CPSIA's impact to small businesses. Cobra and many dealers, who are also small businesses, stand ready to serve as a resource for you and your staff as you further consider the impacts of the CPSIA.

Again, I wish to thank the Chairman, the Ranking Member and the Subcommittee for holding this hearing on "How the Consumer Product Safety Improvement Act Impacts Small Businesses."

Regards,

H. Sean Hilbert

Sean Hilbert
President – Cobra Motorcycle Mfg. Inc.

Consumers Union * Consumer Federation of America
*** Kids In Danger * Public Citizen * National Research Center for Women & Families * U.S. Public Interest Research Group ***

The Honorable Jason Altmire
Chair, Subcommittee on Investigations and Oversight
House Small Business Committee
2361 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Altmire and members of the Subcommittee:

Thank you for your interest in the implementation of the Consumer Product Safety Improvement Act (CPSIA). The undersigned consumer, public health, and scientific groups fully support aggressive efforts to engage and educate all parties involved in the CPSIA, including small and large businesses, microbusinesses, retailers, and consumers.

In August 2008, this law was passed with overwhelming bipartisan support in Congress, signed by President Bush and enthusiastically backed by consumers, public interest organizations and business representatives. The CPSIA provides much-needed tools for the Consumer Product Safety Commission (CPSC) to guide businesses in producing safe and effective products for their customers.

However, since the CPSIA's passage, the agency's leadership has floundered in ensuring a smooth implementation process, to the detriment of businesses and consumers. Indeed, after months of urging from members of Congress as well as from health, science and consumer groups, the CPSC has begun to develop common sense rules that will ensure the safety of our children while addressing small business concerns, mostly related to testing and certification requirements.

Business concerns that emerged due to the lack of CPSC guidance soon developed into a full-blown demand for major changes to the law. However, the CPSIA does not need to be changed to address these concerns. Congress has included language in the CPSIA that already empowers the agency to provide exclusions for certain materials. The CPSC has the power **right now** to exempt certain materials from testing and certification requirements, to relieve those manufacturers who are in no danger of violating the new standards.

Changing the law would hurt consumers by removing the critical safety protections it provides. It will also hurt businesses by diminishing consumer confidence – and therefore sales – at a time when business can least afford it.

Further, in the last two months, the CPSC has received resources that will help with implementation without need for changing the law. Congress and President Obama have increased funding for the agency. In addition, the President recently nominated a new chair and an additional commissioner. These new resources should enable the agency to implement the CPSIA effectively.

We urge you to resist calls to reopen the CPSIA and instead, to focus on the prompt, clear and sensible implementation of the law. The new CPSC Chair, once confirmed, should be allowed to put in place her vision for the agency's new direction. We look forward to working with you and the new CPSC leadership in ensuring that businesses and consumers all benefit from the CPSIA and its new protections.

Sincerely,

Rachel Weintraub
Director of Product Safety and Senior Counsel
Consumer Federation of America

Ami Gadhia
Policy Counsel
Consumers Union

Nancy A. Cowles
Executive Director
Kids in Danger

Diana Zuckerman, Ph.D.
President
National Research Center for Women & Families

Elizabeth Hitchcock
Public Health Advocate
US PIRG

David Arkush
Director, Congress Watch
Public Citizen

May 13, 2009

Erik Lieberman

House Small Business Committee

Re: Written Testimony for the May 14, 2009 House Small Business Subcommittee on Investigations and Oversight Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

On behalf of the Handmade Toy Alliance, an alliance now numbering 335 toy stores, toymakers and children's product manufacturers from across the country who want to preserve unique handmade toys, clothes, and children's goods in the USA, we respectfully submit the following testimony for the House Small Business Committee's Hearing on the CPSIA.

Please add this letter and the two pages which follow into the official record of this subcommittee hearing.

We appreciate your assistance in this matter. Please contact us if we can be of any assistance.

Sincerely,

Stacee Wion
Co-owner, SpielWerk Toys
stacee@spielwerktoys.com

Dear Erik Lieberman and House Small Business Committee:

We are a small brick-and-mortar toy shop located in Portland, Oregon. Our business is currently approaching 3 years in it's operation, while our second shop was opened just this last December.

Our founding concept is that play is the work of childhood, and that essentially, toys are the tools of childhood. Our goal is to make traditional, safe, and high quality toys available to Portland families.

In order to find the safest toys on the market, in some cases we had to look far. Many of our toys are imported from Germany, France, Poland and the like, as these countries continue to support their long-standing traditions of making simple, healthy, traditional toys. We have always trusted these varieties for the strict safety standards they adhere to, set forth by the European Union.

In stating this, you might be wondering how this information pertains to the new law put forth by the CPSIA. Well, here is what is happening:

Toys marked with a "CE" stamping (signifying that they meet EU safety standards) are inherently compliant to the new CPSIA standards by the very fact that their testing is more exhaustive and stringent, yet currently we are requiring these small manufacturers to not only pay for their own testing, but also become compliant with our new CPSIA standards, which not only requires more expensive testing, but also requires very complicated (and again, expensive) batch labeling (which the CPSIA currently does not have guidelines for) for each individual item. Essentially, we are asking them to do everything twice and create a US only tracking system that does not yet exist.

The consequences of this incessant testing are many. Most European exporters still able to afford the cost of small-scale, traditional manufacturing can hardly afford to test once, let alone twice. What we as a US retailer of these toys are experiencing, is an immense loss of product, incredibly higher prices, far longer backorders, and a huge overlapping problem with our competitors as we are now all fighting for the same reduced pool of product. Currently I am experiencing a 30% reduction in CE stamped product, which makes up 80% of my total inventory.

There is a lot of uncertainty at this time. Especially in these extremely challenging economic times, being faced this struggle to retain product and keep our niche in the local marketplace is especially detrimental. We cannot survive this crunch on the traditional toy industry—there are not enough domestic traditional toy makers around to keep us supplied.

And on the subject of domestic product, another more spoken about fault to this new law is the crunch on small domestic toymakers. I do not feel I need to say as much here, as it's opposition to this law has certainly gained momentum. What I would like to add, is that another of our founding goals was to eventually manufacture toys on a small scale, to contribute our concepts to the traditional toy market while also supporting our local crafting community. At this time, due to the extremely high costs involved with testing handmade goods, I cannot embark on this endeavor, nor can I legally support those who currently

make handcrafted items with the hopes of selling through our store.

I urge you please to amend this law. The integrity of the toys we sell have always been the driving concept to our business, it is also the reason why we support small toy manufacturers. Please do not let the poor ethics of the few affect the many. And please, please do not let it happen that we homogenize and water down the unique qualities of our toys as these are the most important tools of childhood.

We request that you:

1. Grant exemption to all "CE" certified products for children,
2. Grant exemptions to all natural products, both raw and compounds made up of natural and certifiably safe materials,
3. Allow "component-based testing" on all products for children putting the costly and timely burden of testing on the manufacturers of toy components (i.e. finishes, fasteners, and processed component materials),
4. Compile and publish clear and simple guidelines for all testing requirements for both retailers, distributors and manufacturers of children's goods,
5. Create small children's toy manufacturers access to financial assistance toward becoming compliant based on the size of their company and production.

I thank you very much for your time and consideration. Please do contact me with any questions or need for further testimony.

Respectfully,
Stacee Wion
Co-owner, SpielWerk Toys
Portland, Oregon
www.spielwerktoys.com

Erik Lieberman

House Small Business Committee

Re: Written Testimony for the May 14, 2009 House Small Business Subcommittee on Investigations and Oversight Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

On behalf of the Handmade Toy Alliance, an alliance now numbering 335 toy stores, toymakers and children's product manufacturers from across the country who want to preserve unique handmade toys, clothes, and children's goods in the USA, we respectfully submit the following testimony for the House Small Business Committee's Hearing on the CPSIA.

I am a small retailer who specialized in handmade toys made by US manufacturers as well as manufacturing my own line of fabric related items (aprons, purses, etc) I have been in business for over 10 years and have never experienced a quality issue with any of my vendors. Most of whom are family owned and have been in business for over 10 years. I am strongly against the mandate for all retailers to conduct ADDITIONAL testing for any products they sell as it is duplicative and is too costly for small retailers buying in small batches.

Please add this letter into the official record of this subcommittee hearing.

We appreciate your assistance with this matter. Please contact us if we can be of any assistance.

Sincerely,

Vicki Mote Bodwell
Owner
WarmBiscuit.com

May 13. 2009

Erik Lieberman
House Small Business Committee

Re: Written Testimony for the May 14, 2009 Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

On behalf of the Handmade Toy Alliance, an alliance now numbering 335 toy stores, toymakers and children's product manufacturers from across the country who want to preserve unique handmade toys, clothes, and children's goods in the USA, we respectfully submit the following testimony for the House Small Business Committee's Hearing on the CPSIA.

Please add this letter and the two pages which follow into the official record of this subcommittee hearing.

We appreciate your assistance with this matter. Please contact us if we can be of any assistance.

Sincerely,

Dan Marshall
Vice President, Handmade Toy Alliance
dan@peapods.com

Save Small Businesses from the CPSIA

The Problem

The Consumer Product Safety Improvement Act (CPSIA) is overly broad in its focus and puts unrealistic testing costs on small businesses that were already providing safe products. The result is a decreased capacity to protect consumers, and severe financial hardship for small business.

What should Congress do?

The CPSC has indicated that they are unable to fix the unintended consequences of the CPSIA without a technical amendment from Congress. We are seeking:

1. ***Component-based testing*** so that suppliers of our raw materials could provide the children's product manufacturer with certification of compliance within the law, which would eliminate the need for redundant and costly unit-based testing. Safety would be improved by driving compliance upstream in the supply chain, catching non-compliant materials prior to distribution, practically eliminating the chance that any given finished unit would be non-compliant.

2. ***Exemptions from testing*** for materials known by science not to pose a lead or phthalate contamination hazard, such as fabrics, certified organic materials, and many natural materials such as wood, paper and bamboo. Manufacturers would be spared the costs of testing these materials, and testing labs and the CPSC could better focus their efforts on high-risk materials such as metals and paints.

3. ***Harmonization with European Standards.*** Accepting the stringent EU standards in the United States as sufficient for the requirements of CPSIA would save countless US businesses that import from or export to the EU from the costs of performing multiple tests. US and EU regulators would be able to work together to oversee the global marketplace.

4. ***Exempt permanent batch labeling*** of products for hand crafted and micro businesses that have small batch runs. While permanent labeling may be efficient with large runs of plastic products, it would be extremely difficult and cost prohibitive for small batches made from wood or fabric.

5. ***Revisit the retroactivity*** of the CPSIA based on a risk-based approach.

The Result

Fixing the CPSIA ***now before any more*** law-abiding and well-intentioned small companies are forced out of business will preserve the integrity of the original legislation, prevent political backlash, and refocuses the efforts of the CPSC to fulfill the law's original purpose. To date, some businesses have discontinued their children's lines or have closed altogether. Libraries are sequestering children's books printed prior to 1985. Thrift stores have removed children's products from their shelves. Several European toy manufacturers have pulled out of the US market. ATV and motor bike manufacturers and storefronts have removed inventory intended for children 12 and under, including replacement parts. Without common sense changes to the CPSIA, the tragic result will in fact not be increased product safety, but the closing of small businesses that were already providing safe products.

About the Handmade Toy Alliance

The Handmade Toy Alliance (www.handmadetoyalliance.org) represents small toymakers, children's product manufacturers, and independent retailers whose businesses cannot survive without repairing the CPSIA. We believe that these changes will not only help our businesses, but many other companies large and small who have been caught in a snarl of unintended consequences, affecting everything from apparel to educational materials for children with disabilities. We need common sense reform to preserve the heart and soul of American toys and children's products.

Risk Based Assessment Amendment to the CPSIA

Since it was passed into law in August, 2008, numerous industries have felt the impact of the unintended consequences of the Consumer Product Safety Improvement Act (CPSIA). Books, ATVs, thrift stores, school supplies, handmade toys, and clothing have all been negatively affected in ways which do not improve product safety or protect American jobs.

At the Handmade Toy Alliance, we have identified five key changes to the enforcement strategy of CPSIA which would dramatically reduce these negative impacts for our members. These include exclusions from testing for natural materials, component-based testing, and harmonization with EU standards.

However, it is now clear to us that a more fundamental change in the approach of the CPSIA is required in order to ensure the long term viability and diversity of children's products in the USA. Specifically, the Consumer Product Safety Commission (CPSC) should be given the discretion to implement the requirements of the CPSIA such as third party testing, age ranges of covered products, labeling requirements, and applicability of total lead content limits according to a risk-based approach.

This risk-based approach has been used effectively since 1986 in the State of California's landmark Proposition 65 law, giving the state the flexibility to identify and control substances that may pose hazards to children. The CPSC has also relied on this approach since its inception and has used risk analysis to target its research and enforcement initiatives. Under the CPSIA, however, the CPSC must now dedicate overwhelming time and effort to managing compliance for whole categories of products with little history of or cause for concern.

We propose that a technical amendment be created for the CPSIA that would allow the use of risk assessment to establish priorities, provide for common sense exemptions and set implementation deadlines. Under the law as currently written, a product intended for children ages 12 and under must be certified to be under 300 ppm by August of 2009 by a third party laboratory. A product can not be excluded if touching it would result in the absorption of "any lead", even if said contact contains *de minimis* risk or negligible risk of toxicity to the child. The wording of the CPSIA prevents the CPSC to do what they do best – assess risk.

Adding an amendment that outlines solely the regulatory discretion of the CPSC to assess risk while keeping intact the overall provisions of the law would allow for common sense exemptions that both the Commission would like to make and Congress intended to be included. The clear language of the statute as written is rigid. Safety in products is a priority, but without a risk based approach, this well intended children's safety law is irrevocably flawed. Using a scientifically based assessment of risk, the CPSIA will be strengthened, and the Commission can grant much needed and common sense, exemptions to small businesses that are creating safe products. This amendment will allow the CPSC to immediately address the products that pose the greatest risk to children while providing clear guidance to industry for the compliance of all products.

House Committee on Small Business
Subcommittee on Investigations and Oversight
May 12, 2009

RE: The Consumer Product Safety Improvement Act and Small Business

Statement of
Michael E. Warring
American Educational Resources LLC
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STATEMENT OF MICHAEL E. WARRING
President, American Educational Products LLC
Fort Collins, Colorado and Chippewa Falls Wisconsin

Good afternoon, Mr. Chairman and distinguished Members of the Subcommittee. As the President of a small 70 employee company serving the educational manipulatives business, I am deeply troubled by the devastating impact of the Consumer Product Safety Improvement Act (CPSIA) on any small business serving the children's products market. As written, and currently implemented, this law will put the lives and well being of small businesses and their employees providing children's products at risk. Ironically, CPSIA will do more harm to children than it will ever prevent, as children begin to use products not designed for their bodies and capabilities, as their 'hands on' options in school programs (before, during and after hours) are significantly reduced, as their parents avenues of meeting their children's needs through thrift stores become limited and as their parents lose their livelihoods when small businesses serving these needs disappear.

This law in effect, makes every children's product dangerous in terms of lead, lead in paint and phthalates until proven otherwise. It applies this standard retroactively, currently and continuously. In other words, existing inventory must be tested, all future production runs must be tested, and conceivably, periodic testing must be done on previously tested inventory. As final nails in the coffin of small business, CPSIA imposes product tracking requirements on all children's products regardless of probable risk or limited annual volumes, as well as generating a documentation requirement that will easily consume one business day per year per product sold. For any single children's product not generating $20,000 a year or more in product margin, that product will disappear from the market, forever.

Others testifying before you will likely speak or write in generalities around the very real issues of CPSIA: burdensome compliance costs, increased and unmanageable regulatory and complexity issues, and an absurdly uncontrollable liability risk. I will endeavor to lay out a specific example of a product line from my business and how CPSIA will increase my cost on that product line. I will then extend that same set of concerns and costs to the totality of products that my business brings to market and quantify just what investment in testing dollars and additional employment I will need to make (assuming I could) to maintain my products in the market. Next, I will quantify what I can actually do and how that will change the dynamics of American Educational Products (AMEP). Finally, I will provide a real world example of a byproduct that this legislation has introduced to the children's products marketplace that I cannot overcome – fear.

The nature of AMEP's products is one of 'hands on' use by students and teachers to deliver educational content in a form that better engages the student. Products can be as simple as a ring used in a ring toss exercise up to the complexity of a completely self contained botany lab. 99% of our sales go to distribution companies or teacher stores (70% of that goes to 20 large distributors) who then market to teachers or schools. We do not do much in the way of direct sales, we are business to business. The group of products I will use for this presentation will be our inflatable line – products that you can find on our web site (www.amep.com) under 'Clever Catch', 'Tumble N. Teach', 'Toss N Talk, and 'Bio2'. The easiest of these to visualize is the 'Clever Catch'. Think of a 24 inch diameter beach ball that has been divided into sections through color changes, geometric patterns, that sort of process. Each small divided area contains a question number and a question. The students toss the ball around and wherever their left thumb lands they read

the question number and the question, then they answer the question. We currently have 74 titles ranging from addition/subtraction all the way up to physics, crossing all curriculum areas. Each of these 77 titles comes from the same manufacturer, using the same materials and color dyes. We purchase them in lots as small as 500 units all of the way up to 3,000 units depending on the annual demand. In 2008, we sold 40,300 clever catches or about 523 of each title on average. Our total revenue on these units was around $215,000 or about $2,800 per title. Now let's analyze what CPSIA does to this product line.

On average, each of these titles consists of a plastic valve, a non-latex vinyl ball, an average of six different colors, a vinyl patch kit and a multicolor teacher's guide packaged in plastic bag with a pre-punched header card. All of the dyes used throughout the line are the same, all of the valves are the same, and all of the vinyl balls are of the same base material, as are the patch kits and teacher's guides. CPSIA requires that I test each component of each title separately. An average ball therefore consists of a valve, a ball, six different colors, a patch kit and a teacher's guide or about ten components needing tested. On average, testing currently runs around $200 per component tested assuming one is only testing for lead, lead in paint and phthalates. There are additional costs to testing for choking and ASTM issues also mandated by CPSIA; however I am not going to consider those tests in this writing. On average then, I can expect to spend $2,000 per title (ten components at $200 per component). I need to test existing iaventory, I need to test each title each time I have a production run completed and there is still a yet to be defined 'periodic' testing requirement. In the prior paragraph I pointed out that we geaerate an average of $2,800 a year in ANNUAL REVENUE on each title. On average then, I really

cannot continue carrying any of these titles, as the product margin generated annually won't pay for one test run on average, never mind a potential future periodic requirement. I cannot spread the cost over a bigger production run because the balls have a shelf life in which time they must be inflated, about three years. There are some titles that sell less than 500 units in three years. Please note that we are THE manufacturer of these titles. Our sales volumes are THE worldwide annual sales volumes. The market will not grow to accommodate the financial ramifications of the legislation's requirements.

Now let's take the same group of 77 titles and test it differently. Component level testing might allow me to submit samples of all titles to be tested at one time and test each of the related components as one component. I would pay for one valve test ($200) rather than 77 valve tests ($15,400). The same would apply to colors, the ball itself, patch kits and teacher's guides. Assuming that we use about 60 different colors across the entire line, my total test cost for my existing inventory would be $12,800 rather than the $154,000 in the previous scenario. In reality, we may run production on 20 titles a year, so we're really comparing an ongoing cost of $40,000 (20 titles per production run at $2,000 per title) versus the $12,800, annually. That sounds much better - and it is - but in truth the testing cost for 20 titles each production run will consume more than two thirds of the product's annual product margin each year, leaving me one third of the annual product margin to address warehousing, marketing, development and administrative costs – administrative costs BEFORE CPSIA. Those costs have now increased significantly as well, as I will now detail.

CPSIA requires that each consumer product (not just children's products) have a 'General Certificate of Compliance' (GCC) made available to all parties in the supply

chain including the final consumer. Basically, the certificate requires that the manufacturer (or importer) certify that the product meets all regulations and standards applicable to the product, an ever changing target. That same certification will eventually also require that third party testing documents are made available for every test that is required. Finally, this certificate must be updated each time a production run is completed, as production dates and the new testing documents must be made available. As currently written, CPSIA requires that AMEP certify compliance with limits on lead in paint, lead in substrate, six different phthalates, soluble heavy metals not including lead, and ASTM F963 standards including physical, mechanical, flammability and choking requirements. Each requirement must be listed and certified individually, dates and sources of testing must be provided, as well as dates of manufacture. Finally, beginning this August, we must provide rather specific, production lot based permanent labeling on the product for tracking purposes. This is the mandatory administrative burden that has been placed on every producer of a consumer good in the United States by enactment of CPSIA.

I can only guess at the actual cost of administering these requirements. It is my belief that for AMEP this will be one business day per year per product to administrate the GCC, the labeling and the testing requirements. I appreciate that this estimate may sound excessive but the creation of the certificate itself is the easy part. It is the servicing of the certificate that will consume the bulk of our time. Staying with Clever Catches, AMEP sold this line to 456 different customers in 2008, almost all of which are distribution companies. Each year, these companies will require that we provide them GCC's for every product we sell to them. They will also require that I update the information I have provided them anytime any information changes. I can make this information available on

line. I can publish it all on DVD's and mail them out, I can do whatever I want to help my customer help themselves, but in the majority of the cases, my customers will demand that I provide JUST their information to them and in many cases using THEIR forms. It is a nonnegotiable price of getting their business. I think that it will take us 77 days a year to do that for the 77 clever catches. That is six customers a day in terms of providing recurring and revised documents, that is management of testing on two production runs a year (if I'm allowed component level testing), that is managing the digital and paper files to have documents available to anyone in the supply chain, so on so forth.

In total, AMEP sold about 5,700 different products to 2,800 customers using 500 different vendors in 2008. In a good year with our current products, we ship $12,000,000 to $15,000,000 in product. Our products must have low price points (our final user is a teacher, after all) and we are a low margin business. On average then, we sell $2,100 to $2,600 ANNUALLY for each product we bring to market. On average, most products offer more complexity than the Clever Catch and will have a higher testing cost. When one includes the ASTM testing that is now mandatory, I am being quite conservative in suggesting that the annual cost to test my inventory ONE TIME is equivalent to my ANNUAL REVENUES. Unfortunately, I will have to test my product more than one time a year in at least half of the cases due to multi-year production runs. In addition, I need to hire or dedicate staff hours in the neighborhood of 5,700 person-days annually to administrate the process. At 260 work days per year, I need to add 22 people to my 70 member organization, or find the equivalent in available hours from the existing group or invest in software that might reduce the load to half this number. The reason I need to do this is because federal law now says that it is illegal to sell my product unless I do so, even

though previous CPSC risk assessment methodologies would show that there is no inherent risk to children from most of this product. One day these products were safe, the next day they were 'deadly' unless I can prove otherwise, constantly.

In reality, some of my product is 'exempt' from these requirements – for instance, rock identification kits. Unfortunately, the burden is on me to prove this exemption on an annual basis to up to 2,800 customers. I will have to respond to my customer's demands for GCC's on the product, I will have to ward off the doubts and very real fear (or risk adversity) that a person could pay a $100,000 fine and/or go to prison for up to five years if AMEP is wrong in its' statements. Within the last month, AMEP lost a quote worth more than $5,000 and containing 80 hours of labor for a product that consists of three rocks in labeled plastic bag to be used to teach geology. We lost this quote because the end user was concerned about rocks 'being dangerous' to children. Those students will now be learning geology using posters. This event cemented for me that AMEP will be subject to 'death by a thousand paper cuts' because we cannot comply with CPSIA and even if we could, we could not overcome the irrational fear it has produced. I will end up closing one of two facilities, I will end up laying off half the work force and I will end up dropping the 90 or 95% of our products that do not provide sufficient product margin to pay for testing one to three times a year, never mind the increased administrative time, annually. Once we do that, we will be less desirable as a supplier to our distributors. We will eventually have to look at selling more volume directly. At some point, we become little more than a business being run out of a garage by half a dozen employees. It is just a question of how long it takes.

I have written to (and visited with) most of the Congressional Representatives or their staff serving the two House Districts and the two states in which AMEP has facilities. I have written to Secretary Arne Duncan and the President's office. I have communicated with these party's myriad times – and do so again now. I have offered to provide any level of information, anytime, anywhere on this topic. I am pleading with you to apply the necessary energy and political willpower to bring about change on CPSIA. There are businesses out there that consist of an individual working out of their garage addressing very real and needed niches of children's products that will no longer be able to do. There are companies like AMEP that will die a slower death, but will ultimately be shuttered. CPSIA, while well intentioned, is not based on the science of risk assessment but is instead an over reaction to 'fix' a system that was not broken – recalls were invoked and executed, fines were levied, practices were changed by the culpable parties. It was written based on a perception that all children's products are produced and sold in quantities that allow companies like Hasbro, Wal-Mart and Target tu support the cost of testing and excessive administrative requirements. I have tried to demonstrate that this is not the case in reality. If I can offer any additional information that will compel action on the matter, please let me know. I will do whatever I can to prevent further harm to our nation's youth from this misguided response called CPSIA to a nonexistent threat. In assisting, you will uot only be better protecting our nation's children but also protecting that part of America's small business community that serves the children's market. Thank you for providing the forum and taking the time to consider my views on this matter.

The effects of CPSIA on my resale store:

I am the owner/operator of From My Room in Naperville, Illinois. We opened in November 2006 as a consignment resale store for kids and moms-to-be. We were welcomed by the community and are told on a regular basis that we provide a great community service. Those selling their items are glad to get some cash for them and those buying them are glad to get clothing, toys, books and other items at amazingly low prices. Many people tell me they simply don't have the money to buy new, even at WalMart and don't know where they would buy things if not for my store.

Enter the CPSIA.

This law was thrust upon us with virtually no notice. If I obey the law as it is written, I will no longer be able to sell clothing, toys, books or other items designed for children 12 and under. If I were to follow this law, I would now be out of business. What I have done is to take very few toys but am still taking clothing because people need to buy it. Other neighborhood resale stores are ignoring CPSIA and continuing to sell toys which has hurt my business because I have lost customers to them. I have begun to replace my toy and equipment section with adult clothing to try and offset the loss from other items. This will take some time because people know me as a kids resale store and don't think to come here for teen or adult clothing. In response to the negative publicity surrounding CPSIA , many of my customers now fear buying anything used. And the ones that want to buy toys are disappointed that I have very few to sell. While toys may not seem like a necessity, people with limited incomes want to give their kids some happiness at a low price.

I also have supported local craftspeople by allowing them to sell things in my store. Due to the increased regulations of CPSIA I will no longer be able to do that since they cannot afford the new testing requirements.

So sales are down, when they should be up in response to a poor economy.

When the stay on enforcement runs out in February 2010, I will be out of business unless this law is changed. I have no way to tell which items exceed the lead limits proscribed in the CPSIA so I will be unable to accept any children's items that are more than a few months old. My customers will have greater difficulty finding what they need for their kids.

This effort to protect kids will result in many kids not having the clothes and shoes that they need. Doesn't this have value? The vast majority of children's items do not exceed the limits but all must be refused. Who is harmed by this law? I am harmed. My family is harmed. My consignors are harmed. My customers are harmed. The community is harmed. Who benefits from this? I truly can't think of anyone except perhaps the testing companies. I urge you to consider the harm this law is doing and work to put a stay on the entire law until it can be reviewed and rewritten to provide common sense application and phase-in time. This law was not a partisan issue when it was passed and should not become one now.

If I can help in any way, let me know. Thank you for your attention to this matter.

--Connie

Connie Ballas
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My name is Melanie Tommey and I am the owner of Mel's Country Crafts in Sand Springs, OK. Let me first state, that I understand the reason the CPSIA was passed by Congress, and I completely support the idea of keeping our children safe from lead and phthalate contamination. However, this law actually does far more than that, and will, if left unchanged, actually do more harm than good, to people's lives and the US economy as a whole, and without actually improving product safety.

I have had my business since 1999. I have steadily worked over the years to expand and grow my business, and last fall, upon learning that I was to be laid off from my primary job, I purchased a home embroidery machine. My goal for 2009 was to expand into embroidered items, such as t-shirts, baby bibs and blankets, towels, etc. I sell my items at the Made In Oklahoma Craft Mall in Tulsa, and I participate in several craft shows each year. I make quality handcrafted items at an affordable price.

The CPSIA will impact my plans. I purchased thousands of dollars worth of supplies for my 2009 goals before I had even heard of this new law. I did not learn of the details until December, after my father saw a brief item on the news. Upon reading the law, I was alarmed at the scope of it and the severe restrictions it places on small businesses such as mine, as well as so many others. I also noted that there is a funding provision to grow the CPSC, and provides for the hiring of 500 inspectors, as well as allowing state's attorney generals to enforce it. The law even mentions yard sales and thrift stores!

To give you a scale of my business, last year, as a part time venture, I only had $3200 in sales, before expenses. This year, since I'm now taking it full time due to my previous lay-off, I hope to have sales of at least $15,000 before expenses. But if I have to try to comply with CPSIA, I cannot do that, and would have to stop offering all children's products, write off the supplies as a loss on my tax return next year, and then try to explain to potential customers why I can't make them a baby blanket or bib. And since the majority of this country still has no idea about the CPSIA, nor it's far-reaching consequences, they generally look at me like I've come from another planet when I inform them about the law. Their response, is usually one of surprise and disbelief...and then they state "that's stupid, Congress wouldn't do that". I tell them it's already happened. Also, I assure you, if I do comply and don't sell, others will ignore the law and sell, so by being honest, I'm also penalized by loss of revenue.

Let me address a few of my concerns. There are too many items swept up in this law that do not pose a risk, because they are made from inherently lead free materials. My t-shirts, baby blankets and 100% cotton baby bibs with Velcro closure, fall into this category. In all of the years the CPSC has been issuing product recalls due to lead contamination, I've never heard of a child being lead poisoned by a t-shirt, their blanket or their bib. And if I embroider on it, using 100% polyester thread, it doesn't suddenly become dangerous.

My first concern is the testing requirements. From what I've seen about testing costs, these average about $75 to $100 for each part of the product. A blue 100% cotton bib with Velcro closure that uses 4 different colors of thread in the embroidery design, would cost approximately $500 to test... all for an item that I would most likely sell for about $5.00. And that's just the lead testing...since this is an "instrument of feeding" for a child under 4, it would also have to be tested for phthlates, a chemical used in certain plastic products. That testing is far more expensive and would be an additional $1500. So I would have to pay a total of $2,000 to test each batch of bibs. I'm certain that I will not find a consumer who would pay $2000 for a simple embroidered baby bib. The way CPSIA is written, as soon as I embroider on that bib, I become a manufacturer, therefore I am responsible for the testing and the certification to prove it is safe to sell. If I do not do this, and I am caught, I am then faced with a fine of at least $100,000. It wouldn't be because the bib was unsafe...only that I didn't pay to prove it to the government. Under this law, I can have a safe lead free item, but if it's not certified, I've violated the law. This is a technical violation and does nothing to ensure safety. In the state of Oklahoma, if I provide tobacco or alcohol to a minor, I'm only fined $100 for the tobacco and $500 on the alcohol violation. It seems a far greater crime to me to provide alcohol to a minor over selling an untested baby bib.

My next concern, is the labeling provision, which is a quagmire of confusing and again, expensive requirements, which would place a huge burden on crafters and small businesses like myself. My items have the labels they came with that the original manufacturer placed on them. But other than a temporary price tag, I don't add any type of label to that. I don't track my inventory with SKU numbers and bar codes. I typically keep a written record, and then enter it into an excel spreadsheet. I make things as I need them, or as people order them, and do not keep a large inventory on hand of finished products. Often my items are one of a kind or personalized. If I have to add labels to my items, that is also cost prohibitive and I cannot do it.

I am asking Congress to make amendments to this law. I suggest that the law be changed to certain items for children 5 years of age or younger, since many studies have shown that most children stop mouthing everything they touch by the age of 3. It should only apply to products and materials that are LIKELY to include lead and/or phthalates. Inherently lead free products and materials should be automatically exempted.

This change alone, would frankly give relief to many of the organizations, industries and individuals that are appealing for changes to this law. Then, for those items that are for 5 and under, component testing must be the order of the day. It is overkill to have a manufacturer test a zipper or a snap, then to expect that same zipper or snap to be tested again when it's actually used in a garment or other product.

My third concern is with the fact that it grants power to each state's Attorney General. Therefore, this law could actually be interpreted and enforced in 50 different ways, and it would depend upon the state you are in, or where you sell your products. Some Attorney Generals have stated they intend to vigorously enforce this law, in spite of what the CPSC even recommends. Businesses and consumers alike should be very worried about this turn of events.

In summary, as a small business owner, who has now taken her business full time, this law could severely hamper my ability to operate. I'm somewhat fortunate in that children's products are only a part of my business, but at a time, when I need to try to make every possible product to earn every possible dollar that I can so that I don't file bankruptcy or lose my house, CPSIA could indeed cause that to happen. The assumption of risks, where there are none, and the prohibitive testing and compliance costs, will only kill small business in America. And in the end, children will not be any safer than they were before. They, and their parents, will just have less choice as consumers, and small businesses like myself could be closed, file bankruptcy and do further economic damage to our already fragile economy.

Thank you for your time and consideration of this very important matter.

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Erik Lieberman
House Small Business Committee

Re: Written Testimony for the May 14, 2009 House Small Business Subcommittee on Investigations and Oversight Hearing "The Consumer Product Safety Improvement Act and Small Business"

Dear Mr. Lieberman,

Please add the following testimony to the Congressional Record for the May 14, 2009 Hearing of the House Small Business Subcommittee on Investigations and Oversight regarding the CPSIA.

My husband and I own a small independent toy and baby goods store in St. Paul, MN. In our eleven years of business, we feel that we have earned the trust of our customers and our community by offering high-quality products made by other small businesses. Whenever possible, we have sought to provide alternatives to products made in China and have helped promote awareness of quality American and European-made products.

After the CPSIA, however, our task has become much more difficult. Because the CPSIA's testing standards are not aligned with European Union standards, we have lost access to many of our small European manufacturers. Many of these companies have already tested their products to EU standards, but simply cannot afford to retest their entire line to CPSIA rules. With the larger companies who have remained available to us, prices have increased dramatically in the past nine months, making it very difficult for us to compete in the current economy.

We are also very concerned about the dozens of small American companies we buy from. Many have attempted to test their products but have found that third party labs are charging exorbitant prices. One of our suppliers, Camden Rose of Ann Arbor, Michigan, was quoted $4,000 to test a single wooden rattle, of which they manufacture only a few hundred per year.

Although many provisions of the CPSIA have been stayed by the CPSC, we are still feeling the effects of those provisions which have not been stayed, in particular the testing requirements for painted products. We are simply unable to buy anything with paint on it unless it has been made by a company large enough to absorb testing costs. We have discontinued dozens of products from wooden German baby rattles to Amish-made wagons

because of this one rule alone. In many cases, we have actually been forced to buy more from products made in China because non-Chinese alternatives are no longer compliant.

We are very concerned that we will be losing dozens more suppliers if the CPSIA isn't fixed before the CPSC's stay of enforcement expires. The CPSC has made it clear that they lack the authority within the law to offer enough flexibility to protect small businesses.

We strongly support the goals of the Handmade Toy Alliance, which we feel would protect small business without creating loopholes for large overseas manufacturers. These goals include:

- Exemptions from testing for natural materials and materials known by the science not to contain lead or phthalates.
- The allowance of component-based testing, which would allow small manufacturers to test their component parts instead of each finished product.
- Harmonization of US product safety standards with EU standards.
- Exemptions from batch-labeling requirements for small manufacturers.

We feel that these changes, if enacted, would preserve hundreds of unique small businesses and would allow us to continue to offer unique quality products for our customers.

We strongly urge all members of Congress to reexamine the CPSIA and act now to improve the law and save small businesses.

Sincerely,

Millie Adelsheim and Dan Marshall
owners, Peapods Natural Toys And Baby Care
St. Paul, MN

STATEMENT FOR THE RECORD

BY

PRINTING INDUSTRIES OF AMERICA, INC.

BEFORE THE

HOUSE COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

"The Consumer Product Safety Improvement Act and Small Business"

May 14, 2009

Printing Industries of America, Inc. is pleased to present this statement for the record before the House Committee on Small Business Subcommittee on Investigations and Oversight, and thanks Chairman Altmire for holding a hearing to examine the important topic of the Consumer Product Safety Improvement Act's (CPSIA) effect on small businesses.

Printing Industries of America, the world's largest graphic arts trade association, represents an industry with more than $174.5 billion in revenue and 1.05 million employees. Book printing specifically employs nearly 50,000 workers and totals more than $7 billion in shipments.

The CPSIA, intended to keep children's products safe from dangerous chemicals, will also apply to ordinary children's books and other printed material, adversely impacting the printing industry despite Congressional intent. Although the deadline to comply with testing and certification requirements of the CPSIA has been delayed for one year, this has not provided necessary, practical relief in the marketplace. Despite the one-year stay, retailers, vendors, and other print customers continue to request that printers test and certify products at this time, well in advance of the February 10, 2010 deadline.

Economic Impact of CPSIA on Small Printers

The CPSIA is economically devastating to the printing industry, especially small printing companies. Consider the following:

- With tests costing approximately $300 to $500 per product, and in some cases up to $1,000 or more for specialty books, without an exemption, the testing costs for printers will be astronomical. Since many printers publish hundreds of titles, they may have to test each separate book, even if the raw materials were identical across an entire line of books. The cost to test for total lead content and phthalates in products could escalate into millions of dollars per printer.

- Currently labs are experiencing a four-to-six-week backlog for results, and as the testing and certification deadline approaches, this delay is likely to increase significantly. Printers cannot afford and are not equipped to store books at warehouses as they wait for lab results.

- Printers and publishers may have to test products both immediately to meet the demands of customers in order to be in compliance and again later in the year when the CPSC announces laboratory accreditation standards. Essentially, the testing costs and delays will be doubled.

- Printing Industries is aware of one instance in which a printer submitted a Section 15(b) report as required by statute for a packaging component that failed to meet the CPSIA phthalate limits. Upon reviewing the case, the CPSC's Office of Compliance notified the printer that the product, "when used as intended as part of a toy product, would not exceed the phthalate limits when tested based on the entire weight of the toy product." This surprising determination by the CPSC's Office of Compliance unfortunately came too late, as the printer had already purchased $90,000 of new inventory to replace a product that testing had shown failed to meet the CPSIA's phthalate limits. This example highlights the economic impact the lack of clear guidance has caused to the industry.

Product Safety Testing & Data

Printing Industries of America, along with the Association of American Publishers (AAP) and other organizations and companies, has been collecting testing data on industry raw materials and finished products. As of April 17, 2009, the printing and publishing industry has submitted over 100 ink, toner, and coating test results, over 50 adhesive and wire test results, and over 255 finished product test results, including over 40 results for other printed material, all without a single negative test result. All 400 tests showed that the raw materials used in and the products manufactured by the industry inherently contain lead and phthalates below the CPSIA limits. This data includes test results on more than 10 books printed before 1985, including books from the 1950s, 1960s, and 1970s. In short, ordinary children's books and other printed material (such as flashcards or paper bookmarks) are child-safe.

Industry Request for Determination by CPSIA

The printing and publishing industry has been fully committed to pursuing the appropriate administrative channels within the CPSC in order to achieve a determination that children's

books and other printed material be exempt from the Act's testing and certification requirements, as well as from the Act's lead content limits. Industry representatives have submitted the necessary scientific data to support this request and continue to work diligently so the manufacturing, sales, and consumer use of this proven class of child-safe products remain viable.

Thank you for the opportunity to comment on this important topic.

For additional information, contact:
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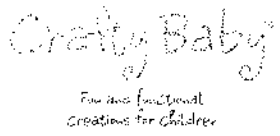
202-730-7970



May 13, 2009

My name is Jill Chuckas and I own a small hand crafted children's accessories business called Crafty Baby (www.craftybaby.com). In December, when I learned that the CPSIA would indeed affect my business, I joined and quickly took on a leadership role within the Handmade Toy Alliance. Currently, I am on the executive board and hold the position of Secretary. Our grass roots alliance of 334 businesses, represent children's product artisans and manufacturers and retailers of children's products throughout the country.

As a hand crafted artist, I am involved in every aspect of my business – from production to sales, advertising and marketing to accounts receivable. When the toy recalls began, my business increased. People were seeking out hand crafted and made in the US products in droves. When Congress first spoke of this "toy safety" legislation, I applauded their efforts along with the rest of the country. In December of 2008, though, I read the fine print. I, along with many others, quickly realized that this law, meant to regulate the companies that had betrayed the countries trust, would effectively put me out of business in less than a year. Not because my products are unsafe, but because I simply can not afford the cost prohibitive, redundant testing protocol that this law stipulates.

For example, I create a soft clutch ball for children ages 4 months and up. Like most small scale manufacturers and artists, I work in small batches – usually about 10 in a production run. The way the law is currently written, as of August of this year, I would need to send one clutch ball of each run in to a third party accredited laboratory to test for lead and phthalates - a component in plastics. There that are no plastics on or in the clutch ball, but because it is intended for children under 3, it would need to be evaluated for this toxin as well. The test is destructive, so I would not get my clutch ball back. And, they would break it down into components – 5 for this product - and perform the tests – to the tune of an average price of $75 per component for lead and $250 per component for phthalates. That totals $1500 to test 1 clutch ball that retails for $16.50.

Once I receive the test results, I would need to permanently mark each clutch ball with a distinguishing label listing place of manufacture, company information, date of manufacture and identifying numbers for the batch – different labels for every batch, or run, of 10 clutch balls. The tracking on this alone is burdensome in and of itself, and would only prove to increase administrative costs without any safety enhancements. For one of a kind artists, this process would be impossible.

Rather than increasing safety, we would be putting artists and small production businesses out of business. The very people that we as a country have turned to for quality children's products would no longer be available. Instead, we need to put risk assessment back into the CPSIA. A technical amendment, focusing on the issue of risk in products for children, is a logical solution to the problems with the CPSIA. This simple change would ensure that the safety aspects which are essential to our country's children continue to be enforced, but would allow small businesses producing safe products the ability to continue to do what they do best.

Thank you for the committee's willingness to open the CPSIA up for discussion in the House of Representatives. If subsequent hearings are scheduled, I would be happy to come to Washington to discuss these issues further. Please feel free to contact me directly at your convenience.

Best Regards,

Jill Chuckas
Owner, Designer

[illegible]

Statement from American Apparel & Footwear Association to the Subcommittee on Investigations and Oversight: "How the Consumer Product Safety Improvement Act Impacts Small Businesses"

May 14, 2009

The American Apparel & Footwear Association (AAFA) is the national trade association that represents the apparel and footwear industry, including many small businesses. Our members (which include manufacturers, retailers, distributors, importers, suppliers and service providers, including many small businesses) thank you for holding this hearing to explore how the Consumer Product Safety Improvement Act (CPSIA) impacts small businesses." Implementation of the CPSIA is an extremely important topic and a Congressional hearing to discuss the impact of the legislation on businesses is long overdue.

AAFA's members are committed to supplying and selling safe and compliant consumer products. Our members strongly support the goals of the CPSIA and believe the landmark legislation was an important contribution in efforts to strengthen product safety laws and enforcement to ensure only safe and compliant products are sold to our nation's children. Out of the 6,445,908,000 apparel and footwear items sold in the United States last year, only 0.0082% were recalled. While we believe any recalls are unacceptable, we are proud that this recall rate is so low.

However, while well-intentioned, this legislation contains several provisions that impose new and burdensome requirements that have caused considerable disruption to businesses without adding significant improvements to overall product safety. AAFA respectfully submits the following concerns our members have faced since the implementation of the CPSIA for public record. We further hope that Congress can work together with the Consumer Product Safety Commission (CPSC) to effectively carry out the mandates of the CPSIA while addressing these concerns.

Testing

The CPSIA's extensive third party testing requirement for all children's products is redundant, overly burdensome, and extremely harmful to businesses. Currently, the CPSIA requires products to be tested as finished products rather than at the component level. Under this scenario, the cost of testing exponentially increases as a company has to repeatedly test the same components applied on different products. Product-based testing is particularly problematic for the apparel and footwear industry that not only sells different products, but different styles of products. Further, testing the final product does not actually make a safer product. Our members believe that testing should be done at the beginning of the supply chain when components are sourced so that product safety can be engineered into an article. Thus, if a manufacturer discovers a product defect, resolving the issue is far less problematic.

Understanding the costs associated with the new testing regime mandated by the CPSIA, the CPSC issued a temporary stay of testing and certification for many standards. However, our industry still has to have all children's products with surface coatings (including screen prints, paint, heat transfers, etc.) tested for lead in paint by a third party testing facility. And unless the rules are changed, all children's standards will have to be tested at the product level, when the stay is lifted on February 10, 2010.

Lead Standards: Retroactivity and Risk

The retroactive nature of the lead standard that came into effect on February 10, 2009 has created considerable havoc for companies. Companies who manufactured inherently safe products that were compliant with all pre-existing product safety standards now have to figure out at how to apply new standards to inventory in warehouses and on store shelves. This has resulted in significant business disruption, financial losses and disposal/destruction costs for products that may not comply with the new standards but also do not present a demonstrable risk to children's health. To complicate the matter further, because the lead limit retroactively drops to 300ppm in August, 2009, products that are considered "safe" today under the new CPSIA limits are arbitrarily declared "unsafe" once the new standard kicks in.

While the CPSC issued a stay of testing and certification for the lead standard, the stay offers limited relief to companies because the products still have to be compliant with the underlying standard. This creates a bit of a "Catch-22" since the only way a company can be fully sure whether the product is compliant is to test. Moreover, retailer customers, concerned about the ramifications of selling a non-compliant product, expect vendors to certify that their products meet the new standard. In fact, many retailers are requiring manufacturers be compliant with stricter limits and at earlier dates than what is legally required. When a company can not retroactively test or certify a product because the costs are unsustainable, or because it is simply impossible to do so, the products are returned and often destroyed even if the products do not actually present a product safety concern.

Unfortunately, the CPSIA does not appear to allow the CPSC to regulate according to risk. The new lead standard applies broadly to all children's products. Therefore, many non-compliant materials and products have been destroyed at great economic cost even though health and safety concerns are negligible if at all present. For example, materials found in a shoe, particularly one manufactured for an older child, are far less likely to be mouthed than materials in a piece of jewelry. However, the lead standard applies equally to all children's products – regardless of risk and behavior sciences. While the CPSIA does permit the CPSC to exempt certain products from the lead standard, the language is so tight that the CPSC has not yet even been able to issue a ruling exempting inherently lead-free products (such as fabrics and textiles) let alone products that may contain lead but do not present a risk of lead absorption.

Guidance and Regulations

Due to tight deadlines and insufficient resources, the CPSC has not been able to publish sufficient comprehensive guidance to help businesses interpret the vague regulatory language and carry out the new requirements. Even though President Obama has planned to increase the CPSC budget, the tight CPSIA deadlines provide little implement relief. Consequently, companies have acted on different, and sometimes conflicting, views on how to comply. For example, the CPSIA lead standard applies to "any part of the product." In other words – every component on the product must be compliant. However, the definition of component remains

vague. Is a zipper a component? Or does a company have to take apart the zipper and test the individual teeth, slide, pull, stopper, fabric, etc.? Other key terms remain undefined like "practicable" and "reasonable testing program" even though these definitions are critical in determining compliance.

Companies similarly are extremely confused about the new tracking label requirement that comes into effect on August 14 – three months from today. Stakeholders still do not have clear answers to basic questions like:

- What does "to the extent practicable" mean?
- What information satisfies the "location" requirement?
- What exactly is the date of production? Can a range be used? How specific does the range need to be?
- How does one account for a product that is manufactured in multiple locations by multiple entities? Some products are manufactured in one factory, shipped, then processed further in another facility. Who needs to label these products?
- What is "cohort information"? How precise does this information need to be?
- What exactly is a "product"? Are multi-item sets considered a single product?

We can draw upon our experience to make several observations how we can go forward with the CPSIA in ways that will benefit small businesses. Where possible, the Commission should immediately use whatever regulatory flexibility exists in the CPSIA. But when that is not possible, Congress must act urgently to make necessary changes through the legislative process.

First, Congress must eliminate the retroactive application of product safety standards, including those that apply for lead, lead in paint, and phthalates.

Second, the CPSC must move quickly to approve pending determinations that a range of products – including textiles -- do not contain lead. Congress must also modify the law to make sure the CPSC has authority to make commonsense determinations for products that may have lead in excess of the standard but have a *de minimis* risk of lead absorption.

Third, the CPSC and Congress need to revise the testing mandates, which are currently costing the industry millions of dollars without any appreciable gain in product safety or public health. The current system created by the CPSIA features redundant and excessive testing and creates severe testing backlogs at the limited number of accredited facilities. With a "test everything" mentality, we no longer have a system that focuses on risk and potential hazards. Instead, the CPSIA treats every article and component equally, regardless of risk. As a result, product safety suffers. We should immediately move to a component-level testing program for only those materials that present risk. Moreover, companies should be able to rely upon the validated certifications of their suppliers – a system that is already operating well with the Flammable Fabrics Act. Finally, the Commission should ensure that more labs and testing protocols have a chance to be accredited and accepted.

Fourth, we should delay the effective dates of these new standards until after full regulations are developed and published. Federal safety standards, labeling regulations, and certification and documentation rules under the CPSIA should be created and enforced ONLY after the CPSC has issued comprehensive regulations and educated all stakeholders on the new requirements. We can start by delaying the tracking label regulations that take effect on August 14, 2009.

This is a complex law that will become progressively harder to comply with unless urgent reforms are taken now. We have already seen companies in our industry go out of business, lay off workers, and incur other significant costs with no discernible benefit to public health and safety. Many are still grappling with basic questions or making multi-million dollar decisions based on their best guesses. The current piecemeal system is intolerable and has left our nation's product safety system in a state of considerable confusion and uncertainty. With little direction, retailers have been left to create their own contradictory programs that have added additional costs to manufacturers with no gain in product safety or public health. We can't let this situation persist.

Thank you again for holding this extremely important hearing to discuss the impact of the CPSIA. While it was absolutely necessary for Congress to reform consumer product safety regulations last year, the new requirements have caused a devastating economic impact to the apparel and footwear industry. Going forward, Congress must work with the CPSC to address implementation concerns and establish a strong, risk-based regulatory regime that does not unduly burden compliant companies, including the many small businesses in our industry.

Terrapin Toys™
makers of Mary's Softdough

May 13, 2009

I am writing in regards to the Consumer Products Safety Improvement Act of 2008 (CPSIA). I am the owner of a small toy company in Eugene Oregon called Terrapin Toys. We manufacture a kid's product called Mary's Softdough. I have been in business for 20 years and this is one of the biggest challenges I have had. I agree that toy safety should be a high priority but I believe the new Consumer Products Safety Improvement Act of 2008 (CPSIA) went too far and needs to be modified to consider all aspects of toy manufacturing. It is placing a financial burden on small business while not addressing the safety issue. In this economic times we are struggling to stay in business and the new regulations have added over $5,000 in testing cost alone not to mention the cost to implement the labeling and tracking requirements. I have also spent countless hours on researching and working to try to comply with the new regulations. This is all time and money that I am taking away from my company, while not providing any benefits. I have never had a product recall and because we manufacture all our products locally we have control of the production. Nothing in this new law would improve the safety of our products.
I am writing to ask that you support new reform regulation.

1. Allow small manufacturers to use the testing and certification that their component suppliers have done to certify that the components do not contain an impermissible amount of lead
2. Exempt thrift stores, yard sales, consignments shops and other re-sellers
3. Prevent retro-active enforcement of the act
4. Provide a Good-Faith Exemption
5. Require the CPSC to provide small businesses with a compliance guide (this last one would really help to clarify what is needed)

Again, I really feel that we all need to do something about toy safety but not at the cost of small business. Most toy companies, from toy stores to manufactures, are committed to having safe, fun toys for kids. Please make it a priority to create reasonable regulation for our kids while keeping small companies in business.

Thank You

Mary Newell
Terrapin Toys, LLC
mary@softdough.com
541-461-1585

WRITTEN TESTIMONY OF STEVE BURNSIDE,

OWNER, DSD KAWASAKI,

PARKERSBURG, WEST VIRGINIA

House Committee on Small Business

Subcommittee on Investigations and Oversight

Hearing: "The Consumer Product Safety Improvement Act and Small Business"

May 14, 2009

Chairman Altmire and members of the Subcommittee on Investigations and Oversight of the Committee on Small Business, thank you for the opportunity to submit testimony regarding the significant impact that the Consumer Product Safety Improvement Act's lead content provisions have had on motorcycle and ATV dealers.

I represent a small town community: Parkersburg, West Virginia, where I own a little motorcycle and ATV dealership. Some people may not understand that, in our world, this off-road segment of motorcycles and ATVs is used by everybody for farming, fishing, hunting; it's just fun. That's the biggest segment of our business by far and away.

This past couple of years in this downturned economy, we have suffered some losses already that have been tough to overcome. Since the economy took a turn for the worse in the Fall of 2008, we had been waiting for this Spring – our main selling and riding season – to be our salvation.

People are not spending money like they did; what money they do have they are spending on the kids, especially in our segment. But now they can't because of the new law passed by Congress.

Since the CPSIA lead ban on youth motorcycles and ATVs, we have had somewhere from twenty-five to thirty-five percent of our business jerked out from underneath us. But that is not the end of the losses. Many of the people that come to my business will not purchase vehicles for themselves because they cannot buy the proper age-size for their kids. They are just getting out of the game entirely because it is a family sport.

The ones that we really are concerned about are those who are going to put kids on the wrong size product. We do the right thing and tell parents they cannot and should not buy adult vehicles for their kids, but it is a tough spot to be in because we are hungry for sales.

We have embraced families ever since we started our business in 2003. I have had everybody from toddlers to teenagers in my shop and they are not chewing, eating or licking the bike, or anything that will cause them to ingest lead. And even the toddlers, they want to be on the seat and holding the handlebars. That's what they want to do -- "Mom and Dad get me up on there," when they're not trying to climb on there themselves. Lead consumption from motorcycles and ATVs is not an issue - we've never seen it be an issue and we don't feel like it's necessary to treat it as an issue.

Last month, the CPSC issued a stay of enforcement of the lead content provisions for ATVs and motorcycles to try to get dealers to start selling again and keep kids off of adult size vehicles. But the stay does not solve the problem. The reality is that this stay of enforcement is simply inadequate to protect dealers, like me, who wish to sell these products.

First, the stay requires manufacturers to provide unnecessary and burdensome information about parts of these vehicles. But the CPSC staff has already found these parts present no health hazard to children. And the manufacturers have already explained functional alternatives to the lead are not available.

In addition, the stay does not prevent state Attorneys General from taking enforcement action against companies who distribute or dealers who sell these products. Youth ATVs and motorcycles sold under the stay are still a "banned hazardous product" in the hands of customers. The stay does not protect dealers from private lawsuits based upon the legal status of these vehicles as "banned" products either. Dealers and other small businesses should not have to face these risks because the CPSC provided inadequate relief and Congress has not yet taken action to fix the law.

Finally, the stay is only temporary, with a stated duration of two years. There is nothing to prevent a Commission with new and different members, like those nominated by the President last week, from revoking it at any time, leaving manufacturers and dealers subject to enforcement for products sold under the stay.

Since the stay does not provide the necessary relief to manufacturers or dealers, some manufacturers and dealers simply will not sell youth model ATVs and motorcycles, resulting in more lost sales and more children 12 and under riding larger, faster, adult-size vehicles where they are at risk of serious injury. Those that do sell face serious business and legal risks.

The CPSC should have granted the industry's petition to exclude ATVs and motorcycles from the CPSIA lead content limits. The petition was based upon science showing that the small amounts of lead contained in metal parts of these vehicles do not present any health hazard to children who use them. Yet, the Commissioners said that they had no authority to grant the petition because of the way the CPSIA exclusion provision is written by Congress.

Now, the only way to obtain complete and permanent relief for manufacturers, dealers and riders from this ban is for Congress to take action. The CPSIA must be amended to grant an exemption for youth ATVs and motorcycles which contain small amounts of lead that present no health risk to children. This is the approach taken by H.R. 1587, a bill introduced by Congressman Denny Rehberg with 38 bi-partisan co-sponsors. A separate bill introduced by Congressman Joe Barton, H.R. 1815, takes an alternative approach by revising the CPSIA exclusion provision to give the CPSC authority to grant exemptions in situations, such as youth ATVs and off-highway motorcycles, where small amounts of lead in components present no health hazard to children.

I urge Congress to provide manufacturers, dealers and riders with a permanent end to the ban on youth model ATVs and motorcycles by adopting such an amendment to the CPSIA.

Thank you for giving me the opportunity to present how CPSIA is impacting my industry and my livelihood.

TESTIMONY OF

TOY INDUSTRY ASSOCIATION (TIA)

SUBMITTED TO

HOUSE SMALL BUSINESS COMMITTEE,
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

"THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT AND SMALL BUSINESS"

MAY 14, 2009

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Toy Industry Association, Inc.

www.toyassociation.org

The following testimony on the Consumer Product Safety Improvement Act of 2008 (CPSIA), is submitted on behalf of Toy Industry Association (TIA). TIA is a not-for-profit trade association composed of more than five hundred (500) members, both large and small in size, located throughout North America. Roughly 75% of membership consists of small businesses.

TIA and its members have long been leaders in toy safety. In this role, we develop safety standards for toys, working with industry, government, consumer organizations, and medical experts. The U.S.'s risk-based standards are widely used as models around the globe. We also serve to educate industry on these standards so that they comply and educate parents and caregivers on choosing appropriate toys and ensuring safe play.

TIA hopes that this testimony submitted for the record will help serve our goal of ensuring that the dramatic new requirements for marking an enormous array of vastly different children's toys and/or packaging mandated by the CPSIA is implemented in a thoughtful and orderly fashion. TIA requests the Committee note these challenges, as outlined in testimony by many small businesses appearing before it today. Further, we hope these comments will help the Committee recognize that flexible, practical and a common sense solution, grounded in sound hazard analysis is required and that this may have to be an evolving process for the Commission. This is why TIA supported the National Association of Manufacturers (NAM) Request for a Stay of Enforcement and

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why TIA believes that great care must be employed, so as not to unduly burden small manufacturers and importers when imposing such regulatory requirements.

Our own extensive survey of members after chaotic implementation of CPSIA requirements in the marketplace demonstrated problems faced by many small businesses. As passed, the new CPSIA requirements appear to have resulted in a $2 billion negative impact within our industry alone, at the crux of the current economic crisis. We hope that Congress will recognize that the majority of small businesses could use relief from imposition of costly and burdensome requirements in a haphazard manner.

TIA has submitted extensive comments to CPSC in an effort to ensure the realistic and reasonable implementation of many of the CPSIA requirements. We were pleased that the CPSC adopted many of our collaborative recommendations on reduction of costly paint testing by allowing composite testing. Unfortunately this has been the rare exception rather than the rule.

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CPSIA IMPLEMENTATION ISSUES

Highly publicized recalls involving only a small fraction of total products made in China in 2007 focused attention on the CPSC's resources, including its legal regulatory authority. In the 110th Congress, legislation (H.R. 4040 and S. 2663) to strengthen the Commission was passed and a conference agreement (H.Rept. 110-787) was reached by both chambers, and CPSIA (CPSIA/P.L.110-314) was signed into law by then President George W. Bush on August 14, 2008. The goal of the legislation is laudable as is the mission of the agency to better protect consumers against defective and unsafe products. The CPSC's statutory original purposes are to (1) protect the public against unreasonable risks of injury associated with consumer products; (2) assist consumers in evaluating the comparative safety of consumer products; (3) develop uniform safety standards for consumer products and minimize conflicting state and local regulations; and (4) promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. The new CPSIA provisions:

• Bans lead beyond a minute amount in products intended for children under 12 years of age.

• Prohibits use of dangerous phthalates in children's toys and child care articles.

• Mandates pre-market testing by certified laboratories of children's products for lead and for compliance with a wide range of safety standards.

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• Requires manufacturers to place distinguishing marks on products and packaging to aid in recalls of products.

• Requires CPSC to provide consumers with a user-friendly database on deaths and serious injuries caused by consumer products.

• Strengthens protections against import and export of dangerous products, prohibits the sale and export of recalled products, improves public notice for recalls, and enhances tools for removing recalled products from store shelves.

• Bans 3-wheel all terrain vehicles (ATVs) and strengthens regulation of other ATVs, especially those intended for use by youth.

• Ensures that CPSC effectively shares information with State public health agencies.

• Bans industry-sponsored travel by CPSC Commissioners and staff, and authorizes a travel budget to address problems raised by the increasingly global market for consumer products.

• Restores the five-Member Commission, authorizes significant budget increases, and provides expedited rulemaking.

• Enhances national product safety enforcement by authorizing injunctive enforcement of federal law by State Attorneys General, preserving State common law causes of action and California's Prop 65 warning requirements.

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House Committee on Small Business
Subcommittee on Investigations and Oversight
May 12, 2009

Re: The Consumer Product Safety Improvement Act and Small Business

Statement of
Richard M. Woldenberg
Learning Resources, Inc.
380 North Fairway Drive
Vernon Hills, Illinois 60061

STATEMENT OF RICHARD M. WOLDENBERG
Chairman, Learning Resources, Inc.
Vernon Hills, Illinois

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to provide testimony on the impact of the Consumer Product Safety Improvement Act (CPSIA) on small businesses. My name is Richard Woldenberg and I am Chairman of Learning Resources, Inc. of Vernon Hills, Illinois, a manufacturer and distributor of educational materials and educational toys. We employ 150 people and sell our products in over 80 countries.

As a manager of a small business, I am concerned about the impact of the CPSIA on small businesses serving the children's products market. We have begun to see the destructive economic impact of this precautionary law on small business without providing significant offsetting consumer safety benefits. The CPSIA has the potential to make running an American small business so difficult that many businesses will elect to close or exit segments of the children's product market. In addition, the specialty markets that we serve, like the school market and specialty retail, will become greatly weakened.

The most significant problems caused by the CPSIA for the small business community are (a) burdensome compliance costs, (b) increased regulatory and business complexity, and (c) virtually uncontrollable liability risk. These issues are particularly severe for small businesses, as they have so little infrastructure to manage these challenges, and are often ill-prepared to surmount the complexities created by the law or bear the risk to their invested capital.

I. **Burdensome Compliance Costs:**

A. Retroactive Effect. The first heavy financial blow dealt by the CPSIA was the retroactive application of the new safety standards to existing inventory. By allowing only six months to sell-off merchandise that was "safe" one day and "unsafe" the next, Congress imposed

terrible losses on many small businesses and incited a trade war between retailers and manufacturers over who would be "stuck" with the un-saleable inventory. [Notably, the advanced notice of the retroactive effect of the phthalates ban was even worse – just two business days (see http://cpsc.gov/about/cpsia/nrdcopinion.pdf).] The short sell-off period for the newly illicit inventory is FAR SHORTER than was offered by the Eighteenth Amendment and Volstead Act in 1919 when alcohol was banned in the Prohibition, the culmination of a nearly 100 year anti-alcohol campaign. Retroactivity has virtually no precedence in CPSC history. Industry-wide losses are estimated at billions of dollars. See http://online.wsj.com/article/SB123872361943185291.html. No reparations have been offered to small businesses harmed by this dramatic change in law. New inventory losses may occur on August 14, 2009 as the law requires a further drop in the lead and lead-in-paint standards which will also be given retroactive effect.

B. Testing Costs. The precautionary regulatory approach of the CPSIA imposes testing costs on small business out of proportion to its stated objective of improved safety. The new law attempts to resolve perceived "gaps" in regulation by considering every product intended for children "hazardous" until proven otherwise. Under the CPSIA, the definition of a "children's product" subject to regulation was widened to encompass ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. §2052(a)(2)). Thus, the new restrictions encompass library books, ballpoint pens, dissection specimens, shoes, sweaters, ATVs, used children's bicycles, etc. The CPSIA requires that manufacturers test all "children's products" for compliance using a certified independent laboratory prior to importation or sale (15 USC §2063(2)). The heavy testing burden will crush small businesses of all types. For instance, we have submitted written quotes to Congressional leaders for as much as $24,050 to test a single telescope under the CPSIA. Even allowing for new test specifications recently announced

by the CPSC, the cost for a typical complete suite of CPSIA tests is likely to exceed $1,500 per average product. At our company, we have about 2,000 catalog items. Even with all conceivable efficiencies, the prospective testing cost for our inventory is staggering.

The testing regime under the CPSIA was not designed with small businesses in mind. The low sales volume typical of small business products makes the cost of testing prohibitive and creates an unfair competitive advantage for businesses serving mass markets. Because small businesses bear disproportionately higher production costs from testing, many items will become uncompetitive in specialty markets. The structural advantage of mass markets under the CPSIA will depress the competitiveness and viability of niche markets and niche companies.

The solution to the testing dilemma is not clear cut without a major change in law. The CPSIA eliminates risk assessment as the basis for safety administration and as a result, each product must be individually tested. Small businesses do not have the option to use supply chain management techniques or testing focused on specific risks to achieve safety goals. Repetitive testing of like products for like risks will raise costs significantly for little safety payoff. Even component-level testing offers only limited relief, mainly for the simplest products with few components (assuming component suppliers will cooperate and provide the expensive test reports at all). Notably, Customs inspection of test reports at the time of importation will likely create delays for companies relying on bundles of component test reports. It won't take long for component testing to be exposed as unworkable for imported children's products. This will adversely affect many small importers.

C. Tracking Label Costs. CPSIA tracking label requirements will drive up costs for small businesses. The tracking label provision (15 USC §2063(a)) requires that every item be marked with source and production lot data ostensibly to improve recall effectiveness. The cost of tracking labels is FAR in excess of purported benefits. For instance, we estimate that our

company will spend more than 50,000 times the expected cost of recalls EVERY YEAR to apply tracking labels to our products (based on our 25-year recall rate of 0.00001%). In fact, far less than 1% of all children's products are EVER recalled. With the market comprised of many millions of items, the tracking labels requirement punishes the many for the sins of the few.

In light of the purpose of the new law, the tracking labels provision seems particularly misconceived. The CPSIA is intended to reduce recalls of children's products significantly – so why are tracking labels still necessary? As Wayne Gretzky once explained: "I skate to where the puck is going to be, not where the puck has been." The expected lower rate of recalls will only magnify the damage inflicted on small businesses by the tracking label requirement. We also expect certain high quality factories to stop serving small business customers to avoid the challenge and expense of tracking labels on small production runs of children's products. The loss of these manufacturing resources may curtail many small business activities.

D. No Way to Avoid the New Burdens. Obtaining an exception to the law will be nearly impossible for small businesses. The CPSIA (essentially) prohibits exceptions allowing the sale of materials or items that exceed the new standards (see http://cpsc.gov/about/cpsia/101lead.pdf). Thus, the sale of materials or products with phthalates and/or lead in excess of standards is now a *per se* violation of the CPSIA, whether or not there is any evidence of risk or danger associated with the use of such materials or products. While the recent exercise of "enforcement discretion" by the CPSC in granting a two year enforcement stay on ATVs is a possible sign of broader relief to come, it was notably preceded by a lengthy campaign by the ATV industry for relief. The exemption process (http://cpsc.gov/library/foia/foia09/brief/leadexclusion.pdf) is so expensive that few if any small businesses can entertain it. The ATV industry effort to obtain relief under the CPSIA for its narrow class of goods may exceed $5-10 million in cost over more than four years. For small businesses, this exemption door is effectively closed.

E. Reduced Incentive to Innovate. The increased cost to bring a product to market will make many viable - and valuable – products uneconomic. To cover the cost of developing, testing and safety-managing new products, the prospective sales of new items will need to be much higher than before. This means that low volume items can't be produced profitably and new market entrants may find themselves priced out of the market. The blizzard of new legal requirements will reduce the number of new children's product business start-ups. We think that increasingly companies will be forced to abandon specialty and niche markets to concentrate on the mass market. Over time, only high volume items will be cost-effective enough to survive the Darwinian action of the market under the CPSIA. This will hurt many important, but small, markets like educational products for the blind or the deaf. Our company, with its 2,000 catalog items, is probably now a dinosaur under the CPSIA – the law provides a strong incentive to reduce our product line to 50-150 items, a manageable undertaking under the new rules, and focus on high volume customers only. The efficiencies of selling only in large runs to large customers will drive many enterprises to abandon business models involving large product lines.

II. **Regulatory and Business Complexity:**

The complexity of compliance with the CPSIA is excessive for most businesses, large or small, but is particularly unmanageable for small businesses. Even for the tiniest companies, specialized systems will be needed to manage the chore of continually changing lot markings and retaining the data necessary to make tracking labels useful. For most small businesses, specialized staff and expensive specialized software will be necessary to administer the labeling process. The scale of the chore is mindboggling. We estimate for our company that we will face as much as 30,000 label changes per annum. In our group of companies, annual label changes may exceed 75,000 (about 1,500 changes per week). In addition, supply chains will need new manufacturing protocols by product type, material type, packaging type, component type,

assembly strategy, factory location, and so on. Many items produced by small businesses will be challenging to label properly (e.g., items with multiple production dates, multiple sources, many components, small parts, designed for aesthetics or special functionality, etc.). Many small businesses will be defeated by such a tedious bureaucratic undertaking, all to improve on recalls that may never occur.

Small businesses don't have the resources to manage compliance with ultra-complex laws, and will throw up their hands in frustration. Our company has already lost customers for our entire category on the grounds that selling toys is too confusing or too much of a "hassle". This is our new market reality. We know of businesses that employ retail managers who earn $8.50 per hour. Other stores might have an owner/manager supported by 4-5 hourly workers, often local high school kids. Small businesses like these cannot manage demanding legal compliance schemes among their other burdens. It is unrealistic to assume that a precautionary law will not adversely affect the economics of small businesses ill-equipped to deal with it.

Administering the law is made more difficult by the emerging gap between the law itself and the implementation of the CPSIA by the CPSC. Unfortunately, implementation of the law has become so pockmarked by CPSC exceptions, FAQs, clarifications, letter opinions and stays that the CPSIA itself no longer describes the way it is being enforced. As a consequence, well-intentioned companies may implement the law against themselves at great expense. The apparent insistence of Congress that the CPSC interpret the law with "common sense", rather than amend the law itself to conform to common sense, will hurt small companies ill-equipped to navigate these complicated legal waters.

III. **Significant Liability Risk:**

A knowing violation of the CPSA, FHSA and other applicable consumer rules enforced by the CPSC can result in civil or even criminal liability under the CPSIA (15 USC §2069-70).

Small businesses know about the potential for liability under the CPSIA and are shying away from behavior they consider "risky". This is why some thrift stores have begun to discontinue the sale of children's merchandise. See www.boston.com/community/moms/articles/2009/02/27/lead_law_puts_thrift_stores_in_lurch. Risk of liability will cause small business markets to shrink.

Even following the implementation rules of the CPSC is no assurance of avoiding liability under the new law. The CPSIA provides that the State Attorneys General may independently enforce the new law (15 USC §2073). In other words, the actions and views of the CPSC are not enforceable against the State Attorneys General who may enforce their own interpretations of the law. Small businesses have no capacity to monitor the activities of 50 different State Attorneys General and the CPSC, or maintain relations with each of them. This rule introduces uncontrollable random risk and political risk to small American businesses.

Because all violations of the CPSA and FHSA must be self-reported to the CPSC within 24 hours (15 USC §2064(b)), the CPSIA renders all violations of the law an "emergency", irrespective of risk of injury (if any). The significance of the violation is not a consideration in the self-reporting requirement. As a manufacturer with a product of about 2,000 items, we are fearful of being in a constant state of crisis under this provision. The odds of regularly uncovering technical violations (missing warning label on our website, etc.) is high with so many products in our product line. Each such incidence might constitute a "knowing violation" giving rise to criminal liability unless immediately acted upon. The wear and tear, not to mention the expense, of constant crisis will be a major problem under the new regulatory scheme.

The prospect of liability (civil and criminal) under the CPSIA is driving a refocus of children's product businesses away from product development, marketing, sales and infrastructure investment toward bureaucratic excellence. The diversion of resources toward

unproductive, liability-minimizing activities certainly violates the Pareto Principle (80/20), which dictates that a properly organized business will allocate its resources to the activity which produces the greatest economic return. The precautionary CPSIA creates inefficient incentives which favor heavy investment in unproductive, non-revenue producing overhead – and passing along these inefficiencies in the form of higher prices to an unsuspecting public. The illusion of improved safety cannot overcome the reality of dollars that won't go as far, buy as much or provide as high as standard of living as prior generations enjoyed.

Recommendations and Conclusion:

The dangers of a precautionary approach to legislation are clearly demonstrated by the impact of the CPSIA on the small business community serving children's markets. The solution to the dilemma is to restore the authority of the CPSC to administer safety using risk assessment as its guiding principle. This will allow the agency to refocus its attention on risks that present a danger of actual injury, and avoid wasting resources on pens, library books, bicycles, educational materials, sweaters and shoes, unless they present a quantifiable risk of injury. For the small business community, a more rational system of regulation, with fewer hair trigger liability rules, will also allow productive commerce to resume. Reasonable protection for thrift stores in this proposed common sense safety regime would naturally follow.

To ensure better compliance in the future, the reconstituted CPSC should put more resources into market education and a commercial liaison function. The CPSC in its early days had more "outreach" resources to help companies solve their safety issues without threat or coercion. Improved industrial relations will return a higher dividend than implementation of a penal, restrictive regulatory scheme. I urge the Subcommittee to carefully consider these issues and to encourage the House Committee on Energy and Commerce to reopen this problematic law and fix it once and for all.

Thank you for considering my views on this important subject.

CONSUMER PRODUCT SAFETY COMMISSION OVERSIGHT: CURRENT ISSUES AND A VISION FOR THE FUTURE

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

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CHARLES A. GONZALEZ, Texas
ANTHONY D. WEINER, New York
JIM MATHESON, Utah
G.K. BUTTERFIELD, North Carolina
JOHN BARROW, Georgia
DORIS O. MATSUI, California
KATHY CASTOR, Florida
ZACHARY T. SPACE, Ohio
BRUCE BRALEY, Iowa
DIANA DEGETTE, Colorado
JOHN D. DINGELL, Michigan (ex officio)

CLIFF STEARNS, Florida
Ranking Member
RALPH M. HALL, Texas
ED WHITFIELD, Kentucky
GEORGE RADANOVICH, California
JOSEPH R. PITTS, Pennsylvania
MARY BONO MACK, California
LEE TERRY, Nebraska
MIKE ROGERS, Michigan
SUE WILKINS MYRICK, North Carolina
MICHAEL C. BURGESS, Texas

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WITNESSES

SUBMITTED MATERIAL

CONSUMER PRODUCT SAFETY COMMISSION OVERSIGHT: CURRENT ISSUES AND A VISION FOR THE FUTURE

THURSDAY, SEPTEMBER 10, 2009

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

The subcommittee met, pursuant to call, at 10:10 a.m., in Room 2322 of the Rayburn House Office Building, Hon. Bobby Rush [Chairman of the Subcommittee] presiding.

Members present: Representatives Rush, Schakowsky, Sarbanes, Sutton, Stupak, Green, Barrow, Castor, Braley, DeGette, Dingell, Waxman (ex officio), Radanovich, Whitfield, Pitts, Gingrey, Scalise, and Barton (ex officio).

Staff present: Michelle Ash, Chief Counsel; Anna Laitin, Professional Staff Member; Tim Robinson, Counsel; Angelle Kwemo, Counsel; Will Casey, Special Assistant; Miriam Edelman, Special Assistant; Jeff Wease, Deputy Information Officer; Lindsay Vidal, Press Assistant; Brian McCullough, Minority Senior Professional Staff Member; Shannon Weinberg, Minority Counsel; Will Carty, Minority Professional Staff Member; and Sam Costello, Minority Legislative Analyst.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The subcommittee will come to order. Good morning, members and also the commissioner and all of the other folk who are gathered in the room. This subcommittee is called to order now for the purposes of an Oversight Hearing on Current Issues and a Vision for the Future for the Consumer Product Safety Commission, and I welcome everyone to this hearing. The Chair now without any other delays, the Chair recognizes himself for 5 minutes for the purposes of an opening statement.

The Consumer Product Safety Improvement Act was one of the premier accomplishments of the 110th Congress. The law created basic safety standards for keeping toxic lead and phthalates out of children's products, engaging Consumer Product Safety Commission vital new resources and authority, and establishing a product testing system that would ensure product safety.

I would like to welcome Chairman Inez Tenenbaum, who is the ninth Chairman of the Consumer Product Safety Commission. She

hails from the great State of South Carolina. Chairman Tenenbaum is nationally known and is an advocate for children and families. She served with distinction as the State of South Carolina's Superintendent of Education for two terms. I am looking forward to seeing and hearing from Chairman Tenenbaum as she steers the process of implementing the CPSIA. Under her leadership, the needed implementation will go far more smoother than other previous chairmen and the CPSC will work effectively utilizing the increased resources that are now at its disposal. This is why I am so pleased to welcome Chairman Tenenbaum today and to hear from her about the Commission's new direction and its future vision.

It is mentionable that the Chairman now has a full complement of commissioners, something which it lacked for far too long under the previous administration. I think that the President has chosen well in nominating Robert S. Adler and Anne Northup as commissioners. Commissioner Adler has a deep history of experience as a former advisor to two CPSC commissioners, Commissioners Pittle and Steorts.

Commissioner Northup is the former Congresswoman from Kentucky's third district and the mother of six, who served for 9 years in the House of Representatives. As a congresswoman, Commissioner Northup founded the House Reading Caucus and co-chaired the Congressional Coalition on Adoption which further shows her own personal commitment to helping and defending children.

Madam Chair, when you took the helm you showed great courage, sound judgment and a purpose for rulemaking over our safety. One of the first agenda items that you scheduled was whether to include crystal and glass beads in children's jewelry from the lead content restrictions in Section 101(a) of the CPSIA. You applied the facts as you found them to the CPSI lead limits and to the real world facts and foreseeable possibilities. For example, you talked and wrote about how children handled and played with this jewelry by mouthing, ingesting and swallowing the beads and how any amount of lead constituted too much lead in these beads. You are willing to grapple with thorny issues and the business of our Pacific Rim trading products who today manufacture as much as 85 percent of our toys and 95 percent of our solvents, and almost 60 percent of our electrical products, shows your leadership and your vision. Unfortunately, more than 85 percent of our country's recalled products are also imported.

Chairman Tenenbaum, I will ask you questions this morning based on remarks you have made in your public statements on some substantive areas that pose special safety and recalled challenges and how you will go about implementing the CPSIA. I am also very interested in hearing how you see the CPSIA's transitioning from the Nord-era to Tenenbaum-time. We will look for a shiny, new product safety product testing facility with more employees and more appropriated dollars.

And as I close, I want you to comment as succinctly as you can about the CPSC's timeline for adopting new rules under CPSIA, about some of the things that the GAO advised us and other improvements that you will make at the agency. I look forward to

hearing your testimony and I thank you again for visiting with us today.

Mr. RUSH. The Chair now recognizes the ranking member, Mr. Radanovich for 5 minutes.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Chairman Rush, for calling this important hearing today.

The CPSC is a small but important agency whose mission is implementing and enforcing our nation's Federal Consumer Protection Safety Laws. The Commission and its staff work hard to ensure consumer products are safer when they reach the homes of our constituents.

We all remember the increase in commission-mandated recalls in 2007. Weekly headlines detailed various toy dangers, most of which were due to manufacturers' failure to comply with existing standards, for instance, lead paint. To their credit, the Commission's staff was able to affect more recalls in 2007 than in any other year in the CPSC history and despite the Commission's diligence, some observers claim the increase in recalls was evidence that reform was necessary and spurred the enactment of the Consumer Product Safety Improvement Act, also known as CPSIA.

CPSIA instituted the most sweeping changes to the Commission's regulatory environment since it was created. Among the changes, the law imposes many new requirements on businesses in the name of providing greater assurances that consumer products reaching our ports and placed on our store shelves are safer. While no one disagrees with creating safer products and it is good for public policy, we don't all agree on how to get there. The law has had consequences detrimental to many hardworking Americans. Put simply, the law is not working the way that many of us thought that it should work.

In April, hundreds of business owners that want to abide by the law came to Washington and voiced their concerns. The new law is crippling many honest businesses, particularly small businesses with burdensome and costly testing requirements for children's products, many of which the evidence shows are completely safe, and despite the Commission's stays of enforcement protecting many manufacturers are still being required to prove that their products are CPSIA compliant. As a result, testing for perfectly safe products is costing businesses millions of dollars, inventory losses for safe but technically noncompliant products is estimated in the billions and there is no discernible improvement in child safety.

Many small and home-based businesses are already hurting from the economic recession. On top of the decrease in consumer spending, manufacturers and retailers are now faced with the new cost of complying with CPSIA and if they can comply at all. Many of these same small and medium-size businesses will also suffer punitive effects of the cap and trade legislation passed by the House and the healthcare legislation this committee reported out last month.

We committed nearly $1 trillion in stimulus spending for various industries, bailed out the auto industry, bailed out financial firms, bailed out homeowners and helped purchase new cars for some consumers, but where is the relief for small businesses who we now burden with this regulation. These small businesses are beginning to think that Congress is waging war against them. Providing sensible regulatory relief to those affected by CPSIA would be a no-cost stimulus for the very businesses we are counting on to create new jobs and to bring us out of an economic recession, and it is the right thing to do.

The biggest problem with CPSIA I see is that it doesn't distinguish between risky and safe products. The law strips the Commission of discretion in granting CPSIA exemptions for children's products. The Commission confirmed this interpretation of the law when it voted to deny exemption petitions because the law simply does not permit exemptions if any lead can possibly be absorbed, even if the staff believes the products are not harmful. This standard is more stringent than the FDA's limits for milk and for water, the water our children drink.

The law is not only impacting businesses, it is also straining the Commission's resources as they process the thousands of comments, petitions, rulemakings and other CPSIA-related actions. The Commission has done the best it can with the resources that the appropriators granted to increase its staff in order to meet the stringent deadlines required by law, but it has not received everything we authorized and therefore, needs relief from these tight timelines.

I commend the Commission for finding creative ways to provide some relief to businesses with a few commonsense exemptions and stays of enforcement. Unfortunately, some of these actions are only temporary and they don't address the bulk of the problems, but the highlight of the recognition that compliance with the law as written is impossible for many businesses, and it won't improve safety. I am disappointed that we will not hear from any witnesses from the many businesses adversely affected by the new law, but I look forward to a robust conversation with the new Chairman on these matters.

Mr. Chairman, I appreciate your desire to conduct this oversight hearing into the Commission's priorities under a new administration. It is clear that the top priority for all of us should be to fix the law that we wrote so that it works for everybody. A one-size-fits-all approach is not working and will not improve safety. The time has come for us to work together and fix the problem by restoring flexibility for the Commission to determine what presents a real risk to children's safety, and appropriately target those risks and I stand ready to work with you on this, Mr. Chairman, and I welcome Chairman Tenenbaum to the committee. Thank you.

Mr. RUSH. Thank you. The Chair now recognizes the Chairman of the full committee, Mr. Waxman, for 5 minutes for the purposes of opening statement.

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

Mr. WAXMAN. Thank you very much, Mr. Chairman, for holding this important oversight hearing and I want to welcome Chairman Tenenbaum to this hearing today, as well.

Last year Congress enacted the truly historic legislation on product safety. Our product safety system—and especially our toy safety system—was terribly broken. We saw record recalls and the total loss of consumer confidence in the safety of products, and children were killed and horribly injured by defective and dangerous products, and the stories were shocking. The situation was unacceptable to the American people and Congress responded. Following a lengthy and careful process, we enacted legislation that is strong, well-designed and effective.

The law bans lead in children's products, a step that is decades overdue. There is no safe level of lead and no reason that children should be exposed to lead in their toys. The law establishes a safety net for product safety that many consumers already assumed was in place. For the first time under this law, manufacturers need to demonstrate their products are safe before they can be sold. The law bans phthalates in certain children's products in recognizing science that shows these chemicals to be dangerous, especially to the youngest and most vulnerable children.

And finally, the law addresses systemic problems at CPSC to provide them with stronger legal authorities to carry out their mission and additional funding for the agency, and we restored the Commission to its full size of five commissioners. This is a key step that enables the Commission to carry out its critical mission after years of neglect and dysfunction. So in short, the law is a good, strong one and it vastly improves our children's health and safety.

Now that we are a year away from the recalls, the most dramatic stories have left the front pages, some suggest that we don't really need such a strong law but the fact remains that the system we had in place was a failure. This law was necessary. To retreat now from the proven consumer protections achieved under this law would be a huge mistake. There is no question however, that implementation has at times been uneven. Since the law went into affect, there has been unnecessary and widespread confusion among businesses and consumers, and I am committed to working with the Commission and with interested members of Congress and to you particularly, Mr. Chairman, to assure that moving forward, implementation of the law is clear and comprehensible.

And that is why I am very pleased that Ms. Tenenbaum is here and we will hear from her about her plans for the Commission and for the law. I have great confidence in the Chairman together with the other four commissioners that they will restore the agency to one capable of carrying out this law and its entire mission effectively and efficiently. I look forward to hearing the Chairman's testimony and I look forward to engaging in a productive relationship with leadership that is truly committed to protecting all consumers, especially our children.

Thank you, Mr. Chairman.

Mr. RUSH. The Chair now recognizes the ranking member of the full committee, the gentleman from Texas, Mr. Barton, for 5 minutes.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Mr. Chairman, and thank you, Chairwoman, for being here.

I voted for the bill last year. I was on the conference committee along with Chairman Waxman and Mr. Dingell and Mrs. Schakowsky and others so I am a supporter of the bill. Having said that, I listened with some astonishment to what our distinguished Chairman, Mr. Waxman, just said. I interpret what he said to mean that it's just a problem with implementation. It is not a problem with implementation.

As you have said, Madam Chairwoman, the law doesn't give you the flexibility to do some of the things that you have been encouraged to do to implement the law. We need to change the law. We need to perfect it. We need to modify it. We need to give some flexibility and some discretion to your agency to implement this law.

I and Mr. Radanovich and others have repeatedly asked Chairman Waxman to hold a markup or work with us on a bipartisan basis to come up with a bill to fine tune the law that we passed last year. We started making those requests informally in January. Today is a hearing which is a good step, but that is all this is. It is a hearing. We need to do more, in my opinion, than hold a hearing. I have got right here—I would say that is 200 letters, maybe 150 of small businesses around this country that have written to myself and to the Chairman and other members of the committee to do something to fine-tune the law.

Mr. Radanovich is going to ask unanimous consent at some point in time to put those letters in the hearing record. We have products before us. The dress that is in front of Mr. Radanovich can't be tested because if you test it, it destroys it. These products are going to be pulled off the shelves because the cost of the test is more than the value of the products that are sold. There should be some commonsense implementation, some commonsense refinement. We are not trying to change the lead standard. We are not trying to backpedal on the intent of the law, but when you can't sell an all-terrain vehicle because of concern that a child is going to ingest the tailpipe or something like that, there needs to be some discretion given to the regulatory agency to use a commonsense approach to implementing the regulations.

So, Mr. Chairman, I am glad that you are holding this hearing. I am going to submit my formal statement for the record. I hope it doesn't—I know you are a White Sox fan and not a Cubs fan, but I hope it doesn't take the Cubs winning the pennant before we decide to act to change this bill. You know, we need—and the good news is that what we have done, it is not that difficult, and that it can be done in a bipartisan basis, and it can be moved out of committee, and it can be moved to the House and the other body for the President to sign in the next 2 to 3 months. I mean, this is not a huge mountain that we are trying to overcome and there is not—if we get past the insistence that it is a perfect bill and it

is like the Ten Commandments, you can't change a letter even in any of the Ten Commandments, we can get this done, and I hope that is what this hearing is about is finding a way to get it done.

With that, Mr. Chairman, I yield back.

Mr. RUSH. The Chair wants to thank the ranking member and wants to ensure the ranking member that we will get something done before the Aggies win the BCS.

Mr. BARTON. It could happen, Chairman.

Mr. RUSH. The Chair now recognizes the Chairman Emeritus of the full committee, my friend from Michigan, Mr. Dingell, for 5 minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, I commend you for holding today's hearing. It is an important one. I would like to extend my warm regards and welcome to Chairman Tenenbaum and I would like to thank her for appearing before us today to discuss issues facing her agency and her vision of the agency's future.

I want to make it very clear, Mr. Chairman, this hearing is needed. It is oversights in the way that it should be conducted and again I commend you for it.

A long time ago, a dear friend of mine by the name of John Moss, then a member of this committee, and I in this room held a series of hearings which led to the enactment of legislation creating the consumer product safety which he and I and other members were co-sponsoring. Last year, my dear friend, the ranking Republican member of this committee, and I got together with other members of this committee including you, Mr. Chairman, all in a sense of concern about the fact the Consumer Product Safety Commission was not able to do its job because of budget cuts, personnel cuts, demoralization, the inadequacy of researchers and personnel to do its job. And from that came the successor Act to the original Consumer Product Safety Act which was passed in '72, and which returned it somewhat, and the Commission somewhat, to the state that it had had at the time that we offered the first legislation.

Now, I want to make it very clear that as the original author or the remaining original author of the Consumer Product Safety Act and the author of last year's legislation, I feel very strongly about the needs for strong protection for the nation's consumers. And I feel very keenly that the Consumer Product Safety Commission who has not been able to do its job because of the deregulatory attitude and a skimpy attitude with regard to funding in the nation's regulatory agencies. And so with my colleagues on this committee, I wholeheartedly supported a restoration of a good regulatory framework to ensure the safety of consumer products distributed in the commerce of the United States, particularly those meant for use by children. And that is the feeling which I shared with my colleagues on this committee and we tried to see to it not only did they get the authorities and use the authorities which they had at the CPSC but also that they got the researchers which had been permitted to shrivel in a most lamentable fashion. Indeed, to laughable proportions compared with those of other federal regu-

latory agencies so that the agency was in effect completely neutered and incapable of doing its business but we thought we had corrected that, and I would note that until recently CPSC might well have been described as a moribund agency, hampered by inadequate funding and all too limited statutory mandates.

For these reasons, we did what we did in terms of the Consumer Product Safety Improvement Act, CPSIA, which I have alluded to earlier which was ultimately signed into law by President Bush last August. CPSIA is meant to bolster the agency and to enhance its authorities in order to improve CPSC's ability to carry out its fundamental purpose, again the protection of consumer health and safety.

It should be noted though that a funny thing happened on the way to the forum. Our dear colleagues on the other end of the building called the United States Senate got into the act and with profound ignorance of the way the law worked or the intention of this committee and the authors of the legislation, proceeded to do extensive redrafting and it created difficulties which we were unable to cure in the conference between the House and the Senate. We had abundant outside assistance which confused the issues further, from consumer representatives and enthusiasts who did not know how government works or how government should work, and we had considerable messing around from both the Senate and from this body which has created confusions which remain today.

Now, I remain concerned about the difficulties that have been encountered in the implementation of the CPSIA as improved by the United States Senate. I would remind all persons that legislation passed this committee unanimously in a bipartisan fashion and again I commend my friend, the ranking minority member, for his leadership in this matter and his cooperation and assistance. And it passed the House unanimously and then it came back from the Senate and all of a sudden we had a lot of negative votes because people were honestly concerned about the confusion that had been inflicted by the United States Senate through it's own amendment process and through the process which we sought advice in the country. In any event, there appears now to be problems and I am hopeful, Mr. Chairman, that we will be able through this process to ferret them out and to correct them, and indeed to find out what they might be and how they are impacting upon the American people, upon consumers and upon businesses.

In January on the 30th, in a letter to the committee, former CPSC Chairman Nord wrote, "The timelines in the law are proving to be unrealistic," which in fact, they are, and then "[CPSC] will not be able to continue at this pace without real risk of promulgating regulations that have not been thoroughly considered." Moreover, Chairman Nord stated, "Although CPSC staff has been directed to move as quickly as possible to complete its work, short circuiting the rulemaking process gives short shrift to the analytical discipline contemplated by the statute."

In brief, Mr. Chairman and Madam Chairman, I intend to use my time today to discuss with you whether you share this view and more specifically whether you believe that CPSIA contains realistic deadlines for rulemakings and compliance as well as too little implementation discretion to CPSC. These problems have triggered a

number of meetings between members of the House and Senate in which it discussed that perhaps maybe the House and the Senate should pressure CPSC to come to conclusions which may or may not be supported by the law. And I wish to state with great clarity that it is not my intention to undo anything that has been achieved via CPSIA but rather to discover what action by this committee as a part of its oversight may be necessary to correct any shortcomings that have been inflicted on the law and on the people of the United States by the actions of our dear friends in the Senate who have confused in a splendid fashion an otherwise excellent statute.

I want to thank you, Mr. Chairman, and thank you, Madam Chairman, for coming before the committee today and I look forward to a frank and productive discussion about the matters currently confronting the CPSC as well as the future of the agency in the hope that perhaps our current efforts may achieve without the assistance of our dear friends and colleagues in the Senate the kind of confusion that has been inflicted upon your agency in the time since we passed CPSIA. I thank you, Mr. Chairman.

Mr. RUSH. The Chair thanks the Chairman Emeritus and now the Chair recognizes the gentleman from Kentucky for 2 minutes for the purposes of opening statements.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. Thank you, Chairman, for having this hearing today.

I also was a conferee on this legislation that met with the Senate to adopt this legislation and it passed overwhelmingly in the House and also in this committee as former Chairman Dingell said. I think we also have a responsibility to protect our children and this legislation does precisely that but it also has had unintended consequences and many members have already discussed that today. The timelines are in question, the exemption authority that was taken away really from the consumer protection Commission. The sad thing is now the standard is so strict that the CPSC does not have the flexibility to exempt seemingly obvious products that do not contain a lead or other chemically hazardous materials and so we have a lot of small business people today spending thousands of dollars to prove that their product is safe, knowing full well that it is safe.

And so it seems to me that it is not right that Congress passes a law so stringent that the Commission with the authority to enforce these laws does not have any flexibility. And I think we have an obligation to the people of the United States, particularly at this time of an economic downturn that we do not want to make it more difficult for small business people to stay in business, and we need to do everything that we can do to correct the problems that are in the legislation that was passed overwhelmingly by the House and Senate.

Now, I yield back the balance of my time.

Mr. RUSH. The Chair thanks the gentleman. The Chair now recognizes my friend, the Vice Chair of the subcommittee, the gentlelady from Illinois, Ms. Schakowsky, for 2 minutes.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. I thank you, Chairman Rush, and I want to welcome Chairman Tenenbaum. We had the pleasure of meeting each other recently. I appreciate very much your reaching out to me and hearing about your commitment to make the Consumer Product Safety Commission and agency that will truly live up to its name and I look forward to working with you.

I too wanted to talk about the Consumer Product Safety Improvement Act. There were many, many important provisions in the bill which I think everybody would agree to. Some that I worked on, including mandatory infant and toddler durable product standards and testing, and the Danny Keysar Child Product Safety Notification Act, and the first mandatory safety standards for children's toys are going to help grandmothers like me feel confident when I buy supplies or gifts for my grandkids that those things are going to be safe.

And I know that there have been problems with implementation of the new law, particularly under the previous leadership at the CPSC. I personally think that the law can be successfully implemented and I just wanted to point out some flexibility that I do see in the law. The law includes language that empowers the CPSC to exempt certain materials from the testing and certification requirements, and to relieve those manufacturers of products that are in no danger of violating the new standards, and I know that the CPSC has begun to apply some of those exclusions and so I think there are opportunities within the existing bill to deal with complications. For example, I know that the CPSC has exempted from the lead testing requirements components that can't be accessed by a child, components of electronic devices, the inside, intended for children, a stay of enforcement of the lead and phthalates testing rules for a year or so. A number of things have been done and I think we should first before we change the law, look at those and see if they can provide the kind of relief to issues that have been raised today.

I thank you, Mr. Chairman, and I yield back.

Mr. RUSH. The Chair thanks the gentlelady. The Chair now recognizes the gentleman from Louisiana, Mr. Scalise, for 2 minutes for the purposes of opening statements.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Mr. Chairman. I want to thank you and Ranking Member Radanovich for having this hearing and I would like to congratulate Chairwoman Tenenbaum on her confirmation and welcome her before our subcommittee.

The Consumer Product Safety Commission has a very important job. It protects consumers and families from products that may

pose a hazard or injure children. We must ensure that the CPSC effectively carries out this mission and has the tools to do so. As the father of two young children, I want to be assured that the CPSC does its job and that the toys all children are playing with are safe.

One particular issue before the CPSC that has affected my district as well as many across this country is Chinese drywall. After Florida, Louisiana has had the most cases in the Nation of toxic drywall. The Louisiana Department of Health and Hospitals has received over 800 complaints about Chinese drywall and it is estimated that the amount of Chinese drywall brought into Louisiana after Hurricanes Katrina and Rita could potentially affect approximately 7,000 homes. My office has received numerous complaints from constituents affected by Chinese drywall. One man who called lost his home to Hurricane Katrina and had to relocate his family to another town, only to find out that the home he moved into was built with Chinese drywall. Another constituent realized he had Chinese drywall in his home when his wife, who was four months pregnant, wasn't gaining any weight. Her doctor told her to move out of the home and now she and her husband are living in separate towns while their home is repaired.

During these economic times, many of our constituents cannot afford to purchase another home or rent a second one while repairs are being made. It is clear that Chinese drywall is wreaking havoc in homes, charring electrical wires, corroding metal and causing serious health problems. We must determine the origin and scope of the toxic drywall and we must take action against those who introduced the drywall into American markets. It is also important that we continue to testing in order to realize the potential health problems that Chinese drywall can cause.

Chairwoman Tenenbaum, in your testimony you mentioned that the CPSC is committed to finding answers and solutions for all the homeowners impacted by this issue. I want to know what those answers are and solutions you have found. The citizens of Louisiana and elsewhere in the country who have been impacted by Chinese drywall deserve clear answers and solutions. Those affected in my State have already been through so much and now 4 years after Katrina many once again have to rebuild their homes. This is unacceptable and we must ensure that no one has to encounter these problems in the future.

I look forward to your testimony and I yield back.

Mr. RUSH. The Chair recognizes now the gentlelady from Florida, Ms. Castor, for 2 minutes for the purposes of opening statements.

OPENING STATEMENT OF HON. KATHY CASTOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Ms. CASTOR. Thank you, Mr. Chairman, very much for calling this important oversight hearing of the Consumer Product Safety Commission.

Welcome to Chairman Tenenbaum. I am pleased that we have this opportunity to discuss the Consumer Product Safety Act with you. You have outstanding experience and your background as a teacher and the State School Superintendent for the State of South Carolina demonstrates your commitment to families and consumer

issues and you are off to a great start, and in many ways, this hearing is going to be very different then if we had proceeded with the one scheduled a few months ago. At that time, many concerns were expressed to me about the CPSIA implementation, many of them stemming from the lack of information and what to expect from the Consumer Product Safety Commission. Rumors were flying that children's bookstores would be forced to closed or thrift stores would not be able to sell toys at all, but under your leadership in the last few months many of these concerns have been addressed, and I thank you for that.

I appreciate that the assignment that was given to the Consumer Product Safety Commission was not an easy one. The new Consumer Product Safety Improvement Act was a fundamental shift from a reactive product safety regime to a proactive approach. Before parents just had to hope that toys they were buying for their kids were safe and watch for product recalls, and all too often the prevailing consumer safety policy with regard to toys was caveat emptor and this resulted in a disastrous 2007 Christmas shopping season when popular toy trains had friendly, inviting faces painted on them with Chinese lead paint, and one popular toy called Aqua Dots allowed children to arrange brightly colored beads into designs and then bind them together with water. Unfortunately, the beads gave off the so-called—the drug GHB when swallowed, so Congress gave the CPSC a big responsibility last year and there have been some bumps in the road.

For too long there has been a lack of guidance from the agency for retailers and manufacturers and some of the deadlines for guidance came and went without the required guidance but I am extremely encouraged by the actions taken by the Commission in recent months. The quality and quantity of the proposed rules that have come out just since your swearing in is truly encouraging and like my colleague from Louisiana, I do hope you will address the important Florida issue important to many other States and that is the unsafe Chinese drywall that has been used in the construction of homes. It is making many families in Florida sick. Families should not have to worry that the building materials in their walls emit corrosive, toxic gases into their home so I look forward to hearing more from you about what the Commission is doing about toxic drywall and what we can do to help on that issue.

Thank you being here. I yield back my time, Mr. Chairman.

Mr. RUSH. The Chair recognizes the gentleman from Pennsylvania, Mr. Pitts, for 2 minutes.

OPENING STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. PITTS. Thank you, Mr. Chairman. Thank you for holding this important hearing on the issues and the future of the Consumer Product Safety Commission.

I think we all agree that protecting consumers, especially children from unsafe products is a worthy goal of government regulation. In 2008, the House Representatives passed the Consumer Product Safety Improvement Act with the goal of improving the safety of products that children and parents use everyday. How-

ever, the implementation of this law has given me cause for concern. We have observed a number of unforeseen and negative consequences arise and that are now putting undo pressure on businesses and manufacturers here in the United States. These consequences are increasingly problematic, especially during tough economic times when we desperately need the jobs provided by businesses and manufacturers.

I received countless e-mails and phone calls and letters from businesses expressing the difficult and damaging affects this law is having on them. The CPSC needs the proper resources and the time and the flexibility to carry out the implementation of this law in a reasonable and thoughtful manner. I have grandchildren and I want to be sure their toys are safe. I don't want to weaken laws that ensure the products on the market are safe for all consumers but we need to do this in a way that is realistic, clear and fair and that is why I have joined many of my colleagues in co-sponsoring H.R. 1815. I believe this bill institutes the needed flexibility the Commission needs in order to respond to the concerns of businesses and industry.

I welcome Chairman Tenenbaum. I look forward to hearing your testimony and appreciate you coming here today, and I yield back.

Mr. RUSH. The Chair recognizes the gentleman from Iowa, Mr. Braley, for 2 minutes.

OPENING STATEMENT OF HON. BRUCE L. BRALEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. BRALEY. Thank you, Mr. Chairman, and, Chairman Tenenbaum, I think the most important component of your very impressive resume is your experience as an elementary school teacher because elementary school teachers use commonsense in enforcing the law of their classroom everyday. My mother has been teaching in Iowa for over 50 years and at the age of 80 she is still subbing so I have great respect for elementary school teachers.

But I want to focus on a couple of things that have not really been discussed here this morning and one is the point that you raised in your opening statement about the need for increased port monitoring. But underneath that there is a subtext that we rarely talk about and that is the incredible impact of foreign manufactured goods on the safety of consumers in this country. We have seen an incredible shift in consumer products that were manufactured in the United States that are now being made overseas. Most States have product liability laws that limit recovery in the chain for distribution to the manufacturer of those products if the manufacturer is subject to the jurisdiction of the courts and has not been declared insolvent. Anyone who ever tries to hold a Chinese manufacturer accountable to the jurisdiction of the courts in the State will tell you it is an immense challenge. In fact, many of these factories in China are de facto agents of the Chinese government and so the whole concept of accountability in U.S. courts is an enormous impediment to consumer safety. That is why the role of your agency is so critical and that is why the lack of enforcement on defective foreign products is one of the biggest challenges U.S. consumers face so I applaud your efforts to focus on this. We need to realize that many U.S. consumers are not being protected for the

injuries and deaths caused by foreign manufactured products and come up with a joint strategy to address those concerns.

On the issue of Chinese drywall, I inspected homes in Boynton Beach, Florida with defective Chinese drywall and came back here and was sick for the next 6 weeks. I saw with my own eyes the corrosive effect on metal that this drywall is having. I smelled the odors in these homes. It is an enormous crisis and it is just the tip of the iceberg of what is wrong with import monitoring in this country. We have a lot to do to improve the enforcement of the quality of goods coming into this country and I pledge my commitment to work with you and your office to make sure that we are doing a better job of protecting U.S. consumers.

And I yield back my time.

Mr. RUSH. The gentleman from Georgia, Mr. Barrow, is recognized for 2 minutes.

Mr. BARROW. I thank the Chairman.

In the interest of Chairman Tenenbaum's time, I will refrain from offering an opening statement but I cannot refrain from taking this opportunity to personally welcome you and congratulate you on your appointment. Our paths first met 5 years ago when I was seeking election to the House and our guest today was seeking election to the other body and all I can say is that the other body's great loss is the Consumer Product Safety Commission's great gain. You are certainly one of the best things to have come from South Carolina in a long, long time and on behalf of your kinfolk in Savannah, I personally congratulate you and welcome you to the committee and thank you for your service to our country.

With that, I yield back.

Mr. RUSH. The Chair now recognizes the gentlelady from Ohio, Ms. Sutton, for 2 minutes.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. Thank you, Chairman Rush, and thank you for holding today's important hearing on the Consumer Product Safety Commission.

I am pleased to welcome you, Chairman Tenenbaum. Congratulations on your confirmation. You have such an important role and responsibility as the head of the agency charged with protecting the public, especially children from unsafe and dangerous products and with your appointment I am starting to feel better already. I wish you the best of luck.

Consumer product safety is not an area that we can afford to ignore and last year I was proud when we passed the Consumer Product Safety Improvement Act. That law created basic safety standards for keeping toxic lead out of children's products. Manufacturers must affirmatively demonstrate that those products are safe. The Act also provides vital new resources and authority including the Import Safety Initiative which puts inspectors at key U.S. ports, because as we have heard here today, in recent years the relationship, and I know you are well aware of this, the relationship between our Nation's import safety crisis and our Nation's trade policy has become painfully obvious. As imports have continued to grow, 80 percent of all toys sold in the U.S. are imported

from China alone. Some manufacturers have shown a remarkable failure to adhere to basic safety standards. It is a national shame and embarrassment when companies and importers pay more attention to their costs then our safety and the safety of our children and our families. Product safety must be the primary focus. In 2007 and 2008, more than 37 million toys were recalled in the U.S. This year there have been 23 toy recalls issued affecting over 4 million toys and every single recalled toy was manufactured in China.

We have also seen reports of serious health problems in residents of homes containing imported Chinese drywall and in response I am pleased that the CPSC established a drywall task force working with other agencies to investigate the hazards of imported drywall. And I am very interested to see the results of the task force studies and see what we can do to ensure that things being imported into this country are safe for consumers in the United States.

I yield back.

Mr. RUSH. The Chair now recognizes the gentlelady from Colorado, Ms. DeGette, for 2 minutes.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you very much, Mr. Chairman.

I want to add my welcome to our new Commissioner and say hallelujah, we are glad you are here.

I have been working on this legislation for a long time. I was on the conference committee that after we passed the Act to try to bring it to the floor and I was really happy to work with my friends on the other side of the aisle, in particular Ranking Member Barton to come up with these compromises.

What I am now interested in is how the Consumer Product Safety Commission is going to implement these far-ranging provisions of the legislation. Some issues have come up as we are all aware since the enactment of the bill and one of the things I am interested to know, and I think Chairman Dingell and Chairman Waxman and others are interested as well, is can we fix these issues administratively? Do we need to amend the bill? What do we need to do, in particular, with ATVs and other consumer products?

I think though that the change that both the legislation and the new administration have brought to the agency are exciting. I think that we are going to be able to do a lot for the consumers of America and I am really proud to be a part of this process.

With that, Mr. Chairman, I will yield back.

Mr. RUSH. The Chair thanks the gentlelady.

It is now my pleasure and my privilege to recognize the Chairman of the U.S. Consumer Product Safety Commission and to extend to her the customary 5 minutes for the purposes of her opening statement but prior to her opening statement I would ask that she understand that it is now the practice of this subcommittee that you be sworn in before you issue your opening statement, and so would you stand and please raise your right hand.

[Witness sworn.]

Mr. RUSH. Her credentials have been well-established earlier in this hearing and now it is my pleasure to recognize you for 5 minutes for the purposes of opening statement.

TESTIMONY OF INEZ MOORE TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Ms. TENENBAUM. Good morning, Chairman Rush, Ranking Member Radanovich and members of the Subcommittee on Commerce, Trade and Consumer Protection. I am pleased to be here today to talk about the current actions that we are taking at the U.S. Consumer Product Safety Commission to protect the safety of children and consumers as well as give you my vision of this agency.

Let me begin by saying that I am deeply honored to have the privilege of serving as Chairman at such an important time in the Commission's history. In my first two months leading the CPSC I have focused on three key goals, transparency and openness in those we service, a renewed focus on education and advocacy for all Americans, and firm but fair enforcement of the product safety laws and regulations. My top priority since assuming the Chair of the Commission has been meeting the statutory deadlines for rules and reports required by the CPSIA. Through the hard work of the CPSC staff, and I must say I have never met more dedicated, hard-working people then those people who serve at the Commission, I am pleased to announce that 12 substantive rules and policy guidance documents have been released since I was sworn in on June 23, 2009. In each of these proceedings I have directed the Commission staff to work closely with all impacted stakeholders to ensure that the rules that we implement remain true to the statutory intent of the CPSIA while minimizing undue burdens on small businesses and other stakeholders. As we move forward, I assure you this subcommittee that we will continue to solicit feedback from all involved parties and work to implement commonsense rules that are squarely focused on maximizing product safety and reducing administrative burdens.

Another key priority of mine is the rebuilding and revitalization of the CPSC's internal business processes. The Commission's information technology systems are truly the lifeblood of this agency. Sadly, these systems were neglected for far too long. Early today the Commission released a plan to Congress outlining phase one of our business process modernization initiative which is the implementation of a searchable product information database. By leveraging technology, the CPSC can take a proactive approach to protect public health and safety, and recognize emerging hazards more effectively.

Consumer education is another key mission and component of my tenure at the agency. Through network television appearances and newspaper interviews I have worked to reach millions of families with information about dangerous cribs, bassinets and window blinds, products that have killed young children. Last month the GAO released a report noting that the Commission could do a better job of reaching out to poor and minority communities that often do not receive critical consumer product safety information and, Chairman Rush, I know that this is a key priority of yours and I want to assure you that it is also a key priority of mine. To that

end, I have directed the Commission staff to expand our education and consumer outreach efforts to underserved Americans.

Later this month, the CPSC also plans to launch a social networking, social engagement program that will establish the CPSC's presence on various new media sites including Facebook, Twitter and YouTube. Through these efforts we can educate a greater number of consumers and save lives.

Increased oversight of the products coming through our ports is another key priority. The GAO recently released a study that audited and analyzed the agency's effort to police imports and prevent the entry of unsafe products into the U.S. market. I agree with all of these recommendations and I have directed the Commission staff to update agreements with the Customs and Border Protection to allow better information-sharing.

It is also critical for this agency to respond diligently to new and emerging product safety issues such as problems now being reported with certain types of imported drywall. The CPSC is vigorously pursuing its investigation of imported drywall that has been linked to the corrosion of metal components and possible health impacts by homeowners in a number of States, and I understand the personal hardships that this issue has caused impacted homeowners and want to assure the members of this subcommittee that effective and efficient completion of this investigation is a key priority of the CPSC and our Federal and State partners.

Finally, I want to say a few words about the importance of pool and spa safety. Ensuring the compliance with the Virginia Graeme Baker Pool and Spa Safety Act is a critical priority of mine. I am happy to share good news with the Congress today about what we found in the last few months. We have sent our field investigators out to inspect over 1200 pools and spas in 38 States as a part of a recently launched enforcement initiative and we have found that 80 to 90 percent of the pools and spas inspected were found to be compliant. This is very good news and means that the children will be safe when they go swimming. We are also working with the States Attorneys General to find out why the other 10 percent are not in compliance.

Chairman Rush and Ranking Member Radanovich, thank you again for allowing me the opportunity to update the subcommittee on my vision for the future of the Consumer Product Safety Commission. I believe that CPSC stands for safety, especially the safety of children, so with your support I intend to continue the transformation of this agency from what some have described as a teething tiger into the world's leading lion in consumer protection. Thank you and I look forward to answering your questions.

[The prepared statement of Ms. Tenenbaum follows:]

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

Before the Subcommittee on Commerce, Trade, and Consumer Protection

"The Consumer Product Safety Commission: Current Issues and a Vision for the Future"

September 10, 2009

Good morning, Chairman Rush, Ranking Member Radanovich, and Members of the Subcommittee on Commerce, Trade, and Consumer Protection. I am pleased to be here today to inform you of the actions we are taking at the U.S. Consumer Product Safety Commission (CPSC) to protect the safety of children and consumers, as well as my vision for the future of this agency.

Let me begin by saying that I am deeply honored to have the privilege of serving as Chairman at such an important juncture in the Commission's history. I am also pleased to report to the Subcommittee that CPSC is an agency on the rise.

My desire to serve as Chairman was deeply influenced by my previous work as an elementary school teacher, a researcher dealing with consumer product safety issues in the South Carolina House of Representatives, and my service as South Carolina's State Superintendent of Education from 1999 to 2007.

In all of these positions, I focused on doing my utmost to protect the health and safety of children and families - and have made this approach a key focus of the CPSC's move to modernize and address new regulatory challenges.

It is no secret that the Consumer Product Safety Commission has faced numerous impediments in recent years. In 1981, the Commission had nearly 900 full-time employees. By 2008, that number had dropped to below 400. Similarly, years of budget cuts severely impacted the Commission's ability to modernize or, in some cases, even maintain its basic infrastructure.

Last year, this Subcommittee and the Congress as a whole recognized the need to reinvigorate the Consumer Product Safety Commission by passing the Consumer Product Safety Improvement Act of 2008 (CPSIA). Among other things, the CPSIA gave the Commission substantial new enforcement authority, authorized increased staffing, increased public disclosure of emerging product safety issues, and provided new mandatory standards for children's toys and juvenile products.

Mr. Chairman, I applaud your leadership and that of other members of this Subcommittee in crafting the CPSIA. The CPSIA recognizes many of the challenges this agency has faced over the years – and demands that we rebuild the Commission to adapt to an era of consumer products that come from all over the world, and the need to take proactive measures to protect consumers from new and emerging hazards.

In my first two months leading the CPSC, I have focused on three key goals: transparency and openness to those we serve; a renewed focus on education and advocacy to all American consumers; and fair, but firm enforcement of the product safety laws we oversee.

Today, I hope to provide a clear assessment of what the Commission has accomplished so far and my vision for the future.

Implementation of the CPSIA

My top priority since assuming the Chair of the Commission has been meeting the statutory deadlines for rules and reports required by the CPSIA. Through the hard work of CPSC staff, I am pleased to announce that 12 substantive rules and policy guidance documents have been released since I was sworn in on June 23, 2009, including the following items:

- Proposed Rule for Registration of Durable Infant and Toddler Products: On June 29, 2009, the Commission issued proposed rules for consumer registration of durable infant and toddler products, as required by the Danny Keysar Child Product Safety Notification Act, Section 104(b) of the CPSIA.

- Tracking Label Guidance: On July 20, 2009, the Commission issued policy guidance for the tracking label requirement contained in Section 103 of the CPSIA. The policy guidance announced the Commission's interpretation of key features of the tracking label provision, and explained how the Commission would approach enforcement.

- Mandatory Toy Standards: On July 21, 2009, the Commission issued a Notice of Consultation, pursuant to Section 106(b) of the CPSIA, to solicit input from all stakeholders on the effectiveness of the current mandatory toy standard (ASTM F963), and possible ways in which this standard could be improved to further reduce the risk of injuries from toys.

- Lead Inaccessibility Rule: On August 10, 2009, the Commission issued a final rule explaining under what circumstances children's products may contain parts that exceed the Congressionally-mandated lead limits, and describing when those internal lead parts are inaccessible to children.

- Audits for Third-Party Testing Labs: On August 13, 2009, the Commission issued a proposed rule specifying audit requirements for third-party testing labs pursuant to Section 102 of the CPSIA.

- Phthalates Testing Guidance: On August 17, 2009, the Commission issued testing guidance for children's toys and child care articles. This testing guidance only requires testing on component parts likely to contain phthalates, and not the entire article. Comments received on this guidance will also be integrated into a Notice of Proposed Rulemaking on the issue.

- Lead Testing Component Exemptions: On August 26, 2009, the Commission issued a final rule on lead level determinations that exempts certain component parts, including dyed and undyed textiles, polyester, cotton and papers, inks and inaccessible bindings in books from third-party testing requirements.

- Civil Penalties Interpretative Rule: On September 1, 2009, the Commission issued an interim final rule providing notice of the increase in civil fines pursuant to Section 115 of the CPSIA, and provided guidance on how the Commission will now negotiate civil penalties.

- Durable Nursery Goods Rulemaking: On September 3, 2009, the Commission issued proposed rules for infant walkers and bath seats pursuant to the Danny Keysar Child Product Safety Notification Act, Section 104(b) of the CPSIA. Both proposed rules strengthen the existing voluntary standards for those products. In February 2010, the Commission will issue proposed rules for bassinets and toddler beds.

In each of these rulemaking proceedings, I have directed Commission staff to work closely with all impacted stakeholders to ensure that the rules we implement remain true to the statutory intent of the CPSIA, while also minimizing undue burdens on small businesses and other stakeholders.

In the near future, the Commission will publish additional rules clarifying the third-party testing process and the testing of component parts. As we move forward, I assure the Subcommittee that we will continue to solicit feedback from all involved parties, and work to implement common-sense rules that are squarely focused on maximizing product safety and reducing administrative burdens.

Rebuilding the CPSC's Internal Business Processes

The Commission's information technology systems are truly the lifeblood of this agency. Sadly, these systems were neglected for far too long. The result is a patchwork of systems that make it very difficult for CPSC staff to "connect the dots" between different incidents, identify patterns of defects, and respond quickly to emerging hazards. This has led to a situation where the Commission is constantly in the position of reacting to events – rather than receiving new hazard information and proactively targeting harmful products before they flow into the stream of commerce.

Congress recognized the critical need for infrastructure modernization in the CPSIA, and directed the Commission to upgrade its infrastructure and create a product incident database that is easily searchable by the public. In response to that mandate, the agency is developing a single, integrated web-based environment, the Risk Management System (RMS), and an associated public database that will allow access to consumer product safety information.

Earlier today, the Commission submitted a plan to Congress detailing Phase I of the modernization initiative, which is implementation of the searchable product information database required by Section 212 of the CPSIA by March 11, 2011. As detailed in the report, the new web portal will be specifically designed to be easily accessible and usable by all Americans. Furthermore, the Commission plans a major public awareness

campaign as the database is rolled out to ensure that all Americans are aware of the database, and its utility in ensuring the safety of consumers.

However, this initial phase of the RMS is only one component of the Commission's overall effort to improve its infrastructure. CPSC continues to look at its business processes in order to identify improvements that will provide the agency with the tools necessary for identification of emerging hazards, such as using predictive data-mining technologies to analyze the increasing amount of information the agency receives, and identifying emerging hazards in real-time.

It is impossible to understate the absolutely essential nature of these improvements and their ability to transform the way this agency receives, reviews, and acts on new and emerging threats. By forming partnerships with industry and government entities to expand import surveillance and data exchanges, greater consumer involvement through user-friendly reporting and search tools, and the use of new advanced information-management technologies, CPSC can take the truly proactive approaches necessary to protect public health and safety.

Consumer Education

Notice of recalls and other hazards are only effective when all impacted consumers actually hear about them and respond to our alerts. Through network television appearances and newspaper interviews, I have worked to reach millions of families with information about dangerous cribs, bassinets, and window blinds. These are products that have killed young children, and we are working tirelessly to inform parents and caregivers about recalled products that need to be removed from homes or repaired to keep kids safe.

Last month, the Government Accountability Office (GAO) released a report noting that the Commission could do a better job of reaching out to poor and minority communities that often do not receive critical consumer product safety information.

Chairman Rush, I know this is a key priority of yours and I want to assure you that it is also a key priority of mine. To that end, I have directed Commission staff to expand our education and consumer outreach efforts to underserved Americans.

One example of this is the Commission's effort to communicate with populations that are sometimes difficult to reach through traditional media. We are planning a "Minority Outreach Day" to increase awareness of product safety in certain targeted markets. We also have a successful grassroots program called the Neighborhood Safety Networks that has 5600 members who are community leaders and who pass on vital safety information to their constituents. These members include tribal leaders, fire chiefs, health care workers, and child safety advocates. We plan to expand this program and target our materials to specific hard-to-reach populations that the Neighborhood Safety Network aims to serve.

Later this month, CPSC also plans to launch a social networking, social engagement program that will establish CPSC's presence on various new media sites, including Facebook, Twitter, and YouTube. This is an exciting new effort that once launched will reach a great number of consumers who may not know about us right now, but will know about us soon.

Increased Port Monitoring

From 1998 to 2007, the value of consumer products imported into the United States increased over 100 percent. During that time period, imports from China nearly quadrupled – and now constitute over 40 percent of all imported consumer goods.

Pursuant to Section 225 of the CPSIA, the GAO recently released a study that audited and analyzed the agency's efforts to police imports, and prevent the entry of unsafe products into the U.S. market. In the report, the GAO found that increased agency staffing at ports, combined with revised information sharing agreements with U.S. Customs and Border Protection (CBP) would allow the agency to better detect faulty products before they enter the country – not after they enter the stream of commerce.

I agree with these recommendations, and have directed Commission staff to update agreements with CBP to allow better information sharing. This information sharing would include use of CBP's Automated Targeting System (ATS), which contains advance manifest information for shipments entering the United States.

To access the ATS information, the Commission is in the process of hiring an employee that will be resident in CBP's Commercial Targeting Analysis Center (CTAC) when it becomes operational on October 1, 2009. This employee will be able to provide CPSC with real-time advance cargo manifest information, and allow other CPSC staff to make cargo risk assessments as shipments arrive, not after they leave port areas.

Foreign Outreach

Since assuming the Chair of the Commission, I have made a number of efforts to reach out to foreign governments and manufacturers to inform them of new Commission regulations, and to emphasize this agency's commitment to ensuring the safety of imported consumer products.

In late July and early August, I traveled to Asia to meet with industry and government leaders in Hong Kong and Vietnam to discuss the CPSC's new priorities. I also gave a keynote speech at the APEC Conference in Singapore, where I stressed the importance of foreign manufacturer compliance with the CPSIA, the importance of foreign economies building safety into their products, and the relationship between trade and safety.

The Commission is also continuing its efforts to strengthen and deepen our work with the Chinese government and Chinese manufacturers. On October 21-26, 2009, the 3rd Biennial United States – China Consumer Product Safety Summit between the CPSC and

its Chinese counterpart agency, the General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ) will be held in Wuxi, Jinhua, and Beijing, China.

The goal of the 2009 Summit is to bring dialogue between the two agencies to a new level, emphasizing the need for commitment to a more comprehensive approach to product safety. With input from U.S. and Chinese stakeholders, CPSC and AQSIQ will identify and discuss measures to ensure that U.S. importers and Chinese suppliers establish a systemic approach to preventing and detecting safety hazards in consumer products – from product design, through the manufacturing process, and to ultimate use of the product by the consumer.

In addition to overarching policy discussions, the Summit agenda will include topical discussions of product safety issues, with toys, lead in children's products, all terrain vehicles (ATVs), lighters, and fireworks representing specific product areas where we hope to make systemic advances.

In the coming months, we will continue our outreach efforts with representatives from other foreign governments to ensure that all manufacturers importing products into the United States are aware of the existing CPSC regulations, as well as new requirements that will soon be promulgated pursuant to the CPSIA. We will also be working closely with the U.S. Department of State, pursuant to new authorities under the CPSIA, to develop an information sharing agreement with foreign governments as we investigate mutual product safety concerns, and begin to pursue joint enforcement activities.

Chinese Drywall Investigation

CPSC continues to vigorously pursue its investigation of imported drywall that has been linked to corrosion of metal components and possible health impacts by homeowners in a number of states. We are fully committed to finding answers and solutions for all the homeowners who are impacted by this serious situation – and the agency is pouring a record amount of money and manpower toward the goal of helping affected families.

As of September 4, 2009, the Commission had received 1192 incident reports relating to drywall in 24 states and the District of Columbia. The majority of these reports continue to be from Florida, Louisiana and Virginia.

In order to provide a comprehensive response to this issue, the Commission has formed an internal drywall task force that works with other federal and state agencies, including the Environmental Protection Agency (EPA), the Centers for Disease Control (CDC), the Department of Housing and Urban Development (HUD), Immigration and Customs Enforcement (ICE), and several state health departments.

In the last month, the CPSC drywall task force has:

- Made an investigative visit to China to meet with government and industry officials, and collected information and samples relevant to the Chinese drywall manufacturing process;

- Conducted principal air sampling field work in 50 homes to determine the air emissions in homes with suspect drywall;

- Sent over 100 letters to drywall importers, distributors, and builders to determine how much drywall may be at issue and in what homes it may have been used;

- Contacted over 500 consumers to request that they update the information provided in initial drywall incident reports; and

- Coordinated a rapid response to allegations of radioactive phosphogypsum in Chinese drywall. Upon learning of the allegations, we commissioned a study with our state and federal partners, validated the science with an interagency technical committee, and publicized results that the samples tested did not pose a radiological hazard.

Later this fall, the federal drywall task force plans to release initial indoor air sampling test results, drywall elemental analysis results, chamber study results, and a preliminary health assessment – and will continue to diligently work on efforts to reach further conclusions on the exact source of contamination in the affected homes. The Commission is also studying the remediation activities of certain builders in an effort to assist its federal and state partners in developing a remediation protocol for impacted homes. Further detail on the federal testing efforts and associated activities is available in our September Drywall Investigation Status Report.

I understand the personal hardship that this issue has caused impacted homeowners, and want to reassure members of the Subcommittee that effective and efficient completion of this investigation is a key priority for the CPSC and our federal and state partners.

Pool and Spa Safety

In 2007, Congress passed the Virginia Graeme Baker Pool and Spa Safety Act in response to a series of horrible child injuries and fatalities involving drain entrapments and drownings in pools and spas. CPSC has worked with the Baker family and Taylor family and is pouring its heart and energy into effectively implementing and enforcing this safety law – this is our way of honoring the children who have died or been seriously injured in pools and spas.

Ensuring compliance with this law is a critical priority for me. In the last several months, CPSC has ramped up its outreach and education efforts to ensure that public swimming pool and spa operators are compliant with the law. In July, I conducted an

extensive interview with NBC's *Today Show* to re-state the need for compliance, and warn public pool operators that they should close their facility if they are not in compliance with the law. In addition, CPSC investigators have inspected over 1200 pools and spas in 38 states as part of a recently launched enforcement initiative.

The good news is that CPSC's public outreach and education efforts seem to be having a positive impact in this area. Recent inspections show that most public pools and spas have installed or have plans to install the new, compliant drains covers and safety equipment in the near future. Let me state again, contrary to some reports, there are many more public pools and spas that have been made safer because of this important law.

As we approach the end of the summer swimming season, CPSC will continue to work with state Attorneys General, state health departments, and consumer groups to ensure that public pools are in compliance with this important law – and will not hesitate to take action against those that are not.

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Chairman Rush and Ranking Member Radanovich, thank you again for allowing me the opportunity to update the Subcommittee on my vision for the future of the Consumer Product Safety Commission. I believe that CPSC Stands For Safety, especially the safety of children.

With your support, I intend to continue the transformation of this agency from what some have described as a "teething tiger" to the world's leading lion of consumer protection.

I now look forward to answering your questions.

Mr. RUSH. The Chair thanks the Chairman.

Before we engage in the questioning from the members of the subcommittee, the Chair requests unanimous consent that letters from five consumer groups and a letter that was sent to me through the offices of Congressman Schauer of Michigan, that these letters be entered into the record. Without any objections or hearing no objections, so ordered.

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

Mr. RUSH. Do you want to report unanimous consent requests at this time?

Mr. RADANOVICH. I would. Thank you, Mr. Chairman. I have got a couple of unanimous consent requests, statements on behalf of Congressman Gingrey and Burgess and also letters from constituents, over 100 here of constituent companies, small businesses that are impacted by the effects of CPSIA, of this legislation. I would ask that all three of these items be accepted into the record.

Mr. RUSH. Hearing no objections, so ordered.

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

Mr. RUSH. The Chair recognizes himself for 5 minutes for the purposes of questioning the witness.

Madam Chairman, last year the CPSC requested $8 million for fiscal year 2009 as part of its performance budget statement to the Congress and that request has funded 444 full-time employees which is an increase of 24 over the full-time employee staffing level for '08, and my question is how many of these additional employees have been hired by the agency? Do you seem to need additional employees and are any of those funds still going to CPSC's enhancements in import safety and product testing capabilities? What proportion of the FTE's and of your budget will go to each category and what other roles do you anticipate the needs FTE will play under your administration?

Ms. TENENBAUM. Thank you, Mr. Chairman. The CPSC has a staffing level of 530 FTEs. We are currently at 458 employees at the agency. We have 18 pending hires that have accepted offers for employment and we have 36 full-time employees that we have hired since January, 2009. We have 29 vacancies where interviews are currently underway and 27 other positions are in the stages of the recruitment process. We hope by October to reach the ceiling of 530 employees so that we will be fully staffed and we will be putting additional staff in port security and surveillance as well as compliance, and throughout the agency to see that we implement the CPSIA and other statutes. I can give you the breakdown for every division and how many will be added to those divisions. I can send it over but I did not bring it with me today.

Mr. RUSH. Would you please supply that?

Ms. TENENBAUM. We will get that to you but we are hoping by October we will meet the ceiling of 530 which is the maximum FTEs that we are supposed to have.

Mr. RUSH. Can you—the GAO's report on improving safety for minority children and families as you indicated was a major concern of mine and I know from your previous statements that you have committed to reversing or to improving the patterns of safety for minority children and families. Can you expound a little bit more on some of your priorities in that particular area, please?

Ms. TENENBAUM. Well, we found that overall the Commission needs to improve our ability to educate consumers. There is nothing more disheartening and sad than to find out that products that were recalled several years ago are resulting in injury and deaths, and we have found that recently we had to go back and reissue press releases, and we did this recently on bassinets but so that is why we want to step it up. We have a CPSC 2.0 where we are going to be using new media as others are to get the messages out. We also want to focus in the minority outreach of looking at how we can enhance our ability to talk directly with minority organizations. We welcomed the recommendation of the GAO and information that we hope, we think we nced to have and the other thing is just the information efforts, not only to consumers as a whole but targeting minorities. We believe that a child's economic background should not affect the risk of injury. Now, we will be leading a minority outreach day to increase awareness in product safety in targeted markets which will be a media event and working with organizations, and then we also work with the Neighborhood Safety Network members, and these are several hundred organizations where we can get information to them and they disseminate it to other minority organizations. We are going to report to you at the end of October on the GAO report so we will address that in detail in our report to you in October.

Mr. RUSH. My time has expired. I want to thank you for your responses to my questions.

The Chair recognizes Mr. Radanovich for 5 minutes.

Mr. RADANOVICH. Thank you, Mr. Chairman, and welcome, Chairman Tenenbaum, to the committee and I enjoyed our getting a chance to know each other and appreciate your outreach and welcome you to the Commission.

I want to just highlight a couple—I have got a couple of items in the committee room here to kind of highlight some of the problems that CPSIA seems to have with small business and there is a couple of products over there that cost $65, a microscope for $60 and testing for those products for the microscope is $3,678 for—that was for one of 24 samples that were submitted, and the other one was $5,973. But I think the item that represents problems with small business the most is this Native American ceremonial costume that was created in the Southwest somewhere. Recently my family and I came across the country, California to Washington, D.C. in a cross-country trip this August and there were a lot of vendors at the reservations and such that were making a living by selling similar costumes like this, and many of these have beads or special designs that make each one of them individual. None of them are made the same and this poses a real problem because under CPSIA this would have to be—one costume at a time would have to be tested and you would be destroying the costume at the time that it is testing so it is really a small batch run product problem with CPSIA, and I think this item highlights the problem the most. Now, products like this were especially with crystal beads and such that folks had a problem with and they submitted a request to exclude crystal and glass beads from the lead provisions in CPSIA and it was denied, and I want to read if I can your comment on the denial of the request. It said, "In making a determina-

tion, I was mindful that the statute does not use the term harmful amount which would allow staff to utilize a risk-based approach. Thus, while Commission staff recognized that most crystal and glass beads do not appear to pose a serious health risk to children, the request for the exclusion must be denied."

So I guess I have a couple of questions that kind of revolve around this problem of small batch testing and the crystal and glass bead exclusion from the lead provisions. Do you think the Commission has the flexibility to exempt safe products that don't meet the exemption standard or is it virtually impossible under the standard of any lead absorption for most products and materials?

Ms. TENENBAUM. I appreciate your question, Ranking Member Radanovich, because I think there has been some interpretation of my comments that have muddied the waters around this issue so I appreciate the opportunity to comment. You did read the section of my comments that have people wondering were the crystals—did they pose no hazard at all to children. And I met with the staff yesterday to make sure that I understand and it was really, I guess, poorly worded that part of my statement and what the staff meant when they—and I was taking it from their memorandum, was that under the Federal Hazardous Substance Act which was the old Act. The Act that we enforced and continue to but before it was amended by the CPSIA, that CPSC had to determine whether a product can contain lead and it resulted in substantial illness or injury. So before you could regulate the lead content, you had to prove that there was substantial illness or injury. When you passed the CPSIA, we were not required to prove that standard, in fact, Congress struggled over where to set the lead limits and you determined that there was no safe level of lead based on testimony and, you know, Congress did.

Mr. RADANOVICH. Which did not allow you to do any risk-based assessment of any of the products?

Ms. TENENBAUM. Well, going back to the lead crystals, Congress has set the threshold after August 14 of this year to be 300 parts per million. These lead crystal beads were 900 parts per million up to 23,000 parts per million per bead so I think it was poorly worded.

Mr. RADANOVICH. But during the conversation too, it was known that the lead in those beads were not in a form that was going to cause a problem even if they were ingested and I think that is where the devil is in the detail of a lot of this. Some of those beads would have to be crushed up into powder and then swallowed in order to have the adverse affect of the lead which makes me think that the Commission needs some type of some ability to test things on a risk-based assessment. And I guess what I think I would like to get an answer from is do you think that products that are excluded such as crystal present an unreasonable risk of injury or are unsafe and do you need flexibility to grant permission exemptions to permit safe products that can't meet the statutory limit?

Ms. TENENBAUM. Well, in the lead we showed that there was some leaching but it did not rise to the level with one bead to oppose to be listed under the Federal Hazardous Substance Act.

Mr. RADANOVICH. But then that doesn't give you—but you don't have any flexibility to exempt that?

Ms. TENENBAUM. But what if the child swallowed 50 small beads, we could not determine whether or not one, you know, one bead. It was determined we would not put one bead on the Federal Hazardous Substance Act but what if a child swallowed multiple beads and it would have raised the blood level.

Mr. RADANOVICH. And if I may get you to answer this one last question though, do you need flexibility to grant exemptions to permit safe products that can't meet the statutory limit?

Ms. TENENBAUM. Well, it goes to the heart of the matter on what is a safe level for lead and Congress struggled with it.

Mr. RADANOVICH. But do you feel you need that flexibility so that you can exempt safe products?

Ms. TENENBAUM. I feel it would be premature for me to answer that question at this time because these beads went all the way up to 23,000 parts per million.

Mr. RADANOVICH. Well, let us just in all products, do you need in any case do you feel that you need the flexibility to grant exemptions for safe products?

Ms. TENENBAUM. I believe that we have to look at products on a case-by-case basis and with good science wedded with a good statute determine whether or not it is at risk.

Mr. RUSH. The gentleman's time has expired.

Ms. TENENBAUM. So I think it is premature for me to say when Congress struggled with this very issue it was the heart of the CPSIA lead limits and Congress collectively decided and overwhelmingly passed a statute that said we will have any lead—we will not allow a product that had any lead.

Mr. RADANOVICH. Even if those products are safe.

Mr. RUSH. The Chair has been very lenient with the gentleman.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Ms. TENENBAUM. Thank you. That's the heart of the matter really.

Mr. RUSH. The Chair now recognizes the Chairman Emeritus for 5 minutes for questioning the witness.

Mr. DINGELL. Mr. Chairman, I thank you.

On March 4, 2009, I sent a letter to CPSC with 10 detailed questions concerning implementation of the Consumer Product Safety Improvement Act, the CPSIA. I would ask unanimous consent that that be inserted in the record at this time, Mr. Chairman.

Mr. RUSH. Hearing no objection, so ordered.

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

Mr. DINGELL. At the request or rather at the instruction of former Chairman Nord, CPSC prepared responses to the questions which I ask unanimous consent be inserted into the record at this point.

Mr. RUSH. Hearing no objections, so ordered.

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

Mr. DINGELL. Those responses indicated support for amendment of the statute, "in order to allow CPSC to set risk-based priorities given the finite resources available to it." I would appreciate now your candid responses to the following questions in order to ascertain whether you support such course of action or how we should address the problems that the Commission has with the implementation of that statute. As my time is limited, Madam Chairman, I

ask that you respond to these questions with a yes or no. I will note that I will submit these and other questions for the record in order to allow you to provide more detailed answer.

First question, given widespread concern about the practicality of retroactively applying CPSIA's requirement to existing inventory, do you believe that the applicability of such requirements should instead be limited to products manufactured after the effective date of the statute except in circumstances where the Commission decides that the exposure to a product presents a health and safety risk to children, yes or no?

Ms. TENENBAUM. Well, I would have to say no. The Federal Court decided in the phthalate case that we could not exempt products that were manufactured before the statute was passed.

Mr. DINGELL. Thank you, Madam Chairman.

Next question, I am concerned that the age limit for children's products defined in CPSIA unnecessarily subject certain products such as bicycles or books or magazines to more rigorous standards than otherwise necessary. Do you believe the age limit used in the definition of children's products should be lowered to better reflect exposure, yes or no?

Ms. TENENBAUM. No, because you often have a home where multiple children are at all ages using the same product.

Mr. DINGELL. Now, do you believe that CPSC should be given the discretion to set a further age or rather to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household, yes or no?

Ms. TENENBAUM. I think I answered that in number two that we need to.

Mr. DINGELL. Do you mean the same no answer, Madam Chairman?

Ms. TENENBAUM. Right, no.

Mr. DINGELL. Thank you. I hope you understand this is not an attempt on my part to be discourteous but I have a lot to get in here and I am much concerned about that the fact the time is running very fast.

I am also concerned that the blanket applicability to products of certification tracking label requirements would be unduly cumbersome, both from the standpoint of CPSC and consumer product manufacturers. Should CPSC be allowed to address certification tracking labels and other issues on a product class or other logical basis using risk assessment methodologies to establish needs, priorities and a phase-in schedule, yes or no?

Ms. TENENBAUM. It depends on the individual product. We have to look at it product hy product.

Mr. DINGELL. I am going to ask that you will have time to respond further to these questions and I will be submitting additional questions to you as Chairman of the Commission.

Do you believe the implementation of CPSIA has overstretched CPSC's staff and resources, yes or no?

Ms. TENENBAUM. It has but they are hardworking and our staff is working until midnight many nights. Many worked the 4th of July. They are working many weekends to work out to get these rules finished so that you can have it.

Mr. DINGELL. Madam Chairman, thank you. I have a couple more questions here.

Put differently, does CPSC have adequate resources with which to implement CPSIA as well as to carry out its other mandates, yes or no?

Ms. TENENBAUM. No.

Mr. DINGELL. I am sorry?

Ms. TENENBAUM. No, we don't have adequate resources but we are working hard to do the best we can.

Mr. DINGELL. If not, what amount of funding would you suggest be given to CPSC to allow it to perform its functions satisfactorily?

Ms. TENENBAUM. Well, we are not—we submitted our budget to OMB and we cannot discuss it until September the 14th, I understand, publicly.

Mr. DINGELL. Well, we do need the answer to that question for us to see that you can function. This committee has legislative jurisdiction over these matters and OMB lacks that jurisdiction.

Ms. TENENBAUM. Well, we can give it to you on September the 14th.

Mr. DINGELL. Remember that difficult fact so I am asking that you submit that to us for the record.

Ms. TENENBAUM. Thank you.

Mr. DINGELL. Madam Chairman, in conclusion, do you believe that the problems encountered in implementing CPSIA can be remedied solely via administrative action by CPSC, yes or no?

Ms. TENENBAUM. I would say most of them can by administrative action.

Mr. DINGELL. Most, so that means some cannot?

Ms. TENENBAUM. There will be some areas where we still have not come up with a solution.

Mr. DINGELL. I will be asking further information so as you can identify that. Now, if not, do you support targeted amendments to CPSIA to address the concerns which have arisen during the Act's implementation, yes or no?

Ms. TENENBAUM. It is premature for me to answer that. We are working with all of the industries that are affected and trying to untangle the knots that they have with their products and we are making great progress in resolving many of these issues.

Mr. DINGELL. So you are telling me that such cut and bite amendments carefully targeted to CPSIA may be required?

Ms. TENENBAUM. I said it is premature for me to answer that.

Mr. DINGELL. I said may, I didn't say will be.

Ms. TENENBAUM. May be required, may.

Mr. DINGELL. OK, now, if they are required will you first tell the committee whether they are required or not and second of all, will you work with us if such are required?

Ms. TENENBAUM. Absolutely, 100 percent.

Mr. DINGELL. OK, now, when will you know whether these amendments, carefully targeted will be required?

Ms. TENENBAUM. Well, there is one rule that we are working on and once it—it is called the—it contains the component part testing rule that many of these issues dealing with handcrafters and other products will be—will find out that under the component part they will not have to test. For example, a shirt that falls under deter-

minations rule, it is cotton so you don't have to test a cotton shirt but the buttons, if you have the button manufacturer certify to you that the button does not contain lead then the whole product would not have to be tested and we feel like that is going to untangle a lot of knots.

Mr. DINGELL. All right, let me try to just—do you have problems in involving a rule with regard to bicycles, off-road vehicles and things of that kind, right?

Ms. TENENBAUM. Well, I met recently.

Mr. DINGELL. Just yes or no.

Ms. TENENBAUM. We are—if you will let me explain on the ATVs, we met with the industry.

Mr. DINGELL. My time is about gone and the Chairman is kindly permitting me.

Ms. TENENBAUM. There are issues that we are working with administratively with both industries.

Mr. DINGELL. Say it again.

Ms. TENENBAUM. It has a stay right now on both the bikes and the ATVs and we are working with them on how they can make the lead inaccessible in the parts that the rider comes in contact with, like the handlebars. You know, I looked at my bicycle. It has rubber around it so I don't come in contact with that.

Mr. DINGELL. So you have a problem that you can't solve very quickly, can you?

Ms. TENENBAUM. Yes, we can once we determine that they can make those parts inaccessible.

Mr. DINGELL. Now, you have got a fine problem on motorcycles?

Ms. TENENBAUM. Motorcycles has the issue of lead in the handlebars. There might be lead in the vinyl seats but the motorcycle might not be a children's product.

Mr. DINGELL. OK and you have got a similar problem on all terrain vehicles and snowmobiles and such?

Ms. TENENBAUM. There are issues there in implementation and we are working with the industry and met with them last week.

Mr. DINGELL. And you have got a problem with regard to lead in publications, periodicals, books, children and adult books, is that right?

Ms. TENENBAUM. Well, no we don't.

Mr. DINGELL. No you don't?

Ms. TENENBAUM. This is a book.

Mr. DINGELL. Why is it that the book publishers are calling and telling me so?

Ms. TENENBAUM. Because, you know, it would be nice if we could and I want to—offering to meet publicly with affected industries which we are doing, holding public hearings which I want to do. We are resolving many of these issues. The ordinary book like this book will contain no lead. It is pictures. It is printed with a four-color process. This book complies and the reason we have it covered is because——

Mr. DINGELL. But you have books out there that do not comply, is that right?

Ms. TENENBAUM. The only books that don't comply are books that are published prior to 1985 which we don't consider children's books. These are vintage books that will be considered adult vin-

tage books even if they are for children and those books the only ones that don't comply are those that have illustrations using color.

Mr. DINGELL. Madam Chairman, I see that my time has been exceeded.

Ms. TENENBAUM. Now, the other thing about the books.

Mr. DINGELL. What I want you to understand is that this committee wants to see to it that you have a statute that you can properly administer without a lot of toe-dancing and improper pressure placed upon you to resolve questions in a way which are inconsistent with the statute.

Mr. Chairman, I will ask unanimous consent that I be permitted to submit a further letter and information to the record and responses by the Chairman to get to the bottom of these questions that I am trying to answer.

Mr. RUSH. Hearing no objection, so ordered and the Chair wants the Chairman Emeritus to know that you are in the thereabout area of 5 minutes.

Mr. DINGELL. You have been excessively kind and courteous. I give you my respect and thanks.

Mr. RUSH. Well, the Chair has a deep-seeded love for the Chairman Emeritus.

The Chair now recognizes the gentleman from Louisiana, Mr. Scalise, for 2 minutes.

Mr. SCALISE. Thank you, Mr. Chairman.

Madam Chair, on the question of Chinese drywall, looking through your opening statements there are a few questions, one that you had cited that your office has 1,192 incident reports on this issue. Do you know how many of those are from Louisiana?

Ms. TENENBAUM. Well, most of the drywall problems are from Florida, Louisiana and Virginia and so a great number of those are from Louisiana, and we realize that this is a serious problem for your constituents.

Mr. SCALISE. And of course with all of the rebuilding that occurred after Hurricanes Katrina and Rita, our offices all throughout our delegation continue to receive more complaints and serious problems and I know some of my other colleagues from other States have expressed similar things they are experiencing in their State but just, I guess, because of the high number of homes that have been rebuilt and obviously some of this toxic Chinese drywall was used in many of these homes, we continue to receive higher numbers. Have you talked to our State's Department of Health and Hospitals to see if—I don't know if maybe some people might have reported incidents to them that didn't find their way to your office to make sure that the numbers and the incidents that have been reported are accurately being delivered over to your office in the cases where the State knows about an incident in our State?

Ms. TENENBAUM. We are working with our State partners, with your State health departments and we are also working with our Federal partners, the CDC, HUD, EPA and the White House Domestic Policy Council to get as much information as possible.

Mr. SCALISE. OK, I understand your task force on this issue is going to be issuing a report it says sometime in the fall. Do you know roughly when that report will be issued?

Ms. TENENBAUM. We are trying to issue this in late October and the report will have the EPA pilot study of six homes, the indoor test study, the EPA's elemental analysis of drywall which breaks down all the account compounds in the drywall. We also have been working on a phase two chamber test with the Lawrence Berkeley National Laboratory and a 50-home indoor air quality test program that is conducted by a private company, the Environmental Health and Engineering Company.

Mr. SCALISE. Is that report going to look into how this tainted drywall actually came into our country? What steps were maybe—what things were missed that allowed it to come in?

Ms. TENENBAUM. Well, we sent a team over to China and our team from the CPSC visited six mines and received samples to come back and we are using them in the testing. We are tracking distribution of drywall in the United States and what we have done is written letters to numerous importers, builders, companies that sell drywall. One of the issues that I have found is that the drywall standards only address the structural integrity and did not address what goes in the content.

Mr. SCALISE. The toxic levels, potentially.

Ms. TENENBAUM. So that is one of the things that I want to do is to create a standard for drywall so we would have a universal standard of products that can go into drywall.

Mr. SCALISE. And I would look forward to working with you on that. And final question, you had mentioned in your testimony that over 500 consumers were asked by your office to update their information on their incident reports. What types of things did they, you know, was it maybe that they didn't fill out all the things you wanted or there was additional information you wanted? What types of things did those?

Ms. TENENBAUM. Do you mean on the drywall?

Mr. SCALISE. Yes.

Ms. TENENBAUM. Well, they have just had new information about how it is affecting them physically. There are two tracks in this. One is to look at is this drywall—are these problems of drywall causing these health problems, these respiratory problems? And then is the drywall corroding electrical wires and so we are looking at that and they probably—I can get you a summary of what the complaints were or what the information is.

Mr. SCALISE. Sure, I appreciate that.

And thank you, Mr. Chairman, for your latitude.

Mr. RUSH. The Chair would like to announce that there are votes occurring on the floor and I am not sure exactly how much time is left but it is the Chairman's intention to go vote and allow members to go and vote and then to return for the continuance of this hearing. So we will be coming back but the Chair wants to recognize the gentlelady from Florida for her 2 minutes prior to us going to vote.

Ms. CASTOR. Thank you, Mr. Chairman.

I will stick on Chinese drywall and I appreciate the seriousness with which the Consumer Product Safety Commission has undertaken the investigation and as you know, importation of Chinese drywall spiked dramatically a few years ago. In 2005, we imported $3.6 billion worth. In 2006, that spiked to over $32 billion worth

before dropping back down to $6 billion. When that kind of massive spike occurs in trade for product that could potentially cause problems, does that raise a red flag for the CPSC that maybe we should take a closer look? And during your investigation have you considered an interim ban on Chinese drywall? And finally, there have been a number of proposals in the Congress and I would ask you to please review those and get back to us on what you recommend. Will you wait for the results of the investigation and tell me again what the timeframe is for that?

Ms. TENENBAUM. OK, thank you for those questions and we understand from Florida that you are getting many constituent letters and that you are very concerned about the quality of life for the people who live in your district and we are too. We want you to know that.

There are 6.9 million piece of drywall imported from China in 2006, there were—so 6.9 million pieces coming from all over the country. We have not been—from different sources with different manufacturers and which poses a different issue for the CPSC. It is not like you find one product that doesn't comply and can ban all products. There were some pieces of drywall from China that did comply and didn't have this problem and other pieces did. The report that we will give you in late October will be studies of in-home, the chamber test as well as we take the drywall out of the home and take it to a chamber so we can test the emissions from that drywall. There will be in-air quality tests, in-home air quality tests and there will be elemental tests where the EPA is breaking down the elements to tell us what is in there that is causing the corrosion and the respiratory problems. So we hope that this yields more information on the drywall. Practically speaking about a ban on drywall is very—the market has taken care of that because very few people want Chinese drywall and therefore we see very little coming into the country at this point. And so that is where but the overwhelming amount of drywall had been coming from China and now we get notification from the ports if drywall is sent to the port but very little is coming in at this time. We have met with our counterpart, the Chinese counterpart, AQSIQ. China has sent experts in to visit homes. They sent two of their drywall experts to look at—to go into these homes that were contaminated. As I said, we sent a team to China. Senator Bill Nelson from Florida went and met with the AQSIQ several weeks ago. He told them that President Obama was going to, he hoped, mention that when he met with President Hu in China. And so it is—we are really putting a great deal of our resources and attention on this, probably more than any other issue we are working on at this time is focusing on drywall so that we can find an answer to it, and so after we find an answer to on into rulemaking so that we can not have this situation happen again.

Mr. RUSH. The committee stands in recess and there are approximately four votes on the floor which are the final votes for the week but we will reconvene 15 minutes after the last vote and the Chair really wants to thank Chairman Tenenbaum for her contribution to this. Thank you.

Ms. TENENBAUM. Thank you.

[Recess.]

Mr. RUSH. Committee will again come to order. I will once again repeat to you, Madam Chair, for your graciousness and for the time that you are spending with us this afternoon. I don't see any other members here so I am going to recognize myself for one additional question and I think the ranking member has one additional question and then we will-if there are no other members we will just adjourn and go that way.

Every year for many years we have seen numerous bills that have addressed specific product safety issues. These bills have continued to be introduced even after the passage of last year's product safety reform. Just this year there are bills in Congress to permit sales to children to stop the sale of dangerous toy cigarette lighters and even to address additional national health threats, such as the beforehand reported upon Chinese drywall. The question is why are we seeing these bills? Why is the Commission not addressing these issues as they arise under its own authority and on its own initiative? And the second question is, do you agree that the consistent introduction of these bills is evidence that the Commission is not fully and properly carrying out its mission and how do you see us moving forward? Is the introduction of these bills, are they any kind of indication of a need or specific focus of the Commission or are they just members introducing bills?

Ms. TENENBAUM. Thank you, Mr. Chairman, and what you are asking me is how can the CPSC be proactive in spotting hazards so that Congress does not have to introduce bills, and do we have the administrative and regulatory structure where we can handle them without legislation. I appreciate this question because it is a good one.

First of all, as I have looked back in the history of the CPSC the leadership makes a tremendous difference because, you know, this Commission relies on voluntary standards, and it is a question of when you see a voluntary standard not working to protect the health and safety of individuals whether you move right in and go ahead and promulgate a mandatory rule. One of the things that I have observed as the Chairman for less than 3 months is that we need to review our existing emerging hazards and early warning identification system and we really need to bolster this system with technology and resources, and our new technology database will give us more information then ever before so that we can spot these issues earlier. We need to initiate more investigations and increase our investigations and be much more proactive about them.

There are also scientific research organizations where if we had the resources, we could engage them or even they could use private resources to do analysis and testing if we asked them to. We have a deference toward voluntary standards. In fact, the law was passed in 1981 requiring deference to voluntary standards unless they are proved ineffective in addressing the hazards. I have already noticed in my short tenure that there is one particular product that I have seen that there are no standards for yet we have already determined 60 people have been killed by this product and we are going ahead and announced proposed rulemaking, ANPR, so that we will begin working on a standard and not just wait until the industry comes up with a voluntary standard.

So all of these are ways that the CSPC will be more proactive and we also want to harness the new media opportunities that we have. Our new brand is CPSC 2.0 with the blog, the Facebook, the YouTube, Twitter, Recall Widget so consumers have up-to-date information. It is really going to be interesting with the new—we have the tracking labels which we went back to the statute and wrote a tracking label guidance but industry is looking at a futuristic tracking label so you could look at this bar code that would be universal throughout the world and pull it up on say your Blackberry or iPhone and find out everything about this product right there in the store or, you know, when you by looking at the bar code, and so very few people are using it. It is very futuristic but that is the kind of technology that will enable us to be more proactive.

Mr. RUSH. The Chair recognizes the ranking member, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman. I appreciate that.

Madam Chair, I want to know what the purpose of a testing and certification stay of enforcement is and what happens when the stay expires in February? Do you think that the Commission will be ready to implement the laws as written?

Ms. TENENBAUM. Thank you, Ranking Member Radanovich.

First of all, we call that the 15-month rule and that we were required by statute to have that month which will be what is reasonable testing and it will have the component part testing in that rule, and it is due to be promulgated in November, and so under the statute we will be working trying to get that out because I guess what I wanted to say here this morning and what we have prepared to try to leave in your minds is that we are working hard to implement the CPSIA. We are finding out that with every rule that we put out like the lead determinations which probably would have exempted the blouse that you showed us from any testing, the component testing which will exempt so many products from the manufacturing having to retest again on items, all of these are helping us resolve a lot of these questions and untie a lot of these knots. And so we will be having that rule shortly and I think that it will help tremendously with a lot of the complaints that you are receiving from industry.

Mr. RADANOVICH. Do you think that you will be able to implement and enforce the law as written by then in February?

Ms. TENENBAUM. Well, we think that after the stay of enforcement expires, we will have all the rules in place and the stay was necessary the leadership at the Commission felt at that time because there was so much rulemaking to do. We had not even approved all the third-party laboratories. The law says that manufacturers and private labelers have to have their children's products tested by a third-party laboratory.

Mr. RADANOVICH. Right, right.

Ms. TENENBAUM. And we had to approve all these laboratories and so to date we have approved 190 laboratories in 27 countries. So now industry has a place to go to get their products tested. So we think that when the stay expires, that we will have these rules in place and that we will be able to untie a lot of these problems

that industry has. That is why I said it was premature today then for me to——

Mr. RADANOVICH. Forgive me though, I am sorry. I just don't have enough time here.

Ms. TENENBAUM. I know. I am taking your time.

Mr. RADANOVICH. But do you think that—will you be able to grant exemptions under CPSIA during—after that stay or do you think that you will have to post another stay?

Ms. TENENBAUM. We are hoping that we won't have to post another stay.

Mr. RADANOVICH. If you do, won't that be evidence of the need for statutory change in CPSIA in order for you to get all this done and be able to grant exemptions?

Ms. TENENBAUM. Well, we believe that if we in good faith implement all the regulations that CPSIA requires that most of these issues can be resolved administratively.

Mr. RADANOVICH. All right.

Thank you, Mr. Chairman.

Ms. TENENBAUM. Either through the product not containing lead or not being a product that will ever contain lead like cotton or paper or certain kinds of ink used in printing.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. RUSH. Madam Chairman, we certainly appreciate your time.

We have been joined by Mr. Sarbanes from Maryland and the Chair now recognizes Mr. Sarbanes for 2 minutes for questioning.

Mr. SARBANES. Thank you very much, Mr. Chairman. I appreciate the opportunity. Thanks for holding this hearing. I want to welcome you, Ms. Tenenbaum, to your new role and I am very, very close friends with a fellow named Brad Parham from South Carolina who I think you know and I look forward to getting to know you in your new position.

I just wanted to pass along a concern. I have a number of bulk vendors and there is a number of bulk vendors in Maryland and you are, I think, aware of this provision under CPSIA Section 103(a) regarding the tracking of products and I guess they have expressed concern about that being impractical with respect to some of these smaller items that come packaged in bulk and then are distributed across the country to vending machines and so forth. And to the Commission's credit and to your credit and evidence of you moving quickly in the job to try to address these areas of concern, on July 20 there was a statement of policy issued by your office that for certain category of products, 103, by your interpretation would not apply, and they have just expressed some concern. I wanted to relay and get your comment on about the fact that that doesn't necessarily prevent action at the State level by State Attorneys General acting with respect to the statute, nor does it necessarily mean that future Commissions couldn't reverse its position on that, and I just wanted to get your perspective on how this statement of policy you see working going forward.

Ms. TENENBAUM. Well, this is a good example of us using commonsense to enforce the law is our definition of tracking labels. The law requires manufacturers of children's products to have a tracking label to the extent practical on each product and the packaging. And so we looked at—we told the industry it is not one size-

fits-all, that you must be able to ascertain and by ascertain we have to look at your product to see can we find the name, location and date of production, and can we find who manufactured it and track it down if it needed to be recalled. Regarding—so we got a great deal of praise from a number of industries because we used a commonsense approach to the tracking label. Regarding the Attorneys General, we have regular telephone conferences with them. I will be speaking to the Attorneys General. We want to enrich our relationships with them because we see the fact that this is such a small agency that we don't have the resources to enforce all of the consumer product safety laws without the assistance of our State partners, our local Consumer Product Safety Commissions, the Attorneys General and our local health departments. So we don't—have not found any cases where the Attorneys General have gotten out in front of enforcement ahead of the CPSC and we are encouraging them to let us get our rulemaking finished and work through a lot of these issues administratively so we don't encourage them to bring enforcement injunctions because under the law that is what the Attorneys General can do. They can see injunctive relief.

Mr. SARBANES. So I assume that your ongoing conversation collaboration with them is to sort of cultivate this commonsense approach at all levels?

Ms. TENENBAUM. We are working with them and we certainly want everyone to have a commonsense approach. We hope no one gets out in front of us before we get all the rules in place which we hope will give relief to so many of these industries you are hearing from now. That is our goal to protect the safety of children, to keep intact the integrity of the statute and to work out the best way we can these issues that you are hearing from industry.

Mr. SARBANES. Thank you.

Mr. RUSH. The Chair now recognizes Mr. Stupak for 2 minutes for the purposes of questioning the Chairman.

Mr. STUPAK. Thank you, Mr. Chairman, and I was down in another hearing in telecommunications so that is why I was not here but I am very interested.

Congratulations on your appointment. I look forward to working with you especially in my role as Chairman of Oversight and Investigations.

Let me ask you about the Consumer Product Safety Improvement Act of 2008, and in my Northern Michigan district, ATVs and motorcycles are a way of life for many of us and it is very important to our outdoor tourism and our economy. In the Consumer Product Safety Improvement Act of 2008, purposefully included a provision to regulate youth ATVs and motorcycles, however it was an unintended consequence of the CPSIA that the equipment is also subject to provisions regulating the amount of lead contained in motorcycle and ATV parts. On April 3, 2009, the CPSC voted to delay enforcement of a lead-ban on youth ATV and motorcycles for one year. It was not the intent of Congress to regulate lead content in youth ATV or motorcycles.

So my question would be does the Commission have reports of injury or death caused by lead poisonings, I mean by the use of youth ATVs or motorcycles?

Ms. TENENBAUM. We have over 900 deaths per year from ATVs so the industry has told me.

Mr. STUPAK. Correct, but I mean from lead.

Ms. TENENBAUM. No.

Mr. STUPAK. Nothing from lead.

Ms. TENENBAUM. I don't have any data on that.

Mr. STUPAK. OK, is the Commission testing the youth ATV or motorcycles to determine possible exposure to lead?

Ms. TENENBAUM. We have just met with the ATV industry. The leaders of the industry came over and met with me last week and what they have reported to us is that they could make any lead that would be exposed to a rider inaccessible. They feel like they could make the handlebars inaccessible from lead by putting covers on them.

Mr. STUPAK. Sure.

Ms. TENENBAUM. And handbrakes and also the seat would not contain lead so they have—the stay helped them come up with this and so that would—they are getting back with us to show us how they can do that, and then the other parts of the ATV might be considered inaccessible depending on what technology they can provide to make the tire stem, the brass in it inaccessible, the battery cables inaccessible.

Mr. STUPAK. Well, I understand all this inaccessible.

Ms. TENENBAUM. So based on inaccessibility, that really would solve the issue, we think. We are working with them to clear that up so that they won't have to.

Mr. STUPAK. Well, I am glad you are working with them but if we have no death or injuries from lead exposure, why do we have to go through all these gyrations? Isn't it your responsibility to make sure that the law is properly implemented especially since the intent of Congress was not to ban these vehicles?

Ms. TENENBAUM. We have had plenty of cases of deaths to children from lead exposure and hand-to-mouth.

Mr. STUPAK. But from ATVs and motorcycles?

Ms. TENENBAUM. Well, a child could ingest lead and that is what the statute requires is any lead can't be.

Mr. STUPAK. Right, yes, I agree but with any law there is a practical application, correct?

Ms. TENENBAUM. No question about it and that is why the industry is coming back to us with practical solutions and we think this will take care of any problem they have and they won't have to be regulated.

Mr. STUPAK. All right, let me ask you about this one. This is a recent GAO report, August, 2009, concluded that the CPSC's presence at U.S. ports is limited and in order to identify potentially unsafe products like drugs, inferior steel from China, you must work closely with U.S. Customs and Border Patrol Protection. The report also found that CPSC's activities at U.S. ports could be strengthened by better targeting incoming shipments for inspection and by improving CPSC coordination with the Customs and Border Patrol. As the Chairman of Oversight and Investigations I have spent a lot of years on this especially drugs coming in from other countries, not properly marked, handled properly and we know that FDA's efforts are lacking and place American lives at risk but this GAO re-

port concluded that the FDA has more staff, has more surveillance technology, has more data on incoming shipments in our ports then CPSC who also has the responsibility so that was not a good news report by the GAO. So are you developing any plan to coordinate your port surveillance with other agencies to improve CPSC surveillance at our ports?

Ms. TENENBAUM. We are and I reviewed the report and agree with those findings and will be getting back with Congress in October with our formal response to the report but starting October 1 as a result of that report, CPSC will have access to the Customs Import Safety Center which is called Commercial Targeting and Analysis Center. We will be able to place one full-time employee at that Center to get information that we need in surveying the imports coming into the country.

Mr. STUPAK. OK, currently Custom and Border Patrol doesn't have any authority to deny shipments at a port whether it is steel or whether it is drugs. That is, if a substandard shipment comes into the United States they may flag it but they can't block its entrance into the United States. What does CPSC intend to do when it finds a substandard or hazardous product at a port—right now we just stack them up in warehouses. Do you have any other ideas?

Ms. TENENBAUM. We destroy them. We destroy the product. We have the authority to destroy it and Customs has the authority to flag it. They stopped several products from coming in recently so here is what if you look at our—we have nine people in 300 ports and we also have field staff, 100 field staff but we have nine people at the ports. We—this is a bigger area then just what the GAO reports because the FDA—you are required to send a manifest to the FDA 30 days ahead of time.

Mr. STUPAK. Correct.

Ms. TENENBAUM. We are only required to receive the third-party testing results 24 hours ahead of time under the CPSIA but this would be something that we need to have information earlier. We need through this manifest, this Commercial Targeting Analysis System, those are the manifests and we with the proper technology which we are submitting to Congress in our new technology plan can look and mine this data so we will know what is coming into the port and then if we find products that don't conform under the statute, the manufacturer or importer is required to take those products and remove them from the United States. If they don't have the funds and they have to post a bond, if they don't have the funds, we can destroy them. A lot of times we don't have the amount of funds it requires to destroy them and we might need to start increasing the bond to cover the cost of destroying the product but that is what we do with them.

Mr. STUPAK. OK, so this is new authority underneath the 2008 law then?

Ms. TENENBAUM. No, we have always had the authority to stop—well, no, this is new authority because the third-party laboratories certificate is new under the CPSIA.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. RUSH. This concludes the questioning of the witness and the Chair wants to recognize Mr. Radanovich who has a unanimous consent request.

Mr. RADANOVICH. Thank you, Mr. Chairman. I do have another unanimous consent request from one other member however I would just like to make it a blanket unanimous consent request that if other members wish to submit statements they be allowed to do so.

Mr. RUSH. All right, well, for the record, the record will remain open for two weeks and members may submit questions to the witness or any other documentation that they want to submit to the record. They bave two weeks from today's date in order to submit those questions. The record will remain open for two weeks.

Ms. TENENBAUM. Thank you.

Mr. RUSH. Thank you so much, Madam Chairman, and we look forward to working closely with you as we move forward protecting America's children and families. I want to thank you so very much for your participation.

Ms. TENENBAUM. Thank you. I appreciate the opportunity to meet with all of you and I hope to in the next few weeks meet with many of you individually for your personal questions.

Mr. RUSH. Thank you. Thank you so very much.

The committee is now adjourned.

[Whereupon, at 1:00 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection
Hearing on "The Consumer Product Safety Commission: Current Issues and a Vision for the Future"
September 10, 2009

Mr. Chairman, thank you for holding this hearing, and I would like to welcome the new Consumer Product Safety Commission Chairwoman Tenenbaum before our Subcommittee for the first time.

You came to the Commission at one of the most critical points in hits history as you implement the Consumer Product Safety Improvement Act of 2008 – I was an original cosponsor of that legislation, authored by Chairman Rush.

For too long we watched as the budget and staff continued to shrink at the CPSC, and no action was taken to strengthen the Commission.

The Consumer Product Safety Council holds one of the most important responsibilities in our government – ensuring the products children and families use everyday are safe.

Like many of my constituents, and Colleagues here in Congress, I have four grandchildren and knowing their safety could be compromised by the lack of authority and funding for the Consumer Product Safety Commission, prompted Congress to act, and in a bipartisan manner. The Consumer Product Safety Improvement Act conference report passed Congress by a vote of 424-1.

Unfortunately, there have been many difficulties and delays in implementing the Act – while there was not a significant outcry from our district, we did hear from a lot of small, and second-hand retailers at the beginning of the year that had serious concerns about testing requirements for children's toys due to lack of guidance from the CPSC.

The stay on enforcement of these provisions, while I believe was necessary due to lack of guidance by the Commission, was troubling nonetheless because it gave the public no more confidence that the Commission was able to enforce consumer protections.

Since then however, I am pleased at the progress Chairwoman Tenenbaum has made in her time at the Commission in issuing 12 rules and policy guidance documents – these actions are a significant step in the right direction for the Commission and in implementing the CPSIA.

Mr. Chairman, thank you again for holding this important hearing to hear from Chairwoman Tenenbaum her plans and direction for the agency.

I'd like to welcome the Chairwoman and I look forward to your testimony on the Commission's current and future work and the direction you plan to take the agency.

Thank you and I yield back my time.

Statement of the Honorable Cliff Stearns
CTCP Subcommittee Hearing – September 10, 2009
"CPSC Oversight: Current Issues and a Vision for the Future"
321 words

Thank you, Mr. Chairman.

Thank you for holding this important hearing. I would like to begin by welcoming our distinguished witness – Chairman Inez Tenenbaum. I look forward to working with you in your capacity as Chairman of the Consumer Product Safety Commission (CPSC).

We are here today to discuss the current issues the CPSC is facing, and in my mind the biggest issue and highest priority for the Commission is the ongoing implementation of the Consumer Product Safety Improvement Act (CPSIA) as passed by Congress in August of 2008. I, along with all of my colleagues on this committee, are steadfastly committed to ensuring the products and toys our children use are safe – nothing is more important than the wellbeing of our children.

Unfortunately, however, the reality of implementing the CPSIA has proven difficult and is wreaking economic havoc and confusion amongst a broad spectrum of industries and small businesses. This is particularly worrisome given the current financial crisis and severe economic strains that American small businesses and families are up against.

Since the time this law came into effect, I have heard directly from small business owners, charity organizations, and even public libraries in my district - all of who are suffering at the hands of the CPSIA, which is a well-intentioned but unflexible law.

I am therefore supportive of simple legislative fixes to the CPSIA, such as H.R. 1815, of which I am an original cosponsor, that can bring relief to small businesses and industries without the risk of endangering or compromising the safety of our children.

I look forward to working with my colleagues and Chairman Tenenbaum on improving the safety of the products our children use, but I believe we also should work together on achieving a commonsense legislative fix that will untie the hands of the CPSC so that the Commission can continue to be an effective and robust agency in all areas of consumer protection.

STATEMENT OF
CONGRESSMAN MICHAEL C. BURGESS, M.D.

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION
COMMITTEE ON ENERGY AND COMMERCE

SEPTEMBER 10, 2009 HEARING
""Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future"

Thank you Chairman Rush and to the fellow Members of this Subcommittee. As an alumnus of this subcommittee, I know and appreciate the critical work you are undertaking, and I appreciate this opportunity to talk about an issue which remains extremely important to me.

But first, I would like to congratulate you Ms. Tennebaum on your confirmation as the Chairman of the CPSC. I have watched all 101 minutes of your Senate confirmation hearing and, having also read several of your recent speeches, I think you appreciate the challenge of helming a small agency with a monumental task

And let's be frank. It is the flaws with the CPSIA we should be discussing because that is what the CPSC is drinking from the fire-hose to implement. That hearing was noticed last December when I was still on this subcommittee but got cancelled with no new hearing date set. Now, nine months and countless problems later, here we are, allegedly, discussing oversight issues at the CPSC when everyone in this room knows its all about the CPSIA.

Undoubtedly, Congress has given the CPSC more then it handle. In the 110th, we gave the CPSC, an agency with a 70 million dollar budget in FY'09, at least two major bills. The CPSIA is the focus of so many Members, as it rightly should, but we also

handed you the Virginia Graeme Baker Pool and Spa Safety Act, no small task in-and-of-itself.

So Congress is partly to blame.

But I am concerned with hearing how you will implement the CPSIA.

In September of 2008, the CPSC General Counsel listed 42 required actions pursuant to the CPSIA. In the ensuing twelve months, we've gotten dribbles-and-drabs of action, but nothing in reliable streams. We got a stay in enforcement in testing and labels as well as a stay in enforcement for ATVs. Last month, we have a final rule as it relates to materials which have no business being tested for lead like gemstone and wooden jewelry. We also finally got some recognition from the CPSC about whether books should be exempt from lead requirements, ***but the fact that we even had to have a conversation about a piece of legislation which was aimed at prevent lead poisoning in toys was expansively interpreted to include library books is ridiculous.***

These are some of the questions which remain unanswered and what I want to know is whether all these problems in implementation are the fault of the CPSC or the Congress. And if it's not the fault of the CPSC, then how can Congress fix it. Did we poorly draft the bill? What of the 42 required actions in the CPSIA should not occur?

For instance, last month, the CPSIA statutorily mandated the lead standard be dropped from 0.06 percent to 0.009 percent yet we have delayed testing for meeting the higher lead standard – though we have not delayed culpability. How can this make sense? Does it make sense to you?

And you stated in your Singapore speech last month that there are only a mere 170 laboratories which can test all these products covered by the CPSIA – foreign and domestic – when will the testing meet the supply chain?

This bill remains for me the standard as to why we should not rush large, comprehensive legislation through Congress without adequate vetting, testing, input from expert and thorough analysis. This bill has done more damage then good, causing confusion to parents whose sole goal is to protect their children and seriously harming businesses like the ATV industry which will lose more then a billion dollars as a direct result of this bill.

We must fix this problem and we must learn from this problem.

Thank you.

Chairman Rush, I want to thank you for calling this hearing today regarding challenges facing the Consumer Product Safety Commission with implementing the Consumer Product Safety Improvement Act (CPSIA). I would also like to take the time to welcome our distinguished guest, the newly confirmed Chair of the CPSC, Ms. Inez Tenenbaum.

Mr. Chairman, in 2007, this Subcommittee – along with parents throughout the country – was up in

arms over the safety of toys and products for children containing lead that were coming in to this country – and rightfully so. In 2008 alone, an estimated 563 products were recalled, mostly on account of lead poisoning hazards, especially in children's toys.

To respond to this outcry, Congress overwhelmingly passed CPSIA last year with the intention of improving the safety of the products that get into children's hands. While I support the intent of CPSIA, I – along with close to 600

constituents who have called or written me on this legislation – have strong concerns with the unintended consequences that have arisen due to this law.

Mr. Chairman, the first of these has to do with provisions in CPSIA that have actually made all-terrain vehicles (ATV's) less safe for children to operate. Some parts of youth ATV's unavoidably contain small quantities of lead in excess of the new limits under CPSIA. As a result, youth ATV's are being removed from showrooms, leaving parents

potentially buying bigger, adult ATV's for their children that could contain a much more hazardous lead content than the small ATV's.

Furthermore, I am concerned that CPSIA may also unintentionally create an unfair competitive advantage for larger companies since they can better shoulder the added costs of further testing their products. I fear that this law puts an unneeded burden on small toy-makers that will inevitably cause them to close their doors, and cost us more jobs when we can ill afford to do so.

As a father, a grandfather, a physician, and a consumer, I recognize the important need and responsibility to safeguard the products that our children play with and enjoy. We all share the common goal of ensuring the safety of our children. As we move forward, I hope that we can have a future hearing on this issue so that we may also hear from industry stakeholders.

I look forward to the testimony of the Chairwoman, and I yield back the balance of my time.

Consumers Union * Consumer Federation of America * Kids in Danger * Public Citizen * U.S. PIRG

September 9, 2009

Rep. Bobby Rush, Chairman
Committee on Energy & Commerce
Subcommittee on Commerce, Trade,
and Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

Rep. George Radanovich, Ranking Member
Committee on Energy & Commerce
Subcommittee on Commerce, Trade,
and Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Rush and Ranking Member Radanovich:

As you know, in 2008 Congress overwhelmingly passed, and former President Bush signed, a groundbreaking law: the Consumer Product Safety Improvement Act (CPSIA). This legislation was crafted to address the tens of millions of unsafe products that had infiltrated the marketplace – especially children's products – and to breathe new life into the beleaguered Consumer Product Safety Commission (CPSC). Faced with an unprecedented number of children's product recalls, it was clear that there were gaping holes in our country's safety net, and that industry was doing a poor job of policing itself. Now that the CPSIA has equipped the CPSC with the authority it needs, the agency should be given the opportunity to fully execute the law.

With strong bipartisan support from lawmakers, the CPSIA was designed to make consumer products safer by requiring that toys and infant products be tested before they are sold, and by effectively banning the use of lead and phthalates in children's products. The law also paves the way for the first comprehensive publicly-accessible database of consumer complaints about unsafe products. It authorizes badly-needed funding so that CPSC has the resources it needs to protect the public, increases the level of civil penalties that the CPSC can assess against violators of the law, and protects whistleblowers who report product safety defects.

Since the law was enacted, the CPSIA has been criticized by some members of industry, particularly about the law's impact on small businesses. The truth is that the law includes language empowering the CPSC to exempt certain materials from the testing and certification requirements, and to relieve those manufacturers of products that are in no danger of violating the new standards.

In fact, the CPSC has already begun to apply these exclusions. Since the law's enactment, the CPSC has exempted from regulation the following children's products: those made from wool, cotton, yarn, dyed or undyed textiles (cotton, wool, hemp, nylon, etc.), including children's fabric products, such as baby blankets, and non-metallic thread and trim; certain educational toys such as chemistry sets; and children's books printed after 1985 that are conventionally printed and intended to be read, as opposed to used for play. The CPSC has also exempted from the CPSIA's lead testing requirements components parts that cannot be accessed by a child, and components of electronic devices intended for children. In addition, the CPSC issued a stay of enforcement of its lead and phthalates testing rules for an entire year in order to give companies

more time to come up to speed on the new rules, and it has created materials to guide small businesses with compliance with the law. **The focus should be on allowing the agency to continue to apply the exclusions already permitted under the law in a common sense way that doesn't jeopardize public health or safety.**

We are encouraged by recent developments at CPSC. Inez Tenenbaum has been installed as the head of the agency, and two new Commissioners have begun to work for a safer marketplace. Staffing levels have increased to 460 full time employees, and the Commission continues to move forward with implementation of the new law in accordance with its defined schedule. The industry had its chance to police itself to ensure the safety of children's products with a disastrous and sometimes deadly result. Now the CPSC must be allowed to lead the way.

Sincerely,

Ami Gadhia
Policy Counsel
Consumers Union

Rachel Weintraub
Director, Product Safety and Senior Counsel
Consumer Federation of America

Nancy Cowles
Executive Director
Kids in Danger

Christine Hines
Consumer and Civil Justice Counsel
Public Citizen

Elizabeth Hitchcock
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U.S. Public Interest Research Group

Consumers Union * Consumer Federation of America * Union of Concerned Scientists * Kids in Danger * U.S. Public Interest Research Group * Public Citizen

For Immediate Release:
September 9, 2009

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Consumer, Scientific and Public Health Groups Support CPSC Efforts to Implement New Product Safety Law and Protect Consumers from Unsafe Products

Groups Urge House Subcommittee to Highlight These Efforts

Inez Tenenbaum, the new chairman of the Consumer Product Safety Commission, is the invited witness for a hearing, entitled "Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future." to be held on Thursday, September 10, 2009, by the Subcommittee on Commerce, Trade, and Consumer Protection of the U.S. House of Representatives Energy and Commerce Committee.

As Ms. Tenenbaum prepares to testify before Congress for the first time since her confirmation, our coalition of consumer, scientific and public health groups is encouraged by the significant steps taken over the last year to improve the safety of consumer products, and we now urge the subcommittee to focus on the critical issues that will further advance the agency's mission to safeguard consumer products.

First, it is important to highlight the risks to consumers in the global marketplace before passage of the Consumer Product Safety Improvement Act (CPSIA): too many dangerous products were on store shelves, some seriously harming, and even killing, their customers; the CPSC had neither the funds nor the regulatory authority to effectively solve these problems; and there were gaping holes in existing laws that needed to be closed to protect consumers. The CPSIA was passed almost unanimously in Congress to solve the problems plaguing the marketplace.

Second, we look forward to a dialogue about how the CPSIA and CPSC's efforts are restoring consumer confidence in the marketplace. Consumers lost confidence in our product safety net

because of the many recalls of children's products and the numerous deaths and injuries posed by those products. When fully implemented, the CPSIA will restore consumer confidence by improving product safety, by requiring that they be tested for safety before they are sold -- an action that most consumers assumed was already occurring. In addition, the CPSIA turned voluntary standards for toys and other juvenile products into mandatory requirements which will help to ensure that those products meet safety standards.

Finally, we look forward to hearing how the Commission is implementing the new law including the status of the many regulations that the agency is promulgating. We hope the Chair will share her vision for the future of product safety, including details about her effective and much needed core priorities establishing transparency, enforcement and education and advocacy as the agency's primary goals.

We look forward to a productive dialogue about how the CPSC will continue to fulfill its mission and protect consumers from the hazards posed by unsafe products.

Consumers Union
Consumer Federation of America * Kids in Danger
Public Citizen * U.S. PIRG

Myths and Facts on CPSIA Implementation

In August 2008, the Consumer Product Safety Improvement Act was passed with overwhelming bipartisan support in Congress, signed by President Bush and enthusiastically backed by consumers, public interest organizations and industry representatives. In a publicly released statement, the Toy Industry Association (TIA) applauded the president's signing of the bill. Its president Carter Keithley said at the time: "With the health and safety of children our primary concern, the toy industry supports the creation of a uniform national standard for product safety and testing, upon which consumers across the nation can rely."

As TIA's Keithley stated, the new law added safety and testing requirements for consumer products, and children's products in particular, including the gradual elimination of lead and a ban of phthalates in toys and children's articles.

Myth: CPSIA deadlines were unrealistic and too short for businesses to comply.

Fact: CPSIA has built-in time for compliance and CPSC has repeatedly stayed enforcement of key provisions.

The law granted a six-month period for industry to ready their goods in compliance with the new ban on toxic chemicals in children's products. Compliance with the new lead standards and phthalates ban would begin on February 10, 2009. On the day President Bush signed the law, the Toy Industry Association said in a statement "Toy manufacmrers and major retailers are already moving to conform to the legislation...."

Many other provisions, including tracking labels, lower lead limits and more didn't go into effect until a year after the bill was signed.

Myth: CPSIA provisions don't keep children safe, they simply make it harder to do business.

Fact: Implementation of CPSIA has reduced lead in children's products; removed dangerous phthalates from many toddler toys and ensured the children's products, including cribs, strollers and high chairs are tested for safety before they are sold.

Myth: Lead in toys isn't a problem anyway – the amount is so small it won't really hurt children.

Fact: According to the American Academy of Pediatrics, there is no safe level of lead exposure.

"Lead is potent neurotoxin that causes permanent, irreversible brain damage. Children and their developing brains are at special risks for the harm caused by lead, and those effects often have repercussions throughout the lifespan. There is no known "safe" level of lead for children. No study has determined a blood lead level that does not impair child cognition. Since any

measurable lead level causes lasting harm, prevention of exposure is the only treatment. Lead exposure is an important, unnecessary, and preventable poisoning."

Lead poisoning is also cumulative, so the amount from a toy or lunchbox will add to lead the child has been exposed to in the environment, increasing the negative effects.

Myth: CPSIA has to be changed through additional legislation to address business concerns about expensive testing and exemptions of certain products.

Fact: CPSIA contains within its language the flexibility CPSC needs to address concerns and exempt products that don't pose a risk to children.

Business concerns that emerged due to the lack of CPSC guidance have developed into a full-blown demand for major changes to the law. However, the CPSIA does not need to be changed to address these concerns. Congress has included language in the CPSIA that already empowers the agency to provide exclusions for certain materials. The CPSC has the power **right now** to exempt certain materials from testing and certification requirements, to relieve those manufacturers who are in no danger of violating the new standards.

Contact for more information:

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Nancy Cowles, Kids In Danger, 312.595.0649

Christine Hines, Public Citizen, 202.454.5135

Elizabeth Hitchcock, U.S. PIRG, 202.546.9707

AMEND the CPSIA

The Alliance for Children's Product Safety
2000 K Street, N.W., Suite 500
Washington, DC 20006

September 3, 2009

The Honorable Henry Waxman
Chairman

The Honorable Joe Barton
Ranking Member

The Honorable Bobby Rush
Subcommittee Chairman

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. Our family business makes educational products for schools and has an exemplary 25-year safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

The severe penalties under the law are not scaring companies into compliance – they are shooing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products.

The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Richard Woldenberg,
Chairman
Learning Resources Inc.

CC: Rep. Joe Barton, Ranking Member, House Committee on Energy and Commerce

Coalition for Safe and Responsible ATV Use

2000 K Street, NW ◆ Suite 500 ◆ Washington, DC 20006

September 8, 2009

The Honorable Henry Waxman
Chairman

The Honorable Joe Barton
Ranking Member

The Honorable Bobby Rush
Subcommittee Chairman

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

We write on behalf of the all-terrain vehicle (ATV) industry in regard to the Committee's upcoming hearing on September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission, is due to testify regarding implementation of the Consumer Product Safety Improvement Act (CPSIA).

We applaud the Committee's interest in keeping abreast of the status of CPSIA implementation. However, we are disappointed that businesses such as ours, who have suffered the unintended consequences of the new law, have not been invited to testify before the Committee regarding its impact on our ability to conduct business.

The unintended consequences of the CPSIA on the ATV industry and consumers have been enormous. ATV riding is an outdoor recreation activity for the entire family. Yet due to the lead provisions contained in the CPSIA, since February 10, 2009 the law has effectively banned the sale of smaller, speed-limited ATVs designed specifically for children. In addition, many consumers who previously purchased such vehicles have been unable to get them serviced or repaired.

The CPSC's own studies show that almost 90% of youth injuries and fatalities occur on adult-sized ATVs, and the Commission recognized this fact when issuing a stay of enforcement in May 2009. The Commission stated that without the availability of youth models "children 12 and younger . . . would likely face a more serious and immediate risk of injury or death" than any theoretical risk from lead exposure.

Unfortunately, CPSC's stay of enforcement is not a permanent solution nor has it been effective in keeping youth sized ATVs on the market. Due to the uncertainties and potential risks of selling under the stay, many manufacturers and dealers are not selling Y-6+ or other youth model off-highway vehicles. In fact, at least half of the legacy manufacturers have stopped selling Y-6+ youth models for these reasons.

We appreciate your consideration of this matter and look forward to engaging in a substantive dialogue with the Committee about fixing the unintended consequences of the CPSIA and ensuring the safety of youth operators. It is now clear that amendment of the CPSIA's lead content provisions is necessary to keep properly sized, speed-limited vehicles available for children.

Sincerely,

Ed Krenik

Edward D. Krenik
Executive Director, Coalition for Safe and Responsible ATV Use

COALITION FOR SAFE AND AFFORDABLE CHILDRENSWEAR, INC.

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kidsfashions@gmail.com

September 8, 2009

The Honorable Henry Waxman
Chairman

The Honorable Joe Barton
Ranking Member

The Honorable Bobby Rush
Subcommittee Chairman

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I write in regard to the Committee's hearing scheduled for September 10, 2009. At this hearing, Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), will testify regarding implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am President of the Coalition for Safe and Affordable Childrenswear, a group of nearly 130 small children's clothing manufacturers in the New York area. Our member companies are all family owned businesses that have been making safe children's products for years. Many of our companies are being run by the second and in some cases the fourth generations of the company founders. Product safety has always been and will continue to be a priority for our companies.

We welcomed the CPSIA when it was passed, however its overly broad definition of children's products, unrealistic implementation timelines, and the lack of clear guidance from the CPSC has caused very considerable confusion in the marketplace. We are struggling to implement the numerous provisions of the CPSIA without the benefit of the required direction and clarifications by the CPSC. Because the CPSIA prohibits the CPSC from using risk assessment in enforcing the law, we remain obligated to conduct costly and time-consuming tests to repeatedly prove that our safe products conform to the lead standards. Put simply, these and other burdensome provisions of the CPSIA threaten our ability to remain in business and provide jobs and do nothing to improve product safety.

While we are pleased that the Committee is holding the September 9th hearing to learn more about the challenges involved in CPSIA implementation, we are disappointed that businesses such as ours will not be afforded the opportunity to testify before the Committee to discuss the unintended consequences of the Act.

We would welcome the opportunity to discuss this important issue with you and Members of the Committee. It is our view that the only way to resolve many of these issues is to amend the law to provide for a common sense, risk-based approach. As you know, there have been more than 10 bills introduced in Congress to amend the CPSIA. We strongly urge you to begin the legislative process and provide the appropriate relief.

We appreciate your consideration of this matter. We are available to discuss any of these issues with your staff.

Sincerely,

Steven Levy
President
Coalition for Safe and Affordable Childrenswear

ETA Cuisenaire

September 4, 2009

Dear Chairmen and Ranking Members:

This letter is in response to the Committee hearing set for Sept. 10, 2009, where the Hon. Inez Enenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

As the President of ETA/Cuisenaire, an educational publisher of hands-on learning materials and books, I am writing to express my extreme disappointment that none of the small businesses severely impacted by the new law have been included in the scheduled testimony before this Committee. This law has taken a devastating toll on small businesses like ours, and as such, the small business community has been aggressively calling for hearings since the passage of the CPSIA in order to make our concerns known. Now, when a hearing has finally been set, we are excluded. Why? Throughout its history, ETA/Cuisenaire has always worked hard to comply with safety laws and assure our products meet the highest standards. Now, the numerous, unyielding strict new rules of the CPSIA have caused major difficulties for us and our ability to continue to conduct business. The Consumer Product Safety Committee needs to hear our issues. This situation cannot be addressed in a vacuum. The small businesses who are out in the trenches day-in and day-out, trying to do the best they can, while producing the highest-quality products and providing a livelihood for dedicated employees, are the ones whose voices need to be heard. Especially today, when our economy is already facing serious deficits, roadblocks like the CPSIA do not need to be thrown into the paths of dedicated small businesses like ours.

The overly broad definition of "children's products" unfortunately includes many products that could not even possibly harm children from lead or phthalates. The CPSIA's rules are so strict that they even prohibit risk assessment, with no flexibility to exercise good, sound judgment. This has resulted in unrealistic, impractical regulations. And, equally unfortunate, the exemption process under this new law is restrictive and prohibitive.

The severe penalties under the law will only lead to massive lay-offs and to small companies closing down and leaving the market, in spite of years of excellent service and products that the marketplace sorely needs. How does this equal compliance? The deck is clearly stacked against us, while the new law offers rewards to large companies who can afford to test their own products.

It is imperative that the perspective of small businesses be heard so that a true understanding of the implications of the CPSIA be known and can be addressed accordingly.

I appreciate your consideration and look forward to future open hearings where all sides of the table can present their issues.

Sincerely,

Dennis K. Goldman

Dennis K. Goldman
President

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Classroom Products CPW Warehouse™

September 4, 2009

Dear Chairmen and Ranking Members:

As the President of CPW, a supplier of educational and classroom materials, I am writing to express my displeasure and disappointment that none of the small businesses severely impacted by the new Consumer Product Safety Improvement Act (CPSIA) have been included to voice their concerns in the Committee hearing set for Sept. 10, 2009, where the Hon. Inez Enenbaum, Chairman of the U.S. Consumer Product Safety Commission is scheduled to testify.

The small business community has been aggressively calling for hearings since the passage of the CPSIA in order to make our concerns known. Small businesses like ours have been severely impacted by the punitive effects of this new law. Our company has consistently been extremely conscientious about assuring we always comply with safety laws and assure our products meet the highest standards. Now, the numerous, unyielding strict new rules of the CPSIA have caused major difficulties for us and our ability to continue to conduct business. CPW is dedicated to doing the best that it can for its customers every day. The Consumer Product Safety Committee needs to hear the issues of real companies.

How can a company operate when the term "children's products" could mean just about anything based on how it is used? The CPSIA's rules are unrealistic. The exemption process is prohibitive, the rules are inflexible to any logical risk assessment, and the regulations make going out of business the most logical choice.

The landscape, a short time from now, is not difficult to envision. The severe penalties under the law will leave only large companies that were all able to survive the huge cost of testing already safe products and the small companies will simply collapse; leaving a gaping hole of products that the marketplace needs.

We need our chance to come before the Commission and let them hear how CPSIA is really impacting the marketplace. It is imperative that the perspective of small businesses be heard so that a true understanding of its implications be known and can be addressed accordingly. I strongly believe that the perspective of businesses like ours is essential to a complete picture of the real issues CPSIA brings to today's marketplace.

Thank you for your consideration of this important matter.

Sincerely,

William A. Chiasson
President - CPW

Classroom Products Warehouse™
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Tel: 800-271-8305 • Fax: 800-280-6110 • www.shopcpw.com

chapter one organics

September 4, 2009

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

The Honorable Henry Waxman, Chairman
The Honorable Joe Barton, Ranking Member
The Honorable Bobby Rush, Subcommittee Chairman
The Honorable George Radanovich, Subcommittee Ranking Member

RE: House Subcommittee on Commerce, Trade, and Consumer Protection Hearing – Scheduled for Thursday, September 10, 2009

Dear Chairmen and Ranking Members:

I am writing in regard to the subcommittee CPSIA hearing scheduled for Sept 10, 2009. I have read that Chairman Tenenbaum was the one person invited to testify. While I am happy to hear that the subcommittee is finally holding a hearing, Ms. Tenenbaum is not representative of businesses or consumers. Inviting one person to testify at a hearing that impacts the livelihoods of so many Americans is the opposite of an open and transparent government that the current administration has claimed they would provide.

While the CPSC has attempted to make common sense interpretations without an amendment they are still unable to apply risk analysis. Many but not all of the materials we use are exempted because they are organic yet I still have many unanswered questions regarding CPSIA and as a result, this slows the growth of the business and the people we employ. I understand the CPSC is working on handbooks to help businesses. "Handbook" sounds nice for a press release and justification for "work" at the CPSC but handbooks are not going to help our businesses, we need real solutions in the real world of making real and safe products.

The recent allowance of Mattel to do their own testing, not requiring them to use 3rd party labs is incomprehensible. After reviewing the history of the recalls – it is my understanding that they were the primary source of the problem and violated existing laws due to poor supply chain management. I don't understand how it is justified that Mattel can test their own products while the rest of us are forced to pay a premium and wait in a certified lab when there are viable alternatives to 3rd party certified labs and applying risk analysis.

It would be greatly appreciated if you could put the barriers down regarding the CPSIA, start working with our businesses, and allow us to testify.

Sincerely,

Jennifer Murphy
President

Educational Insights®

Engage Minds, Inspire Play.™

September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

As someone who runs a small business impacted by this new law I am disappointed that no representatives from the business community (particularly small businesses) have been invited to testify before the Committee. The business community has raised many legitimate and serious objections to this law and its implementation. To exclude our experiences over the past 13 months and our point of view is wrong.

The provisions of the CPSIA have severely impacted our small business in spite of the fact that prior to it we had a compliant safety record for nearly 50 years. It is important that the Committee hear the issues created by this law from a business perspective of real companies.

I strongly urge the Committee to reconsider its decision and allow the perspective of small businesses to be heard. Thank you for your consideration of this important matter.

Sincerely,

Lisa Quili
General Manager
lquili@educationalinsights.com

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Gardena, CA 90248
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September 4th, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I apologize for not writing a longer letter, but as the owner of the biggest little toy store in Lake County, California, my wife and I are kept very busy, so I'm going to keep this brief. The new child protection laws have been a nightmare for our business. It has left us in a state of constant panic that we could be sued and have to declare hankruptcy. We, like almost everyone in the toy industry, take child safety very seriously, but to change the laws in such a way as to make almost all of my inventory unsellable is seriously flawed. And, when you have hearings into the implementation of the laws to not invite those most impacted is seriously wrong. If you are our elected representatives, please take the time to listen to our opinion and not just those you have appointed. One of the things I have learned is that most employees will only tell you what you want to hear. Please open up this hearing to representatives from small business and manufacturing.

Sincerely,

Jason Curtis

Owner, Funtopia

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The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. Our family business makes educational products for schools and has an exemplary 25-year safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have

issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

The severe penalties under the law are not scaring companies into compliance - they are shooing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products.

The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" cohort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely, George C Atamian

George C. Atamian

Transcience Corporation

Creators & Owners of Sea-Monkeys®

President Brand Management

& Business Development

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September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building, Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA). I believe that additional input from small businesses throughout this country not only deserve to be heard but MUST be heard for the committee to make sound judgments and decisions regarding the Consumer Products Safety Improvement Act of 2008. Some of the issues that are impacting my business are as follows:

1. The CPSC granted relief to companies to acquire Certificates of Conformity from the original deadline of 2/10/2009 too 2/10/2010 which was needed. But they did not grant relief on companies having to prove that the products they are selling are safe. If I'm a reseller and the manufacturers don't supply me a certificate of conformity on 2/10/2009 how do I know they are safe? The law is requiring me as a reseller to prove the item is safe or not sell it. This makes no sense whatsoever.

2. One of my manufacturers makes scales/balances that have been a staple of the education market for over fifty years. One of the accessories that are supplied with the balance is a weight set made from brass. Because brass contains lead as apart of the manufacturing process, this manufacturer has stopped shipping me product until an alternative weight set can be manufactured.
   That may take 4-6 months to complete the production cycle. In the first month I lost $54,000 in sales and have lost some customers because I could not ship what they were asking me to ship. They went somewhere else to get there product.
   The irony of this situation is that brass is becoming a taboo raw material in the toy industry because it contains lead in its makeup although it is not proven that any child has ever contracted any illness due to touching brass. Yet children drink water from brass plumbing fixtures every day of their lives.

3. For catalog sales, we must select products for new catalogs 6 to 8 months in advance to get the catalog to market on time. Any product that you advertise for sale and are no longer available due to testing not being done or a product that was dropped from manufacture due to the testing requirements being too costly to continue production, ends up being a hole in our catalog that is no longer producing sales. Wasted space in a catalog costs catalog sales company's money. That space can't be filled until the next catalog is created. In our case a year later. We lose sales of that catalog space for a whole year. Lost sales equates to lost jobs. This makes absolutely no sense in our current economy.

4. My company prides itself on the ability to serve its customers better than our competitors by offering competitive pricing, fast service and having the product the customer ordered ready to ship without backordering.
   Our backorder levels have increased by over $260,000 this year from last year due to manufacturers not being able to deliver and prove that their products meet or exceed the CPSIA test requirements. It's not that the product won't meet the requirements, it's that the testing labs are so backed up that they can't get the tests performed or that the increased cost of the testing added to the current cost of manufacturing and marketing the product, prices the product above what the consumer is willing to pay. When products leave the marketplace so do the jobs that the sale of the product supported.
   In any case my service levels are being disrupted and those customers are taking their business somewhere else. This is ruining the reputation of my company which we have worked for over 65 years to build.

5. Looking at just these few issues, adding the effect of them up is costing this country JOBS. In a time when the economy is already suffering, our knee-jerk reaction to a few highly publicized incidents that were corrected by the toy industry are now leading to changes that are causing the industry to fill our landfills with products that can't be sold and won't be recycled because the recycled materials would contain the same lead and phthalates that were in the original product.
   This is not a "green" initiative. I urge the Congress to re-think this law. Set deadlines that can be achieved by the toy industry when it re-implements and talk to ALL Segments of the toy industry to get input before making decisions.

6. When developing new products for children 12 years or younger, companies must now include into the R&D costs the new requirements for testing to prove the end product will meet the new safety standards for lead and phthalates. Not only must these companies pay for this testing in the initial development of the product, but each time companies outsource the manufacturing to another company the testing must be completed again. I bring this up not for just the initial added cost but for what it will actually do to limit open competition in the marketplace. Some companies will not bid these manufacturing runs, staying with their initial provider to avoid paying again for product testing. This limits open competition and encourages inflated costs.

I believe that everyone in the toy industry wants to sell safe products. I also believe that some standards are necessary and should be enforced to assure that we are all making products safely. But how you have implemented those standards has impacted the toy industry severely in the form of lost jobs, lost products that are safe but too expensive to produce with the new testing costs, have caused our landfills to be filled with products that were purchased before the law was enacted and because of the very vague definition of what is a toy, products that you did not intend to be part of this law have disappeared from fear that a child could somehow have access to it.

Sincerely,

Jack Marshall
Director of Purchasing
Nasco

Nasco International

WORLDWIDE SERVICE TO EDUCATION • HEALTH • AGRICULTURE • INDUSTRY
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W. Phil Niemeyer
President

September 4, 2009

The Honorable Henry Waxman, Chairman
The Honorable Bobby Rush, Subcommittee Chairman
House Energy & Commerce Committee, 2125 Rayburn House Office Bldg, Washington, DC 20515
The Honorable Joe Barton, Ranking Member
The Honorable George Radanovich, Subcommittee Ranking Member

House Energy & Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen & Ranking Members:

Since the Consumer Product Safety Act, there has been nothing but confusion and hardship for everyone involved. The law is overly broad and does little to really protect the consumer while creating an unreasonable burden on business.

I now understand that you are having a hearing, but only calling the Honorable Inez Tenenbaum to testify. You need to expand the list of people testifying. This is a very serious issue for everyone in this business and has the potential to put many companies out of business.

In our company, we face tremendous write-offs with merchandise that was perfectly legal to sell a year ago and now is not. There should be some grandfather clause for product manufactured before this new law. None of the product has lead in it, but the cost to test and now follow the manufacturing batch is more than the potential sales for many products. A year or even two years is not enough and as with many items, we might have considerably more in inventory.

Please expand the hearing so you are able to hear more sales of what you have created.

Sincerely,

NASCO

W. Phil Niemeyer
President

Fort Atkinson
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September 8, 2009

Dear Sir,

The CPSIA has caused us to spend many thousands of dollars in an effort to become compliant. In these economic times it is unfortunate that we could have spent the money making new products and creating many new jobs. We converted over forty different materials, spent over 1600 hours, bought new equipment to the tune of $35,000.00 and in the end children are no safer then they were before. The idea that children 12-5 need this level of protection is ridicules. At the age of 12 children can baby sit infants but they are covered by this law?

I believe when this law was written you had the best of intentions, but I do not believe you understood the ramifications. I do not want children to be exposed to anything harmful that we can control. No one in their right mind was that, but this law goes too far.

Best regards,

Dennis C. Van De Hey
Nasco Plastics Plant Manager

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September 8, 2009

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

It is disappointing that no small businesses have been invited to share their experiences in testimony before the Committee regarding the new law. The business community's call for hearings since the passage of the CPSIA appears to have been ignored. Our business makes and distributes educational products for schools, always with concern for the safety of our employees and the teachers and children that use them. The CPSIA requirements have had a devastating impact on our ability and the ability of our suppliers to conduct business. These issues need to be explored by the Committee and the best way to do that is to hear from the thousands of companies affected.

The severe penalties imposed by the law are driving companies and innovators out of the market at a time when we need creativity to shine, to create employment and provide teaching tools that will move our kids ahead in Science, Mathematics, the Arts, Social Development and Reading.

I strongly believe that the perspective of businesses is essential to understand the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Thomas B. Belzer
Director of Educational Sales

tbelzer@enasco.com

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9/8/09

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009, in which the Honorable Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. As a Sales and Marketing Director for a large direct mail catalog company in the school supply market, I wanted to share how Nasco and myself have been significantly impacted by CPSIA:

1) When Nasco sent out the first request for product safety information to our vendors in the fall of 2008, I personally received at least 100 phone calls and e-mails from vendors asking questions about the forms and information we needed. I spent at least 40 hours (the five days after the initial contact) responding to questions and concerns. Some vendors had no idea what CPSIA was or what their responsibility was relating to this new law. This process continues today.

2) I have spent countless hours attending meetings, trainings and researching issues related to CPSIA. This has prevented me from completing other important tasks that are critical for my position, such as visiting with customers, certain catalog initiatives, etc. This "distraction" probably cost us business in the long run.

3) I have spent countless hours dealing with the fallout of CPSIA. For our Early Learning catalog, we have replaced at least 100 items that were dropped by vendors due to CPSIA issues. This has affected our art department as well, with many hours setting up new part numbers, writing new copy, new photography, etc. I have also spent additional time contacting vendors after our February 2009 catalog meetings and asking them to complete and submit the safety paperwork.

4) Overall, I would describe the situation as a very challenging for myself, Nasco, our sister companies and vendors. It has been a very difficult time for everyone.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Scott L. Beyer
Director of Early Childhood Sales and Marketing
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September 8, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building, Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA). Many issues have arisen as unintentional repercussions of this act that need to be brought to light.

Competitive edge: it seems apparent that this Improvement Act was put in place to slow manufacturing in China (and elsewhere) under the guise of child protection. Consideration was not made to distributors in the United States to allow existing inventory (including raw materials) to be sold moving it from saleable product to landfill in a short period of time. This pushed businesses in the U.S. to look for alternative vendors and sell at a lower margin when possible or to simply cancel orders losing income and profitability.

Product selection: we select products for our catalogs six to eight months in advance. Because companies were scrambling to have products tested where possible or were discontinuing products we were not able to fill our catalogs with as much product as in the past. Our catalogs are produced once a year and this limited selection will cost us sales.

Science: where is the Science behind the decisions made for this Improvement Act? Lead intake from these products is miniscule compared to everyday exposures and the harmful effects of phthalates (if any) are really an unknown. This puts us in a situation causing thousands of hours of extra labor and lost sales for an unknown. This really isn't about children's safety.

Service: Nasco has prided itself on quality and service since 1941. We have over $260,000 in backorders due exclusively to lack of CPSIA documentation and have lost an immeasurable amount of sales due to discontinued products. Most products were discontinued not because lead or phthalate levels were high but because the cost of testing pushed companies to discontinue products.

Labeling: products now need to be labeled with a traceable date. Many products are too small for this and the added expense for other products creates unnecessary costs in the extremely rare chance of a recall.

Bottom line: we all want to sell products that are safe for everyone. A reasonable approach needs to be taken regarding the definition of "toy" vs a "teaching tool". Not only will school systems see a shortage of available teaching aids but due to the financial burden many companies face because of the expense of testing or of holding noncompliant inventory, businesses will fail, jobs will be lost, and tons of product will have to be destroyed creating an ecological nightmare. I appreciate your time in this matter and I hope you can understand the full impact of this "Improvement" Act as it now stands.

Stephen M. Richter
Executive Vice President
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September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building,
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law and our requests have drastically increased earlier this year when many unintended consequences became obvious for all to see. Our privately-owned business makes many educational products for schools and has an exemplary 25-year safety record because of our hard work to assure high quality and compliance with law. The innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. We are now forced to consider dropping many products in our line because of the direct consequences of the CPSIA. This is a very regrettable situation as no one else is producing these kinds of product that make a genuine positive impact in the schooling of our children and especially special need children. These issues must be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are endless. At its core, the CPSIA overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and

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unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive. The severe penalties under the law are not scaring companies into compliance – they are shooing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products.

The deck is stacked against small businesses under the CPSIA. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products. I have also seen that the CPSC has given itself an award for the outstanding work it has done in implementing the CPSC. How can that be possible in light of the overwhelming evidence to the contrary?

I passionately believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation.

Thank you for your consideration of this important matter.

Sincerely,

Etienne J. Veber
President/CEO
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eveber@learningresources.com

LEARNING RESOURCES®

September 8, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members,

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA). I am extremely disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. You are ignoring the business segment most adversely affected by this legislation. I have children at home, so I know the value of product safety, but I also feel that the laws that were in place previous to the CPSIA did an admirable job protecting my kids. The undue pressures you have put on many, many small businesses will not make the products we use any safer, it will only put financial strain on the these companies and the people that work there. I ask that you reconsider your position and allow small companies to represent themselves at the Sept. 10 hearing as they are the ones most devastated by this legislation. Thank you for your consideration of this important matter.

Sincerely, Eric J. Toriumi
Sr. Director – Marketing
etoriumi@learningresources.com

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September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Redanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:
I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am both a small business owner and a parent, of course I want to know that the products intended for their use are safe; however, I am disappointed that the consequences for small businesses that CPSIA presents have not been addressed. This oversight of policy will affect the economy and limit consumer's choices. Small business owners should be invited to share their experiences before the Committee.

My small family business makes science and education toys and activity kits. We work to assure high quality and compliance with law. However, the innumereble, onerous provisions of the CPSIA have had a devastating impact on our ability to con-

duct business. It is both expensive and confusing. We are concerned that we may be missing a crucial part of compliance and our customers worry that they don't understand their part in the convoluted chain of responsible and prosecutable parties. We deal with many small specialty stores who support small businesses like ours and contribute greatly to their communities in this era of "big box" dominance. We may soon need to cease operations, furthering the dominance of a few large manufacturers and limiting consumer choice. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The confusion doesn't seem to be limited to those trying to comply with the law. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations.

These unworkable regulations will have untold ripple effects through the economy and society. CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products! As a parent of young children, this suggestion baffles and angers me. I and many of my peers rely on resale not only for economic reasons, but to keep toys and baby items that are generally used for a limited window of time out of landfills. This suggestion undercuts both economic and environmental concerns of many people.

Small business has little chance to survive under this law. Ironically, we struggle to determine how to "ascertain" co-hort information on products and spend exorbitant amounts to test products, but the new law provides yet another advantage to large businesses: in-house testing. Again, both as a business owner and a consumer, this is outrageous! I strive to support small local businesses in all of my consumer life. I do not want to be left with only the options provided by big corporations—they do not support my values or provide me with the choices I want for myself and my children.

I enjoy operating my own business and am deeply concerned and saddened by the possibility that I may need to end this phase of my working life because a law that should be protecting my children is unintentionally only protecting big business. I strongly believe that the perspective of business people and consumers like me is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Peggy Tobias
Owner, Copernicus Toys
sales@copernicustoys.com

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September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing to you as a concerned Small Business owner and operator. In many respects, I feel that we are under appreciated, and ignored, by policy-makers in Washington. The Committee hearing set for September 10, 2009 illustrates this perfectly. The Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA) and that she is currently the only witness scheduled.

I find it hard to believe that no Small Businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the impact this new law has had on business. This law is doing damage to real people and real companies, every day. It is destroying livelihoods and creating administrative burdens for law-abiding companies with excellent safety records. These new costs prevent companies from investing in job-creating new products and new lines.

Why, I wonder to myself, will you not listen to Small Business on this? Why are we once again being shut out of the process?

As you no doubt know by now, the problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. That's just plain bad public policy. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

The deck is stacked against Small Business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to Large Businesses who seek to test their own products. Small Businesses are shutting down, and cutting products (i.e. jobs) while Large Business is permitted to test their own

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products? It is ironic that toy recalls by Large Business was partially the impetus behind this law being hastily passed in the first place and now they are allowed to test themselves.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. This law is a boomerang and it is, sooner or later, going to head straight back at your Committee. Take the time to hear us out and perhaps you can avoid some of the damage being done in the real World

Thank you for your consideration of this important matter.

Very truly yours,

James R. Woldenberg
President

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dressing the spirit of childhood

Sept. 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in response to the notice that there is a Committee hearing scheduled on Sept. 10, 2009, with only one witness on the docket to testify, Inez Tenenbaum. I am very angry that this hearing will not have any testimony from small businesses directly affected by the CPSIA law. I am very disappointed that not one voice will be heard from the thousands of small businesses who have already closed their doors and who will be forced to close if the Committee and the CPSC doesn't consider the real impact of CPSIA on small businesses. This is unacceptable

Our businesses community has been requesting hearings since this law was passed over a year ago to find these hearings scheduled, postponed, and cancelled over and over again. It is essential that the Committee hear the reality of this poorly written law on children's product industry from manufacturers, retailers, and resellers who are struggling to comply with the law but also have been requesting risk based assessments for children's products.

My store represents over 80 small businesses who will be forced to close their doors once the CPSIA stay is lifted in February and cannot afford to have their hand made products tested. We have already lost a handful of suppliers who cannot modify their business model to accept the costs and time involved with the tracking label provision of the law. This includes hand knit baby sweaters, felted wool hats, and other products made from the exempted product list. These perfectly safe products are now off the market and these small businesses are no longer able to legally sell their products simply due to confusion and lack of instruction for implementation of the regulations. In addition, the recent announcement that Mattel now has authority to regulate their own products and has received exemption from the stringent regulations of the law is beyond frustrating for many law abiding businesses.

I strongly feel the Committee needs to hear from voices beyond the representation of the CPSC and listen to the consumers, manufacturers, and resellers who can speak to how the implementation and reality of CPSIA has already closed businesses and will continue to devastate the US economy more than removing a few products off the shelf.

Sincerely,

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Get Ready, Inc.
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Lambertville, NJ 08530

September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I learned today that the Committee has set a hearing on the CPSIA for September 10, 2009, in which the only witness scheduled to testify is CPSC Chairman Tenenbaum.

Chairman Tenenbaum's testimony is certainly very important for you to hear. However, CPSIA's far reaching implications for the business community dictate that other testimony must also be heard.

Manufacturers, importers, retailers, distributors, and consumers (including schools, libraries, churches, etc.) of children's products are struggling to comply with this law while realizing little, if anything, in the way of improved

product safety. Among the affected groups, small business is arguably the most severely impacted.

Small businesses have a vital stake in ensuring that children's products are safe and appropriate, and also fill important niches in the market by providing innovative, educational and functional products for children which would not otherwise be available. Many of these products do not lend themselves to mass markets or mass production on a scale that is even remotely possible under the scenario imposed by CPSIA.

However well-intentioned the CPSIA act was when passed, the unintended consequences and problems implementing the act are, by now, well documented. Many issues with the law need to be addressed both for the sake of the small business community and also in the interest of children, who stand to lose access to products that meet their educational, physical and special needs.

Testimony of small business is essential to your hearing. I am writing to request that you invite small business testimony which has been offered to the committee.

Sincerely,

John Haug
General Manager
john@getreadykids.com

Heathrow Scientific® LLC

9/4/2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

It has been brought to my attention that a Committee hearing has been set for September 10, 2009 concerning the implementation of the Consumer Product Safety Improvement Act (CPSIA). It has also been brought to my attention that ONLY one witness, Hon. Inez Tenenbaum, will be called to discuss CPSIA.

I find it difficult to understand how the business communities impacted by this law will not be given the opportunity to share their concerns with this Committee.

The provisions of this law are far reaching and impact products incapable of harming children from lead or phthalates. In addition, passing of this law will give an unfair advantage to larger companies who have the means to absorb these excessive costs driven by the exemption procedures.

Without the testimony of small businesses impacted by this law, how does this committee expect to arrive at a fair decision? The spirit of this law is to protect individuals from things which can bring harm, however the law is now written in a way that impacts those things which bring no harm...how is this fair?

Without the perspective of small businesses you will never arrive at a complete picture of the problems caused by the CPSIA and its implementation. Without a complete picture you will never arrive at a fair and equitable decision. Please include small business representation in your committee hearings. Thank you for your consideration of this important matter.

Sincerely,

Jamie Devin
Marketing Manager
Jdevin@heatsci.com

September 4, 2009

House Energy and Commerce Committee
2322A Raybum House Office Building
Washington, DC 20515

The Honorable Henry Waxman Chairman	The Honorable Bobby Rush Subcommittee Chairman
The Honorable Joe Barton Ranking Member	The Honorable George Radanovich Subcommittee Ranking Member

Re: Format of the House Subcommittee on Commerce, Trade, and Consumer Protection Hearing, "Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future", scheduled for Thursday, September 10

Dear Chairmen and Ranking Members:

We are writing in regard to the subcommittee hearing set for September 10, 2009, the first Commerce Committee hearing on consumer product safety since the CPSIA was passed over a year ago. We are very disappointed to learn that the committee will not be taking this opportunity to hear from any small businesses affected by the CPSIA. Indeed, we have learned that CPSC Chair Tenenbaum will be the only person invited to testify.

While we have full faith in the abilities of Ms. Tenenbaum and believe she is working to apply common sense interpretations to the CPSIA, we do not believe that the she can represent the full scope of the CPSIA's impact on responsible American small businesses. Nor do we believe that the unintended consequences of the CPSIA can be solved through the CPSC's rulemaking. A technical correction is required, and we would like the opportunity to tell your committee why.

Our businesses have been burdened by a law designed to fix a problem created by irresponsible multi-national corporations such as Mattel. The small manufacturers, crafters, and retailers represented by our alliance have impeccable safety records, yet we are burdened by excessive compliance costs while Mattel has once again been trusted to police itself.

Now is the time for Congress to hear the voices of small businesses. Now is the time to show that laws can be written for the common good, not just for the interests of large, well-connected corporations such as Mattel. Now is the time to invite small businesses, including a representative of our alliance, to speak truth to Congress about how the CPSIA is devastating our businesses and our livelihoods.

As parents, consumers and small business owners, we all believe that children's products should be free of toxins and safe for our children. We are in business due to our sincere desire to put forth quality products. Unfortunately, the CPSIA has made this endeavor much more difficult than it should be.

Please, help us fix the CPSIA. Help us continue to provide unique clothes and playthings for America's children. Please, invite us to testify.

Respectfully,

The Handmade Toy Alliance

Contact information and a listing of all 382 business members of the Handmade Toy Alliance is available at http://www.handmadetoyalliance.org/members-of-the-handmade-toy-alliance

Sincerely,

The Handmade Toy Alliance
savehandmadetoys@gmail.com
www.handmadetoyalliance.org.

Board members:

Cecilia Leibovitz, Craftsbury Kids, VT
Jill Chuckas, Crafty Baby, CT
Jolie Fay, Skiping Hippos, OR
Rob Wilson, Challenge & Fun, MA
Kate Glynn, A Child's Garden, MA
Dan Marshall, Peapods Natural Toys, MN
Mary Newell, Terrapin Toys, OR
Heather Flottmann, Lilliputians, NY
John Greco, Greco Woodcrafting, NJ

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September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am highly disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. I am speaking on behalf of over 500 franchise business owners who own resale businesses – Once Upon A Child® and Play It Again Sports®.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC has no flexibility to exercise judgment and as a result, have issued highly impractical guidelines. The CPSC has stated that resale stores such as ours, as well as Goodwill, the Salvation Army, ARC, Church organizations, Garage sellers & consignment stores are not required to test products, but we are liable if those products with banned substances are sold. The CPSC has attempted to provide more detailed guidance, of which, informs resale stores not to sell items such a jeans that have zippers or snaps. They are simply advising resale stores to consider no longer doing business in children's products.

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Last year alone, our brands serviced over 7 million parents. These parents are thrilled that they have a value-oriented business to turn to in this turbulent economy, but are very confused as to what is safe for their children to play with – or even wear.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Susan Baustian
Director, Once Upon A Child

THE WINMARK FAMILY OF BRANDS - Music Go Round • Once Upon A Child • Plato's Closet • Play It Again Sports
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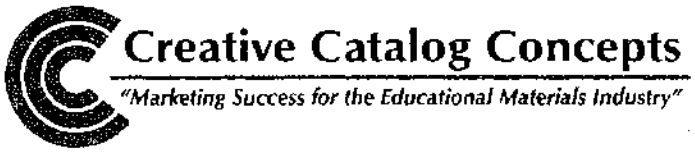

September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing about Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. It is impossible for small businesses to understand the regulations because they seem to change daily. In the last 10 months, CPSC has e-mailed me 103 messages on CPSIA regulations. The most recent message contains 6 updates in 18 pages. To describe CPSIA as overwhelming is a huge understatement. While the regulations become more fine tuned and complex, it is not obvious how many of the recommended procedures and tracking mechanisms will reduce injury or death to children. What is clear is that compliance is very expensive for small businesses.

In the School Supplies industry, we have provided safe products for children's classrooms for decades. Many of us are former teachers who started businesses to make a difference in the classroom. Child safety and development are paramount to us. It would be especially insightful for the Committee to hear from Rick Woldenberg from Learning Resources. Rick has been following CPSIA legislation for over a year and can clearly explain the unfair burdens the legislation places on small businesses. Please open the September 10, 2009 Committee meeting to all the stakeholders.

Sincerely,

James H. Rice

James H. Rice
CEO

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Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Honorable Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

Our family business makes educational products for schools and has an exemplary 10-year safety record because of our hard work to assure high quality and compliance with law. The provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain. I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

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The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Lana Sheets

Lana Sheets

Beacon Ridge, 20951 Baker Road, Gays Mills WI 54631

Dear Chairmen and Ranking Members: I am writing about the Committee hearing set for September 10, 2009.
The Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very confused about why we (small business owners) have not been allowed to express the damage being inflicted on us by this new law. It is unfathomable that we are not being allowed to present our side of this issue.

We have continually requested a venue to present the hardships that have been generated from the poorly thought out implementation of the CPSIA ruling. We have NOT been heard, nor addressed. In fact, it's been 11 months and this is the 1st hearing.
The effects of this law has caused severe financial problems in my small business. I have been forced to file personal bankruptcy because I can't afford the "testing" and lost a very large contract for our elementary science kits. These are expressly designed to be used with a parent present, yet there is no exemption for such items.

Your committee needs to hear the people being hurt by this law. My products have no lead and are not going to be eaten by a 3rd grader! You have been overly broad in your assesment of risks.
You can't scare people into compliance with the penalties. The result will be no market choice, because small businesses will stop marketing their products due to the high cost of testing.

Thank you for your attention to this,

Sincerely,
Teresa Wirtz,
Small Business Owner

September 4, 2009

"Dear Chairmen and Ranking Members:

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Julio Plutt, President

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September 4, 2009

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House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

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WALTHERS

September 4, 2009

The Honorable Henry Waxman
Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

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J. Philip Walthers

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President

JPW/rlz

Model Railroad Equipment Since 1932
Wm. K. Walthers, Inc. Mailing Address: P.O. Box 3039 Milwaukee, WI 53201-3039
Corporate Headquarters: 5601 W. Florist Ave. Milwaukee, WI 53218
414-527-0770 Fax: 414-527-4423 www.walthers.com

WALTHERS

September 4, 2009

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Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
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251 Snelling Avenue South
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September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

We are extremely disappointed to learn that the House Commerce Committee will not be inviting any small business representatives to testify at the upcoming hearing on consumer product safety set for September 10, 2009.

As the owners of a specialty toy and baby store, we are seeing many of our small suppliers exit the market, reduce their offerings, or raise their prices as a result of the CPSIA. We do not believe that the costs they are bearing have improved product safety, but we certainly believe that the CPSIA has bolstered the fortunes of large companies like Wal-Mart and Mattel.

It is time for you to listen to the small businesses who are being unnecessarily hurt by the CPSIA. Please invite small businesses to tell you their stories.

Thanks and best wishes,

Dan Marshall and Millie Adelsheim
Peapods, Inc.
251 Snelling Ave S
St. Paul, MN 55105

Learning Express

315 Route 206 #903
Hillsborough, NJ 08844
(908) 431-7869
And
3150 Route 22, #16
Branchburg, NJ 08876
(908) 725-7869

<date>

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Dear Chairmen and Ranking Members:

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I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. Our family business makes educational products for schools and has an exemplary 25-year safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

I own two struggling toy stores. In February, I requested the assistance of the CPSC, the Small Business Administration and my local representatives to help me even understand the letter or spirit of the law. Not only did the law require legal expertise, but expertise in organic chemistry, statistics and various other physical and chemical sciences. Even reading the CPSC's vague advice provided no meaningful help.

It still seems that to follow the law that a small store must undergo several million dollars worth of independent testing and have thousands of files of printed paperwork on file. And it's unclear whom has the right to demand this information. And as rulings have yet to be made, we can only guess if we are doing the right thing.

We are calling this bill the WalMart and Mattel support bill. Only WalMart as a retailer can afford to keep these records and develop custom computer systems to track this information. Only Mattel (which seems to have some sort of special exemption can seem to continue manufacturing toys. The result will be much like the marketplace in Russia....one company-one choice.

We hear how small businesses are the nation's backbone and the government is now guaranteeing that only the largest of the large businesses can survive in the toy industry. It is not the small businesses who have had the problem with safety...the small business rides on it's reputation. People die in large box stores, and people will still shop in them.

We stand behind the intent of the law, but the implementation will neither enhance safety of our children, nor support their development. The big box stores of the world are looking at children as numbers. We know their names. Who's more likely to consider safety?

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Rick Grossman
Owner
Rickg.learningexpress@verizon.com

the little 3 toy company
N110 W13125 Washington Drive
Suite A
Germantown, WI 53022
Toll Free: 866-730-0899
Fax: 262-512-2944
www.littletc.com

August 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building, Washington DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am extremely disappointed and surprised that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The small business owner who has worked diligently for many years to produce safe toys and has conformed to all the testing requirements, both voluntary and mandatory, through third party labs has been thrown in to a turmoil. The law has had so many interpretations over the last months that no one is able to determine how and what needs to be done.

In our small companies products are made in small quantities and therefore many common components are used in order to keep product costs down. Under the new law we now have to treat these common components as entirely different entities for **each** toy they are a part of. We have to test some of our components 25 and 30 times, at cost of several hundred dollars **each** time, even though they have already been documented as safe by an independent testing lab. This is just one of several issues in this law that could be made simpler and less expensive

without being any less safe. Most of these problems have to do with a lack of knowledge and understanding of actual manufacturing processes and need to be addressed to prevent small businesses from failing.

Small business in the children's industry has been actively calling for hearings since the passage of the CPSIA because of the issues that threaten our very existence and the availability of important playthings for our children. Issues that, if addressed, could allow us to survive this unbelievably difficult time and continue to make toys that would be as safe as the Congress intended. Companies in the small business segment have an excellent record of safety and are asking to be heard so we can continue to make excellent products. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The deck is stacked against small business under the new law. Ironically, while we are left to puzzle over how to "ascertain" co-hort information on products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Peter F. Reynolds
President
The Little Little Toy Co., LLC
peter@littletc.com

Creativity for Kids

September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am quite surprised and disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. How can this be? The business community has been actively calling for hearings since the passage of the CPSIA . In my home state of Ohio we have been plagued by waves of economic turmoil and now there is not even a small business member asked to testify? Our Cleveland based business makes childrens craft and activity products and has an exemplary safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. Be understand, we believe solidly in the importance of product safety, but please take the time to listen to us as those who know it best.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Jamie C Gallagher

CEO, Faber-Castell USA

Faber-Castell USA, Inc. • 9450 Allen Drive • Cleveland, Ohio 44125-4602
Phone: 216-643-4660 • Fax: 216-643-4663 • www.creativityforkids.com • www.faber-castellusa.com

Hello

I hope that you still make an effort to talk to some of us who work in the trenches, before making anymore misguided rulings regarding child and toy safety. As a small toy shop owner, I have been so discouraged by the lack of response from my congressmen and senators. NO ONE IS LISTENING!

May I give you just a couple of examples of bad things that have happened as a result of this law. A wooden wagon maker in Berlin Ohio... a group of Amish folks... have been forced to pay ridiculous amounts of money to have each of the components of their individual styles tested... this is something they cannot afford to do... they have simply cut back on the number of items available, raised their prices, and have probably had to reduce their small work force. WHAT ARE YOU PEOPLE THINKING? BRIO wooden trains, from Sweden are not available in the U.S. this year, because, they do not want to spend the additional money for testing of each SKU (as required by the law) when they already meet the standards of the EU. We have seen the same thing with a number of other companies.

AND YET one of the biggest culprits in causing this overreaction Mattel, has been allowed to do their own testing and in their own labs... while small companies like the Berlin Ohio people have to pay to the point of going out of business.

PLEASE reconsider the age of childhood as noted in the law. 12 year old children are not the same as infants, toddlers and pre-school ages.... This law uses a Sherman Tank to take care of what could have been done with a broom. Stop acting based on the rantings of a few well-intentioned, but over zealous people. Moderation , Moderation ... deep breath.... think about what you are doing and fix this thing!

Carolyn Meyer
Blue Turtle Toys
2314 Far Hills Avenue
Dayton OH 45419
937 294-6900
Member of *ASTRA* and *The Good Toy Group*

All the Numbers
Eco-Conscious Clothing for your little one, Handmade in Boston, MA

September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

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2322A Rayburn House Office Building
Washington, DC 20515

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I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. My children's clothing business has been put under real stress due to the unforeseen effects of this law, and these issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

The severe penalties under the law are not scaring companies into compliance – they are shooing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products.

The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law

awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Kiki Fluhr
Founder and Creative Director, All the Numbers, Eco-Conscious Clothing
allthenumbers@live.com
617-328-7449

http://www.allthenumbers.etsy.com
http://www.TheMeasure.etsy.com
http://www.bostonhandmade.blogspot.com

Luv U Pumkin

Catherine (Cathy) Frazier
LuvUPumkin.com
2349 Apache Street
Mendota Heights MN 55120

August 4. 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses – like our family-run business - impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. Before CPSIA, our family business used to make wooden doll cradles and high chairs as well as other wooden toys. We also made baby diaper cakes using various items from a variety of vendors – and we sewed the baby blankets for the baby diaper cakes ourselves. This business was growing and we were hoping to hire a worker or two to help us out.

Due to the innumerable, onerous provisions of the CPSIA, we have ceased all production and only do resell at this time. The CPSIA has had a devastating impact on our ability to conduct business – people want our homemade wooden toys, but we cannot test each and every one of our toys and baby diaper cakes. In our business model, we do a lot of specialty orders for the toys and diaper cakes, so doing a large production run does not make business sense. We follow Just-in-Time (JIT) business practices for the production part of our business. We even use milk paint instead of acrylic as it is 'suppose' to be safer for children – but it's more dangerous for my husband who paints our wooden toys.

NOTE: These are **Made in the USA** toys!

Issues like ours need to be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

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The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company, LuvUPumkin.com, is essential for a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Catherine Frazier, CEMBA – Carlson School of Management Executive MBA 2005
CEO/Foundress
cathy@luvupumkin.com
651-216-5579

Andrea Friedman Sales
15 Taylor Road
New Milford, CT 06776
Ph: 860 350-2235
Fax: 860 350-2434
Andrea57@charter.net

Sept. 7, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

Dear Chairman and Ranking Members: I am writing in regard to the Committee Hearing set for Sept. 10 in which the Hon. Inez Tenenbaum is scheduled to testify on the the implementation of the CPSIA.

I am distubed that no representative of small businesses has been invited to share their testimony before the committee. Family businesses making educational products will be severely affected by this draconian law as well as many other small vendors.

The overly broad definition of "childrens products" has included many products that are not capable of harming children from lead or phthalates. The severe penalties are causing companies out of the market and they will no longer be able to make childrens products.

I believe you should allow small businesses to testify on their outlook of this important matter.

Sincerely,

Andrea Friedman
Independent Sales Rep
Andrea57@charter.net

Andrea Friedman Sales
15 Taylor Road
New Milford, CT 06776
Ph: 860 350-2235
Fax: 860 350-2434
Andrea57@charter.net

Sept. 7, 2009

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

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Sincerely,

Andrea Friedman
Independent Sales Rep
Andrea57@charter.net

Cannon Sports, Inc. **CSI CSI CSI**
United States Postal Service Mailing Address: PO Box 11179, Burbank, California, U.S.A., 91510-1179
Executive Offices & Warehouse Ship to Address: 11614 Pendleton Street, California, U.S.A., 91352-2501
Telephone: 1.800.223.6064 extension 133 Local: 1.818.683.1000
Office Fax: 1.800.388.1993 Personal computer fax: 1.818.683.1015
Personal office e-mail address: jon@cannonsports.com iPhone: 1.818.749.9553
company e-mail address: csi@cannonsports.com
Web site: http://www.cannonsports.com Your personal web site for discount pricing: www.csivip.com
Jon Warner **President & CEO**

Friday, September 4, 2009

"Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. Our family business makes educational products for schools and has an exemplary 25-year safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

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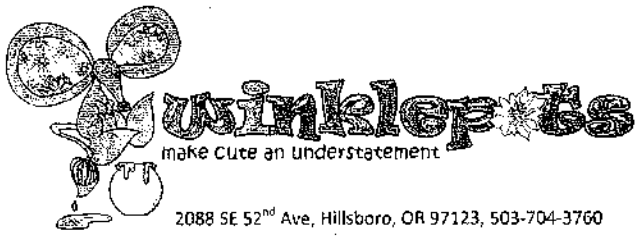
The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Cordially,
Cannon Sports, Inc.

Jon Warner



2088 SE 52nd Ave, Hillsboro, OR 97123, 503-704-3760

September 5, 2009

Dear Chairmen and Ranking Members,

I'm sincerely disappointed that during the upcoming hearings, scheduled on 9/10/09, you have only asked one representative to speak on behalf of everyone affected by the new CPSIA law, and the small business owners are not being included. The small business owners have been at the forefront of the debate against this new law and its ramifications, yet we're being ignored and not given the voice we've fought so hard for you to hear.

This new law threatens to put me and thousands of other small businesses out of work. As if our current economy isn't already suffering enough. It is requiring testing and labeling on items I know to be non-toxic. Forgive me if I'm a little rusty with my science, but last I checked, combining a non-toxic item with a non-toxic item does not a lead product make.

I make some one-of-a-kind items; have you thought about how this new law affects unique creations? It would be impossible to ever buy or sell anything personalized or custom in nature.

While the law affects anyone who manufactures items for the under 12 set, it is hitting the small businesses the hardest while big toy companies hide behind their lawyers and are granted exemptions. By excluding the small businesses, you're essentially reaffirming what we've suspected all along; this is all a ploy for big box to put mom and pop out of business.

In order to ensure a more complete and accurate representation of the law's effects, small businesses need to be heard and included. Please re-evaluate and let the majority, who is affected, not be left by the wayside while decisions are made without their voice being heard. We need to be heard. This affects us too.

Sincerely,
Holly Medell
info@winklepots.com
Winklepots Clothing and Accessories

September 4, 2009

The Honorable Henry Waxman, Chairman
The Honorable Bobby Rush, Subcommittee Chairman
House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton, Ranking Member
The Honorable George Radanovich, Subcommittee Ranking Member
House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

It came to my attention today that the committee has scheduled a hearing on September 10, 2009 regarding implementation of the Consumer Product Safety Improvement Act (CPSIA). Initially, I was elated that the Committee is finally going to hold this much needed hearing.

Since I first became familiar with this law last year, my small company has expended enormous personal efforts and financial resources to comply with the CPSIA. I have written numerous letters to legislators and CPSC personnel, pleading with them that it is not economically feasible for me to fully comply with the retroactive treatment of inventory. I will be happy to expound on that. You would just not believe the position that you have put me in by rushing this law into effect.

I am one of the good guys. I follow not only the law but also the moral code. I have small children. I want products to be safe like most people do. However, the draconian CPSIA placed me in a position to either allow our multi-generational family business die as a company or to compromise my own principles.

My pleas to the CPSC consistently told me effectively "our job is not to interpret or modify the law, just to enforce it – take it up with your representative or congressman." Yet my pleas to individual legislators consistently referred me to the CPSC – a useless cycle. So I have been hoping and praying (and expecting, actually) that the committee would eventually take this issue up – and, once and for all, make things right.

You can imagine how devastated I am to learn that, during the hearing next week, no voice is being given to the interested parties on either side of the issue(s). It is my understanding that testimony will be given only by the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety.

I urge you to call as a witness Rick Woldenberg, Chairman of Learning Resources, Inc.Vernon Hills, Illinois 847-573-8420 so that he can provide an accurate perspective of the business community to this issue that is important to all of us.

Sincerely,

Jack Summerselt
President
Educators Resource, Inc.
(251) 645-7337

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

The people who should be testifying at this meeting are the businesses that are being hurt or even closing because of CPSIA – home crafters, resellers, charities, low income families and many, many small and medium businesses, not Hon. Inez Tenenbaum. It would really be different if CPSIA was really helping kids, but it's not.

One of the companies that brought lead laden toys to our American children in 2007 was Mattel, but now Mattel is able to use its own testing lab. If they had been testing their items like they should have been, there would have been no problem with lead in the toys. Mattel just needed to follow the laws in 2007 that were all ready on the books.

This law has many different parts to it, such as the testing and labeling. I am a home crafter of doll clothes, sewn, knitted, and crocheted for dolls for children over the age of three. My doll clothes sell for $8 - $10 each on ebay. If I had to have them tested at $70 each, I certainly could not afford to sell. The small amount of money that I was making was being put away for my grandchildren's college.

During this recession, my grandchildren are shopping at resell shops to be able to have new clothes for the school year. But this law states that coats, jeans, and shirts must be tested if they have buttons, snaps, and zippers. These items would be very hard to find without buttons, snaps and zippers. You are punishing the poor and low income with this law.

I hope that you will consider and listen to the many businesses, crafters, children, charities and grandmas that CPSIA is hurting.

Thank you so much for taking the time to read my letter.

Sincerely,

Barbara Raubuch
Grandma
ebraubuch@comcast.net

To Sen. Waxman:

As the founder of Free-Range Kids, I strongly believe in keeping kids safe. I also think there is such a thing as "overkill." Or "oversafe," if you will. I hope you will allow more than one person to present to you at your hearings. My followers (1 million and counting) also wonder why we are keeping kids "safe" from things that help much more than hurt them, such as books, which few children eat.
Thank you.
Yours,

Lenore Skenazy
Columnist, founder of www.freerangekids.com
212 779 3016
646 734 8426 (cell)
Busy twittering at FreeRangeKids

The Kids Closet

P O Box 404

130 South John St

Rochester, IL 62563

September 7, 2009 (Yes, I work on Labor Day)

The Honorable Henry Waxman

Chairman

The Honorable Bobby Rush

Subcommittee Chairman

House Energy and Commerce Committee

2125 Rayburn House Office Building

Washington, DC 20515

The Honorable Joe Barton

Ranking Member

The Honorable George Radanovich

Subcommittee Ranking Member

House Energy and Commerce Committee

2322A Rayburn House Office Building

Washington, DC 20515

Dear Chairmen and Ranking Members, I am writing in regard to the Committee hearing set for September 10th, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U S Consumer Product Safety Commission (CPSC), is scheduled to testify about the CPSIA law.

I find it outrageous that you are only listening to one witness. Since thousands of small businesses and families have been and continue to be detrimentally affected by this law, I find it reprehensible that you do not have a representative from either of these groups present to testify. I am the Vice President of the National Association of Resale and Thrift Shops and own The Kids Closet, a store that is now down 25% in sales due to the loss of products covered under this law. Although I'm sure none of you feel the effects of a bad economy personally, believe me, plenty of the rest of the country does. This is very poor timing to try to make things safer. If you really want to improve safety for children, go after the big manufacturers who shipped all the lead-laced stuff in from China in the first place. And why was this law made retroactive? Even car manufacturers get years to improve safety and they kill lots more people.

This law makes it impossible to sell items that are perfectly safe but that we have no documentation to prove such.

I really believe that to get a good perspective of all the effects of any change, you need more than one point of view. You can't read the label from inside the bottle.

If you want, I would be happy to come testify. Just ask me.

Sincerely,

Kitty Boyce

1000, Illinois Street
San Francisco, Ca 94107
(415) 252-0372
(415) 252-0369
www.blueorangegames.com

Blue Orange USA

September 6th, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
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I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law.

Our small business makes educational products for schools and toy stores and has an exemplary 10-year safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are myriad. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

The severe penalties under the law are not scaring companies into compliance – they are shooing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products

September 8, 2009

The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Julien MAYOT, CEO

info@blueorangegames.com

Cell: (415) 572-3885

SCHOOL AIDS
EDUCATIONAL MATERIALS FOR TEACHERS AND PARENTS
9335 Interline Avenue – Baton Rouge, Louisiana 70809 – (ph) 225.923.0294

September 7, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am the president of School Aids, a Baton Rouge based retail and catalog school supply business. We have 76 employees. I was stunned by the Consumer Product Safety Improvement Act (CPSIA). This law has caused massive confusion for thousands of small businesses, causing some to have large inventory write-offs, file for bankruptcy, and go out of business. This is affecting me, and my employees. This law has serious negative impact on small businesses in the United States without having much measurable improvement on safety.

Therefore I was disappointed to learn that no small businesses would be invited to testify at the September 10 Committee hearing regarding the CPSIA. I am writing to ask that you allow for our input.

Thank you for your consideration.

Jamey Firnberg
President
jamey@schoolaids.com

Vernier Software & Technology

13979 S.W. Millikan Way • Beaverton, OR 97005-2886
toll free 888.837.6437 • 503.277.2299 • fax 503.277.2440
info@vernier.com • www.vernier.com

September 4, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing today in regards to the September 10, 2009 Committee hearing on the CPSIA. It is disappointing that it appears there will be no representation from business owners such as I, whose businesses are suffering from unintended consequences of the law.

Vernier Software & Technology is a small to medium-sized company that makes products for science education. We are confident that our products are safe. We have been manufacturing sensor technology for over 28 years, and safety is a priority to us. We adhere to environmental and material usage directives that are accepted in countries throughout the world. Yet due to the CPSIA, we have discontinued the marketing and sales of our products for use by students under age 13. This is not only a blow to us as a company, but to science education in this country.

Due to broadly-written definitions in the law, we are not even certain whether it applies to us. Should science education probeware that connects to a computer (e.g., a temperature probe or light sensor used in a science experiment), be lumped into the same category as toys and child care products? We need clarification and communication.

I applaud your work to keep our country's children safe. Yet there are consequences of this law that need to be understood and addressed. I appreciate your time and consideration of allowing small business to have a voice at the hearing.

Sincerely,

David Vernier
Founder and CEO, Vernier Software & Technology
dvernier@vernier.com
503-277-2299

September 7, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

The last year has been especially difficult on small businesses like those of our members, 50% of who have gross sales of under $3 million. Since Congress passed the Consumer Product Safety Improvement Act of 2008 – a law which we have supported from the beginning – the juvenile products industry has spent at least $45 million on increased testing and compliance costs and we've lost more than $138 million in destroyed or returned inventory. Implementation of this well-intentioned but poorly-conceived law during the current recession has been a nightmare. One estimate shows the combined effects on the juvenile products industry of the CPSIA and the recession to be greater than $430 million and rising.

Many small businesses in the juvenile products industry came to DC earlier this year to meet with our Senators and Members of Congress about the CPSIA. We were mostly told to wait for the Obama administration's appointees to take charge at CPSC and things would get better. Now, all five Commissioners have been confirmed and the chairman has been on the job since late June. We still need help. Our biggest fear is that the new folks in charge will tell Congress that the worst has passed and everything will be fine. I am writing to tell you that is not the case.

Juvenile Products Manufacturers Association, Inc.
15000 Commerce Parkway, Suite C • Mt. Laurel, NJ 08054 • 856.638.0420 • 856.439.0525
E-mail: jpma@ahint.com • Website: www.jpma.org

We believe Congress needs to amend the CPSIA this year. Everyone seems to admit there have been unintended consequences – but no one can agree on whether and how to address them. We are not asking to repeal the law in its entirety because we know that is not politically feasible or, frankly, desirable. There are some good things in there already. But I hope you can work towards making a few changes to make things better for small businesses and better for the agency staff who are struggling to implement the CPSIA. Common-sense reforms in areas such as tracking labels, science- and risk-based regulations, certification, retroactivity, and component part testing would help turn a well-intentioned law into a well-made law.

Small businesses impacted by the new law, such as those small businesses represented by JPMA, must be included in Thursday's hearing and must be invited to share their experiences in testimony before the Committee. Many of the small family businesses we represent have built their reputations on the safety and enjoyment of their products, and have spent multiple generations assuring high quality products that comply with all laws and regulations. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on the ability of many of our members to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain. Small businesses like JPMA members in all 50 states are counting on you.

Thank you for your consideration.

With best wishes,

Sincerely,

Robert Waller

Robert Waller, Jr.
President
rwaller@ahint.com
Phone: 856-642-4402

2010 NE 123rd Avenue
Vancouver, WA 98684-5500
September 5, 2009

The Honorable Henry Waxman
Chairman, House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Honorable Henry Waxman,

I am extremely upset by the effects of the Consumer Product Safety Improvement Act of 2008 on small business and Native Americans. I'm the owner of a fledgling toy business. It's been my dream of twenty-five years, and just as I am in the process of achieving it, the over-reaching effects of the CPSIA are threatening it. As an American citizen and a dyed-in-the-wool Democrat, I'd like to believe that the negative fallout on such businesses as mine was unintentional, but I wonder when I see how that Mattel gets to test its own toys!

I'm just as concerned for the Native American cultures as for my own welfare. This law has put them at risk, along with every other ethnic culture whose children depend on custom clothing to participate in cultural events.

Traditional powwow, ceremonial and burial clothing for Native Americans is an important part of cultural activities. Every outfit made is intentionally one-of-a-kind, to reflect the family, clan and tribal heritage of the wearer. Clothing is an integral part of most cultural activities, and is a continuation of the ancient tradition of tribal members dressing in an identifiable manner.

Without community members and commercial regalia makers helping to dress our children, many children of busy working parents will be left sitting on the sidelines at cultural events. Many people who have previously made regalia for children have already stopped making it due to this law. So this legislation is already preventing Native American children from participating in cultural activities, thus hindering families and tribes from passing on their traditions to their children.

The Consumer Product Safety Improvement Act of 2008 requirements of expensive 3rd party testing and tracking of every "SKU" made for children under age 13 is financially infeasible for small businesses and custom clothing makers. The end result will be Native American Cultural Genocide on the level not seen since the days when children were forced to attend Indian Boarding Schools and punished for speaking their native tongues.

Unless this legislation is amended to allow raw material manufacturers to certify their products are safe to use in products for children, those of you who refuse to amend this flawed piece of legislation will be PERSONALLY RESPONSIBLE for destroying the very heart and soul of native cultures, and the very FUTURE OF NATIVE AMERICA.

I implore you to open the upcoming hearing to include testimony by representatives of the small business community. As a member of the Handmade Toy Association, I'm proud that its leaders have diligently studied all of the issues surrounding the CPSIA and have commonsense suggestions for improving this act. I implore you to hear them testify.

Sincerely,

Linda Moore Kurth

Linda Moore Kurth

2010 NE 123rd Avenue
Vancouver, WA 98684-5500
September 5, 2009

The Honorable Bobby Rush
Chairman, Subcommittee on Commerce, Trade and Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

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September 5, 2009

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Ranking Member, House Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, D.C. 20515

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Sincerely,

Linda Moore Kurth

Linda Moore Kurth

Littlecrow Trading Post LLC
Red Rock, OK
www.littlecrowtradingpost.com

Sept. 7, 2009

The Honorable Henry Waxman
The Honorable Bobby Rush
The Honorable Joe Barton
The Honorable George Radanovich

Dear Honorable Congressmen,

The war being waged on small business and Native Americans by the Democratic Party, via the Consumer Product Safety Improvement Act of 2008 is ***extremely*** distressing. Once again we're victims of a Congress who has legislated Indians into forced assimilation, albeit as collateral damage caused by unintended consequences this time. In any case, the CPSIA is legislative ***NATIVE AMERICAN CULTURAL GENOCIDE.***

I'm Janet Littlecrow, partner in Littlecrow Trading Post LLC with my husband James. I'm a lifelong DEMOCRAT who is ***furious*** that members of my own party are ***IGNORING MY CONCERNS,*** and I grow more inclined to raise a stink daily. Ask Cindy Sheehan if one tough woman can make a difference.

My husband and I run an internet-based business in rural Oklahoma, producing traditional clothing and powwow dance regalia for Native Americans throughout the U.S. & Canada. Our inventory is handmade and "one of a kind", representing the dancer's family, clan and tribal heritage. Testing each "SKU" is cost-prohibitive. Destructive testing can't be done on a beaded buckskin dress, feather dance bustle or beaded feather fan. Our items don't need cradle-to-grave tracking like a commercial aircraft altimeter, and don't get recalled.

Clothing is an integral part of most cultural activities, and is a continuation of the ancient tradition of tribal members dressing in an identifiable manner. We can adapt some items to use plain fabrics, yarn and ribbon, without snaps, buttons and zippers. However, beaded buckskin dresses, leggings and beaded moccasins are mainstays of Native American attire. Jingle dresses use hundreds of tin cones on a dress. Dyed deer tail lines the outside of a porcupine hair roach headdress. Quillwork was used for decoration before beads; maybe I should start hunting porcupine since beads are glass and are not exempt. Do I need to start cooking up deer brains to brain-tan deerskins like in the old days, since commercially-tanned skins aren't "natural"? Should I start using duck poop for blue dye, buffalo gallstones for yellow dye, bloodroot for red dye again? I can go on…

Many regalia makers have stopped making children's items because of the CPSIA. ***This law is already forcing assimilation on Native American children, by restricting their participation in powwows & cultural events.*** Cultural diversity is the strength of this country. The children of other ethic cultures depend on custom clothing to participate in cultural events also. This law has the potential to light a firestorm.

Certification should be done at the raw materials level. There are simple solutions to FIX THE PROBLEMS!

PARTISAN POLITICS ARE UGLY FROM EITHER SIDE OF THE FENCE!

Janet Littlecrow
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(580) 723-9244
www.littlecrowtradingpost.com

Maiden America
HANDMADE JUST FOR YOU

www.maidenus.com

September 7, 2009

The Honorable Henry Waxman -Chairman

The Honorable Bobby Rush - Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton - Ranking Member

The Honorable George Radanovich - Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am deeply chagrinned to learn that **not even one** of the thousands of small businesses being discriminated against by CPSIA legislation have been invited to testify at the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

Your decision not to include the voice of small business at your hearing supports the idea that CPSIA is a holocaust against small business in that, apparently and as far as I can see, **the small business victim – the most disadvantaged under this new law – is being eliminated from both the dialogue at your hearings and from competing fairly in the marketplace.** I have deep concerns about this practice being permitted by public servants charged with listening to our will and performing their duties to us in a manner that supports our expressed concerns, true will and best interests.

As a small business owner devastated by CPSIA, I have come to the harsh understanding that "intent" of a law does not mean the same as "letter" of the law. After reading a feature about the First Lady's "organic" garden (attached) and another (also attached), more recent feature about Mattel being given a "pass" while the rest of the peons in our industry continue to suffer in playing by the rules set down by the CPSIA (confusing as they are!), I'm officially exhausted by the entire nightmare, for which I now hold you and your Committee 100% responsible.

Mr. Chairman, you and your associates have not only gotten my attention as a business woman, you have also gotten my dander up, as a citizen and parent. This law has officially replaced "Mother Approved" with "Big Brother Approved," effectively undermining parental authority across this great nation. From a small business perspective, your committee has established CPSIA "at our expense," not "on our behalf." The discrimination, hypocrisy, lack of representation and apparent disregard for getting this law "right" on behalf of OUR children and the small, family-owned business victims that serve / support them (one and the same interest) is as obvious as the nose on your face.

What ever happened to **equal representation**? Small business is the backbone of the American economy. Unless the intent is to foster a new kind of backbone that serves another type of economic model, I can see no reason why this committee would, in all good conscience, fail to include our voice at your hearings? I strongly urge you to invite small business to testify at this and every future hearing you may hold regarding a law that so deeply impacts the "little guy."

Sincerely,

Tristan Benz
Mom, Citizen, Registered Voter, Small Business Owner
tristanb at maidenUS dot com

Is The White House's Organic Garden Toxic To Kids?

Jeff Stier , 07.23.09, 01:24 PM EDT
http://www.forbes.com/2009/07/23/white-house-garden-opinions-contributors-jeff-stier.html
No, according to toxicologists. It ought to be, according to environmentalists.

Michelle Obama's "organic" White House garden was designed to promote a green agenda. In order to provide safe food to children in the community, the First Lady wouldn't use chemical pesticides or fertilizers. Green groups cheered. In an ironic twist, all of that has now backfired.

The garden was created using a "green" approach, based on the belief that exposure to even minute levels of synthetic chemicals and contaminants such as lead is dangerous. Indeed, when environmental activist groups lobbied for a drastic consumer product safety law known as the Consumer Product Safety Improvement Act (CPSIA), they repeated the frightening but unscientific mantra that "there is no safe level of exposure" to the synthetic chemicals and contaminants they sought to ban.

The law passed, but it won't make anyone safer; the idea that the level of exposure doesn't matter flouts every known precept of toxicology. CPSIA is putting the squeeze on already threatened small businesses, forcing them to discard products with the tiniest trace of forbidden substances--and it turns out the White House is getting a taste of the same medicine.

Earlier this month, The New York Times reported that the National Park Service found lead in the White House garden soil. In fact, tests found somewhere between 450% and 900% of the normal amount of lead in U.S. soil. The White House did not dispute the findings but defended the lead in the garden, calling it "completely safe." They are right. Though lead at higher levels can be dangerous, the garden, like the products banned by CPSIA, is well within safety limits. But the White House's defense rings of self-serving hypocrisy. Where were the White House reassurances when environmentalists were pushing CPSIA restrictions on other fronts?

Greenpeace, the Environmental Working Group, and others who were behind CPSIA--along with their allies in Congress and in the administration--manipulate the fears of concerned parents by contradicting established rules of toxicology, claiming that all lead needs to be eliminated. Aside from causing needless panic, their agenda could end up taking an expensive toll on industry and driving up prices for consumers.

The consequences of environmentalist fear-mongering are already spreading quickly. Bisphenol-A (BPA) and phthalates in plastics have been thoroughly demonized by junk-science reports--so much so that people forget these chemicals have never been shown to be harmful to humans. Likewise, the organic approach endorsed by the White House unjustly contests the proven safety of properly applied chemical pesticides and fertilizers.
Now that they've seen the light, will the White House join thousands of small businesses and consumers calling for the repeal of the CPSIA? The Bush Food and Drug

Administration found BPA to be safe, but the Obama FDA called for a do-over. Will their findings be consistent with the White House's newfound appreciation for basic tenets of toxicology? Will the new regime at the EPA halt its trumped-up health claims and halt their unprecedented attack on America's producers?

If so, something truly beneficial will have grown out of the White House's "organic" garden after all.

Jeff Stier is an associate director of the *American Council on Science and Health*.

Mattel gets a CPSIA waiver
posted at 9:30 am on August 28, 2009 by Ed Morrissey
http://hotair.com/archives/2009/08/28/mattel-gets-a-cpsia-waiver/

After consumers discovered an influx of lead-tainted toys imported by Mattel and other companies, Congress acted to strengthen protections through the Consumer Protection Safety Improvement Act (CPSIA). The legislation created almost impossible hurdles for small manufacturers and resellers for testing products, while earlier this month the CPSC announced it would send inspectors fanning out across the USA to enforce the laws in thrift shops. Now one of the companies that created the problem in the first place has gotten a waiver from the CPSIA's requirements for third-party testing:

> Toy-makers, clothing manufacturers and other companies selling products for young children are submitting samples to independent laboratories for safety tests. But the nation's largest toy maker, Mattel, isn't being required to do the same.
> The Consumer Product Safety Commission recently, and quietly, granted Mattel's request to use its own labs for testing that is required under a law Congress passed last summer in the wake of a rash of recalls of toys contaminated by lead. Six of those toys were produced by Mattel Inc., and its subsidiary Fisher-Price. ...
> Mattel is getting a competitive advantage, Green said, because smaller companies must pay independent labs to do the tests. Testing costs can run from several hundred dollars to many thousands, depending on the test and the toy or product.

Mattel had to recall more than 2 million toys from the market after inspectors discovered lead in the imported products. Now they claim that their "firewalled" labs will protect consumers and block out "corporate influence". Where are the labs that Mattel will use? Mexico, Malaysia, Indonesia, and China — and China is where the dangerous toys originated.

Mattel gets to test its own products. People like Suzi Lang have to pay laboratories to certify their hand-made products contain no lead or phthalates, which she already knows because she handpicks her materials. Thrift stores have to either test products for resale or confirm that they have not been recalled, on an individual basis. But the company that caused the biggest problem that led to the CPSIA gets a waiver. How convenient ... and unjust.

Dr. Stevanne Auerbach, PhD/Dr Toy
268 Bush Street
San Francisco CA 94104
September 3 2009
drtoy@drtoy.com 510) 540 0111

The Honorable Henry Waxman,Chairman
Subcommittee Chairman
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby Rush
The Honorable Joe Bartoo
Ranking Member
The Honorable George Radanovich
Subcommittee Ranking Member
House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. I know that the business community has been actively calling for hearings since the passage of the CPSIA because of the disastrous effects of the new law. The changes are affecting innovative people who are creating the best products possible. They are safe, used throughout the country, and many products are made in the USA. I am aware of many who have created small business that make products for home and school that are seriously affected at the huge costs involved in meeting the new laws. The problems in the first place stemmed from mismanagement of Chinese factories by one of the largest toy companies who should have had quality assurance and on-going staff supervision in China. As a result of their oversights as to safety the repercussions are instead affecting the small mom and pop businesses who can no longer afford to compete. This is unfair and out of proportion to the problem that caused this change in the first place.

Then you are not allowing the small companies who are greatly affected by the new laws to share their real and serious concerns and that is totally unfair and causing further alienation. These issues need to be explored by the full Committee based on the testimony of real companies and the people involved who are suffering real pain. The problems caused by the law are myriad.

The overly broad definition of "children's products" swept in many products that are incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations.

In addition, the exemption process under the law is both very limited and very expensive. The severe penalties under the law are not scaring companies into compliance – they are forcing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products. The deck is stacked against small business under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products.

I strongly believe that the perspective of businesses that are small, innovative and constitute the cross section of America are essential to a complete picture of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter and opening the doors to a full and complete understanding of the current state of the toy and educational product market. It is too important to this country to let it be destroyed by laws that are not flexible in standards or methods. Hope you will hear the full "Toy Story" and not throw out the baby with the bathwater or even listen to its cries. At least listen and act from having a clear understanding of what is being asked of those without deep pockets. This country needs all of the innovation, productivity and production it can muster and it needs it now.

Sincerely,
Stevanne Auerbach
Dr. Stevanne Auerbach, PhD./Dr Toy™

Sept. 6, 2009

To Chairman Waxman and other members of the Congressional committee reviewing the pending requirements of CPSIA.

My company -Timeless Toys Inc., Hayward, CA is a very small company. We employ three people and our sales volume is less than $500, 00 per annum. There must be well over 500 similar and smaller sized companies in the Toy Industry today. We are the innovators and creators of new products as well as classic products. We have always complied with all of the voluntary toy safety standards and our own in house quality control systems have always resulted in safe, well designed, quality products. We have never had a recall or any safety issue in all the years I have been in business.

I actually assisted in the creation of the Voluntary Toy Safety Law back in the 1980's when I was CEO of a Toy company with revenues of $250 Million. As Dr. Stevanne Auerbach pointed out in her comprehensive letter on the subject; we do not have the resources of the dominant large companies in the industry and it is the largest one who actually caused the major problem.

The new requirements are especially onerous and costly to the smaller companies. Most of us are struggling to keep our doors open in the present economic climate and the new requirements make our situation even more tenuous. The CPSIA law of 2008 was made in an atmosphere of hysteria caused by the larger companies and a few others who were not in compliance. No analysis was made as to the impact the requirements would have on small companies. Please extend the compliance date to allow more input and arguments from smaller companies before a final compliance date is set. We are still not certain as of this writing of exactly what the acceptable labeling requirements are! These new requirements are causing our suppliers problems as well and they are also confused as to what is required. The law as it is now written should be rescinded and other alternatives should be reviewed.

I will be glad to provide more information if needed or requested.
Sincerely yours,

Harold A. Nizamian
Chairman, Timeless Toys Inc
2534 Barrington Ct.
Hayward, CA 94545
Tel 510 -732 1960 Fax 510 732 6190, harry@timeless-toys.com

September 8, 2009

"Three Bags Full"
Children's Consignment Sale

ATTN: House Subcommittee on Commerce, Trade, and Consumer Protection

To Whom It May Concern:

My name is DeAnn Nightingale and I organize and operate a small children's consignment sale within Central Ohio every spring and fall.

This small business, Three Bags Full Children's Consignment Sale, represents thousands of families from throughout the Central Ohio community. The recent CPSIA law has been confusing and unclear to the community of consumers, and the retail small business community.

It is unsatisfactory that such a poorly written law was put into effect without proper foresight and without proper collaborating with the community of consumers and small business owners. The media attention to the CPSIA, the greatly inappropriate number of individuals handling the CPSIA and the poorly thought out execution of this law should be indicators to you that this is of the utmost important to small businesses and the general consumer.

Your scheduled hearing on September 10 is overdue. You have scheduled to call one witness, someone representing the CPSC, and no one from the small business community or the crafters community or the general consumer that is affected by this law. That is unacceptable.

May I remind you that you are elected officials and work for the general public. It is your duty to effectively and adequately explore all ramifications of the CPSIA and make due changes as necessary. Do not punish the community of consumers, small businesses and the crafting industry because of excessive lead paint found in toys from China. Thoroughly research what is due diligence, responsibility and appropriateness in legislation to keep excessive lead paint toys and other products from entering the market. To do so, calling more than one witness is absolutely necessary. All sides should be able to discuss and explore their situation so that responsible and insightful change can take place.

Sincerely,

DeAnn Nightingale, sale organizers
Three Bags Full, Children's Consignment Sale
740-587-2923

www.threebagsfull.info
7619 North Street Newark, OH 43055

NSSEA Promoting an Open Market for Quality Educational Products and Services

An Education Trade Association Founded in 1916

September 8, 2009

The Honorable Henry Waxman, Chairman
The Honorable Bobby Rush, Subcommittee Chairman
House Energy and Commerce Committee
2125 Rayburn House Office Building,, Washington, DC 20515

The Honorable Joe Barton, Ranking Member
The Honorable George Radanovich, Subcommittee Ranking Member
House Energy and Commerce Committee
2322A Rayburn House Office Building, Washington, DC 20515

Dear Chairmen and Ranking Members:

We have just learned that only one speaker -- the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify at the Committee hearing being held on September 10, 2009 on the implementation of the Consumer Product Safety Improvement Act (CPSIA). We are very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the harsh effects of the new law.

NSSEA represents 1,500 companies in the children's product marketplace. These educational product manufacturers and retailers care deeply about the safety of children; however, we have grave concerns about the insurmountable burden the CPSIA places on small businesses in the educational products marketplace. It is our hope that your Committee hearing will lead to prompt action to correct the excessive reach of this law and its devastating consequences on the small businesses within the educational products industry.

Here are some specific areas of concern:

1) The definition of children's product is too broad.
The CPSIA imposes a regulatory burden on the children's product industry unrelated to risk. Many of these items, have never presented any risk of injury and therefore will have no effect on improving safety. Both the lead and phthalates bans need to be carefully constrained to avoid unnecessary harm to commerce. The safety concerns covered by the CPSIA mainly pertain to products aimed at young children. We recommend the age limit for the definition of "children's products" be reduced to eight years and that the CPSC have the discretion to lower the age limit for certain groups of products for which the risk of harm from lead or phthalate exposure is remote to non-existent (for example, children's books, even those published prior to 1985, ATVs and bicycles).

2) The deadlines are not practicable and the economic impact is severe.
The children's product industry is not prepared for the sudden imposition of heavy regulatory burdens. Children's products are typically priced low in a very competitive marketplace. The overhead and infrastructure needed to comply with the CPSIA are unreasonable for small manufacturers, single location stores or even small retail chains and will accelerate mass consolidation in the channel. These changes will lead to businesses closing and continued job elimination.

3) The penalties are excessive.
The economic impact is overwhelming. In an effort to address every possible danger, the new law exposes businesses to excessive testing costs and record-keeping expenses and enforces its new rules with penalties of up to $100,000 per violation. We urge you to sharply restrict the use of heavy penalties in the CPSIA particularly for inadvertent violations and for small businesses. The current law provides broad discretion to the CPSC to impose excessive fines, criminal charges and even asset forfeiture. Our members care deeply about safety and have a proven record of providing safe products.

4) Commission needs more leeway to make risk-based decisions for banned products containing lead.
The mere presence of lead in many materials does not mean there is a risk of injury. For example, older children are far less susceptible to lead poisoning and engage in less of the mouthing behavior that can cause lead ingestion. Further, small amounts of lead bound in plastic or other materials may never be biologically available to a child, and lead transfer from certain types of products is highly unlikely given the nature of certain products (examples classroom items, bicycle valves, ATVs, motorbikes). The Commission should have the discretion to set limits on the lead ban that take these factors into account, including excluding certain age groups, products, and materials based on a risk based analysis. This would result in the high level of consumer protection anticipated by the Congress without imposing the kinds of costs for testing and compliance that are putting our members and many other consumer product firms in jeopardy.

On behalf of the members of the National School Supply and Equipment Association, we urge Congress to give business a seat at the table in its efforts to implement reasonable and common sense amendments to the CPSIA to fix its many serious flaws. As the impact of the CPSIA has already caused damage to many companies, there is a great deal of urgency to listen to the businesses in this marketplace in order to act both sensibly and quickly.

Cordially,

Tim Holt
President/CEO
National School Supply and Equipment Association

Cc: The Honorable Inez Tenenbaum, Chairman

Suzi Lang
Owner and Designer
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9/8/2009

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Chairman

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Subcommittee Chairman

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2125 Rayburn House Office BuildingWashington, DC 20515

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Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that there will be only one person testifying at this hearing, when this law negatively affects thousands and thousands of small businesses. This law not only makes it difficult to do business, it makes it almost impossible for a small business like mine. I make and sell Teething Giraffes. My Giraffes are made from 100% cotton, natural fiber stuffing and thread. However, according to the CPSIA I have to have my item tested for lead and phthalates, where no lead or phthalate ever existed.

This law unfairly targets small businesses like mine who make safe, but small batches of children's items. I think it only fitting that we have a seat at the table.

In this rough economic time, putting thousands and thousands of small businesses out of business isn't the prudent course to take. Please listen to our concerns.

Suzi Lang
Owner and Designer, Starbright Baby
suzilang@gmail.com

Fun & Achievement

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September 8, 2009

House Committee on Commerce, Trade and Consumer Protection

RE: HEARING titled "Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future."

My name is Kate Maxin, and I am the manager of TFH USA located near Pittsburgh, PA. TFH USA is part of an international company founded in England in the early 1980's by a British Schoolmaster, who felt that there were insufficient quality products for children with Special Needs. The company has grown over the years, and TFH USA has been established since July 1991. We began with two employees and sales of $300,000 per year. Eighteen years later we have 8 employees and sales just slightly over two million dollars.

Due to our understanding of the disabilities of our end-user, our products have ALWAYS been designed and manufactured with quality foremost. We have always used paint without lead and without small parts. Many of our toys are manufactured by our sister company in England, and they conform to the European Safety Standard –CE. The items manufactured in the U.S. are done by small local companies, manufacturing to our high standards. Our line has been rounded out by offering a few general, developmental-type toys from well-known toy distributors in the U.S. and in England. Our toy line has been awarded the "Symbol of Excellence" by Exceptional Parent Magazine in 2005, 2006 and 2007.

Because of the size of this segment of the toy industry, many of our products have annual sales of less than 100 units, some as few as 10. But we continue to manufacture even low-volume products because of our desire to serve the growing community of children and adults with various forms of disabilities.

To test every product to the CPSIA standards would devastate our company and we would not survive. To follow your guidelines for the February 10th deadline for existing inventory would not be physically or financially possible. Small companies, like ourselves, that have always strived to offer quality, safe products are being unfairly penalized along with the very large toy manufacturers, who have gone offshore to produce their products in order to enhance their profitability.

It has come to my attention that a meeting is to be held with **ONE WITNESS ONLY**. I disagree with the Subcommittee on this decision. The business community (particularly Small Business) raised many legitimate and serious objections to this law and its implementation. To exclude the business community from this hearing is to distort the truth and to keep inconvenient views off the record. I have written to my congressman numerous times and am angry at their responses.

I am pleading with you for your assistance to help us to survive this regulation. Our company's passion for providing products for children and adults with special needs would not be able to overcome this onerous legislation. For reference, our websites are www.tfhusa.com and www.adultsensoryactivities.com

Yours most sincerely
For TFH USA LTD

Kate Maxin
General Manager

CC: Arlen Specter, Robert Casey, and Jason Altmire

Have a sensory experience!

To whom it may concern:
The new consumer product safety law is a senseless one. We do not need to protect our children from books and socks! Please hold a hearing on this law in which all sides are heard from.
Sincerely,
Marion Sibley

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8 September 2009 (via e-mail)

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

As a small business owner, I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

It is quite difficult to understand why no one from any of the hundreds of businesses affected by this law will be allowed to testify. As it is, there is little problem in implementation of the law *per se*, as long as the members are not concerned with the devastating consequences.

My friends in the toy industry, along with contacts we have in other aspects of children's products tell me of their concerns:

The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. Frankly, this was an incredibly foolish aspect of the law. How this could have been vetted is truly a mystery, and would not serve as a confidence builder to a public noticeably wary about pending health care legislation.

The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. If "no level of lead is safe," then how can safe levels be specified in the law? Ms. Tenebaum may be able to elaborate on this and other difficulties, but what about those directly affected?

Regrettably, especially in light of the Mattel decision, whereby this company can now test its own products in its own labs, cynics who note that regulation always favors big companies have been proven right. This is made more irksome inasmuch as Mattel was the poster child for bad toys, which caused this law to be passed in the first place!

Egos notwithstanding, this law has to be modified, and there is no better way to determine how, than by hearing from those affected. I would submit that although the CPSC is "affected," their problems pale in comparison to those of business owners.

Very truly yours,
INTERSCAN CORPORATION

Michael D. Shaw
Executive Vice President
mds1@gasdetection.com

Why is there only going to be one witness on this important matter? Our livelihoods are at stake!

We have been in business since 1972 and have always been concerned with safety. We have been providing products from many of the same suppliers going back as far as 1972. They have stood the test of time and meet the intent of the CPSIA but not the record keeping requirements. We don't understand the results being caused. Companies that meet European standards have decided to stop providing to this country. American companies are going out of business. Companies like us are looking to outsourcing causing people to lose their jobs and so forth.

PLEASE HELP!

~~

Beecher Hoogenboom
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Tuesday, September 08, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office BuildingWashington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing to express our views regarding the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

My family- owned business develops and manufactures educational and arts and crafts products in the United States and Canada. We have been doing this for over forty years. Our record and reputation for quality and safety are extremely high. Because of this, I am disappointed that no small businesses impacted by the new law have been called on to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA. The over- reaching provisions of the CPSIA have had a devastating impact on our ability to run our business, let alone develop and market new products. Let us, the companies who this hurts so badly, have equal time to testify and tell you what is really happening here.

The vast majority of products made for children are not harmful. Taking them off the market or never being able to introduce them to the educational systems because of the high costs of testing and all that goes along with the new laws is more harmful.

American companies are choosing to shut down rather than have to deal with these new laws. Some European exporters to America are choosing not to sell their products to us; not because their products are unsafe, but rather because these laws make it impossible to work here and far too expensive to be even remotely profitable. What a shame! Our children suffer in the end. Even second hand stores are shying away from selling children's products. Crafters who make one of kind products are rethinking their artwork and as a result, we will see less made for children under 12.

By giving small and mid size companies equal time will help to clarify all of the problems caused by the CPSIA and its implementation. Thank you for your consideration of this important matter.

Sincerely,

Carolyn

Carolyn Voisin

To Whom It May Concern,

This email is in regard to the Committee hearing on 9/10/09. As an employee of Learning Resources, I am greatly disappointed that small businesses (who will be impacted by this law) have not been invited to give testimony to the committee. I take great pride in our company's product not only in its service to children but its safety. I feel that without letting the small businesses present their history and examples it will deprive our children of these wonderful products. I would kindly ask that you reconsider this position. Thank you very much for your time and consideration.

Thank You,
Jeff Kaiser

Jeff Kaiser
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Educational Insights Inc.
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September 7, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
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Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

The last year has been especially difficult on small businesses like those of our members, 50% of who have gross sales of under $3 million. Since Congress passed the Consumer Product Safety Improvement Act of 2008 – a law which we have supported from the beginning – the juvenile products industry has spent at least $45 million on increased testing and compliance costs and we've lost more than $138 million in destroyed or returned inventory. Implementation of this well-intentioned but poorly-conceived law during the current recession has been a nightmare. One estimate shows the combined effects on the juvenile products industry of the CPSIA and the recession to be greater than $430 million and rising.

Many small businesses in the juvenile products industry came to DC earlier this year to meet with our Senators and Members of Congress about the CPSIA. We were mostly told to wait for the Obama administration's appointees to take charge at CPSC and things would get better. Now, all five Commissioners have been confirmed and the chairman has been on the job since late June. We still need help. Our biggest fear is that the new folks in charge will tell Congress that the worst has passed and everything will be fine. I am writing to tell you that is not the case.

Juvenile Products Manufacturers Association, Inc.
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We believe Congress needs to amend the CPSIA this year. Everyone seems to admit there have been unintended consequences – but no one can agree on whether and how to address them. We are not asking to repeal the law in its entirety because we know that is not politically feasible or, frankly, desirable. There are some good things in there already. But I hope you can work towards making a few changes to make things better for small businesses and better for the agency staff who are struggling to implement the CPSIA. Common-sense reforms in areas such as tracking labels, science- and risk-based regulations, certification, retroactivity, and component part testing would help turn a well-intentioned law into a well-made law.

To outline some of our organization's most pressing concerns, the Commission seems unable to define child care articles under section 108 as only those products that are likely to result in ingestion of hazardous amounts of phthalates or define such products that facilitate sleep, feeding, sucking or teething as products reasonably intended to be mouthed. This lack of clarity in policy continues, despite Congressional admonition that restrictions on interim banned phthalates only apply to product that can be mouthed, sucked and chewed. This has resulted in needless testing and restriction of perfectly safe products. Similarly, the Commission has indicated that Congress did not provide it with authority to exclude products that may functionally or inherently contain lead but that do not expose children to it and present no health risk. Corrosion resistant brass and structurally tough metals used in frames of protective products for children, in nuts, bolts and other fasteners (that secure products and keep dangerous small parts inaccessible to children) need to be strong to keep children safe. As a practical matter this needs to be done to assure that structurally sound safety related infant products (strollers, highchairs, carriers, etc) remain affordable and accessible to the public.

Small businesses impacted by the new law, such as those small businesses represented by JPMA, must be included in Thursday's hearing and must be invited to share their experiences in testimony before the Committee. Many of the small family businesses we represent have built their reputations on the safety and enjoyment of their products, and have spent multiple generations assuring high quality products that comply with all laws and regulations. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on the ability of many of our members to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain. Small businesses like JPMA members in all 50 states are counting on you.

Thank you for your consideration.

Sincerely,

Robert Waller

Robert Waller, Jr.
President
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Phone: 856-642-4402

BLUE-BOX TOYS

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September 8, 2009

The Honorable Henry Waxman
Chairman

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"Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no small businesses impacted by the new law have been invited to share their experiences in testimony before the Committee. The business community has been actively calling for hearings since the passage of the CPSIA because of the draconian effects of the new law. Our business makes toys products have an exemplary 57-year safety record because of our hard work to assure high quality and compliance with law. Yet the innumerable, onerous provisions of the CPSIA have had a devastating impact on our ability to conduct business. These issues need to be explored by the Committee based on the testimony of real companies suffering real pain.

The problems caused by the law are countless. The overly broad definition of "children's products" swept in many products incapable of harming children from lead or phthalates. The CPSC itself has been hobbled by the CPSIA's strict new rules that prohibit risk assessment. The agency has no flexibility to exercise judgment and as a result, have issued impractical guidance and unworkable regulations. In addition, the exemption process under the law is both very limited and very expensive.

The severe penalties under the law are not scaring companies into compliance – they are shooing companies out of the market. Even the CPSC's own guidance to resale shops advises stores to consider the option to stop doing business in children's products.

I strongly believe that the perspective of businesses like our company is essential to a complete picture of the problems caused by the CPSIA and its implementation.

Thank you for your consideration of this important matter.

Sincerely,

Mona Seto
Director of Operations
mona.chan@blueboxtoys.com

American Educational Products, LLC
TEACHING TOOLS FOR UNDERSTANDING OUR WORLD

9/8/2009

The Honorable Henry Waxman
Chairman

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House Energy and Commerce Committee
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Dear Chairmen and Ranking Members:

I am writing regarding the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I would like to express my concern that no small business representatives are scheduled to testify about the impact the new law will have on their businesses. It is incredulous to me, in fact, that only one person is being allowed to testify. Is this hearing simply an attempt to say that a meeting has been held or is it an honest attempt to hear how companies are being affected? If the latter is the goal, then certainly more voices need to be heard. It seems only logical to me that that would be the case.

My company's president has been most involved in expressing the challenges this new law will have our small business. Obviously, as an employee, I am concerned as well for my job security. As our company manufactures educational materials, this law impacts us greatly. We have always had the end user's safety in mind as we have developed our product lines. Without these materials, how are children to receive the education that you and I had growing up? Certainly as danger to our children has been identified by products on the market, they have been evaluated and made safe or been discontinued. The restrictions being applied by this law are extraordinary and in many cases, ridiculous. We need to make our children safe while maintaining a sense of reality and sensibility.

To the point, no one wants children harmed by lead or phthalates. The CPSIA has yet to accurately define many of the products caught up in the generalities defining the amounts of lead and phthalates allowed in products. Furthermore, who can identify the true definition of "child's products"? The generality of both is beyond definition, but has brought much of the industry to a virtual standstill. The penalties are impractical and, frankly, silly. How can these be fairly enforced? Who will be able to make judgments? The expense to companies for testing is beyond comprehension. Products will be forced off the market that are important to our children's education due to the lack of clarity in the law. Do we really want that? Again, how will this impact our country's consumerism, which is the basis of our market place? How many companies will be forced to close? How many of those will just throw up their hands and quit? How many people will be out of work as a result?

May I again express how important it is to hear from actual members of this huge industry, which is being so adversely affected by this new law? Please allow that to happen. As I am sure you are aware, there are many business owners or leaders who would jump at the opportunity to express their concerns to the Committee.

Thank you for your time and attention to this most critical issue.

Sincerely,

Lane Oesterle Miller
Sales and Marketing representative
American Educational Products, LLC
800-445-5767
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9/07/09

The Honorable Henry Waxman
Chairman
The Honorable Bobby Rush
Sub-Committee Chairman
House Energy and Commerce Committee
2i25 Rayburn House Office BLDG Washington DC 20515

Dear Chairmen and Ranking Members,

With your permission,
I would respectfully like to recount for you a brief and recent history of mine and, further, to state for the record how I, James Mentzer (NYS small business owner), am directly and negatively impacted by the fast, and largely unchallenged, implementation of the CPSIA as it stands today. The intent of my letter is to lend a voice to the growing chorus of similarly affected businessmen and businesswomen who, as a direct result of this legislation are staring, as I am, at a forced withdrawal from the "toy and game" industry that we so love.
I would also like this letter to reflect my private concerns, as both a parent and as a citizen of this great country, about the unintentional consequences that will inevitably follow this legislation. I strongly believe that these have the potential to be so far reaching, within not only our industry but also every one of our communities at large, that I feel it only prudent that all sides of the CPSIA discussion be given a chance to be heard.

It seems to me that the potential loss of so many businesses' involved entirely in the pursuit of happier and healthier children, families, educators, etc. and coming as it does, at a time when our country so desperately needs a strong and vibrant business community, seems to me a tragedy in the making and one that dictates a closer examination before full implementation.

For my own story let me take you, respectfully, to the year 2005 and have you know this was the year that my wife and I began a 2 ½ year journey that saw us leave the comforts of our country (USA) for the challenges of Guyana SA. The purpose of our 'move' was to effectuate the adoption of our son, Christopher, from that country and to maintain his safety, during this period. I would just tell you that, while there, my wife and I were forced to sell our 2 homes in America and give up our successful construction business as well, in order to complete this 'journey' of ours but were, in return, rewarded with a son for whom no sacrifice would be unworthy.

As it came to pass, we eventually returned to our lives here in the 'states, richer for our experience but unfortunately right 'smack dab' in the middle of our country's current financial crisis. Thus, the construction industry was closed to us as a means to make a living and we were forced to do like so many Americans had before us and, hopefully, will be able to do again. That is to say, we went into a new line of business and let our passion become our guide. The trip to Guyana, aside from rewarding my wife and I with the light of our lives, was one that saw us frequenting the orphanages of that country in order to fill our time as productively as we thought able. While so doing, we were able to discover a whole lot about the needs of children and more importantly, for us, the universality of these needs. As a result of this new

understanding I was able to innovate a system for empowering these children and that system, "Goal Bands", became the basis of our new business venture and the circumstance that compels me to write this letter.

The long and short of my story, and the reason for this petition, is that I am now a "toy and game" small business owner and have on my hands a wonderfully successful little educational game product that can quite literally change the world, or so I am told by an increasing number of parents, educators, healthcare professionals, and the like.

This was how my version of the American dream was playing itself out until the specter of the current CPSIA legislation made itself felt to my own small business undertaking.

Esteemed members, it is not my intent in writing this letter to you to overwhelm you with my personal 'take' on this particular legislation. Nor will I cite what I feel to be the specific negative effects it holds for my company or, for that matter our whole country. I would only ask, respectfully, that the "toy and game" businesses' of America be given an opportunity to address your committee in order to provide you with the proper balance necessary to make this legislation the success that we all want it to be.

Sincerely,

James Mentzer, President
Black Belt Goals Inc.
Blackbeltgoals@gmail.com
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September 7th, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing on behalf of my customers, my company, and my employees in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am a small business owner, a catalog retailer in business for 27 years, employing 50-100 people seasonally, and am very disappointed that no small businesses, countless of which are impacted by this law, have been invited to tell of their experiences in testimony before the Committee. As I am sure you know, the business community has been vocal in its efforts to call for hearings since the passage of the CPSIA due to this law's unimaginable effects on its members.

My company has always gone the extra mile to ensure that the products we sell are safe, of high-quality, and of course, compliant with law. We are known in the children's product industry as having integrity and commitment to the safety of our customers. However, the countless burdensome provisions of the CPSIA have had such an impact on us that business has become difficult to conduct. There is no chance we will have a profitable 2009, and this is largely due to the myriad problems caused by this law. As you know, many small businesses have shut down because of these problems, and many more will do so unless our concerns are addressed. Just as tragically and ironically, with all of the expense and hoop-jumping that the law has forced businesses to undergo, the result is that there is little more assurance of safety for our children than the laws that were previously in effect. Simply, compliance with existing laws is what was needed, but inspection was lacking. Instead of tackling that issue, CPSIA was legislated in knee-jerk fashion, creating problems that are so far-reaching that it is mind-boggling. To start with, the law's interpretations are all over the map, and there is little consensus even at the CPSC! How are we to conduct business in this environment?!

To put it mildly, this is insanity, and a sad day in our country's history for businesses who strive to offer safe and high-quality items for children. Families will find themselves with far fewer choices of items to buy for their family, children will be arguably no safer than they were 2 years ago with then-existing laws, businesses will continue to collapse, and good and committed employees will be jobless. In a country that has grown strong on the backs of small business, you need to know that the deck is stacked against them under the new law. Ironically, while crafters are left to puzzle over how to "ascertain" co-hort information on their products, the new law awards a freebie to large businesses who seek to test their own products. This is a truly remarkable time for America, not only because such a near-worthless law has been put into effect, but also because it is so destructive. You owe it to all Americans to have a complete picture of problems caused by the CPSIA and its implementation. I am extremely disappointed that small businesses have not been invited to share their experiences with the committee. Thank you for your consideration of this important matter.

Sincerely,

Ann Ruethling

Founder

annr@chinaberry.net

The Burgan
household

August 26, 2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

With regards to the CPSIA legislation, I would like to write to let you know my disappointment in the law as it currently stands. The law is intended for the safety of our children. However, why must we give big business a blank check to bend and break the law, still producing products that contain levels of contamination unsafe for our children, just because they have the funds to write off the "error." Quite frankly, while The CPSIA is intended for good, it is serving to cripple small businesses, "stay-at-home mom" crafters, artisans, and those looking to save by shopping second-hand. And yet companies like Mattel, one of the worst offenders, are allowed to police themselves by using testing methods of their choice. Meanwhile the lady who makes hair bows for toddlers has to retest any time she changes a spool of ribbon.

When the only recourse for airing concerns is to address the one person in charge of the legislation and regulation of the CPSIA, who is in turn the ONLY person asked to give her concerns on the subject in a legislative arena, I shudder with dismay. To this I say, "Hello, Big Brother. Thank you for taking our voices away." We as American people *should* question the decision-making of our legislators. I sincerely urge you to please take *immediate and direct* action to revise the legislation. Temporarily remove the thought of "free trade or die" and "he with the most money wins," and make some adjustments to the law that actually *support America*. Modify the law so that it is written to support *American* small business with *American-made*, safe (and ideally American-made) components resulting in quality *American* products for our *American* children. We're told to buy American and support America, and are then prevented from making educated, personal choices that supports this initiative. The bottom line is that I don't want my only choice surrounding my children's health and safety to be "Pampers" or "Huggies," "Fisher Price" or "Playskool." I want options that go beyond b g business. Please help to put that choice back in my hand, so that I can support it with my dollars.

Nathan & Carrie Burgan
23235 Forest Street, Oak Park, MI 48237
248.885.4246

The Burgan
Household

A fellow member of the "blogosphere" and mother of two special needs children strikes the heart when she says, "As a parent of two children with special needs that have high levels of toxins in their system due to everyday exposures, I see this as a waste of time and resources. There are REAL dangers out there to our children that are 100% being ignored by these same "concerned" politicians. But let's make sure to not sell a 1972 copy of The Pokey Little Puppy. *Eek, the horrors!* While we put REAL toxins into our kids with little to no notice, we freak out over these ridiculous things. *Wake up and spend that money on real issues.* Don't turn over rocks, dig down 15 feet, get out your flashlight, and pray to find an issue you can deal with. We have real ones out there that are so much bigger and of more concern."

Respectfully Yours,

Carrie J.t. Burgan
Small business owner & concerned citizen
cjburgan@gmail.com
(248) 885-4246

Nathan & Carrie Burgan
23235 Forest Street, Oak Park, MI 48237
248.885.4246

9/8/2009

The Honorable Henry Waxman
Chairman

The Honorable Bobby Rush
Subcommittee Chairman

House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member

The Honorable George Radanovich
Subcommittee Ranking Member

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen and Ranking Members:

I am writing in regard to the Committee hearing set for September 10, 2009 in which the Hon. Inez Tenenbaum, Chairman of the U.S. Consumer Product Safety Commission (CPSC), is scheduled to testify on the implementation of the Consumer Product Safety Improvement Act (CPSIA).

I am very disappointed that no one outside the CPSC has been called to testify. The CPSIA affects small businesses and average citizens who sell used "children's products." Conceivably, any person who sells an old lunchbox, used children's clothing with a zipper, or a jigsaw puzzle could be penalized under the law if the items contain lead, toxic plastics, or could be choked on by a child who is too young to use the item anyway.

Personally, I do check the recalls.gov website to investigate my children's toys, so I know how time-consuming and difficult it is to determine if something has been determined "unsafe". I can hardly imagine how difficult it must be for the local Goodwill or other secondhand stores to try and determine whether items are "safe" to sell – safe for children **and** safe from the CPSIA penalties.

In these tight financial times, shouldn't a committee hearing actually hear from the small businesses that help drive our economy? Shouldn't secondhand goods dealers who may be punished by the implementation of the CPSIA have the chance to testify that they have been requesting for over a year? I think any sensible person would answer "yes" to both.

Thank you for your consideration of this important matter.

Sincerely,

Sarah Chipman
Layton, UT
frostandut@yahoo.com

THE ART & CREATIVE MATERIALS INSTITUTE, INC.
Street Address: **1280 Main St., 2nd Fl.**
Mailing Address: **P. O. Box 479**
Hanson, MA 02341 USA
Tel. (781) 293-4100 Fax (781) 294-0808
Website: www.acminet.org

September 8, 2009

The Honorable Henry A. Waxman, Chairman
The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman and Ranking Member Barton:

Congress enacted the Labeling of Hazardous Art Materials Act (LHAMA) in 1988 which directed the Consumer Product Safety Commission (CPSC) to adopt ASTM D 4236 as a mandatory safety standard under the Federal Hazardous Substances Act (FHSA). To insure compliance with LHAMA and ASTM D 4236, The Art and Creative Materials Institute, Inc. (ACMI) added LHAMA to its well-respected almost-fifty-year-old certification program for its members. The ACMI certification program insures that children's art materials are non-toxic and adult art materials are properly labeled with cautionary warnings and safe use instructions if those art materials could produce any adverse health effect with improper use. In ACMI's program, the toxicological evaluation is performed by a team of three toxicologists at Duke University, testing required by the toxicologists must be performed by laboratories approved by the toxicologists, and the toxicologists have the added expertise of four eminent toxicologists serving on its Toxicological Advisory Board. Risk assessments utilized by Duke toxicologists are submitted to CPSC as required by LHAMA. The program essentially mandates a pre-market clearance regime for art material products. Since the adoption of LHAMA, no children's art material product certified by ACMI has been involved in a recall by the manufacturer and/or CPSC. This is an outstanding record by any account of any industry's products.

Because ACMI was very concerned that the Consumer Product Safety Improvement Act (CPSIA) passed last year by Congress would conflict with LHAMA, ACMI was successful in having Congress add the following amendment to CPSIA in Section 102 for art materials that have been certified by ACMI:

> TESTING AND CERTIFICATION OF ART MATERIALS AND PRODUCTS.—A certifying organization (as defined in appendix A to section 1500.14(b)(8) of title 16, Code of Federal Regulations (or any successor regulation or ruling)) meets the requirements of subparagraph (A) with respect to the certification of art material and art products required under this section or by regulations prescribed under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.).

LOOK FOR THESE SEALS.....

The Honorable Henry A. Waxman, Chairman
The Honorable Joe Barton, Ranking Member

September 8, 2009

It was our understanding that the purpose of this amendment was to insure that LHAMA as implemented by ACMI continued to be the primary regulatory vehicle for children's art materials as requested in our letter at that time to Congressman Dingell, then Chairman of the House Committee on Energy and Commerce. A copy of that letter is enclosed.

Unfortunately, CPSC which administers the CPSIA cannot or will not acknowledge that exemption, even after numerous letters to and visits by ACMI with CPSC. Even though ACMI's program certifies that the children's art materials it evaluates **contain contaminant total lead levels already lower than what CPSIA requires on August 14, 2011**, had already **banned the use of phthalates now banned by CPSIA**, and also **bans any other hazardous ingredients that could cause a potential acute or chronic risk of injury**, this outstanding certification program might be rendered moot because member companies cannot afford both the cost for the evaluation and testing for LHAMA and the additional redundant testing required by CPSIA. Compounding the redundancy problem are the various retailer programs that require testing for art materials that is neither required by CPSIA nor LHAMA and only at their designated labs. Thus, member companies may be required to do the same tests at as many different labs as they have retailers.

Why is CPSIA testing necessary if the products have already received pre-market testing and approval? And, why should CPSIA compliance be retailer-driven? Without relief from this excessive testing burden, member companies may have to close their doors. We do not believe that this was the result that Congress intended.

We feel Congress must now act to correct this situation. We respectfully ask that Congress clarify this conflict between LHAMA and CPSIA for art materials or direct the CPSC to confirm ACMI's interpretation of its statutory exemption in CPSIA or to explain why the agency does not agree with our interpretation and what actions ACMI needs to take to achieve their agreement.

Respectfully yours,

Deborah M. Panning, CAE
Executive Vice President

DMP:tb
Enc: ACMI November 12, 2007 Letter to John D. Dingell and Bobby L. Rush

AMA MOTORCYCLIST

AmericanMotorcyclist.com

September 8, 2009

The Honorable Joe Barton
U.S. House of Representatives
2109 Rayburn House Office Building
Washington, DC 20515-4306

Dear Congressman Barton:

The American Motorcyclist Association (AMA) understands that the Subcommittee on Commerce, Trade, and Consumer Protection of the U.S. House Committee on Energy and Commerce will hold a hearing titled, "Consumer Product Safety Commission (CPSC) Oversight: Current Issues and a Vision for the Future" on Thursday, September 10. We are writing to voice are concern about the lead content requirements of the Consumer Product Safety Improvement Act of 2008 (CPSIA) and its effects on the off-highway vehicle (OHV) community.

The Act signed into law on August 14, 2008 and effective February 10, 2009, subjects any consumer product that is designed or intended primarily for a child age 12 years or under to the new limits on lead content (section 101). While the Act was passed with laudable intent, it has created a severe and unwarranted disruption to families who recreate together responsibly, a deleterious effect on youth amateur racing and is counterproductive to a well-documented safety hazard for children because some consumers will likely purchase vehicles that are physically too large for young riders.

The CPSC has voted to stay enforcement of the CPSIA that currently bans the sale of youth-model OHVs. The stay, which extends through May 1, 2011, follows a unanimous vote by Acting Chairwoman Nancy Nord and Commissioner Thomas Moore.

While we applaud the CPSC commissioners' vote to stay enforcement of the law, this does not solve the real issue, which is the law itself. Despite the stay, it is unclear whether state attorneys general will also decline to enforce the CPSIA. The sale of youth-model motorcycles and ATVs is still technically illegal. Even though a stay means that dealers would not be subject to fines or penalties imposed by the CPSC, state attorneys general would still be able to prosecute violators if they chose to do so. Youth-model motorcycles and ATVs should be exempt from the law.

To permanently address this issue, the AMA supports H.R. 1587, introduced by Representative Denny Rehberg. This legislation will exempt youth-model motorcycles and ATVs from the CPSIA.

In accordance with the foregoing, the AMA respectfully requests your consideration of our concern for the hearing regarding the lead content requirements of the CPSIA and to support H.R. 1587, which will provide immediate relief to the OHV community.

Thank you for your time and consideration of our concern. Should you have any questions or request additional information, please do not hesitate to contact me at 202-742-4302 or by e-mail at rpodliska@ama-cycle.org.

Sincerely,

Richard Podliska
Washington Representative

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Web Address: www.acmionline.org

Deborah M. Fanning, CAE
Executive Vice President

Deborah S. Gustafson
Associate Director

November 12, 2007

The Honorable John D. Dingell, Chairman
The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bobby L. Rush, Chairman
The Honorable Cliff Stearns, Ranking Member
Subcommittee on Commerce, Trade and Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Dingell and Ranking Member Barton, Chairman Rush and Ranking Member Stearns:

ACMI has continued to study the various provisions of H.R. 4040, even after its submission of comments in a letter dated November 7, 2007. In the course of this study, it determined that one of its two recommendations for amending H.R. 4040 might not alleviate our concern that ACMI's well-established certification program would not qualify to provide manufacturers of art materials compliance to all the certification requirements established by this legislation. Therefore, we ask that you discard the second recommendation we offered which was to insert in the Section by Section Analysis or the Committee report this sentence: "Nothing in Section 102 is intended to supersede, or otherwise interfere with, Section 23 of the Federal Hazardous Substances Act, 15 U.S.C. 1277."

It dawned upon ACMI that the recommendation referenced above would limit ACMI's certification program to chronic hazards only, since Section 23 of FHSA addresses chronic hazards alone. ACMI's program also certifies that art materials in its program have been evaluated to meet the regulations for acute hazards in the FHSA as well. Given the recent experience with the recalls of so many children's products,

LOOK FOR THESE SEALS.....

we believe acute hazards certification is as important as - and may be more important than - chronic hazards certification. Therefore, we would like to recommend that our original first proposal with a slight modification be accepted as an amendment to H.R. 4040. The modified language is as follows:

> Insert after the phrase "*... and is not owned, managed, controlled, or directed by such manufacturer or private labeler*" the following **"except as for non-profit trade associations who offer their members certification programs for acute and chronic hazards under any of the Acts administered by the Consumer Product Safety Commission similar to a certifying organization as defined in FHSA 1500.14(b) (8) Appendix A."**

Thank you for your consideration of this suggestion. We apologize for not recognizing the limitation imposed by one of our original proposals. ACMI hopes that this change of position will not inconvenience you in any way.

Sincerely,

Deborah M. Fanning, CAE
Executive Vice President

CC: Members of the Committee on Energy and Commerce

"United effort for individual security"

Representing the Bulk Vending Industry Since 1950

September 9, 2009

The Honorable Joe Barton, Ranking Member
House Committee on Energy and Commerce
2322-A Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Barton,

The National Bulk Vendors Association ("NBVA") represents both suppliers and operators of vended products that include toys and novelties that are dispensed from vending machines all over America. While demographics vary from product to product, we especially cater to children. On behalf of the more than 300 members of the NBVA representing thousands of bulk vendors, I urgently want to express my views on Section 103(a) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), commonly referred to as the "tracking labels" requirement. I understand that a hearing is planned by your Subcommittee on Commerce, Trade, and Consumer Protection this Thursday, September 10, and would like to reiterate our position so that it can be expressed to the other committee and subcommittee members.

The vending industry is unique in terms of products and distribution but it is important to understand that it supports thousands of U.S. jobs, including work opportunities for disabled Americans as these groups fill our plastic capsules. Other charities, including the American Cancer Society and the Center for Missing and Exploited Children for example, raise substantial funds through sponsored vending machine sales. Most importantly; however, our industry brings smiles and enjoyment to millions of low-income American children every year for whom a vending machine may be their first (or only) purchasing experience and means of obtaining toys.

As you know, Section 103(a) requires that all "children's products" and their packaging manufactured on or after August 14, 2009 bear a permanent tracking label "to the extent practicable." On July 20, 2009, the Consumer Product Safety Commission (CPSC) issued its "Statement of Policy" concerning the implementation and enforcement of Section 103(a). The statement reflects the Commission's current interpretation of the statutory requirements of Section 103(a) and how it intends to enforce the provision for products manufactured on or after August 14, 2009.

The NBVA is pleased that the Commission's guidance explicitly recognizes that it is not "practicable" to label each bulk vended product. The policy, however, does require that the package or carton in which such products are shipped to the retailer be marked with the requisite information. Effective immediately, supplier members of the NBVA are making a concerted effort to make sure that their shipments comply with this policy.

The NBVA considers the CPSC guidance to be a positive development for the industry and a step in the right direction. However, we remain concerned about the tracking label mandate of Section 103(a) as the agency's Statement of Policy can be changed by the Commission at any time, and it is not binding on state attorneys general (who are specifically empowered to independently seek enforcement of Section 103(a)).

NATIONAL BULK VENDORS ASSOCIATION
7782 East Greenway Road, Suite No. 2, Scottsdale, AZ 85260
Toll Free: (888) NBVA-USA ▪ Fax (480) 302-5108 ▪ www.nbva.org ▪ admin@nbva.org

the federal courts or other interested parties. **Therefore, the National Bulk Vendors Association continues to request that Congress include an explicit exemption for bulk vended children's products in any future technical corrections bill or similar amendments to the CPSIA or other appropriate legislative vehicle.**

On behalf of the thousands of Americans whose livelihoods depend upon bulk vending (including many disabled Americans and numerous charities), we therefore respectfully ask for your consideration for binding, statutory assurance that Section 103(a) will not be applied to children's products dispensed from vending machines. Such assurance is absolutely necessary to ensure the long-term survival and success of this uniquely American industry.

Thank you for your consideration of our concern and request. Please feel free to contact me if you have any questions regarding the tracking labels requirement of the CPSIA and its effect on the bulk vending industry. In addition, you may reach our Washington, D.C. counsel on this issue, Quin Dodd of Mintz Levin, P.C., at 202-434-7435 or qdodd@mintz.com.

Sincerely,

Randy Chilton, President

Toy Industry Association, Inc.

www.toyassociation.org

September 9, 2009

Representative Henry A. Waxman, Chair
House Energy and Commerce Committee
2204 Rayburn House Office Building
Washington, DC 20515

Representative Joe Barton, Ranking Member
House Energy and Commerce Committee
2109 Rayburn Building
Washington, DC 20515

Representative Bobby Rush, Chair
Subcommittee on Commerce, Trade
and Consumer Protection
2416 Rayburn Building
Washington, DC 20515

Representative George Radanovich
Ranking Member, Subcommittee on
Commerce, Trade and Consumer Protection
2410 Rayburn Building
Washington, DC 20515

Dear Chairmen Waxman and Rush and Ranking Members Barton and Radanovich:

I understand that the House Subcommittee on Commerce, Trade and Consumer Protection will hold a hearing tomorrow where the new chairman of the U.S. Consumer Product Safety Commission (CPSC), Inez Tenenbaum, will testify regarding the CPSC and issues before it.

On behalf of the Toy Industry Association Inc. (TIA) and its more than 500 member companies, we respectfully urge you to focus this hearing on an examination of the unintended and harmful consequences that have been – and continue to be – caused by problems with the implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Now is the time to closely examine these problems and to provide relief to businesses that are struggling to comply with the Act by:

- providing the CPSC the clear and necessary authority to promulgate practical common sense regulations that will support the CPSIA's implementation.
- acting on legislation that will address specific areas of the CPSIA that need correcting by Congress, not the CPSC.

TIA is the not-for-profit trade association for producers and importers of toys and youth entertainment products sold in North America; our members represent more than 85% of the total domestic toy market. As a global leader in the development of sustainable toy safety initiatives, TIA and its members are committed to implementing standards and regulations that will help to keep young consumers safe. We are advocates for a national approach to safety requirements for toys and children's products and we support many of the concepts contained in the CPSIA.

However, you have likely already heard many shocking stories from constituents in your district and around the country who are struggling with the law. Efforts to implement the Act have regrettably resulted in confusion and placed unnecessary burdens on many small- to medium-sized businesses, including toy sellers that are suffering from the current economic downturn.

(continued)

One month following the February 10, 2009 effective date for a number of new CPSIA requirements, TIA surveyed manufacturers/importers and retailers to collect information about the economic impact the law is having on the toy industry. At that point, we estimated that CPSIA implementation would result in a $2 billion negative affect – nearly 10% of the total value of the U.S. domestic toy market.

The lack of clarity in the law and implementing guidelines has forced safe toys off retail shelves, small toy businesses to close, and local economies to suffer.

Chairman Jason Altmire (D-PA) and the members of the House Small Business Committee received first-hand accounts of these economic hardships during a CPSIA oversight hearing on May 14th. Following the day's testimonies, members of the majority and minority were united in calling for a further examination of the law. TIA shares this sentiment – which is why we intend to continue working closely with the CPSC and Congress to address CPSIA implementation requirements.

We applaud President Obama's decision to provide much-needed additional funding for the Commission and congratulate the President and Congress for making an excellent choice in the appointment of the Agency's new Chairman and new Commissioners. We also support Chairman Tenenbaum's approach to "common sense rulemaking" and ask Congress to help the new Chairman achieve her objectives by formally considering the current inadequacies of the CPSIA at tomorrow's hearing:

The CPSC Needs Authority to Regulate Based Upon Risk Assessment
The CPSIA contains inflexible standards which are difficult or impossible to modify. Without consideration of quantifiable risk of injury, far too many safe products are swept up into the safety legislation's overly broad reach. The CPSC needs discretion to exclude products and materials that do not represent a health risk.

Retroactive Application of New Standards is Unreasonable
The applicability of new requirements should be limited to products manufactured after the effective date, except in circumstances where the CPSC decides that exposure to a product presents a health and safety risk to children. Applying the new law retroactively has caused widespread market chaos and significant business losses.

Unreasonable Implementation Timeline
The CPSIA's unrealistic implementation deadlines did not provide the CPSC with sufficient time to manage the deluge of questions, certifications and rulemakings that were required to effectively manage product that was already in inventory. Nor was time available for firms to transition manufacturing standards or sell off inventory. This lack of lead time has led to large business losses for both manufacturers and retailers across the industry.

Testing and Certification Must Be Efficient and Clear Protocols for Periodic Testing Must be Established by the CPSC on a Timely Basis
Upstream component testing and reliance on manufacturer's supplier certification of compliance should be permitted to reduce costs and duplicative testing. In addition, the CPSIA calls for CPSC to establish by November 14, 2010 protocols and standards for ensuring that a children's product is subject to testing periodically. Those protocols and standards must be clear and practical; they should recognize measures taken upstream in the manufacturing process; and they must be promulgated by the statutory deadline to provide timely guidelines for manufacturers.

(continued)

I am sure you and your staff are aware that these and other concerns surrounding the CPSIA's new requirements were the subject of an April 2, 2009 Congressional Research Report (CRS) titled: *Consumer Product Safety Commission: CPSIA Implementation.*

Thank you for your time and interest in toy safety issues. TIA stands ready to meet with you to discuss these issues in more detail. Should you have any questions or if TIA can be of future assistance, please do not hesitate to contact me (ckeithley@toyassociation.org; 646.520.4841) or Ed Desmond, TIA's Executive Vice President for External Affairs (edesmond@toyassociation.org; 202.857.9608).

Sincerely,

Carter Keithley
President

Copy: Michelle Ash
Tim Robinson
Will Carty
Shannon Weinberg

9-8-09
SEP 0 4 2009 Brian
Shannon
Will

September 4, 2009

House Energy and Commerce Committee
2322A Rayburn House Office Building
Washington, DC 20515

The Honorable Henry Waxman Chairman	The Honorable Bobby Rush Subcommittee Chairman
The Honorable Joe Barton Ranking Member	The Honorable George Radanovich Subcommittee Ranking Member

Re: Format of the House Subcommittee on Commerce, Trade, and Consumer Protection Hearing, "Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future", scheduled for Thursday, September 10

Dear Chairmen and Ranking Members:

We are writing in regard to the subcommittee hearing set for September 10, 2009, the first Commerce Committee hearing on consumer product safety since the CPSIA was passed over a year ago. We are very disappointed to learn that the committee will not be taking this opportunity to hear from any small businesses affected by the CPSIA. Indeed, we have learned that CPSC Chair Tenenbaum will be the only person invited to testify.

While we have full faith in the abilities of Ms. Tenenbaum and believe she is working to apply common sense interpretations to the CPSIA, we do not believe that the she can represent the full scope of the CPSIA's impact on responsible American small businesses. Nor do we believe that the unintended consequences of the CPSIA can be solved through the CPSC's rulemaking. A technical correction is required, and we would like the opportunity to tell your committee why.

Our businesses have been burdened by a law designed to fix a problem created by irresponsible multi-national corporations such as Mattel. The small manufacturers, crafters, and retailers represented by our alliance have impeccable safety records, yet we are burdened by excessive compliance costs while Mattel has once again been trusted to police itself.

Now is the time for Congress to hear the voices of small businesses. Now is the time to show that laws can be written for the common good, not just for the interests of large, well-connected corporations such as Mattel. Now is the time to invite small businesses, including a representative of our alliance, to speak truth to Congress about how the CPSIA is devastating our businesses and our livelihoods.

As parents, consumers and small business owners, we all believe that children's products should be free of toxins and safe for our children. We are in business due to our sincere desire to put forth quality products. Unfortunately, the CPSIA has made this endeavor much more difficult than it should be.

Please, help us fix the CPSIA. Help us continue to provide unique clothes and playthings for America's children. Please, invite us to testify.

Respectfully,

The Handmade Toy Alliance

Contact information and a listing of all 382 business members of the Handmade Toy Alliance is available at http://www.handmadetoyalliance.org/members-of-the-handmade-toy-alliance

savehandmadetoys@gmail.com
www.handmadetoyalliance.org.

Board members:

Cecilia Leibovitz, Craftsbury Kids, VT
Jill Chuckas, Crafty Baby, CT
Jolie Fay, Skiping Hippos, OR
Rob Wilson, Challenge & Fun, MA
Kate Glynn, A Child's Garden, MA
Dan Marshall, Peapods Natural Toys, MN
Mary Newell, Terrapin Toys, OR
Heather Flottmann, Lilliputians, NY
John Greco, Greco Woodcrafting, NJ

September 10, 2009

The Honorable Henry Waxman
Chairman
Committee on Energy and Commerce
U.S. House of the Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U.S. House of the Representatives
2322A Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby Rush
Chairman
Subcommittee on Commerce, Trade, and
Consumer Protection
Committee on Energy and Commerce
U.S. House of the Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable George Radanovich
Ranking Member
Subcommittee on Commerce, Trade, and
Consumer Protection
Committee on Energy and Commerce
U.S. House of the Representatives
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Waxman and Rush, and Ranking Members Barton and Radanovich,

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I want to thank you for holding today's hearing on the Consumer Product Safety Commission. NFIB is hopeful that today's hearing will address the negative effects the Consumer Product Safety Improvement Act (CPSIA) – the Commission's chief concern – has had on America's small businesses.

In the current economic recession, the CPSIA further cripples small businesses by requiring that more time, money and labor be devoted to government regulations, diverting these precious resources away from job creation. In the months since the law's enactment, NFIB's Small Business Economic Trends (SBET) survey has continued to report that small business owners have a negative view of the economy. While our members understand that the intent of the 2008 law is to protect children, small businesses are concerned that the law will continue to cause serious economic hardships for many law-abiding small businesses that manufacture and sell safe children's products. During a time of economic uncertainty, new costs and mandates inhibit economic growth and may force small businesses to raise prices, cut jobs or shut their doors.

NFIB has heard from members nationwide from diverse industries about how the CPSIA has severely impeded their businesses. For example, an NFIB member in the Midwest owns a small retail children's store with over 100 different products on the shelves and about $90,000 in inventory. Attempting to comply with the myriad of new regulations and deadlines in CPSIA has been a significant business hurdle for him, including but not limited to labeling, testing and certification of his inventory. Another NFIB member manufactures educational science products geared towards high school and college science classes, although some school districts may choose to use his products in classrooms with children under age twelve. The largest cost he has faced under the new law continues to be the countless hours spent researching the new law. Because he buys from component suppliers and sells to catalogue retailers, multiple questions arise as to who is responsible for the testing, labeling and certification of the parts he purchases and the products he sells. NFIB urges Congress to act on legislation that will alleviate these burdens.

In particular, NFIB strongly supports allowing for "component part testing" which is necessary to prevent duplicative and expensive testing. Small manufacturers would be permitted to use the testing and certification that are obtained by their component suppliers (if all components are certified, the final product is certified). Component part testing would in particular help alleviate some of the financial, labor and administrative burden that small businesses face in complying with the CPSIA. NFIB strongly supports legislation that would amend the current law to allow for component part testing.

Additionally, the Commission should exercise a more practical interpretation of the current law as it did when resale establishments were exempted from the testing requirements. This exemption and others stays of enforcement are a good start. If the Commission does not have the authority under current law to make common sense exemptions, then Congress must act to provide the Commission with such authority. NFIB remains hopeful that Congress and the Commission can begin to work together to address additional burdens that may be fixed through the regulatory and legislative process.

NFIB is encouraged that during her Senate confirmation hearing, Chairman Inez Tenenbaum committed, "I will also ensure that industry knows that their views will be heard and considered," and that "regular and timely public communication is critical to keeping the public informed about consumer product safety." Thank you again for holding this hearing. NFIB looks forward to working with the Commission and Congress on this issue as the 111th Congress continues.

Sincerely,

Susan Eckerly
Senior Vice President
Public Policy

cc Members of the House Committee on Energy and Commerce

Goodwill Industries International, Inc.

Member Services Center
[illegible]

Phone [illegible]
Fax [illegible]
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www.goodwill.org

September 9, 2009

The Honorable Henry Waxman, Chair
Energy and Commerce Committee
2204 Rayburn House Office Building
Washington, DC 20515

The Honorable Joe Barton, Ranking Member
Energy and Commerce Committee
2109 Rayburn House Office Building
Washington, DC 20515

The Honorable Bobby Rush, Chair
Commerce, Trade, and Consumer Protection Subcommittee
2416 Rayburn House Office Building
Washington, DC 20515

The Honorable George Radanovich, Ranking Member
Commerce, Trade, and Consumer Protection Subcommittee
2410 Rayburn House Office Building
Washington, DC 20515

Dear Chairs and Ranking Members:

As the Commerce, Trade, and Consumer Protection Subcommittee conducts a hearing titled, "Consumer Product Safety Commission Oversight: Current Issues and a Vision for the Future" on Thursday, September 10, Goodwill Industries International, Inc. (Goodwill Industries) urges you to consider the unintended consequences that the Consumer Product Safety Improvement Act of 2008 (CPSIA) (P.L. 110-314) have affected nonprofit resellers, such as Goodwill, that sell donated children's products to support the delivery of mission services. It is important that future hearings take into account the concerns that the business community, especially resellers, have raised over the implementation of the CPSIA.

Goodwill Industries' network of 159 local Goodwill agencies provides jobs, job placement and training to people with disabilities and other barriers to employment through revenues raised in donated goods stores. Goodwill Industries wholeheartedly agrees with those who supported passing the CPSIA in order to create a safety net that protects all children from exposure to products that have dangerous lead levels. Throughout Goodwill's more than 100 year history, our first priority has always been the safety and well-being of the people that we serve, the families who shop at our stores, and our donors and community partners. Goodwill Industries has a long and distinguished track record of working with the CPSC to ensure that potentially dangerous products never make it to our store shelves. Before a product is placed for sale at a local Goodwill store, we confirm that the product is not on the CPSC's product recall list. Products found on the recall list are disposed of in compliance with the law.

As you consider the challenges that the CPSC currently faces and its vision for the future, it is worth noting that Goodwill Industries has partnered with the CPSC in a public awareness campaign to work in concert to educate shoppers and employees about the hazards of certain products and proper recall procedures. Goodwill Industries recognizes Chairwoman Tenenbaum's efforts. While the unintended consequences of the CPSIA

certainly has the potential to have negative impact on local Goodwills and the communities they serve, Goodwill Industries has been pleased to be part of this collaborative effort. Goodwill Industries looks forward to being part of ongoing discussions and solutions with the CPSC and Congress regarding implementation of the CPSIA and its potential to negatively impact our communities, as we continue to ensure the safety of the people we serve.

Sincerely,

Jim Gibbons
President and CEO

cc: Commerce Trade, and Consumer Protection Subcommittee Members

JOHN D. DINGELL
16TH DISTRICT, MICHIGAN

CHAIRMAN
COMMITTEE ON
ENERGY AND COMMERCE

CO-CHAIR
HOUSE GREAT LAKES
TASK FORCE

MEMBER
MIGRATORY BIRD
CONSERVATION COMMISSION

Congress of the United States
House of Representatives
Washington, DC 20515–2215

March 4, 2009

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

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

Dear Acting Chairman Nord and Commissioner Moore:

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

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

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

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

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

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

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

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

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

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

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

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

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

With every good wish,

Sincerely yours,

John D. Dingell
Chairman Emeritus
Committee on Energy and Commerce

cc: Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon

Representative Bobby L. Rush
Representative Anna G. Eshoo
Representative Bart Stupak
Representative Eliot L. Engel
Representative Gene Green
Representative Diana DeGette
Representative Lois Capps
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Representative Roy Blunt
Representative Steve Buyer
Representative George Radanovich
Representative Joseph R. Pitts
Representative Mary Bono Mack
Representative Gregg Walden
Representative Lee Terry

Representative Mike Rogers (MI)
Representative Sue Wilkins Myrick
Representative John Sullivan
Representative Tim Murphy
Representative Michael C. Burgess
Representative Marsha Blackburn
Representative Phil Gingrey
Representative Steve Scalise
Senator Harry Reid, Majority Leader
Senator John D. Rockefeller, IV
Senator Daniel K. Inouye
Senator John F. Kerry
Senator Byron L. Dorgan
Senator Barbara Boxer
Senator Bill Nelson
Senator Maria Cantwell
Senator Frank R. Lautenberg
Senator Mark Pryor
Senator Claire McCaskill
Senator Amy Klobuchar
Senator Tom Udall
Senator Mark Warner
Senator Mark Begich
Senator Kay Bailey Hutchison
Senator Olympia J. Snowe
Senator John Ensign
Senator Jim DeMint
Senator John Thune
Senator Roger Wicker
Senator Johnny Isakson
Senator David Vitter
Senator Sam Brownback
Senator Mel Martinez
Senator Mike Johanns

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

NANCY A. NORD
ACTING CHAIRMAN

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

March 20, 2009

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

Dear Representative Dingell:

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

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

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

Sincerely,

Nancy A. Nord
Acting Chairman

Enclosure

cc: Commissioner Thomas Moore

Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon
Representative Bobby L. Rush
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Senator David Vitter
Senator Sam Brownback
Senator Mel Martinez
Senator Mike Johanns

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

Date: March 20, 2009

TO : Acting Chairman Nancy Nord
Commissioner Thomas Moore

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

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

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

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

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

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

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

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

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

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

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

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

Mandated Deadlines: Effect on Safety Priorities and Staff Workloads

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

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

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

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

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

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

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

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

Practical Solutions: Prioritizing Workload Based on Risk or Extending Deadlines

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

- Use of Risk Assessment to Establish Priorities

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

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

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

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

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

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

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

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

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

- Extend Deadlines

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

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

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

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

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

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

Industry Estimates

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

CPSC Testing Estimates

CPSC staff has estimated that the cost for third-party testing of product for lead and phthalates would range from several hundred dollars to several thousand dollars per product tested.

depending on the number of product components requiring testing. Based on information obtained from testing laboratory price lists and quotes, the cost to test for the lead content of a substrate appears to range between about $50 and $100 per tested component. In a recent public meeting, industry representatives stated that testing of the 233 various components of a bicycle, valued at $50, cost one of their members approximately $14,000. Less information is available about the cost of testing products for phthalates, but the limited information obtained from price quotes and laboratory presentations to CPSC staff suggests the best estimate for the cost of phthalate testing at this time ranges from $300 to $500 per tested component. The cost to test for phthalates appears to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant told of receiving quotes for the testing of a product ranging from $7,000 in Asia to $22,000 in the United States. Because these tests tend to be destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.

Economies of scale provide an advantage to larger volume manufacturers, relative to their smaller volume counterparts, as they can absorb these testing costs over a larger production volume. Spread over this larger volume, the incremental increase to the cost of each product is much smaller for the large manufacturer versus the much smaller manufacturer. In short, the heavier burden falls to the smaller volume business. When the Commission establishes random sampling requirements (as part of the required rulemaking on periodic testing in Section 102(b)), testing costs will increase over current levels for manufacturers of all sizes.

The exclusion of most fabric from the third-party testing requirements will provide only limited relief for npparel manufacturers, including small manufacturers. In a public meeting with CPSC staff, several apparel retailers reported finding virtually no lead in fabric, but they did find lead in about 2% of the tests on hard items, such as buttons, zippers, snaps, and fasteners. Since most apparel items have some non-fabric items, there will still be testing requirements for most apparel items. Moreover, under the new restrictions the presence of lead in fasteners used on clothing has had a negative impact on the second-hand market for children's clothing in the United States.

Although testing children's products, as applicable, for lead and phthalates has received the most attention, many products will be subject to additional third-party testing requirements. For example, cribs must be tested for compliance to the crib safety standards at 16 CFR part 1508. Toys are also subject to testing for compliance to applicable provisions of the Toy Safety Standard, including testing for additional heavy metals, such as arsenic, cadmium and chromium. We have no quotes for these tests; however, it is probable that the major factor in the cost of the tests will be the labor time required to conduct the tests. Once again, given the destructive nature of the testing, the manufacturer will also bear the expense of lost material, labor, and overhead.

It is important to keep in mind the wide expanse of goods falling under the definition of "children's products" and subject therefore to third-party testing requirements. Beyond toys and durable infant and toddler products, items such as books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies, and Scout equipment and accessories are subject to lead and/or phthalates testing. Likewise, all products for children 12 years of age or younger that are made by crafts people, stay-at-home moms or dads, charitable church groups and the like,

must meet the new limits and be tested for compliance or their products are banned. This has completely upset the business model for many of those small businesses and charitable organizations. Because of the retroactive nature of the regulations, many retailers began turning back product with more than 600 ppm well in advance of February 10, 2009, in order to ensure their shelves were free of non-compliant product. As a result, many small manufacturers, who failed to recognize the true scope of the law or were unprepared for the retailers' reaction to the CPSIA, now find they have inventory they cannot sell.

Retailers Accelerating Deadlines

Retailers continue to move well ahead of the deadlines established in the CPSIA. For example, it is staff's understanding that Wal-Mart stopped receiving product with more than 300 ppm lead in January 2009. These actions have stranded inventory that may be compliant today but will be banned in August as the lead limit drops to 300 ppm. In addition to the risk that these products may become obsolete and will need to be reworked or destroyed, manufacturers of all sizes are incurring expenses to hold this inventory while they decide how to move their product. The cost to carry this inventory varies by business, but typically runs about 25% of the on-hand inventory value.

As retailers pull product from their shelves, many consumers have also been negatively impacted. For example, CPSC staff have received numerous emails from consumers stating they could no longer purchase parts for their child's youth model motorcycle because of retailer concerns over the lead content of the parts. More than one consumer has noted the possibility of consumers' purchasing vehicles sized for older children or adults if they could no longer service their current motorcycle or ATV. This reaction potentially places these children in a situation of increased risk of injury or death.

Solution: Risk-based Assessments That Consider Age and Exposure

It may be too late to mitigate the significant economic impact of the February 10, 2009, ban on children's products containing more than 600 ppm total lead content, by weight, for any part of the product. However, some relief could be provided to deal with the impact on thrift shops and second-hand sales, and Congress still has time to act to prevent the even greater impact that will occur when the lead limit drops to 300 ppm in August 2009. For example, toxic substances limits are better regulated based on the possibility of exposure in relation to age. Foreseeable use data, combined with mouthing and ingestion data at various ages, would define the group at risk for any given product.

This approach would exclude items such as bikes and ballpoint pens from the discussion and we could focus on items like metal jewelry and other objects likely to be mouthed or ingested. By granting the CPSC the flexibility to determine the relevant hazards, flexibility in determining exemptions based on assessment of risks, and the discretion to adjust the age limit for certain groups of products where the exposure is low, resources can be properly focused on areas of greater risk, yielding maximum reductions in consumer risk of death and injury.

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

In light of the concerns expressed by small business owners and employees, CPSC staff has been considering what relief might be provided for them without compromising safety. The first challenge was to define what is meant by "small business" in the context of the manufacture of children's products.

For example, with regard to children's apparel, there are not good statistics differentiating those firms that make all apparel versus those firms that make apparel intended only for children 12 years of age or younger. With regard to toys, the analysis of those businesses that are focused on the manufacturing of products solely for children is more reliable. Bureau of the Census (2006) data shows that there are 776 firms that manufacture dolls, toys, and games (NAICS 33993); 403 of those firms (51.9%) have fewer than 5 employees, 632 (81.4%) have fewer than 20 employees, and 963 (98.3%) have fewer than 500 employees which is the standard definition of a small business. Only 13 of the firms (1.7%) that produce toys would not be considered small businesses by the Small Business Administration. All (or almost all) of these firms are likely to produce children's products and all are affected by the current economic downturn.

Another group significantly impacted by the CPSIA is small crafters of products for children, many of whom work out of their homes. Based on a 2000 survey conducted by the Craft Organization Directors Association, there were an estimated 106,000 to 126,000 craftspeople in the United States. Additionally:

- The average gross sales revenue was $76,000 per craftsperson.
- The median household income of craftspeople was $50,000 per year, with about half coming from craft activities.
- 64% of craftspeople worked alone, 18% work with a partner or family member, and only 16% had paid employees.

Component Certification

The cost of testing and certification is a huge burden on these small businesses and a robust component certification program would be extremely helpful. However, any component testing rule would have to apply across the board to all businesses, small and large, and to our global trading partners in compliance with international trade laws. Furthermore, we have to design a program we are confident will avoid the switch of components during manufacture which is the very problem that Congress was intending to fix by requiring testing of children's products in the CPSIA. Component testing presents real challenges since many of the components used in children's products are not children's products on their own and do not require third party testing. Snaps could be used on a hand knitted sweater that were not produced primarily for use in children's products, and we cannot be sure given the expense of testing, that a market will develop for certified compliant materials for use by crafters.

Potential Solutions

Recognizing that the Commission always has the ability to take action to address unsafe products in the marketplace, Congress could take many different approaches to mitigate the effects on small businesses. Congress could apply the new lead and phthalates limits prospectively to mitigate the impact on inventory existing prior to enactment. It could allow for a more flexible exception process based on balancing of risks against the burdens of the costs of testing and certification but that could overburden staff. Another option would be to allow the Commission the flexibility to decide what children's products require testing and certification.

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

CPSC staff has only limited, anecdotal information concerning the impacts of the Act on second-hand stores. Major resellers such as Goodwill Industries and the Salvation Army have estimated impacts, including both lost sales and disposal costs, totaling hundreds of millions of dollars. Many smaller resellers have indicated that under present circumstances, they cannot afford to continue selling children's toys or apparel, which account for much of their revenues. Even church bazaars and neighborhood yard sales are adversely affected.

The major problem for second-hand stores and other resellers is that the CPSIA prohibits the sale, distribution or export after February 10, 2009, of any children's products exceeding the applicable lead or phthalate limits regardless of when they were made. Second-hand stores are typically selling items that were manufactured years earlier. Thus, a large percentage of a reseller's current inventory of children's products may have been manufactured long before the stringent new limits took effect, and it may now be impossible to dispose of such items lawfully except by destruction (which itself may be costly, particularly for non-profit organizations). To make matters more difficult, there is often no cost-effective way to determine which products can lawfully be sold and which cannot.

Unlike other retailers, resellers generally have little or no control over the compliance of the goods that they obtain. Most are donated. Even where they have regular donors, resellers cannot practically establish specifications for children's products as major retailers can for their regular suppliers. Testing everything they receive is not a practical solution either. Like small, home-based manufacturers, resellers cannot spread testing costs across many units of the same type; at any given time, they would usually have on hand no more than a few items of the same type. The standard tests for lead and phthalate content are destructive, so if one tests a single item to determine whether it can be sold, one no longer can sell that item.

Screening devices, such as x-ray fluorescence (XRF) machines, can help in weeding out children's products that have excess lead, without destroying products that comply, but the new technology is still expensive. No such screening device yet exists for identifying phthalates. Even if such technology can be developed quickly, it remains a disproportionate burden to test every unique item in inventory. Some internet resellers and auctioneers do not even have access to the products that are offered for sale by third parties on their website and so could not feasibly test them by any method.

The second-hand store problem will get worse for several years before it may ultimately get better. The lead content limits will drop to 300 parts per million in August 2009 and to 100 ppm in August 2011 (unless the Commission determines that such limit is not technologically feasible for a class of products). Products manufactured after these dates will be in use for some years before they are donated to second-hand stores. So, it will probably take many years before children's products that comply with these stringent limits make up a sizable majority of the products for sale at second-hand stores.

Potential Solutions

Under the circumstances, merely postponing the effective date of the lead or phthalate limits for everyone, while this would help alleviate some problems we are seeing, would not be very helpful to resellers because it would allow products with excess lead and phthalates to continue being made, and thus add to the number of noncompliant products that may eventually find their way to resellers and so postpone the day of reckoning.

The most effective way to help resellers is to address the issue of retroactivity, requiring that manufacturers meet the statutory limits for products manufactured after the effective date but that retailers and resellers be allowed to continue sale. If this suggestion were adopted, it would be important to note that resellers could not sell recalled products and that the Commission retains its authority to stop sale of any product if it finds an exposure that presents an unreasonable health and safety risk to children.

A law like the CPSIA that outlaws sales of previously lawful products will, by its nature, hurt retailers more than manufacturers and hurt resellers even more than other retailers (given the fact that products are typically in consumers' hands for several years at least before they reach second-hand stores). While dealing with retroactivity across the board would be the most effective way to deal with the inequities presented by the current law, other suggestions include such things as establishing a separate rule for resellers. For example, the ban on selling children's products with excess lead or phthalate content could take effect at a later date for second-hand sellers than for retailers generally. Or, resellers (or some subset of them, such as individual consumers or non-profit resellers) could even be exempted entirely from the provision that makes it a prohibited act to sell products containing more than trace amounts of lead or phthalates. Children's products that would have been banned under prior law should not be exempted in any case, and there may be categories of products, for example, children's metal jewelry, that should be handled more strictly. While consumers are accustomed to the notion that used goods are sold "as is," it might be appropriate to require a label or other type of

warning at the point of sale if resellers are allowed to continue to sell older children's products that do not comply with the new limits.

Lest there be any question, CPSC staff does not favor exempting second-hand sellers from the prohibition against selling recalled products (including children's products that are recalled for excess lead paint, or excess lead or phthalate content). The staff believes that resellers can reasonably be expected to keep abreast of CPSC recalls by signing up to receive CPSC's recall press releases and to remove any recalled products from their shelves. Similarly, where Congress has unambiguously directed application of new regulatory requirements to a discrete class of used children's products, such as cribs, CPSC staff believes that resellers no less than others must take steps to comply, even if that means deciding not to sell the products in question.

The Commission has adopted an enforcement policy on lead limits and has issued other guidance to second-hand stores to address many of the recurring issues. In the staff's view, however, the core problem is caused by the retroactive nature of the law and is beyond the agency's authority to solve.

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

The term "children's product" has significance for several different provisions of the CPSIA. It specifies which products are subject to the lead content limits. Indirectly, it plays a role in defining which products are subject to the phthalate limits. It governs the scope of products that require certification based on third-party testing and those that will require tracking labels "to the extent practicable."

CPSC staff believes that for purposes of defining which products are subject to lead limits, the boundary age could reasonably be lower than 12, at least in most cases. The Senate bill (S. 2045) deemed age 7 a satisfactory upper limit. CPSC staff understands that the conferees ended up agreeing to age 12 primarily because of the so-called "common toy box problem" – *i.e.*, the concern that a product intended primarily for older children might nonetheless be available to younger ones in the same home. This choice had the effect, however, of applying the lead limits to a much larger population of products, including many that are not toys and even including outdoor products such as dirt bikes or ATVs that would rarely be accessible to younger children under any circumstances.

CPSC's Regulations Established Age Limits by Product Class

CPSC's own regulations have used a variety of different ages to define what group of children's products will be subject to a standard or ban, and these precedents may be useful to consider. For example, the small parts ban applies to products that are intended for children under 3. Toys that are intended for ages 3 through 5 are allowed to have small parts, provided that they have

cautionary labels to warn that they are not suitable for youngsters under 3. In general, toys that are intended for children 6 and older do not require cautionary labeling except in a few specific cases such as balloons and small balls. The lead paint ban (16 CFR part 1303) applies to children's products without a specific age definition. Despite this broad applicability, the scope of the lead paint ban has rarely if ever, generated controversy. This is probably so because it is limited to children's products that have paint or similar surface coatings, and such products are much fewer in number and more easily identified than children's products generally.

Both the likelihood of exposure and the route of exposure are factors to consider in deciding what products should be subject to lead limits. Lead presents an acute hazard when direct ingestion is possible. For this reason, CPSC staff has long treated children's metal jewelry as warranting special concern. In other applications, brass and many other metals often have some lead content, particularly to improve workability, corrosion resistance and other properties. Where such objects can be mouthed but not swallowed, they generally pose a lesser risk, and objects that can be licked but not mouthed pose still less risk. There are some products where mouthing or licking is unlikely but where some lead exposure may result from touching and inadvertent transfer of lead from hand to mouth. A child's exposure to lead from zippers and snaps will depend on the type of garment and the child's age, among many other factors.

Practical Solution: Commission Discretion

One way to address these issues would be to give the Commission more discretion to grant exclusions from the lead or phthalate limits. Under the law as currently written, a material having more than 600 parts per million lead cannot be excluded unless touching the product will not result in the absorption of *any* lead. Taken as a whole, the language of section 101 appears to rule out treating even very low levels of absorbable lead as negligible. Congress could modify this exclusion criterion to allow *de minimis* levels of absorption or to change the focus to preventing any significant increase in blood-lead levels of a child, particularly for children who are of the age of the intended user.

Giving the CPSC discretion to lower the age limit for certain classes of products might be more efficient than dealing with many requests for exclusion, which is a resource-intensive process. Another resource conserving approach would be for Congress to lower the age limit across the board and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

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

CPSC staff is aware that many different parts of youth ATVs and youth motorcycles have lead content, some of which may exceed the 600 or 300 ppm level. Some of these parts are inaccessible, and some parts may qualify for the higher limits applicable to certain electronic components. Other parts, however, appear to be accessible and may not qualify for any

exclusion under section 101 of the CPSIA. These youth vehicles may also have some phthalate content, but they do not appear to be covered by the section 108 bans, which are limited to certain toys and child care articles.

The possibility that children will suffer significant lead exposures from these classes of vehicles appears to be remote at best. First, the vehicles are generally stored outside the home, where younger children would rarely be allowed unsupervised access. The vehicles are generally designed for children of at least 6 years of age and older. These children are far less likely to ingest or mouth components of a motorized vehicle – even those that are physically exposed – than something that fits readily in the mouth, such as a jewelry chain or charm. Children may still be exposed to some lead as a result of touching seats, handle bar grips or other places and then inadvertently transferring some of the lead to their mouths from their hands, either directly or indirectly, as for example while eating. For most children, however, this type of exposure is not likely to result in significant absorption of lead. This is particularly true where children are wearing appropriate protective riding gear, such as gloves and helmets.

Broadening the Exemptions for Metals

In section 101(b)(4), Congress recognized that it might not be technologically feasible for certain electronic devices to meet the lead limits applicable to children's products generally and gave the CPSC authority to adopt other requirements for such devices. The Commission has exercised this authority on an interim basis and established higher limits for certain electronic components where it concluded that such parts cannot be made inaccessible and it is not technologically feasible to substitute other materials at this time. These include metals such as steel, aluminum and copper alloys as used in electronic devices. In adopting these alternative limits, the Commission made reference to exemptions recognized elsewhere, such as the European Union directive 2002/95/EC known as RoHS. It is worth noting that in Europe, the RoHS exemptions are equally applicable to non-electronic uses of these metals, but the staff believes that section 101 gives us no flexibility to apply the same exemptions outside the realm of electronics. This means that children's products containing these metals and metal alloys manufactured for the U.S. market cannot employ recycled metal to the same extent as they can in Europe; rather, the manufacturers for the U.S. market must obtain supplies of primary metal, forcing vastly higher energy consumption and higher costs, or they must quickly switch to substitutes whose properties are poorly understood and may even pose more significant safety risks to children.

Under the current law, CPSC staff believes that an exclusion for youth ATVs would be very difficult to justify. Some have argued that if youth-sized ATVs cannot be sold for an extended period of time, owing to lead limits, then more children may end up riding adult-sized ATVs. A child using an adult ATV as a substitute would face a far graver and more immediate risk than that of the possible lead exposure from the youth ATVs.

Potential Solutions

The ATV situation is illustrative of a number of product classes that may not qualify for an exclusion. Congress could moderate this situation in several different ways. These include one or more of the following (not in priority order): (1) postponing the deadline for sales (not

manufacture) of children's products containing lead above the new limits; (2) lowering the age limit for children's products (as discussed in the response to question 6); (3) exempting some or all children's products that are usually not kept in the house, such as bicycles and ATVs; (4) giving the CPSC greater discretion to exclude from compliance with the lead limits any materials or products that pose a negligible risk to children (as discussed in the response to question 6); or (5) allowing materials that are eligible for special treatment when used in electronic devices to receive similar treatment in other children's products when the justification is equally compelling.

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

This issue lies within the authority and expertise of the Environmental Protection Agency (EPA).

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

Lead Testing and Printing Ink: The Publishing Industry's Challenge

Given the breadth of the definition of children's product in the CPSIA, the Commission received thousands of questions over the past six months regarding the scope of applicability of the retroactive lead limits and the required third–party testing of such products. At the same time, retailers began demanding certificates of compliance for products likely to be on their store shelves on February 10, 2009. The publishing industry claimed to have been unaware that the definition of children's product would encompass books until retailers started asking for certificates of compliance and we posted a response to one of the frequently asked questions regarding the application of the CPSIA to books intended or designed primarily for children. Because of the variety of colors of inks used in making children's books printed on paper and cardboard, the requirement of testing for compliance to the new lead limits proved costly and onerous. Some retailers were demanding separate certificates of compliance for each book title.

The issue of lead in printing ink and other products used to make a book is not new. Indeed, in 2007 the publishing industry issued a statement on lead in books to respond to any concerns

raised about books related to that year's toy recalls for excessive lead in paint. (See American Booksellers Association statement of November 29, 2007, Bookselling this Week: Getting the Lead Out: Consumers Question Books Made in China, found on March 15, 2009 at http://news.bookweb.org/news/5695.html.) The Commission has occasionally recalled such products for excess lead; for example, a recall was conducted in February 2008 for excess lead in paint on the colored spiral metal bindings of several sketchbooks. In July of 2004, the Commission issued a warning regarding the hazards of lead in candy wrappers that contain lead or bearing lead-containing ink.

The "Ordinary Book" Exemption

The Commission staff wanted to provide some relief to the book publishing industry given the extraordinary impact of third-party testing for lead and because the publishing industry maintained that the Commission had never considered ordinary children's books to be a health hazard. However, given the requirements of the CPSIA, the staff felt that they needed some representative data upon which to base a decision to exempt children's books from the requirements. The number of requests for relief from the retroactive effect of the CPSIA was so high that the staff felt that in fairness, any determination that the law did not apply to a material or class of products should be based on science and supported by test results.

It is not the case (noted in your question) that the Commission staff has had access to a "large number of tests on finished 'ordinary books'," but rather we have had access to a very limited data set on which the publishers have based their request for an industry-wide exemption from testing to the new lead content limits. The publishing industry association provided the staff with 152 separate entries representing testing done on approximately 157 books conducted anywhere from 2004 to 2009. The books tested range from the ordinary books to books with handles, stickers, kits or other accessories. The staff reviewed those test results, and initially concluded that many of the tests were done for European standards and/or did not test for total lead content as required by Section 101 of the CPSIA. The staff of the CPSC asked the industry to provide more data for total lead content and demonstrate that the data submitted was representative of all of the millions of ordinary books sold to children 12 years of age or younger.

The additional data submitted suggests that modern book publishing using offset lithography does not result in books with lead levels in excess of the 300 ppm limit that goes into effect in August of 2009. However, the Commission staff has not had the time or resources to look at the issue completely or comprehensively and has been hopeful that more data would be submitted by industry particularly with respect to books published in the 1960s and 70s. The Commission staff has been assured that the publishers now all use inks that result in children's books that fall below the statutory limits for lead. While the staff does not have a statistically valid basis for a wholesale exclusion of children's books at this time, its determination to exclude them from testing and certification does not mean that any children's book can exceed the lead limit. All children's books must meet the lead limit.

Making a determination that ordinary books cannot and will not exceed the lead limits appeared to be the only means of providing immediate relief. Such an exemption from testing also should

provide relief from the retroactive application of the standard to all books in schools and libraries that are provided to children for their use. In the meantime, the publishing industry was given a conditional enforcement waiver on the testing and certification requirements for lead, pending staff's review of the data and any additional data that may be submitted. That exemption was limited to books manufactured after 1985 because the publishing industry has not provided any test data on books published in the 60s and 70s. Instead, the industry has pointed to the fact that lead was removed from printing operations in this country due to federal statutory restrictions on worker exposure to lead in printing operations which went into effect in the late 70s. The very limited testing the Commission staff has done indicates that the lead content of these older books can occasionally exceed the 300 ppm limit that goes into effect in August 2009 but that data may not be representative. At this time the Commission staff has not had the time or resources to prove that books made more than twenty years ago do not exceed the lead limits as staff has needed to focus its resources on its investigations of deaths and injuries to children and other emerging risks and health hazards.

Library Books and Used Book Resellers

The retroactivity of the lead provision is particularly problematic in the area of books and other printed materials. We have done very limited testing of books from the 60s and 70s. It suggests that the lead content hovers around the 300 ppm mark. Anecdotal evidence received by the agency suggests that on occasion books from this earlier period may contain lead in excess of the lead limits in their binding materials. The only way to determine the total lead content in these books is to test them.

Under the CPSIA, however, sellers of used children's books, including used book stores and thrift shops, are not required to test or certify that children's books meet the new lead or phthalates limits. The CPSIA does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's books intended primarily for use by children that exceed the lead limit.

The Commission had hoped that an exemption for "ordinary books" plus its announced enforcement policy for lead would alleviate this situation. Based on information received from the trade associations with information regarding books in libraries and schools, the Commission staff understands that most textbooks in schools are less than ten years old. Likewise, the information received suggests that most library books lent to children are recycled approximately every 18 lending cycles or three years. Thus, it appears that few of the books being provided to children in their schools and from libraries would be more than 20 years old.

Potential Solutions

Staff has considered children's behaviors with books and concluded that after about 19 months of age, children may occasionally put part of a book in their mouths, but they typically are taught to care for their books so that they can continue to be used for reading and learning. This information suggests that any exposure to lead from contact with books diminishes as children age. We believe an exemption is the only way to provide relief under the CPSIA. Congress could limit the testing of books to only those picture books provided to children much younger

than 12 since this is the population of children that would be most likely to interact with their books in a way that could expose them to inks with higher lead content. Lowering the age limit would be extremely helpful to staff in dealing with books and many other products by narrowing the scope of products covered. Lowering the age limit would also provide relief to schools who face retroactive application of the lead provisions not just with regard to books but also the wide variety of other educational materials they provide to school-aged children.

The CPSIA establishes that any children's product no matter when it was made is a banned hazardous product if it exceeds the lead limits and the law does not have an exemption procedure other than one based on scientific proof that there will not be absorption of any lead. One solution would be for Congress to create a waiver process allowing the Commission to "grandfather" in products made prior to the date of enactment if the Commission concludes those products present only a *de minimis* exposure level and, therefore, a negligible risk. This could be used to solve the problem of used books as well as other products commonly sold second-hand such as used clothing or youth bicycles. It creates an administrative burden that the Commission may not be able to handle without some delay, but it would provide relief without having to undo the retroactive effect of the law altogether.

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

The CPSIA provides too little implementation discretion for the agency. One of the major problems with implementation has been the statute's reach across a variety of industry sectors quickly and simultaneously by virtue of its broad definition of "children's product." The lead limits reach literally every product intended or designed for a child 12 or younger. The breadth of the statute's reach has made it difficult for the Commission to address industry specific concerns in the few areas where the agency has discretion. The Commission needs room to address toy industry concerns separately from those of the apparel industry, from those of the publishing industry, and separately again from those of industries that make outdoor products for children such as motorized recreational products, playground equipment and bikes.

The lead limits and testing and certification provisions could be implemented much more smoothly if the Commission had the discretion to roll out those requirements on a product class basis. The same will soon be true for tracking labels where each industry has specific concerns about how additional labeling requirements will work given existing and multiple other labeling requirements. Congress can direct the agency as to how to determine priorities and work to a specific schedule as evidenced by section 104 which gave some flexibility to the Commission in pursuing the congressional mandates for new durable infant product standards. A similar approach to implementing all of the Act's new rules and requirements would ease the implementation burden. Indeed, the stay of enforcement of certification and testing was the agency's only means to get the breathing room it needed to deal with the various unanticipated issues that arose given the breadth of the industries affected.

Some have argued that the Commission should have a more relaxed approach to exclusions from the lead limits. However, the lead provision of the CPSIA restricts the agency's discretion at a variety of points in the statute. It allows for exemptions in three limited circumstances described in section 101(b). That section allows exclusions for inaccessible component parts of children's products and also allows the Commission to exempt electronic devices where lead is necessary for their functionality and cannot be made inaccessible. Beyond those exclusions, however, the statute leaves very little flexibility. Section 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material that exceeds the lead limits established for children's products under § 101(a) of the CPSIA if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will "neither result in the absorption of any lead into the human body," given reasonably foreseeable use and abuse of such product, including swallowing, mouthing, breaking or other children's activities or the aging of the product, "nor have any other adverse impact on public health or safety." (Emphasis added.)

The clear language of the statute is rigid; an assessment of whether there is absorption of "any lead" cannot be based on a risk based assessment because that language does not appear to allow any amount of lead, no matter how insignificant, to be absorbed in the human body. While the courts have occasionally upheld agencies applying a *de minimis* standard and exempting trivial risks from regulation, that has been permitted only when Congress has not unambiguously denied agencies that authority.[1] Here the act specifically limits the exclusion to an application supported by peer reviewed science supporting a demonstration that there cannot be absorption of *any* lead. Moreover, section 101(e) appears to restrict the agency's ability to use enforcement discretion while exclusion requests are pending, by stating that a pendency of a rulemaking to consider a request for exclusion "shall not delay the effect of any provision or limit . . . nor shall it stay general enforcement" of the lead limits.

Those who argue that common sense exclusions are permitted by the CPSIA would have to ignore sections 101(b)(1) and 101(e). Yet as the unanticipated consequences of the retroactive effect of the law have demonstrated, some ability to provide for *de minimis* exclusions would be helpful in implementing of the Act. The effort to deal with the *de minimis* risks given the speculative yet conceivable routes of exposure presented by certain products such as bike tire valve stems distracts attention from more serious health and safety problems that the agency must address. Recently proposed legislation banning BPA recognizes the need for such flexibility to provide relief when a manufacturer cannot comply because it is not technologically feasible to do so in the timeframes permitted. Yet such a waiver or exemption process could prove to be too resource intensive and divert agency resources to handling thousands of exemption requests when staff should instead be dealing with other risks that deserve attention such as identifying emerging hazards.

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[1] *Compare Les v. Reilly*, 968 F. 2d 985 (9th Cir.1992) and *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) with *Ohio v. EPA*, 992 F.2d 1520, 1534-35 (D.C. Cir. 1993). *See also* Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, U Chicago Law & Economics, Olin Working Paper No. 150. This paper can be downloaded without charge at: http://www.law.uchicago.edu/lawecon/index.html.

The CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks and the actual consequences of the hazard. Congress should permit the agency to exempt certain products from the limits established by the CPSIA, to ease the burdens of testing and certification on products unlikely to present more than a negligible health risk, and to regulate on a timetable influenced by the seriousness of the actual risks not artificial deadlines. A more flexible exception process would avoid regulation of *de minimis* problems both prospectively and retroactively.

Moreover, this would allow the CPSC to consider the impacts of the regulatory requirements of the CPSIA, like the balance between the adverse effects on second-hand sales of children's clothing or bicycles and the potential risks from exposure in such products, which is especially important during the current economic crisis. It should also allow the Commission to balance risks such as balancing the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV. Given that exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions will be public allowing for transparency and accountability. Finally, relaxing certain deadlines in the Act will allow for better priority setting which will allow Commission resources to be put towards the most serious health risks first.

* * *

CONCLUSION

The staff has set forth in its answers to specific questions above numerous approaches to dealing with the issues raised. In our view, we have been confronted with three major issues in implementing the CPSIA: (1) the retroactive application of requirements to inventory; (2) the broad reach of the legislative mandates given that "children's product" is defined as a product for children 12 years of age or younger; and (3) the impact of the new testing and certification requirements for all consumer products and the third-party testing requirements for children's products. You have asked us to consider possible solutions to the problems raised in the letter, and make our best recommendation as to productive solutions recognizing that these are ultimately policy decisions for others to make. We concluded that the following three changes would resolve many of the major difficulties identified above:

- Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children.

- Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

- Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities and a phase-in schedule.

As discussed above, there are many ways to address the challenges of implementation and meet the important goals of the statute. Regardless of the path chosen, some legislative changes would be helpful to allow the agency to set risk-based priorities given the finite resources available to the Commission.

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

March 20, 2009

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

Dear Chairman Dingell:

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

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

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

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

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

Sincerely,

Thomas H. Moore
Commissioner

cc: Acting Chairman Nancy Nord

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

CHAIRMAN INEZ M. TENENBAUM

October 16, 2009

The Honorable Henry A. Waxman
Chairman
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman:

Attached please find responses to the written questions for the record submitted by certain Members of the Committee in connection with the September 10, 2009, hearing entitled "CPSC Oversight: Current Issues and a Vision for the Future." An electronic version of these responses will also be provided to Early Green, Chief Clerk of the Committee.

Thank you again for the opportunity to testify before the Committee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Very truly yours,

Inez M. Tenenbaum

Attachments

The Honorable Joseph R. Pitts

Chairman Tenenbaum, in your testimony to the Subcommittee, you made reference to the need for import monitoring by stating:

"Pursuant to Section 225 of the CPSIA, the GAO recently released a study that audited and analyzed the agency's efforts to police imports, and prevent the entry of unsafe products into the U.S. market. In the report, the GAO found that increased agency staffing at ports, combined with revised information sharing agreements with U.S. Customs and Border Protection (CBP) would allow the agency to better detect faulty products before they enter the country – not after they enter the stream of commerce.

"I agree with these recommendations, and have directed Commission staff to update agreements with CBP to allow better information sharing. This information sharing would include use of CBP's Automated Targeting System (ATS), which contains advance manifest information for shipments entering the United States."

Directly tied to the need for import monitoring is the development of a mandatory standard for cigarette lighters, which would give the Commission additional authority to exclude unsafe lighters from the U.S. steam of commerce.

1. **The Committee would like to ensure that the CPSC complete a rulemaking mandating general safety standards for lighters that it initiated on April 11, 2005. In fact, the Senate approved an amendment (as Section 33) during consideration of the CPSIA that would have required the CPSC to complete its rulemaking within 24 months. The House did not include this language, but the Conference Committee included committee report language urging the CPSC to complete the rulemaking. Can you please explain the status of this proceeding and the timetable for its completion?**

   Answer: The April 11, 2005, rulemaking mandating general safety standards for lighters remains an agency priority and is listed on the Commission's current regulatory agenda.

2. **There has also been some concerned about the Staff not adhering strictly to the procedure of the regulation to determine if new cigarette lighter products comply with the requirements of the CPSC child resistant standard. Can you please explain the Commission's process of review of these products?**

   Answer: In the just-ended FY 2009, CPSC staff received 230 lighter submission reports addressing 576 separate lighter models. CPSC staff has completed its review on 554 models; 22 recent submissions are still pending. We are not aware of any irregularities or other factors that would give rise to the expressed concerns about not strictly adhering to the procedures of the regulation. Most of the submissions we

receive involve requests to cross-qualify one lighter based on the child-resistance testing of a model previously approved by CPSC.

In these cases, CPSC staff compares the later model and its characteristics with those of the previously approved model. Another type of submission involves a request that a company be added to the list of authorized importers for a previous approved lighter model. In these instances, CPSC staff works to verify that the lighter has in fact been previously approved for import. The last and smallest category of applications involves newly tested models. The staff spends more time on these than on any other category of application.

With regard to newly submitted models, the submission report is first sent to the Health Sciences to determine whether the testing performed on the new model was consistent with the protocol specified in our regulations. A copy of the report also goes to the Human Factors Division of the Office of Engineering Sciences to review the characteristics of the lighter and determine whether a child could operate the lighter having the specifications shown in the application. In some cases, physical testing of the lighter may be done at CPSC's laboratory to verify that the specimen is operating within specifications. As soon as a determination has been made, the applicant is notified. If the lighter is approved, it is added to a list that enables that lighter to be imported by specific entities.

3. **Finally, are CPSC resources devoted to the implementation of CPSIA preventing staff from completing the rulemaking?**

Answer: The implementation timeline required by the CPSIA, the delay in receipt of additional funding earlier this year, and the emergence of several new hazards requiring immediate Commission attention, such as imported drywall, required a significant reallocation of resources and reprioritization of planned agency work. This has resulted in a delay in completing this particular rulemaking.

The Honorable George Radanovich

CONFLICTING STANDARDS

1. **The Consumer Product Safety Commission's (CPSC) organic statute establishes the purpose of the Commission as to protect against "unreasonable risks of injury" associated with consumer products, not from "*any* risk of injury." The Consumer Product Safety Improvement Act (CPSIA) takes something like this latter approach and attempts to remove any *theoretical* risk of injury by establishing specific bright line requirements for all children's products. Should the CPSIA standard of risk conform to the underlying statute or does the underlying statute need to be amended to reflect the zero tolerance standard of CPSIA? Additionally, could this new standard affect the Commission's ability to conduct its "unreasonable risk of injury" mission over non-children's products not covered by CPSIA?**

   Answer: The findings and purposes section of the Consumer Product Safety Act (codified at 15 U.S.C. 2051) provides that the Commission's overall, general mission is to "protect the public against unreasonable risks of injury associated with consumer products." In the CPSIA, however, Congress decided that certain areas, such as lead and phthalates in children's products, required bright-line standards.

   These provisions are not contradictory; rather they express Congressional intent to apply a stricter standard to certain classes of materials and products intended for children. Both the CPSA and the FHSA remain the primary vehicles for addressing non children's products not covered by the CPSIA and allow the Commission to consider unreasonable risks of injury.

2. **A few weeks ago, the CPSC released its "Back to School Safety Checklist," which included a reminder for parents to make sure all children wear their safety helmets whenever they ride their bikes. Commission staff estimates an average of 80 deaths of children 16 and under each year related to bicycle accidents. Is it consistent to continue to permit bicycles to be distributed in commerce when we know their use will result in scores of deaths each year, yet ban the use of any bicycles with tire valves containing trace amounts as hazardous products?**

   Answer: On June 30, 2009, the Commission published a two-year stay of enforcement of the CPSIA Section 101 lead level requirements with regard to certain bicycle parts. (74 FR 31254) During the pendency of this stay, the sale or use of bicycles with tire valves containing trace amounts of lead is not banned. Furthermore, the Commission has committed to work with bicycle manufacturers during the stay to come into compliance with the Section 101 requirements, or identify those areas where compliance is technologically infeasible.

During the course of the stay, the Commission believes it is still prudent to warn children of other risks – such as failing to wear a safety helmet – in order to reduce injuries and deaths to the lowest level possible.

COSTS ASSOCIATED WITH CPSIA

3. **Testing products for lead and phthalates requires destroying a product sample. In some cases, the independent tester requires multiple samples. How do we effectively address the unique circumstances to preserve cultural benefits of products - such as the Native American clothing - that are one- of a kind and can't be tested unless the product is destroyed?**

   Answer: A children's product that is produced as "one-of-a-kind" obviously cannot be subjected to destructive testing. However, the CPSIA requires the manufacturer to certify the product as compliant to all applicable children's product safety standards based on the results of third party testing. Third party testing of components parts may satisfy the testing requirements of the CPSIA without subjecting the final product to destructive testing. Staff is in the process of developing a rule on testing requirements that will address the issue of "one-of-a-kind" products.

   a. **In addition, how should similarly situated business that produce few items per batch be addressed when the costs of testing a product are greater than the value that can be recouped by the manufacturer or home based business selling the rest of the batch?**

      Answer: The CPSIA requires manufacturers of children's products subject to a children's product safety rule to certify their product complies with all applicable safety rules. This certification must be based on third party testing. Staff is in the process of developing testing requirements for Commission consideration that will attempt to address the need to balance testing costs with the Congressional mandate to ensure compliance to applicable safety standards.

4. **There have been numerous reports from industry surveys about the lost inventory and testing costs that have forced businesses to simply fold up their shops. In total, these costs are in the billions. Is the Commission tracking the economic impact and costs of the CPSIA? If not, does the Commission plan to produce an estimate in the future?**

   Answer: The Commission does not customarily track the economic impact and costs of federal legislation, and is not tracking this data regarding the CPSIA. In the past, Congress has relied on the Congressional Budget Office (CBO) and the Government Accountability Office (GAO) to conduct analyses detailing the economic impact of federal legislation. At this time, the Commission does not plan to produce an estimate due to the resources that would have to be diverted from CPSIA implementation and other deadlines.

5. **Should the Commission survey the independent testing labs to see what percentage of products tested for CPSIA compliance failed these tests? If not, please explain why.**

   Answer: The Commission is not currently surveying independent testing labs for this data. However, there may be some value in using the results of the suggested survey as an indicator of industry's progress, or lack thereof, towards ensuring their manufacturing processes are capable of producing compliant products.

STAYS OF ENFORCEMENT

6. **Are companies regulated by CPSIA still subject to State Attorneys General (AG) enforcement and penalties regardless of any stays of enforcement issued by the CPSC?**

   Answer: Companies regulated by the CPSIA remain subject to state attorney general injunctive actions during the stays of enforcement issued by the Commission. To date, no state attorney general has filed an injunctive action to enforce the CPSIA and several have indicated that they do not plan to do so until implementation issues have been addressed by the Commission. Commission staff recently met with and will continue to meet regularly with several assistant and deputy state attorneys general with responsibility for consumer health and safety to foster constructive dialogue in an attempt to reach a common approach on these issues.

7. **Would you consider the enforcement stays issued by the Commission relief if companies are subject to State AG enforcement and potential civil liabilities?**

   Answer: The CPSIA reflects Congress's intent to allow state attorneys general to pursue an injunction. Although legally the state attorneys general can bring an injunction action, to date they have not done so.

8. **What happens when the stay on ATV's expires in 2011? Is the Commission ready to implement and enforce the law as written? Will the Commission have the necessary resources to implement and enforce the law as written?**

   Answer: During the pendency of the two-year stay of enforcement of the Section 101 lead limits for certain ATV component parts, the Commission will continue to work with manufacturers to identify feasible means to comply with the Section 101 limits. It is premature to predict what might happen when the stay expires in 2011.

   The Commission has the resources absolutely necessary to implement and enforce the law. However, we would welcome any additional resources and appropriations Congress can provide not only to implement provisions of CPSIA, but also to help the Commission increase staffing and improve its information technology modernization efforts, both of which will enhance the Commission's ability to identify and address new and emerging product hazards.

9. Do you believe industry will be able to comply with both the decreased lead limit as well as the testing and certification requirements, or will additional relief be necessary? If so, will the Commission consider issuing another stay of enforcement?

Answer: The one year stay of enforcement on testing and certification was intended to give industry a year to prepare for the testing and certification requirements. The Commission will fully review this issue again in February of 2010 but I cannot speak for the Commission on how individual Commissioners might vote on this issue.

10. Do you believe the Commission has the legal authority to issue further stays of enforcement? If not, what actions could the Commission take if it determined an additional stay is necessary?

Answer: The stays of enforcement issued to date have been based on a policy determination by the Commission that the safety of the product given the functional purpose of the part containing lead in excess of the limit supported a decision to provide the manufacturer with additional time to determine whether and when substitute parts made in accordance with the lead limits would be available. The stays are limited as to the parts covered and the duration of the stay and require interim reporting on the efforts made by the various companies to bring their products into compliance. Furthermore, the stays are tantamount to a refusal to initiate enforcement proceedings, which is ordinarily committed to the agency's discretion. The Commission could issue additional stays if warranted. The clear intent of the law is to remove lead from children's products so any additional enforcement stays should be limited to the narrow circumstances where the strict, immediate compliance with the lead limit could jeopardize the health and safety of children.

PHTHALATES

11. The CPSIA contained an exemption for lead parts that are inaccessible to children through reasonable and foreseeable use and abuse. In perhaps an example of unforeseeable issues, Congress overlooked that some products may contain inaccessible parts made of phthalates, versus other products such as rubber bathtub toys that typically contain phthalates. How will CPSC address concerns expressed by toy manufacturers about the requirement to test "inaccessible" parts? Does CPSC need additionally authority to exempt inaccessible phtbalate parts in parity with the lead scheme of the CPSIA?

Answer: In February 2009, the Commission requested public comments on draft guidance regarding which children's products are subject to CPSIA requirements for phthalates. (74 FR 8058) Commission staff is currently reviewing those comments, and the Commission plans to issue guidance on the matter shortly. In addition, on August 6, 2009, the Commission voted to issue a *Statement of Policy: Testing of Component Parts with Respect to Section 108 of the Consumer Product Safety*

Improvement Act, and requested public comments. The policy statement describes the Commission's position regarding component testing, and the Commission has posted a new test method on its Web site.

Through these rulemakings and policy statements, the Commission has attempted to simplify the phthalate component part and testing guidance as much as possible. With regard to phthalate parts that are completely inaccessible and present no risk of leaching (i.e., a moving belt enclosed in a hard plastic case), the Commission is reviewing whether Section 108 of the CPSIA contains flexibility to allow an exemption from the overall prohibition as a part of the ongoing rulemaking.

12. What is the status of the Chronic Hazard Advisor Panel (CHAP), which is tasked with a scientific review of phthalates?

Answer: The CPSC staff is in the final stages of compiling a list of possible candidates for Commission consideration. Staff received names of scientists from the National Academy of Sciences (NAS). The nominees have been contacted by the staff and asked to indicate their interest in serving on the CHAP. Responses have been received from most, but not all, of the nominees. Once the information provided by the interested nominees has been reviewed by the CPSC Office of General Counsel's ethics officials for conflicts of interest and cleared, staff will forward to the Commission a proposed list of candidates for the CHAP. The staff hopes to transmit its recommendations to the Commission in November. The Commission will then vote on the information provided to them.

Do you plan to make the participants of the CHAP public?

Answer: Yes, we will make the participants of the CHAP public.

AGENCY SUPREMACY

13. Since the effective dates of the CPSIA have gone into effect, the Commission has issued more than one stay of enforcement. Additionally, you stated in your August 18, 2009 signing statement an intention to focus the Commission's enforcement priorities to a smaller world of products than that laid out in CPSIA. However, the law grants State Attorneys General enforcement of CPSIA. Do you believe the Federal agency should have the primary authority in interpreting a Federal law? How can Federal agency supremacy be reconciled with State Attorneys General potential enforcement in areas in which the Commission has yet to pursue enforcement and will not pursue enforcement due to the issued Federal stays of enforcement?

Answer: As discussed above in response to question 7, while we should have the primary responsibility and authority for interpreting federal law, legally the state attorneys general can pursue their own injunctive proceedings. The law allows the Commission to intervene in a case filed by a state that should allow us to protect the

Commission's interests in interpreting the federal law. We are working to coordinate federal and state enforcement activities with the state attorneys general to avoid the situation where the states take enforcement positions different from those of the Commission. We have recently met with several assistant and deputy state attorneys general with responsibility for consumer health and safety and plan to continue quarterly meetings with them to discuss and coordinate our enforcement activities.

14. One of the purposes behind the CPSIA was the establishment of bright-line, uniform legal safety standards. How does the Commission intend to maintain the bright-line rules established by the CPSIA if Commission interpretation is preempted by State Attorneys General enforcement due to the Federal stays of enforcement?

Answer: To date this has not proven to be a concern as no state has filed such an action. As discussed in response to question 13 above, we have recently met with and will continue to meet with assistant and deputy state attorneys general with responsibility for consumer health and safety and plan to continue quarterly meetings with them to ensure that they understand our interpretation and enforcement policies with regard to the CPSIA. The FHSA has always contained a provision allowing for state attorneys general to file actions seeking injunctive relief for many years, and the issue of preemption and federal agency supremacy has not presented a problem.

15. Please detail the Commission's efforts in working with State Attorneys General to create a uniform enforcement scheme that assures consumers and businesses will be treated consistently in every state.

Answer: As noted in the answer to question 13, the Commission recently met with assistant and deputy state attorneys general with responsibility for consumer health and safety and will continue to meet with them on a quarterly basis to discuss and coordinate federal and state enforcement efforts. At our most recent meeting we discussed the importance of cooperation and uniformity in enforcement. Through these meetings, and other efforts, the Commission strives to coordinate enforcement activities with the States to the maximum extent possible.

EXEMPTIONS FROM LEAD LIMITS

16. In your July 17 statement accompanying the Commission's denial of the request to exclude crystal and glass beads from the CPSIA lead provisions, you stated:

> **"In making a determination, I was mindful that the statute does not use the term 'harmful' amount... which would allow staff to utilize a risk based approach... Thus, while Commission staff recognized that most crystal and glass beads do not appear to pose a serious health risk to children... the request for an exclusion must be denied."**

a. Do you support banning products from the marketplace that have been scientifically proven to present no unreasonable risk of harm?

Answer: With regard to crystal beads, data provided to staff indicated that there may be some absorption of lead from ingestion depending on the type and amount of beads swallowed. In the CPSIA, certain other children's products containing lead and phthalates were banned by limits set on their content. When the CHAP finishes its work on the three phthalates that have been banned on an interim basis, the Commission will revisit those limits. Otherwise, the CPSA and FHSA provisions on when a product can be banned remain unchanged and require consideration of risk.

b. Do you support statutory exclusions for products and materials that can be scientifically proven to present no reasonable risk of harm?

Answer: Section 101(b)(1) grants the Commission some authority to exclude certain products or materials where "the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product will not result in the absorption of any lead into the human body nor have any adverse impact on public health or safety."

In the interest of making effective use of Commission resources, however, it would be helpful to have a narrow exception to the overall Section 101 lead prohibition in cases where a component with lead is required for a functional purpose, contact with the lead is infrequent, and the elimination of such component part is impracticable or impossible based on available scientific and technical information. This exception would provide the Commission with greater flexibility.

17. In your July 17 statement accompanying the Commission's denial of the request to exclude crystal and glass beads from the CPSIA lead provisions, you stated, "the agency will take a common sense approach to enforcement," and that the Commission "will focus [its] enforcement activities on crystal and glass bead products designed and intended primarily for children six years of age and younger[.]"

- **a. Please explain the basis for the determination that the CPSC should limit its enforcement activities in this way.**
- **b. Are there other areas in which you foresee the CPSC using enforcement discretion to focus on products manufactured for an age range of less than 12 years?**
- **c. Does this enforcement decision mean that companies do not have to report such products under 15(b) of the Consumer Product Safety Act (CPSA) and will not face civil penalties for sales of such products?**

d. Does this enforcement guidance provide relief from State Attorneys General enforcement? Does the CPSC have or intend to enter agreements with the State Attorneys General in which the State will honor the Commission's decision to focus enforcement on products for children 6 and under?

Answer: Enforcement decisions are generally matters that are left to agency discretion. In this case, my July 17, 2009, statement indicated that the focus of enforcement actions would be on products designed an intended primarily for children 6 and under. This reflects a Commission enforcement policy determination, and does not impact the underlying statutory provisions.

As noted in the answers to questions 7 and 13, we have already met with and plan to have quarterly meetings with the states to discuss enforcement efforts. We are working to coordinate federal and state enforcement activities with the state attorneys general to avoid the situation where the states take enforcement positions earlier than or different from those of the Commission. Furthermore, the law allows the Commission to intervene in a case filed by a state which should allow us to protect the Commission's interests in interpreting the federal law.

18. In your August 18 signing statement accompanying the Commission's decision on printed materials, you stated, "older children's books did not use the modern CMYK printing process and some have been able to contain lead, [therefore] *the Commission was unable to make a determination that older books...do not exceed the CPSIA's lead limits.*" In the same paragraph, however, you state the Commission intends to issue a separate statement of policy on such books that may still be lent out by libraries or other institutions for use by children. You said, "It is my hope that this guidance will offer common sense solutions that alleviate undue burdens on those who lend older children's books." Please explain from where you will derive the authority for a solution permitting the continued lending and use of these books if they exceed the 600ppm or 300ppm standard and can result in the absorption of some lead, such that they are not eligible for an exemption under CPSIA.

Answer: The Commission is continuing to look at the lead levels in children's books manufactured prior to 1985, and is continuing to test those books in order to make additional determinations.

With regard to the policy guidance, that document will integrate the results of the ongoing testing. Furthermore, the Commission has determined that many older books are not used by children (due to the fact that they wear out quickly), and still others may be used by adults as older "collector's items." In that context, they may not be subject to the Section 101 lead limits.

19. How does the Commission intend to address an environment potentially made more dangerous for children by the CPSIA standards because they use replacement products not primarily intended for use by children? Does the Commission have the flexibility and authority to exempt certain children's products, even though they may not meet the CPSIA exemption standard, in order to protect their safety? For instance, children's use of adult-sized all terrain vehicles (ATV) is far more dangerous to their safety and lives than the possibility of lead exposure from ATV parts on a child-fitted ATV.

Answer: CPSIA section 101(a) explicitly limits the exceptions to the general rule that children's products exceeding the lead limits must be treated as banned hazardous substances. In the case of youth ATVs and certain other motorized vehicles intended for children, the Commission recognized that strict enforcement of the new lead limits could increase the risk of injury to children rather than reduce it as intended. Nevertheless, the Commission did not exempt such vehicles from the lead limits entirely; rather, the Commission adopted a temporary stay of enforcement of the lead limits for certain component parts of such vehicles. To date there have only been a few products where strict enforcement of the new lead limits could potentially increase the risk of injury to children.

20. Is it possible that certain products that are compliant with the total lead limit could have more accessible lead available to be absorbed than products excluded from the market, such as crystal, that have less accessible lead? Would a solubility standard encompassing risk be more protective or less protective of children?

Answer: It is possible, *on a case-by-case basis*, that a lead-content compliant product could have more accessible lead than a product that is not compliant with the lead content requirement. Limited data (provided by industry; letter from Sheila Millar, representing the Fashion Jewelry Trade Association, *et al.*, dated February 2, 2009) on leaching of lead into a mild acid solution from crystal beads showed that some bead samples had very little accessible lead, but other beads leached higher amounts of lead. From CPSC staff analysis of lead accessibility from compliant metal jewelry items, in some cases, the accessibility of lead from a crystal bead would be less than from a metal item, but in other cases, the accessibility from a crystal bead would be greater.

A lead content limit that is more than zero could result in some lead exposure in children, depending on the characteristics of the product and the expected interactions between a child and the product. Further, given a particular lead content standard, it is not possible to generalize expected or potential lead exposure for children's products because of the inherent variability among products and children's behaviors. A solubility standard would require that a test method be designated and a soluble lead limit be chosen. The choice of an "acceptable" lead exposure level is not straightforward, because there is no known level of exposure to lead that is safe for children.

21. If child-sized ATVs cannot be made to meet the 600ppm, 300ppm, or 100ppm lead limits, how do you intend to deal with these products when the ATV exemption expires? Is a legislative fix needed to provide such authority?

Answer: During the pendency of the stay of enforcement, the Commission is continuing to work with the ATV manufacturers to bring them into compliance with the lead limits contained in Section 101. In the interest of making effective use of Commission resources, however, it would be helpful to have a narrow exception to the overall Section 101 lead prohibition in cases where a component lead is required for a functional purpose, contact with the lead is infrequent, and the elimination of such component part is impracticable or impossible based on available scientific and technical information. This exception would provide the Commission with greater flexibility.

22. At the Subcommittee hearing, you stated rubber grips could be used to prevent youth ATV operator exposure to lead in the metal handlebars. However, under the Commission's August 2009 final interpretative rule on inaccessible component parts in children 's products cnntaining lead, hundreds of other parts of these vehicles, such as engines, suspensions, carburetors and frames, with which child operators do not normally or routinely interact are also deemed accessible and thus subject to the lead content limits. Because of this fact -- and despite the stay of enforcement, many companies have ceased selling youth ATVs for children under 12, which may unfortunately lead these children to ride larger, faster adult-size ATVs on which CPSC studies show they are at much greater risk of serious injury or death. Should this interpretative rule he revised to specify that with respect to youth ATVs and other youth motorized recreational vehicles, only those components, such as hand grips, brake and clutch levers, throttle controls, ignition keys and seats, with which child operators routinely interact during normal and reasonably foreseeable operation of the vehicle will be considered accessible and thus subject to the lead content limits?

Answer: As noted in the answer to question 21, the Commission is continuing to work with youth ATV manufacturers during the pendency of the stay of enforcement to address specific issues of accessibility and inaccessibility.

23. Art supply manufacturers have been required since 1988 to test and certify under the Labeling of Hazardous Art Material Act (LHAMA), including testing and certification for lead content. Does the Commission have the authority those products or materials already subject to Federal testing requirements to avoid duplicative and unnecessary testing?

Answer: CPSIA section 102(f)(2)(C) provides a special rule allowing organizations who are qualified, under CPSC regulations, to certify art materials, to qualify as third party conformity assessment bodies "with respect to the certification of art material and art products" without meeting any additional requirements. CPSC staff does not

interpret this privilege as exempting anyone from testing art materials for purposes of establishing compliance with section 101 lead limits.

TRACKING LABELS

24. There is an exception to the tracking label requirement if placing such labels on consumer products or packaging would be "impracticable." What does "practicable" entail in your opinion? Should the word "practicable" encompass the economic practicality of these tracking labels, in addition to the technological feasibility of placing them on consumer products?

Answer: The CPSIA provides an exception to the tracking label requirement when placing such labels on products or packaging would be impracticable. On July 20, 2009, the Commission issued a statement of policy on interpretation of the tracking labels provision that recognized that the statutory provision does not require a uniform one-size-fits-all system. The Commission announced that it "is not imposing any such uniform requirements, but expects that manufacturers will use their best judgment to develop markings that best suit their business and products." I look forward to working with industry on these tracking labels as they clearly will aid in determining the origin of the product in the event of a recall. Different products have differing levels of risk and cost which are both factors in determining what kind of tracking labels should be used on a product. There are exciting new technologies that are and will become available in the future for consumer use in tracking products. Finding the right tracking solution for the right types of products and harmonizing those requirements with systems being developed in Europe and elsewhere will be something the Commission works diligently to pursue in the coming years.

GENERAL

25. Please provide statistics regarding the impact of CPSIA on the relative safety of children's products.

Answer: It is too early to estimate the impact of the CPSIA on the safety of children's products.

26. One of the chief criticisms of early CPSIA implementation was the Commission's slowness in responding to industry concerns or the issuance of guidance.

a. Specifically, the Commission reportedly received approximately 9,000 questions regarding how interested parties may comply with the new law. How many of those questions have been answered? Does the Commission intend to answer each of these questions? What impact does answering these questions have on Commission resources? What do you expect the continued impact on resources will be? Generally,

what is the current state of Commission outreach to various affected industries?

Answer: When the CPSIA was enacted the Commission very quickly received thousands of questions from individual parties. Many of those questions were received before the Commission had a chance to thoroughly study the new requirements in the Act and before there was time to educate the Commission staff about those requirements. We took the approach of reviewing the questions for major themes and then posting Frequently Asked Questions (FAQs) and responses on our newly created CPSIA web site. Soon after the volume of questions rose dramatically, we provided an automatic response to those individuals who submitted their questions through email indicating that their question was important to us and that while we would not be able to respond to each question individually, we would be developing responses to FAQs. The response also noted that individuals could sign up to receive email notification when new information was added to the CPSIA web site. Responding to the questions has a significant impact on Commission resources and takes time away from important activities such as rulemaking and work on emerging hazards. We recognize, however, the need to provide responses to our stakeholders and are looking for ways to provide those responses more efficiently.

For example, beginning in FY 2010 we have contracted for a new provider for our hotline services. The new provider has the ability to take CPSC-approved FAQs and turn them into automated email responses based on key word searching through the use of a "knowledge-based" email management database. This new database will allow hotline staff to accurately respond to questions posed through email using agency-approved FAQs and scripts. In addition, this software has the ability to search individual emails for keywords and phrases and provide automated form responses, thus preventing email backlogs like we saw when CPSIA was implemented. The system will also track new trends in email and telephone inquiries and identify when new scripts need to be developed.

We have done and are continuing to do extensive outreach to affected industries. We have published enforcement guidance and policies to enhance compliance with the new law, held numerous public briefings to help stakeholders understand their obligations under the law, created a special web site devoted to posting information and answering questions about CPSIA, and responded to thousands of inquiries from affected manufacturers, retailers, resellers, and consumers.

CPSC RESOURCES

27. **In her March 20th response to Mr. Dingell, then-Acting Chairman Nord suggested a lack of resources impacted not only CPSIA implementation, but also the Commission's other non-CPSIA safety mission activities. Specifically, she stated that CPSIA implementation, requests for CPSIA exclusions, Virginia Graeme Baker Pool and Spa Safety Act, the Children's Gasoline Burn Prevention Act, and the rest of the CPSC's ongoing safety mission *"severely***

overstretched the agency staff and has begun resulting in delays in implementation that will continue until we are able to fully hire and otherwise maximize the resources that have just been provided to the agency for the second half of fiscal year 2009." **Similarly, in your August 18 signing statement excluding certain materials from testing and certification you stated *"The Commission has limited resources to make these types of determinations while also vigorously attempting to implement other provisions of the CPSIA and carry on the day to day business of the agency."***

a. Where do the Commission resources now stand?

Answer: CPSC's appropriated funds in 2009 were $105.4 million to fund 483 staff. For 2010, the President's request pending before Congress for CPSC is $107 million to fund 530 staff. The House has approved a $118 million level for 2010 while the Senate Appropriations Committee has reported out a level of $115 million.

b. How will the delay in additional resources affect continued implementation of CPSIA – either mandated actions or CPSIA-related actions such as exemptions?

Answer: The full 2009 appropriation was not enacted until the sixth month of fiscal year 2009. This resulted in delays in staffing up to the desired 483 employee level; we are only now approaching the desired 2009 staffing level.

c. How many exemption requests has the Commission received? How many requests has the Commission responded?

Answer: The Commission has procedures for requesting a determination that a certain material or product does not and would not exceed the lead content limits. The Commission has received approximately 270 requests for lead determinations. These requests were all addressed in the determinations rule, which is codified under the Commission's regulations at 16 C.F.R. § 1500.91. The Commission also has procedures for requesting an exclusion from the lead content limits for a material or product that exceeds the lead limits. Five requests have been received to date (youth motorized recreational vehicles, bicycles and related products, pens, crystal and glass beads, and brass and mechanical components in toys). Four of these requests have been addressed by the Commission. The brass and mechanical components in toys request is currently pending before the Commission.

d. Are the Commission's other safety tasks negatively impacted by the resources demanded by the CPSIA and its mandated timelines?

Answer: One of our highest priorities has been the implementation of CPSIA. As a result, we have had to defer several hazard reduction projects that promise long-term decreases in consumer product-related injuries and deaths. These deferred hazard reduction efforts include activities for products such as cigarette lighters (mechanical malfunction), lighter amendments, bedclothes, range extinguishing systems, sensor technology, carbon monoxide alarms, high energy battery packs, bicycle integrity and illumination, sensitizers, and electric toys. We have, however, maintained our pressing consumer product safety activities such as product recalls and safety information campaigns.

28. In her March 20th response to Mr. Dingell, then Acting Chairman Nord suggested that due to the Commission's limited resources and its ongoing safety mission in non-CPSIA areas combined with the significant new responsibilities imposed under CPSIA, *"The deadlines have proven to be impracticable for our staff to meet and are presenting significant problems for the agency to solve. The Commission staff must have some relief from the deadlines imposed."* Do you believe this is still the state of resources versus burden at the Commission?

Answer: Six months have passed since this letter was sent and after much hard work by the Commission, I believe we have turned a corner. We have much hard work ahead of us, including completion of scheduled rules, perhaps refining earlier rules, and beginning the enforcement of the new rules. Each day, however, we are hiring more staff and Congress has signaled increased resources for 2010. Thus, I believe the case for relief from statutory deadlines is now substantively diminished.

29. Due to the timing of the passage of this Act and the House appropriations bills, we did not specify an authorization level for FY 2009. However, we recognized the massive burdens we placed on the Commission and authorized the CPSC at $118 million for FY 2010.

a. At what level were the Commission's appropriations for the current fiscal year, FY 2009, and when did those funds make it to the Commission?

Answer: The 2009 appropriation of $105.4 million was enacted March 11, 2009. The Office of Management and Budget (OMB) approved our apportionment request for use of the funds on April 15 with one exception. OMB placed apportionment restrictions on the use of funds allocated for the creation of the public database and information technology modernization. These restrictions required certain processes and documents be completed and approved by OMB before funds were

available for CPSC use later in the fiscal year. The majority of these funds were made available by mid-September.

b. How many rulemakings or other agency actions were mandated to be completed by the CPSIA in FY 2009?

Answer: The CPSIA required a total of 16 rules or other documents in fiscal year 2009. The CPSC began and, in most cases, completed 15 required rules and other documents and completed the majority on time despite tight statutory deadlines. (In one case, the CPSIA required the Commission to issue a final rule by a particular date; the Commission issued the proposed rule, but, due in part to a need to comply with other rulemaking requirements, was unable to issue the final rule by the date. In another case, the CPSIA required the Commission to consult interested parties on the toy standard, and the Commission fulfilled this requirement by issuing a notice in the *Federal Register* inviting public comment.)

The number of completed assignments required by the CPSIA, however, is only a partial accounting of the Commission's actual workload. For example, in some cases, a statutory requirement under the CPSIA triggered a need for the Commission to issue a proposed rule before it could issue the final rule required by the CPSIA or to issue an interpretative rule, a statement of policy, or some guidance so that interested parties could understand the Commission's interpretation of a particular requirement or could learn how to request an exemption or to pursue some other administrative action. When one considers these other rules and documents that help implement, but are not required by, the CPSIA, an *additional* 20 rules and other documents were completed during fiscal year 2009.

The only item required by the CPSIA which the Commission did not begin during the fiscal year was a "notice of requirements" relating to baby walkers, walker jumpers, and bouncers. The Commission did not begin the assigned task because the regulation specified by the CPSIA pertaining to baby walkers, walker jumpers, and bouncers was obsolete, and the Commission proposed instead to withdraw the cited regulation. Thus, it would have been inefficient and a waste of resources for the Commission to issue a notice of requirements pertaining to an obsolete rule.

c. Did the delay in appropriations have any impact on the implementation of this law?

Answer: Yes. Commission staff had to undertake CPSIA work beginning immediately upon enactment of CPSIA (August 14, 2008). Without an increase in staff, several product hazard projects were deferred in order to free up staff time for CPSIA work. These deferred hazard reduction

efforts include activities for products such as cigarette lighters (mechanical malfunction), lighter amendments, bedclothes, range extinguishing systems, sensor technology, carbon monoxide alarms, high energy battery packs, bicycle integrity and illumination, sensitizers, and electric toys.

d. Given that the budget request for FY 2010 is $107 million, $11 million less than the authorization, what impact do you foresee on implementation of this law, along with pursuit of the rest of your mission?

Answer: As we work with CPSIA, we have learned more about the requirements. As issues are addressed, we have encountered a need for greater resources. Thus, I am grateful that the House and Senate appropriations committees have reported out resource levels greater than the original request. If these funds are appropriated we will put them to good use in continuing to implement CPSIA and addressing other critical safety issues.

30. The March 20th response CPSC staff memo indicated that the timelines for rulemaking and certification of testing labs were one example where there is a mismatch in the law. Specifically, the baby bouncer standard is out of date and the Commission doesn't rely on it as it will have a new standard by February of 2010. Accrediting labs to test to a standard the Commission does not rely on was properly viewed by Commission staff as incongruous. Ultimately the Commission has wisely proposed to revoke that standard and continue relying on the industry standard. Are there similar problems caused by the mandated rulemakings and certifications that could be fixed with more time for the Commission? Would you agree it is better to have more time as a safety net rather than find out too late that the Commission does not have sufficient time to effectively implement CPSIA mandates?

Answer: In the approximately three months since I assumed the Chair, the Commission has released 12 substantive rules and policy guidance documents implementing various provisions of the CPSIA. I am also committed to meeting the remaining deadlines in the CPSIA. It is true, however, that the Commission still requires additional funding and staff resources to effectively implement the CPSIA, and the other emerging hazards that the Commission investigates.

31. Various laws administered by the CPSC use terms such as "technological feasibility," "practicable" and other similar phrases. What specific considerations do you think are important in looking at technological feasibility or practicability? In particular, should costs or economic impact be factored into these assessments? Why or why not?

Answer: Cost and economic impact are relevant to interpreting terms such as "technological feasibility" and "practicable." These terms are used in very specific

and limited places in the CPSIA and where they are used we have already embraced them in our interpretations.

RISK ASSESSMENT

32. CPSC follows a risk-based decision-making process in setting priorities and in rulemaking. Do you agree with this regulatory philosophy used at the CPSC? Does the current adoption of the CPSIA contradict or prevent this long standing policy?

Answer: The findings and purposes section of the Consumer Product Safety Act (codified at 15 U.S.C. 2051) provides that the Commission's overall, general mission is to "protect the public against unreasonable risks on injury associated with consumer products." In the CPSIA, however, Congress decided that certain areas, such as lead and phthalates in children's products, required bright-line standards.

These provisions are not contradictory; rather they express Congressional intent to apply a stricter standard to certain classes of materials and products intended for children. To this end, the Commission generally prioritizes its rulemaking based on degree of risk, except in those areas (such as lead and phthalates) where Congress has deemed certain materials as inherently risky, and has established bright-line tests for those materials.

33. Do you believe safety would be compromised if human factor studies that monitor what small children touch and play with were included as part of an evaluation to determine whether there is even a risk of exposure associated with certain products that don't meet the lead standards – such as the tire valves on a bicycle that are rarely touched and generally unavailable to small children?

Answer: Prior to the CPSIA implementation, CPSC Human Factors and Health Sciences staff routinely considered both the exposure to a chemical such as lead (*i.e.*, through children's mouthing, hand-to-mouth behaviors, or ingestion) and the toxicity of the chemical to determine an exposure level at which the chemical might be considered a hazardous substance under the Federal Hazardous Substances Act. Because the CPSIA provides specific lead content limits, rather than exposure limits, this type of assessment is not called for at present.

However, human factors analysis is part of an evaluation as to whether certain products could be excluded from the CPSIA lead content requirements. CPSC Human Factors staff have assessed children's interactions with pruducts and components, such as the tire valve on a bicycle. Staff concluded that compared to children's interactions with components such as handle bars and levers, children will have less frequent contact with tire valves, but that older children are likely to have such contact when inflating or deflating a bicycle tire. This conclusion, in conjunction with the industry-supplied data (letter from Erica Z. Jones, representing the Bicycle Product Suppliers Association, dated January 28, 2009), that showed that some

exposure to lead could occur when a child handles components such as tire valves resulted in the Commission's decision to not exclude such products from the lead content requirements of the Act.

If the Commission were to evaluate products based on exposure and risk, as discussed above, questions remain as to the appropriate test methods, the limit for lead solubility or lead exposure that should be designated, and, if the lead content requirement still applies to children's products, the specific product types that would be subject to an exposure assessment rather than the lead content requirements.

34. Most regulatory and enforcement authorities use a risk-based system to target violations, including the CPSC's joint operations with the Custom and Border Protection.

a. How do you see this principle being applied in CPSIA-related rulemakings and in CPSIA-related enforcement?

Answer: CPSC's Office of Compliance is responsible for enforcing CPSIA requirements as well as other standards and regulations. The Office of Compliance uses a variety of approaches, including risk factors, to establish priorities for enforcement each year. In some settings, we use screening criteria to zero in on violations that pose a relatively greater risk. Risk assessment also plays a major role in deciding the appropriate remedy for violations. For example, if a violation is considered to present a low risk to consumers, CPSC staff may ask the responsible party to stop sale of the item but not seek a consumer-level recall. On the other hand, if a violation is considered to present a high risk, the staff would always seek a recall and may take other action.

35. Is the agency ready to patrol safety using its discretion and new enforcement tools? Would the agency have an easier time (be more effective) if the rules permitted it to revert to risk assessment, rather than patrolling compliance with a one-size-fits-all standard?

Answer: A bright-line standard may be easier to enforce, in some cases, than an approach that is based on risk alone. Where enforcement resources are scarce, however, as is certainly true in the case of CPSC enforcement staff, it is important not to lose sight of risk in deciding where to focus enforcement. Vigorous pursuit of minor violations is not in the public interest if it means that other, higher risks go unaddressed. As explained in the response to question 34, CPSC's Office of Compliance tends to use risk assessment at several decision points in enforcement, such as deciding what products to target and what remedies are most appropriate for a particular violation.

36. Does the lead content standard present a contradiction in what presents an unreasonable risk of harm by permitting certain products to be legally entered into commerce because they are below the total lead limit, but which may have

more soluble lead than non-compliant products that exceed the total lead limits but have less soluble lead available to the child? Do you think that materials should be excluded from total lead limits if they are demonstrated to result in exposure to lead in amounts no greater than the exposure of products that comply with the total lead limits?

a. Regarding lead content and items that do not meet the total lead content limits but may only leach trace amounts of lead, during the hearing you indicated that the Commission isn't looking at the potential effect of just one item's risk of exposure if swallowed, but rather the risk of the aggregate effect if many of the like items were swallowed. How is this different than the risk that potentially exists for legally compliant products if multiple items were swallowed?

Answer: The Commission is enforcing the statutory lead limits in Section 101 as provided by Congress, which apply to a children's product or a component part thereof. Enforcing an "aggregate impact" or "cumulative effect" standard for lead in multiple children's products would require congressional action.

b. Is the Commission proposing to treat children's products, which are legally compliant under CPSIA's lead limits, as banned hazardous products if the aggregate potential exposure to lead resulting from swallowing multiple items presents an unreasonable risk of injury? If so, please indicate at what level the Commission would consider necessary to trigger such a determination.

Answer: No, the Commission has not taken this position.

37. Please provide any information the Commission has to support your testimony that swallowing 50 beads presents a health risk to children regarding lead ingestion.

a. Please provide any supporting data regarding the amount of lead that is leached and the resulting effect on blood lead level.

Answer: It is important to note that my decision to deny the Fashion Jewelry Trade Association's request to exclude crystal and glass beads contained in children's jewelry and other products from the lead content limits was based on the statutory language of the CPSIA. The amount of lead contained in the crystal bead that were tested ranged from 900 ppm to 23,000 ppm—in excess of the statutory limit set by Section 101(1) of the CPSIA, which was 600 ppm at the time and the data submitted by the FJTA indicated that some lead could be absorbed into the body.

Information about crystal beads and data on the potential exposures to lead from crystal beads was provided by the industry in their request for an exclusion from the CPSIA-

mandated lead limits (letter from Sheila Millar, representing the Fashion Jewelry Trade Association, *et al.*, dated February 2, 2009). The letter stated that a children's jewelry item would typically include 4-18 beads or stones, depending on the size of the stones.

The data for 18 types of crystal beads of varying sizes showed that extraction of lead from the beads using a mild acid solution (to evaluate possible exposure to lead if the beads were swallowed) ranged from 0.01 microgram per bead to 2.8 micrograms per bead. The former value might be considered to be so small as to be insignificant to a child's health and overall lead exposure, but ingestion of the latter sample could be considered to be an important source of a child's lead exposure that should be avoided. An abundance of research has demonstrated that there is no safe level of lead exposure. Any exposure to lead by a child that results in absorption of some lead into the body will add to a child's overall lead exposure and will have an impact on the child's blood lead level, regardless of whether a change in the blood lead level could be detected. The language of the CPSIA specifically addresses the concern about lead exposure and provides that the Commission may exclude a product from the lead limits only if it determines that the lead in the product will not result in the absorption of any lead into the human body, considering normal and reasonably foreseeable use and abuse of the product by a child, including swallowing, mouthing, breaking, or other children's activities.

The industry provided the CPSC data stating that the amount of lead exposure for the largest bead was 2.8 micrograms per bead. That number multiplied by 50 results in 140 micrograms of lead as the possible exposure.

An exposure at this level would likely result in the blood lead level increasing by several micrograms of lead per deciliter of blood. The CPSC staff had previously estimated that an acute exposure to lead by a small child could change the blood level in micrograms per deciliter by a factor equal roughly 1/20 of the ingested amount. In this case, the increase in blood lead level would be about 7 micrograms per deciliter. This would be in addition to the other sources of exposure the child already experiences. For some children, this additional lead exposure would result in the blood lead level exceeding 10 micrograms per deciliter. Once the source of exposure is removed from a child's environment, the blood lead level will slowly decrease, returning to the previous level over many months.

In 1991, the U.S. Centers for Disease Control and Prevention (CDC) set its "blood lead level of concern" that could cause adverse health effects at 10 micrograms per deciliter. The CPSC adopted the CDC's recommendation of 10 micrograms per deciliter as the threshold lead amount in determining whether to list a product as banned under the Federal Hazardous Substances Act. Research conducted since 1991 has strengthened the evidence that children's physical and mental development can be affected by blood level limits at less than 10 micrograms per deciliter.

b. Would a child swallowing 50 beads be a "foreseeable use and abuse"? If so, please provide supporting data.

With regard to foreseeable use and abuse, I will summarize data provided to the Commission on child ingestions.

The National Electronic Injury Surveillance System (NEISS) is a probability sample of approximately 100 U.S. hospitals having 24-hour emergency rooms (ERs) and more than six beds. NEISS collects injury data from these hospitals. Coders in each hospital code the data from the ER record and the data is then transmitted electronically to CPSC. Because NEISS is a probability sample, each case collected represents a number of cases (the case's *weight*) of the total estimate of injuries in the U.S. Different hospitals carry different weights, based on stratification by their annual number of emergency room visits (Schroeder and Ault, 2001).

Hazard Analysis staff searched NEISS for all cases with diagnosis code 41 (Ingested Foreign Object) and patients 18 years of age or younger. Staff then used SAS® version 9 to categorize the data by product code and age categories by quartile, and to compute estimates and the associated coefficients of variation for the number of injuries as well as the estimated number of injuries with particular characteristics such as age and associated product. A coefficient of variation (C.V.) is the ratio of the standard error of the estimate (i.e., variability) to the estimate itself. This is generally expressed as a percent. A C.V. of 10% means the standard error of the estimate equals 0.1 times the estimate. Large C.V.'s alert the reader that the estimate has considerable variability. This is often due to a small sample size.[1] Estimates and confidence intervals are not reported here unless the number of cases is 20 or more, the estimate is greater than 1,200, and the C.V. is less than 33%.

From 2000 to 2006 staff found 14,421 NEISS cases involving ingestion of a foreign object and a child aged 18 years or younger. Based on these 14,421 cases there were an estimated 365,108 emergency-room treated injuries from 2000 to 2006 involving a child 18 years old or younger ingesting a foreign object. The 95% confidence interval about the number of emergency-room treated injuries from 2000 to 2006 for children 18 years of age or younger is 307,562 to 422,653. A breakdown of the incidents by age group is given in Table 1. The age groups in Table 1 were chosen based on quartiles of age using estimated injuries.

[1] For a more detailed discussion of measures of variation associated with NEISS estimates, see Schroeder and Ault, 2001.

Table 1: Emergency-Room Treated Ingestions by Age Group, 2000-2006

Age Range	Estimate	Percent of Total	Sample Size	C.V.	95% Confidence Interval
0 – 20 months	89,588	24.5%	3,760	9.61%	72,706 – 106,470
21 months – 3 years	116,407	31.9%	4,602	8.52%	96,960 – 135,853
4 – 6 years	85,895	23.5%	3,436	7.89%	72,613 – 99,178
7 – 18 years	73,218	20.1%	2,623	7.83%	61,976 – 84,460
Total	365,108	100.0%	14,421	8.04%	307,562 – 422,653

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

The cases were also categorized by the product associated with the ingestion injury. The ten product categories with the highest estimates are shown in Table 2 on the next page. Note that NEISS allows for the coding of one or two products for each incident. An incident with two associated products would be counted twice in the breakdown by product category, once for each product. Of the 14,421 incidents analyzed, 683 incidents had two associated products. There are several situations where two products may be coded for an ingestion. Both products may have been swallowed. If a part of a product is swallowed, such as a battery from a toy, both the part (the battery) and the whole (the toy) may be coded. One product may also be associated with the incident but not swallowed, such as a toddler swallowing a coin found on the floor, with both the coin and the floor being coded.

Table 2: Top Ten Swallowed Products by Individuals 18 Years Old and Younger, 2000-2006

Based on Number of Estimated Emergency-Room Treated Injuries

Product Code	Product Code Description	Estimate	Percent of Total	Sample Size	C.V.
1686	Coins	177,523	48.6%	7,340	8.73%
1616	Jewelry	24,366	6.7%	971	9.65%
5004	Toys, not elsewhere classified[2]	23,240	6.4%	896	9.31%
1819	Nails, screws, tacks, or bolts	20,540	5.6%	720	8.04%
0884	Batteries	15,366	4.2%	682	11.78%
1354	Marbles	11,992	3.3%	441	12.67%
1650	Desk supplies	7,251	2.0%	254	10.92%
1682	Hair curlers, curling irons, clips, and hair pins	6,073	1.7%	276	12.42%
1729	Christmas decorations (nonelectric)	5,350	1.5%	213	13.20%
1685	Pens and pencils	5,318	1.5%	185	15.57%

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

From 2000 to 2006 staff found 3,760 NEISS cases involving ingestion of foreign objects and children aged 20 months or younger. Based on these 3,760 cases there were an estimated 89,588 emergency-room treated injuries from 2000 to 2006 involving children under the age of 20 months and the ingestion of foreign objects. The cases were categorized by the product associated with the ingestion injury. The ten product categories with the highest estimates are shown in Table 3 on the next page. Of the 3,760 cases analyzed, 250 cases had two associated products.

[2] Toys, not elsewhere classified is a broad category including all toys that do not have their own NEISS product code, and any case where the type of toy involved was not clearly specified. Most cases involved an unspecified toy or part of a toy, but other common toys swallowed from this category include game pieces, puzzle pieces, doll accessories, small balls, and pieces from building sets.

Table 3: Top Ten Swallowed Products by Children 20 Months Old and Younger, 2000-2006

Based on Number of Estimated Emergency-Room Treated Injuries

Product Code	Product Description	Estimate	Percent of Total	Sample Size	C.V.
1686	Coins	35,637	39.8%	1,616	12.15%
1819	Nails, screws, tacks, or bolts	6,489	7.2%	219	10.43%
1616	Jewelry	5,817	6.5%	279	13.71%
5004	Toys, not elsewhere classified	5,178	5.8%	196	16.71%
1729	Christmas decorations (nonelectric)	3,851	4.3%	151	15.31%
0884	Batteries	3,681	4.1%	177	12.99%
1682	Hair curlers, curling irons, clips, and hair pins	3,127	3.5%	145	15.09%
1137	Paper products	2,606	2.9%	89	17.83%
1807	Floors or flooring materials[3]	2,555	2.9%	90	19.89%
1650	Desk supplies	2,055	2.3%	79	18.17%

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

From 2000 to 2006 staff found 4,602 NEISS cases involving ingestion of foreign objects and children aged 21 months through three years old. Based on these 4,602 cases there were an estimated 116,407 emergency-room treated injuries from 2000 to 2006 involving a child between the ages of 21 months and three years and the ingestion of a foreign object. The cases were categorized by the product associated with the ingestion injury. The eight product categories with the highest estimates are shown in Table 4. Only eight product categories are shown in Table 4 due to low, and therefore unreportable, estimates for all other product categories. Note that of the 4,602 cases analyzed, 167 cases had two associated products.

[3] Note that in the case of product code 1807 (floors and flooring materials), the children are not actually swallowing parts of floors, but rather objects that were found on the floor.

Table 4: Top Eight Swallowed Products by Children 21 Months through Three Years Old, 2000-2006

Based on Number of Estimated Emergency-Room Treated Injuries

Product Code	Product Description	Estimate	Percent of Total	Sample Size	C.V.
1686	Coins	70,237	60.3%	2,826	8.66%
5004	Toys, not elsewhere classified	8,101	7.0%	303	12.32%
1819	Nails, screws, tacks, or bolts	5,975	5.1%	206	12.25%
1616	Jewelry	5,250	4.5%	212	11.12%
0884	Batteries	4,942	4.2%	218	13.08%
1354	Marbles	3,432	2.9%	134	20.11%
1682	Hair curlers, curling irons, clips, and hair pins	1,444	1.2%	69	21.01%
1729	Christmas decorations (nonelectric)	1,355	1.2%	52	20.65%

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

From 2000 to 2006 staff found 3,436 NEISS cases involving ingestion of foreign objects and children aged four through six years old. Based on these 3,436 cases there were an estimated 85,895 emergency-room treated injuries from 2000 to 2006 involving a child between the ages of four and six years and the ingestion of a foreign object. The cases were categorized by the product associated with the ingestion injury. The seven product categories with the highest estimates are shown in Table 5. Only seven product categories are shown in Table 5 due to low, and therefore unreportable, estimates for all other product categories. Note that of the 3,436 cases analyzed, 92 cases had two associated products.

Table 5: Top Seven Swallowed Products by Children Four through Six Years Old, 2000-2006

Based on Number of Estimated Emergency-Room Treated Injuries

Product Code	Product Description	Estimate	Percent of Total	Sample Size	C.V.
1686	Coins	49,974	58.2%	2,028	8.24%
5004	Toys, not elsewhere classified	6,522	7.6%	265	10.78%
1354	Marbles	5,497	6.4%	185	15.74%
1616	Jewelry	4,584	5.3%	187	11.22%
1819	Nails, screws, tacks, or bolts	3,391	3.9%	139	14.29%
0884	Batteries	3,148	3.7%	154	18.87%
0428	Kitchen gadgets, not elsewhere classified	1,271	1.5%	49	22.22%

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

From 2000 to 2006 staff found 2,623 NEISS cases involving ingestion of foreign objects and individuals aged seven through 18 years old. Based on these 2,623 cases there were an estimated 73,218 emergency-room treated injuries from 2000 to 2006 involving a child between the ages of seven and 18 years and the ingestion of a foreign object. The cases were categorized by the product associated with the ingestion injury. The ten product categories with the highest estimates are shown in Table 6. Note that of the 2,623 cases analyzed, 174 cases had two associated products.

Table 6: Top Ten Swallowed Products by Individuals Seven through 18 Years Old, 2000-2006

Based on Number of Estimated Emergency-Room Treated Injuries

Product Code	Product Description	Estimate	Percent of Total	Sample Size	C.V.
1686	Coins	21,674	29.6%	870	9.69%
1616	Jewelry	8,716	11.9%	293	11.78%
1819	Nails, screws, tacks, or bolts	4,685	6.4%	156	11.73%
0884	Batteries	3,595	4.9%	133	16.98%
1685	Pens and pencils	3,578	4.9%	116	20.53%
5004	Toys, not elsewhere classified	3,439	4.7%	132	13.61%
1650	Desk supplies	3,212	4.4%	94	18.23%
1103	Self-contained openers[4]	3,000	4.1%	104	15.99%
1669	Pins and needles	2,381	3.3%	88	17.02%
1354	Marbles	2,334	3.2%	88	16.94%

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

Coins are by far the most common consumer product ingested, accounting for almost half of the estimated injuries (Table 2) when viewed across age. With respect to age quartiles, the highest percentage of injuries due to ingestion of coins is in the 21 month- through three year-old age group (60.3%) and lowest in the seven through 18 year-old age group (29.6%). The next three most commonly ingested product categories are jewelry; toys, not elsewhere classified; and nails, screws, tacks or bolts. These three are always in the top five regardless of age category, except for the seven through 18 year old age category, where toys rank sixth. The only other product categories to make it into the top five in any age category are batteries, marbles, nonelectric Christmas decorations, and pens and pencils.

[4] Note that product code 1103 (self-contained openers) refers to pop-top openers from soda cans.

Table 7: Emergency-Room Treated Jewelry Ingestions by Age Group, 2000-2006

Age Range	Estimate[5]	Percent of Total	Sample Size	C.V.	95% Confidence Interval
0 – 20 months	5,817	23.9%	279	13.71%	4,254 – 7,380
21 months – 3 years	5,250	21.5%	212	11.12%	4,106 – 6,394
4 – 6 years	4,584	18.8%	187	11.22%	3,575 – 5,592
7 – 18 years	8,716	35.8%	293	11.78%	6,703 – 10,729
Total	24,366	100.0%	971	9.65%	19,756 – 28,976

Source: National Electronic Injury Surveillance System
U.S. Consumer Product Safety Commission, April 2007

[5] Columns may not sum to totals due to rounding.

**"The Consumer Product Safety Commission:
Current Issues and a Vision for the Future"**

September 10, 2009

Responses of Chairman Inez M. Tenenbaum to Questions for the Record:

The Honorable Jan Schakowsky

1. **It is my understanding that in August, the CPSC granted Mattel an exemption to the requirement that toymakers use independent laboratories to conduct safety tests on their products. As you know, Mattel and its subsidiary Fisher-Price produced six toys that were recalled due to lead contamination in 2007 - affecting millions of toys. Those recalls were part of the reason that we passed the CPSIA in the first place.**

   a. **What is the ageney's justification for granting Mattel this exemption?**

      Answer: Section 14(f)(2)(D) of the CPSA grants the Commission the authority to accredit a conformity assessment body (or testing laboratory) that is owned, managed, or controlled by a manufacturer, such as Mattel, if the Commission by order finds that the testing laboratory would provide equal or greater consumer safety protection than the manufacturers' use of an independent testing laboratory and the testing laboratory has established procedures ensuring test results are protected from undue influence by the manufacturer or other interested parties, procedures to ensure the Commission is notified immediately of any attempt to hide or exert undue influence over test results, and procedures to ensure allegations of undue influence can be reported confidentially to the Commission.

      To be accredited by the Commission, all third party testing laboratories must be independently accredited to ISO/IEC 17025:2005--General Requirements for the Competence of Testing and Calibration Laboratories. The accreditation must be conducted by a full member of the International Laboratory Accreditation Cooperation--Mutual Recognition Arrangement ("ILAC-MRA").

      ISO 17025 accreditation of a laboratory includes an assessment to confirm the technical competence of the laboratory for certain testing methods and also includes an assessment of a laboratory's management and organization to ensure safeguards against undue influence. The laboratory must have arrangements to ensure that its management and personnel are free from any undue internal and external commercial, financial and other pressures and influences that may adversely affect the quality of their work.

To meet these criteria, firewalled third party testing laboratories must meet the same ISO/IEC 17025 accreditation requirements as independent third party testing laboratories, including requirements for technical competence, standards for management and organization, and safeguards against undue influence.

In addition, the laboratory must establish procedures to ensure that:

i) its test results are protected from undue influence by the manufacturer, private labeler or other interested party;
ii) the Commission is notified immediately of any attempt by the manufacturer, private labeler or other interested party to hide or exert undue influence over test results; and
iii) allegations of undue influence may be reported confidentially to the Commission.

Application materials submitted by Mattel and reviewed by Commission staff demonstrated the required procedures were in place. The firewalled laboratory employees also received training on the procedures.

b. I understand that Mattel demonstrated that their testing was protected from corporate influence. How can CPSC ensure that the testing is kept truly separate from other parts of the company?

Answer: Commission staff reviewed Mattel's organizational charts to ensure the reporting structure properly isolated laboratory personnel from production, sales, and marketing functions. It should also be noted that in order to maintain their ISO/IEC 17025 accreditation, the laboratories undergo periodic audits that include an assessment of a laboratory's management and organization to ensure safeguards against undue influence.

c. Mattel also sends some toys to third party testers. What percentage of Mattel toys will be tested by the company's own labs?

Answer: That information is not available to Commission staff.

d. Are their other companies that have sought this arrangement? Which companies are they and what has been the result for these companies?

Answer: In addition to Mattel, staff have received applications from two other entities seeking accreditation as in-house firewalled conformity assessment bodies. These applications are currently under review by Commission staff and have not been submitted to the Commission.

2. **In July, the Illinois Department of Public Health, which inspects swimming facilities, estimated that more than fifty percent of pools in the state were not in compliance with the law. Press reports have indicated similar or higher levels of noncompliance in states and cities across the country and there were a number of moderate to severe drain-related injuries over the summer. What is the status of implementation of the Virginia Graeme Baker Pool and Spa Safety Act?**

   Answer: CPSC's Office of Compliance and Field Investigations is responsible for enforcement of the Virginia Graeme Baker Pool and Spa Safety Act. In Fiscal Year 2009, CPSC staff inspected nearly a thousand public pools, and more than 300 public spas. We have made compliance determinations for 909 pools thus far; of those 81% were determined to be in compliance. For spas, we have found thus far about 78% in compliance. While our sample is not considered statistically representative of pools and the inspections involved basic screening techniques, these results suggest that much progress has been made and that more work remains to be done.

   Our inspections included 54 pools and 29 spas in the State of Illinois. We found that 74% of the inspected pools in Illinois were in compliance—a bit below the national average—and 86% of the inspected spas were in compliance—a bit above the national average.

   The Office of Compliance has awarded contracts to a number of state and local jurisdictions to conduct additional pool inspections for the CPSC. One of the successful bidders was Winnebago County, Illinois. The Illinois Department of Public Health also expressed interest in the program, but ultimately declined to bid on the grounds that state law prevented it from complying with the nondisclosure terms of the contract.

3. **Chairman Tenenbaum, as you know, the CPSIA has called for a scientific review of the health effects on children of three of the currently banned phthalates – DINP, DIDP, and DnOP. As I understand it, a Chronic Hazard Advisory Panel (CHAP) of independent scientists is currently being convened to conduct the review.**

   a. **What stage is the CHAP process in?**

      Answer: The CPSC staff is in the final stages of compiling a list of possible candidates for Commission consideration. Staff received names of scientists from the National Academy of Sciences (NAS). The nominees have been contacted by the staff and asked to indicate their interest in serving on the CHAP. Responses have been received from most, but not all, of the nominees. Once the information provided by the interested nominees has been reviewed by the CPSC Office of General Counsel's ethics officials for conflicts of interest and cleared, staff will forward to the Commission a proposed list of candidates for the CHAP.

b. When can we expect the panel to be named?

Answer: The staff hopes to transmit its recommendations to the Commission in November. The Commission will then vote on the information provided to them.

c. When can we expect the first meeting to take place?

Answer: After the Commission chooses the CHAP members, they will be polled for availability. The first meeting will take place on a date mutually acceptable to all CHAP members. The meeting date chosen will also have to take into account the time needed to give the public advance notice of the meeting in the Federal Register.

d. What was the process for vetting the candidates for possible conflicts of interests – and ensuring that the individuals appointed come to the panel without a preformed opinion?

Answer: The Consumer Product Safety Act (CPSA) specifies criteria for selecting CHAP members (section 28). The CHAP is composed of 7 members appointed by the Commission from a list of 21 individuals who are nominated by the President of the National Academy of Sciences who:

> (1) are not employees of the federal government, except for the National Institutes of Health, National Toxicology Program, or the National Center for Toxicological Research;
> (2) do not receive compensation from or have any substantial financial interest in any manufacturer, distributor, or retailer of a consumer product; and
> (3) have demonstrated the ability to assess critically the chronic hazards and risks to human health presented by the exposure of humans to toxic substance as demonstrated by the exposure of animals to such substances.

In addition to excluding employees of manufacturers of consumer products, the staff also excludes employees of companies that manufacture phthalates, phthalate substitutes, or chemicals with similar properties.

To assess the potential for conflicts of interest, each nominee who was willing to serve completed a conflict of interest form (attached). CPSC attorneys under the direction of the Designated Agency Ethics Official (DAEO) reviewed the forms and curriculum vitae of each nominee. Only nominees approved by the DAEO were given further consideration. Those nominees will undergo even further screening for conflicts before a final list is submitted to the Commission for approval.

Finally, the qualifications of approved nominees are reviewed by CPSC scientists. Recommendations are based on the qualifications of the nominees. The expertise of the CHAP nominees is considered in order to ensure that the required areas of scientific expertise are present on the CHAP.

4. **I understand that the CPSC staff will play a substantial role in supporting and providing background materials for the CHAP. Given this role, I wanted to bring to your attention a rather disturbing story that ran on NPR not too long ago. The story ran several months after the CPSIA became law and focused specifically on the phthalate ban, and it quoted Dr. Marilyn Wind, the CPSC's deputy associate executive director for health sciences, as saying that she is opposed to the phthalate ban because phthalates "posed no risk to children."**

   a. **Is Dr. Wind's position that of the CPSC?**

   Answer: Dr. Wind, in the NPR interview, was discussing the Commission's prior work on Diisononyl Phthalate (DINP), the phthalate studied in response to a request to ban the use of PVC in children's products intended for children five years of age and younger. This petition was submitted to the Commission in November 1998. Dr. Wind was the project manager for that project. A Chronic Hazard Advisory Panel (CHAP), seven independent scientists recommended by the National Academy of Sciences, was convened to review all the toxicological data available on DINP and make recommendations to the Commission about the toxicity of DINP. The Federal Hazardous Substances Act (FHSA) requires that a substance must not only be toxic but there must also be exposure that would result in an unreasonable risk of injury in order to declare a substance a hazardous substance and ban it. Since there was no exposure data available, CPSC staff undertook a behavioral observation study in which 169 children were observed in their homes and day care sites, and what they put in their mouths and how long the objects remained in their months was recorded. In addition:

   1. methodology was developed to measure how much DINP migrates out of polyvinyl chloride (PVC);
   2. the methodology was validated in an international study;
   3. a "chew and spit" study was done in adult test subjects to relate the test method to what might happen in children; and
   4. toys on the market were tested.

   Based upon the recommendations of the CHAP, the data collected from the behavioral observation study, and the survey of products on the market, the staff did a risk assessment and recommended to the Commission that they deny the petition to ban PVC in toys and other products intended for children five years of age and under. This recommendation was based upon the best scientific data available at that time. In their briefing memo to the Commission, staff concluded, "The staff concurs with the CHAP conclusion

that exposure to DINP from DINP-containing toys would be expected to pose a minimal to non-existent risk of injury for the majority of children. The new data from the behavioral observation study not only confirm this conclusion, but demonstrate that children are exposed to DINP at lower levels than the CHAP assumed when it reached its conclusion." The Commission voted to accept the staff recommendation and deny the petition. Thus the Commission formally accepted the staff recommendation above. This is the only position that the Commission has taken on phthalates in children's products to date and it specifically refers to one specific phthalate, DINP. As Chairman, I will ensure that the congressional mandate of the CPSIA to look *de novo* at the issue of phthalates and their health effects on children is followed.

b. The CPSIA instructs the CPSC to conduct the scientific CHAP *de novo*, from scratch. Given that a number of career staff at CPSC were involved in the previous CHAP and some have made public statements specifically opposing the phthalates provision passed by Congress, should Congress be concerned that government scientists have a predisposition or predetermination ahead of that endeavor?

Answer: No, the Congress should not be concerned that government scientists have a predisposition or predetermination ahead of that endeavor. The previous recommendation to the Commission was based on sound science and the requirements under the Federal Hazardous Substances Act (FHSA). In preparation for the new CHAP, Commission staff is conducting a complete *de novo* review of the three phthalates temporarily banned by the CPSIA. These reviews of the current literature are from a strictly scientific point of view. The staff toxicity reviews of DINP and other phthalates are also being subjected to outside scientific peer review before being finalized and made available to CHAP members.

A new CHAP is in the process of being formed from nominations submitted by the National Academy of Sciences, as mandated under the Consumer Product Safety Act. CHAP members will review the toxicity of all the phthalates, consider exposure, make recommendations of how to deal with exposure to more than one phthalate, and make recommendations of what level of exposure could cause a risk of injury. In addition to information provided by CPSC staff, CHAP members will also be considering information from the public. The meetings of the CHAP are held in public and will provide opportunities for all points of view to be expressed.

c. How are you ensuring that the staff's personal biases do not taint the *de novo* review of the science?

Answer: Scientific staff does not approach any scientific review with "personal bias." Review of the science involves evaluation of all studies available based upon well established scientific criteria. The CPSC staff does

not advocate for or against specific chemicals or products; their concerns are focused on assuring scientific integrity and protection of public health.

5. **I understand that industry representatives have provided materials to the CPSC staff that no doubt reflect their spin on the science relating to phthalates. I also understand that those provided materials will be included in the packet of materials the CPSC staff is providing to the CHAP once appointed.**

   a. **How will you ensure that other stakeholders, including public health and environmental professionals and organizations, are given equal access to the process and that the CHAP will ultimately received the full spectrum of science available to best equip them to make a fair and thoroughly informed decision?**

      Answer: All CHAP meetings are open to the public. Stakeholders are free to submit comments or information they think the CHAP should consider. That information will all be public and part of the record. The CHAP will hold a public hearing in which they will receive testimony from interested members of the public. This will be announced in the Federal Register and on the CPSC web site.

   b. **Will the materials provided to the CHAP be made public at the beginning of the process, and will the source of the materials be identified?**

      Answer: To date, no one has submitted data or other materials for the CHAP. Any information submitted to the CHAP will be made available to the public. Copyrighted materials will be cited so individuals can access them but because of copyright law will not be made available to the public.

6. **Will the CHAP require consensus, offering only one opinion from the 7 panel members; or will individual CHAP members be allowed to offer minority opinions?**

   Answer: Section 28(d) of the Consumer Product Safety Act requires that a decision of a Chronic Hazard Advisory Panel (CHAP) be made by a majority of the CHAP. However, an effort is made to achieve consensus among the members of the CHAP. In the event that such consensus is not possible, it has been past practice to provide for differing or dissenting opinions from those presented by the majority of the CHAP.

7. **There has been some confusion and misinformation about the purpose of the ban on lead in children's products, with some people foeusing on death and injury from single exposures to lead as the key problem that the lead ban will address. Congress made clear in enacting the Consumer Product Safety Improvement Act that there is no safe level of lead, and that the risks from cumulative exposure**

are grave. Can you explain the current scientific understanding with regard to the risks from lead exposure and the impacts on children's health and development from such exposures?

Answer: CPSC staff have concluded, as have toxicologists in other federal agencies and outside the government, that there is no known safe level of exposure to lead, though it is clear that lower levels of exposure to lead are associated with fewer and less severe effects than exposure at higher levels. The staff also recognizes that it is not possible to completely eliminate lead from products, foods, or the environment, but that limiting lead content of certain products or lead exposures from products may be necessary to protect the health of children.

Lead accumulates in the body, and even small exposures contribute to the overall burden of lead in the body. Both acute exposure (*i.e.*, a single exposure incident or short term exposure) and chronic exposures (*i.e.*, occurring over a longer period of time) to lead could result in adverse health effects. In both cases, relatively high exposures are associated with symptoms of lead poisoning, including serious health effects and sometimes death. Again, lower levels of exposure to lead are associated with fewer and less severe effects than exposure at higher levels. At lower exposure levels, adverse health effects may be subtle, with no obvious symptoms or indications that exposure has occurred. For example, the scientific literature shows that lead exposures resulting in small increases in the amount of lead in children's blood (*i.e.*, 1 microgram of lead per deciliter of blood) is associated with an IQ decremeot of 1 to 2 points. This adverse effect would not be obvinus in an affected individual child.

8. **In August 2009, the Commission issued a final rule on, "Determinations Regarding Lead Content Limits on Certain Materials or Products." This rule makes determinations that certain untreated and unadulterated products, including precious gemstones, wood, natural fibers, and other natural materials do not exceed the lead content limits under section 101(a) of the CPSIA. It is not clear from the rule if this determination exempts these products from only the testing requirements of the CPSIA, or both the testing and certification requirements. Could you clarify the intent of this rule?**

Answer: The determinations rule, which is codified under the Commission's regulations at 16 C.F.R. § 1500.91, provides that those materials specifically listed in the rule do not need to be tested. The Commission is currently considering guidance that will explain that no third party testing needs to be done and therefore, no certification is required. The Commission has not yet voted on the guidance but the voted is expected to occur within the next few weeks.

Chronic Hazard Advisory Panel Questionnaire[1]

1. Name: _____

2. Employment Affiliation:

   a. Current Position and Description of Duties:

   _____

   _____

   _____

   _____

   b. Employer's Name and Address:

   _____

   _____

   _____

   c. Type of organization, e.g., health care, manufacturing, educational, testing laboratory, governmental, public interest, retail. (Please complete this item even if self-employed).

   _____

   d. Telephone number: _____

   e. Consulting work contracts and grants (current or anticipated only): Specify for whom work is done and who receives payment:

   _____

   _____

   _____

3. Financial Interests:

   a. Companies which you, your spouse, or minor children own or in which you are a partner:

   _____

   _____

   _____

[1]Office of Management and Budget Control Number: 3041-0139.

b. Companies or trusts in which you, your spouse, or minor children hold securities (stocks, stock options, bonds, etc.) that are worth more than $15,000. or which pay you more than $500 per year:

4. Any other information which you believe might relate to the questions of compensation from, or substantial financial interest in, any manufacturer, distributor, or retailer of a consumer product. (For example, do you have any continuing financial interests, through a pension or retirement plan, shared income or other arrangement as a result of any current or prior employment or business professional association.)

I certify that this information is true, complete, and correct to the best of my knowledge and belief.

Signature Date

CRIB SAFETY: ASSESSING THE NEED FOR BETTER OVERSIGHT

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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CRIB SAFETY: ASSESSING THE NEED FOR BETTER OVERSIGHT

THURSDAY, JANUARY 21, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 2322 of the Rayburn House Office Building, Hon. Bart Stupak [Chairman of the Subcommittee] presiding.

Members present: Representatives Stupak, Braley, Schakowsky, Christensen, Green, Sutton, Walden, and Burgess.

Staff present: Bruce Wolpe, Senior Advisor; Alison Cassady, Professional Staff Member; Michelle Ash, Chief Counsel, Commerce, Trade, and Consumer Protection; Will Cusey, Special Assistant; Dave Leviss, Chief Oversight Counsel; Ali Golden, Professional Staff Member; Erika Smith, Professional Staff Member; Ali Neubauer, Special Assistant; David Kohn, Press Secretary; Elizabeth Letter, Special Assistant; Alan Slobodin, Chief Counsel for Oversight; Krista Rosenthall, Minority Counsel; Kevin Kohn, Minority Professional Staff Member; and Brian McCullough, Minority Professional Staff Member.

OPENING STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. STUPAK. Good morning. We are going to begin this hearing, the Subcommittee on Oversight and Investigations.

Our hearing today is entitled "Assessing the Need for Better Oversight on Crib Safety." Members will be recognized for opening statements. I will begin.

Today we are here to answer a painful and difficult question: Are we doing enough to protect infants and toddlers from injuries and death in their cribs? Most experts agree that the safest place for an infant to sleep is in a properly made crib that meets the highest safety standards. Babies sleeping on their backs in the crib with a firm mattress and without soft bedding are less likely to die from SIDS or accidentally suffocate. Our work today is critical because of the unique nature of a baby crib. As we will hear from our witnesses, a baby crib is the only product designed expressly so parents can leave their child unattended for a long period of time and be confident that their child will be safe. It is reasonable for parents to expect that the crib they purchase meets safety standards enforced by a strong regulator. Unfortunately, this Subcommittee

has learned that those reasonable expectations of crib safety have not been met.

The Consumer Product Safety Commission, CPSC, the government agency tasked with keeping consumer products safe for Americans, has recalled millions of cribs in recent years after investigating reports of broken and defective crib hardware, dropped sides that detach and poor wood quality. What is most shocking is that all these recalled cribs were certified as meeting the industry's voluntary safety standards. The crib recalls raise questions about the effectiveness of the current regulations and leave some parents who doubt whether any crib on the market in safe.

In November of 2009, the CPSC announced the recall of more than 2 million Stork Craft drop-side cribs, the largest crib recall in U.S. history, and just this Tuesday, the CPSC announced yet another voluntary recall involving 635,000 drop-side and fixed-rail cribs manufactured by Dorel Asia Corporation. Congress instructed the CPSC to revisit its safety standards for cribs under the Consumer Product Safety Improvement Act of 2008. CPSC is prepared to meet that obligation. Our hearing will detail the recent crib recalls and consider how CPSC plans to prevent cribs with significant defects from entering the market. We will also examine industry's role in ensuring that their products are safe and if crib standards are designed to keep consumers safe.

Today we will hear specifically about the safety concerns of drop-side cribs. A drop-side crib allows a parent to raise and lower the front of the crib for easy access to their baby as opposed to a fixed-rail crib, which has four sides that do not move up or down. According to the Juvenile Products Manufacturers Association, retailers sold approximately 500,000 full-sized cribs in 2008, of which 15 to 20 percent had drop sides. Since 2005, the CPSC has announced more than 30 recalls of 7 million cribs for a variety of safety problems, many of them involved drop sides. CPSC experts have found that mattress support brackets and drop-side hardware can break, deform or are lost. Design flaws permit consumers to intentionally or unintentionally install the drop-side railing upside down, putting unintended stress on the crib hardware. Many different problems can cause the drop side to detach, creating a dangerous gap between the crib railing and the crib mattress. As this simulated picture from the CPSC shows—it should be up here on our screen—in some cases the body of an infant or toddler can become trapped in the space and a child can suffocate.

Since 2007, the CPSC has issued recalls involving millions of drop-side cribs sold by different manufacturers. The CPSC has issued four recalls of drop-side cribs manufactured by Simplicity after receiving reports of dozens of incidents involving several deaths. In October 2008, the CPSC recalled nearly 1 million Delta brand drop-side cribs. The CPSC issued two recalls in 2009 of Stork Craft drop-side cribs for problems associated with the brackets that hold the mattress in place and problems with the cribs' plastic hardware. The CPSC linked four deaths associated with Stork Craft faulty cribs. In November 2009, a recall involved more than 2 million cribs, the largest crib recall in U.S. history.

The fact that most recalls have involved cribs that were built in compliance with current voluntary safety standards shows that our

system for measuring and ensuring and enforcing crib safety is not working. The Juvenile Products Manufacturers Association, a national trade association representing more than 250 companies, certified that Simplicity, Delta and Stork Craft cribs involved in each of these recalls met all U.S. standards and voluntary industry standards. The JPMA gave these cribs their seal of approval. Unfortunately, neither the mandatory nor the voluntary standards were or are strict enough. JPMA will be testifying at today's hearing, and I look forward to learning more about what the crib industry must do to improve its safety record.

In November 2008, the CPSC acknowledged that the mandatory and voluntary standards do not include adequate performance requirements for durability of drop-side crib hardware, the strength and quality of the wood used to make the cribs, and the utility and clarity of crib assembly instructions. I look forward to the CPSC chairperson's testimony today about what the Commission can do to develop and enforce stronger crib safety standards.

Today we will also examine the November recall of 2 million Stork Craft drop-side cribs as a case study on the need for better regulation and oversight of crib safety. First, what can Congress, the CPSC and crib manufacturers learn from these massive recalls? And second, how does the CPSC plan to address the ongoing safety problems with drop-side cribs under its rulemaking authority? The CPSC has the legal authority to tackle this problem and restore American consumers' confidence in the safety of cribs. Because of the work of some of the members of this Subcommittee, particularly Congresswoman Schakowsky, the Consumer Products Safety Improvement Act requires the CPSC to study and develop safety standards for durable nursery products including full-sized cribs. The Act directs the CPSC either to accept the existing voluntary safety standards for these products and make them mandatory or provide a stricter federal safety standard.

Our hearing today consists of three panels of witnesses. First we will hear from Mrs. Susan Cirigliano, who lost her son Bobby in 2004 when the drop side of Bobby's crib detached and he suffocated. Mrs. Cirigliano and her husband have been working to ban drop-side cribs in New York State. Second, we will hear from Michael Dwyer of the Juvenile Products Manufacturers Association, and Nancy Cowles of Kids in Danger, a consumer organization founded in 1998 by the parents of a toddler who died when a portable crib collapsed around his neck. These witnesses will be able to share their perspectives on crib safety, consumer protection, and comment on CPSC's rulemaking authority. And finally, we will hear from the chairperson of the Consumer Product Safety Commission, Inez Moore Tenenbaum.

I want to thank all of our witnesses for participating in today's hearing. Particularly, I want to thank the Ciriglianos for their time, their testimony, traveling from New York to share their personal tragedy with us and the American people.

In preparation for this hearing, the Subcommittee requested and received documents from the Consumer Product Safety Commission and the Juvenile Products Manufacturers Association. The CPSC and the JPMA have been very cooperative with the Subcommittee document request and produced ten of thousands of pages of docu-

ments over the holidays. I appreciate their cooperation with this important inquiry. In addition, the Subcommittee requested documents from Stork Craft, a Canadian-based crib manufacturer whose drop-side cribs were the subject of the largest recall in CPSC history. Stork Craft has pledged its cooperation, and just yesterday provided the Subcommittee with its first submission of some responsive e-mails. I urge Stork Craft to cooperate fully and complete its production of documents promptly. Stork Craft will not be testifying here today but we look forward to reviewing their submissions, the documents they submitted yesterday, and reserve the right to schedule an additional hearing if necessary to bring Stork Craft here and to explain their role in the recall process and its responsibility to ensure the safe manufacture of cribs.

With that, I will yield back the balance of my time.

I would next like to turn to the ranking member of this Subcommittee, Mr. Walden of Oregon, and they have been very cooperative. We have worked well on this one and I think we may have future hearings, but Greg, thanks for your efforts on this issue.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. Thank you, Bart, and I appreciate your holding this hearing and the work that both sides have done on this issue. I first want to mention that I am also scheduled to be in a Telecommunications Subcommittee markup session that is going on right now. We are actually voting on a couple of bills, so I may have to step out and go down to that committee and then I will return.

I want to extend a warm welcome to the Ciriglianos. We really feel awful about the loss that you have suffered. It is unthinkable and it is the last thing any parent wants to go through, and so you have our deepest condolences and sympathy. Thank you for traveling here. Thank you for telling us your story. We look forward to your testimony, admire your courage and your willingness to speak up and make a difference in public policy.

The U.S. Consumer Product Safety Commission is charged, as you have heard from my colleague, with protecting the public from unreasonable risk of serious injury or death from thousands of products. Infant cribs are one of the products under CPSC's jurisdiction and a major focus of that agency. The Commission has acted in the past several months to recall millions of drop-side cribs. Today we have an opportunity to examine the recall process and product integrity questions raised by the latest Stork Craft brand crib recall and understand the roles of the company, the agency and the consumer play in ensuring the effectiveness of the recall and keeping children safe. Our goals here today are first to identify the strengths and weaknesses of the current system, and second, to discuss possible solutions to improve safety and oversight while still allowing access to a wide range of products with the assurance of the public's safety. We will also consider the ASTM international standards specifically for crib manufacturers that were released in December of last year. ASTM is an entity that develops technical product standards that guide the CPSC's evaluation of products. We will want an assessment from our wit-

nesses of whether the new ASTM standards will eliminate or significantly reduce the risk of serious injury.

I welcome CPSC Chairman Tenenbaum and look forward to her statement and the opportunity to ask questions. I am anxious to hear if and when the Commission will adopt the ASTM standard, and if not, why not. I am also interested in learning about the complex matrix the agency uses to determine when a certain number of isolated consumer complaints and incidents evolve into a full-blown investigation and lead to an ultimate product recall.

Congress has not been inactive when it comes to increasing federal regulation of juvenile products and increasing the effectiveness of product recalls. The Consumer Product Safety Improvement Act of 2008 addresses several of these issues that bring us here today. Ms. Tenenbaum will be able to talk about the new authorities of the Commission that they have under CPSIA including new rulemaking procedures that allow the agency to revise its mandatory product standards more easily, new product registration programs and increases in the agency's budget. With the implementation in the last Administration of the early warning system, the CPSC staff and previous Commission leadership were already increasing their surveillance of cribs, bassinets and play yards. This system helped trigger the recalls of millions of cribs since that time. I hope the chairwoman will talk about this system and how it can be expanded, strengthened, improved under the new leadership of the Commission.

Since medical experts agree the safest place for an infant to sleep is in a crib, I want to know what we can do to increase consumer confidence in these products to ensure that parents are not discouraged from purchasing a crib at all. The consumer, the companies that manufacture these products, CPSC and Congress must work together to improve communications and quickly yet thoroughly respond to products that may pose a threat. I do hope that as we move forward, the CPSC will be able to maintain a strong level of collegiality amongst its five commissioners and that both Republicans and Democrats will work together to ensure that the CPSC effectively and wisely uses its new and additional resources and authorities to improve crib and product safety.

Thank you, Mr. Chairman. I look forward to the witnesses, and again at some point I will have to step out for this other markup.

[The prepared statement of Mr. Walden follows:]

Opening Statement of the Honorable Greg Walden
Ranking Member
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
Hearing on
"Crib Safety: Assessing the Need for Better Oversight"
January 21, 2009

Thank you, Mr. Stupak.

I want to start by extending a warm welcome to our first witnesses, Susan and Robert Cirigliano (SIR-RIG-LEE-ANO). The Ciriglianos experienced an unthinkable crib-related tragedy first-hand when they lost their son Bobby in 2004. Time does not blunt the deep sadness of losing one's child and I extend sincere condolences to you. There is no greater grief than that which you've experienced.

Thank you both for traveling here today to tell your story and help us understand the issues associated with drop-side cribs from a consumer's standpoint. I admire your courage and willingness to discuss your story to

help identify ways in which we can improve the safety of cribs, the recall process, and communication among consumers, companies, and regulators.

The U.S. Consumer Product Safety Commission (CPSC) is charged with protecting the public from unreasonable risks of serious injury or death from thousands of types of products. Infant cribs are one of the products under CPSC's jurisdiction and a major focus of the agency. The Commission has acted in the past several months to recall millions of drop-side cribs.

Today we have an opportunity to examine the recall process and product integrity questions raised by the latest Stork Craft brand crib recall and understand the roles the company, the agency, and the consumer play in ensuring the effectiveness of the recall and keeping children safe. Our goals here today are first, to identify the strengths and weaknesses of the current system; and second, to discuss possible solutions to improve safety and oversight while still allowing access to a wide-range of products with the assurance of the product's safety.

We will also consider the ASTM International standards specifically for crib manufacturers that were released in December 2009. ASTM is an entity that develops technical product standards that guide the CPSC's evaluation of products. We will want an assessment from our witnesses of whether the new ASTM standards will eliminate or significantly reduce the risk of serious injury.

I welcome CPSC Chairman Tenenbaum and look forward to her statement and the opportunity to ask her questions. I am anxious to hear if and when the Commission will adopt the ASTM standard, and if not, why not. I am also interested in learning about the complex matrix the agency uses to determine when a certain number of isolated consumer complaints and incidents evolve into a full-blown investigation and lead to an ultimate product recall.

Congress has not been inactive when it comes to increasing federal regulation of juvenile products and increasing the effectiveness of product recalls. The Consumer Product Safety Improvement Act of 2008 addresses several of the issues that bring us here today. Ms. Tenenbaum will be able to talk about the new authorities the Commission has under CPSIA

including new rule-making procedures that allow the agency to revise its mandatory product standards more easily, new product registration programs, and increases in the agency's budget.

With the implementation of the Early Warning System in 2007, the CPSC staff and previous Commission leadership were already increasing their surveillanee of cribs, bassinets, and play yards. This System helped trigger the recalls of millions of cribs sinee that time. I hope the Chairman will talk about this System and how it can be expanded and strengthened under her leadership.

Since medical experts agree that the safest place for an infant to sleep is in a crib, I want to know what we can do to increase consumer confidence in these products to ensure parents are not discouraged from purchasing a crib. The consumer, the companies that manufacturer these products, CPSC, and Congress must work together to improve communications and quickly yet thoroughly respond to products that may pose a threat. I do hope that as we move forward the CPSC will be able to maintain a strong level of collegiality amongst its five commissioners and that both Republicans and Democrats can work together to ensure that the CPSC effectively and wisely

uses its new and additional recourses and authorities to improve crib and product safety.

Mr. STUPAK. Well, thank you, Mr. Walden. You make a good point. There is another hearing going on on the first floor and members will probably be bouncing in and out. It is a markup. By markup, it just means we might have a vote in committee so we may have to leave. I will stay and keep the hearing moving on.

Next, Mr. Braley for an opening statement, 3 minutes, please, sir.

OPENING STATEMENT OF HON. BRUCE L. BRALEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. BRALEY. Thank you, Mr. Chairman and Ranking Member Walden. I can't imagine a more important hearing for this Committee to hold than the one we are having today.

As a child growing up in the late 1950s, my parents had a drop-side crib. As a parent whose children were born in the late 1980s, I purchased, assembled and my kids all spent time in a drop-side crib, and to the Ciriglianos, I want to extend to you our sympathy and also our appreciation for your courage in using this tragedy to teach others about this danger, and I can't thank you enough for coming down and spending your time to help educate us on this important issue.

I am very, very concerned about the recall, not just of these recent cribs but of the millions of cribs that have been recalled in the last several months, and I believe we need to act immediately to ensure that all cribs sold in the United States meet the highest safety standards possible. You have heard the number, 635,000 cribs made in China and Vietnam by Dorel Asia recalled, this right on the heels of the largest crib recall in U.S. history two months ago, and this has been something that hits home for me personally because the most recent recall has been linked to the October 2008 death of a 6-month-old infant in my State of Iowa who strangled after getting trapped in a Dorel Asia crib when the drop-side hardware broke. In addition to that tragedy, the CPSC received 31 reports of incidents involving Dorel Asia drop-side cribs including six reports of children being trapped between the mattress and the drop side and also received 36 reports of broken slats on the Dorel Asia crib, and this gets back to my point earlier. I can tell you having purchased and assembled a drop-side crib 30 years after I was in one, that the quality of materials being used in these cribs is much less than it used to be in terms of the wood products, and that is why we need to have a strong response to deal with this clear pattern of problems.

In their statement, Dorel Asia said that the recalled cribs meet and exceed all applicable safety standards. If that is true, then this is just one more clear indication that we need to act as quickly as possible to strengthen and enforce any standards.

These deaths are inexcusable. They involve the most vulnerable members of our population and we have no excuse for not fixing this problem immediately. I am glad to hear that CPSC has taken initial steps to address these safety concerns for cribs as mandated by the Consumer Product Safety Improvement Act, which we passed hear in 2008 and which this Committee addressed in hearings, but I am concerned about the length of time this is taking and I look forward to hearing from Chairwoman Tenenbaum about

the additional steps the Commission is taking to improve and upgrade crib safety standards.

Unfortunately, these crib recalls also illustrate the dangers of free and unrestricted trade with companies that don't have the same safety standards for manufacturing that we do in the United States. To ensure the safety of American families, we need to ensure that the countries we import products from are on a level playing field with those that are manufactured here in this country regarding product safety regulations. That is why as chairman of the Populous Caucus, I am working to make sure that future trade agreements including strong product safety standards and that products imported into the United States meet or exceed U.S. health and safety standards, and I believe that the enactment of those provisions contained in the trade act would go a long way toward ensuring the safety of imported products including cribs.

So I want to thank you, Chairman Stupak, for holding this timely and important hearing. I look forward to the testimony of all of our witnesses and I hope that this hearing will be an important step forward toward the prompt implementation and strong enforcement of the highest crib safety standards possible. I yield back.

[The prepared statement of Mr. Braley follows:]

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Statement of Congressman Bruce Braley
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
"Crib Safety: Assessing the Need for Better Oversight"
January 21, 2010

Thank you, Chairman Stupak and Ranking Member Walden for holding this important hearing today on crib safety and federal safety standards for infant cribs. I'm deeply concerned by the recall of millions of cribs in recent years and believe that we need to act immediately to ensure that all cribs sold in the United States meet the highest safety standards possible.

Just this Tuesday, 635,000 cribs made in China and Vietnam by Dorel Asia were recalled, right on the heels of the largest crib recall in U.S. history just two months ago, when the Consumer Product Safety Commission (CPSC) announced the recall of over two million Stork Craft drop-side cribs. This most recent recall has been linked to the October 2008 death of a 6-month-old infant in my state of Iowa, who strangled after getting trapped in a Dorel Asia crib when the drop-side hardware broke. In addition to the death of the child in

Cedar Rapids, Iowa, the CPSC received 31 reports of incidents involving Dorel Asia drop-side cribs, including six reports of children being trapped between the mattress and the drop side. The CPSC also received 36 reports of broken slats on Dorel Asia cribs, including two reports of trapped children and seven reports of bruises and scratches.

These numbers indicate a clear pattern of problems with this product. If Dorel Asia's statement that "the recalled cribs meet and exceed all applicable safety standards" is true, this is just one more clear indication that we need to act as quickly as possible to strengthen and enforce these standards.

The deaths and injuries of infants caused by unsafe cribs are simply unacceptable, and we have no excuse for not fixing this problem immediately. I'm glad to hear that the CPSC has taken initial steps to increase safety standards for cribs, as mandated by the *Consumer Product Safety Improvement Act*, which Congress passed in 2008, but I'm concerned about how long this is taking. I'm looking forward to hearing from Chairwoman Tenenbaum about the Commission's plans to improve and uphold crib safety standards and about the support and resources the Commission needs from

Congress to help with and expedite this critical and long-overdue process.

Unfortunately, these crib recalls also illustrate the dangers of free and unrestricted trade with countries that don't have the same safety standards as the United States. To ensure the safety of American families, we need to ensure that countries we import products from are on a level playing field with regards to product safety regulations. That's why, as the Chairman of the Populist Caucus, I'm working to ensure that future trade agreements include strong product safety standards and that products imported into the United States meet or exceed U.S. health and safety standards. I believe that the enactment of these provisions included in the *TRADE Act* would go a long way towards ensuring the safety of imported products, including cribs.

Thank you again, Chairman Stupak, for holding this important and timely hearing today. I look forward to hearing the testimony of all the witnesses, and hope that this hearing will be an important step forward towards the prompt implementation and strong enforcement of the highest crib safety standards possible.

Mr. STUPAK. Thank you, Mr. Braley. Mr. Burgess, opening statement, 3 minutes, please, sir.

OPENING STATEMENT OF HON. MICHAEL C. BURGESS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BURGESS. Thank you, Mr. Chairman.

Mr. Chairman, of course we are here today because of a tragedy. It is a tragedy that we cannot reverse. Maybe we can prevent future tragedies. I am profoundly regretful that for so long the standards as they relate to crib safety have been voluntary and not mandatory despite more than 7 million cribs being recalled in the last 5 years.

We have a new commissioner at the Consumer Product Safety Commission, Inez Tenenbaum. One of her first speeches was last August and she correctly noted that a great deal of product safety occurs by relying on consensus standards coupled with regulatory authority to intervene quickly, and she prefaced this by saying that they should be voluntary consensus standards. This makes sense for a new commissioner who has witnessed the aftermaths of some of the mandates that were issued from the Congress through H.R. 4040, the Consumer Product Safety Improvement Act, because we in the Congress have yet to go back and fix some of the unintended consequences that we visited upon parents and consumers with that Act.

However, that being said, the Consumer Product Safety Improvement Act has beleaguered the Consumer Product Safety Commission. Yes, we have improved their funding. Yes, we have improved their staffing, but I will tell you, as one of the few Members of Congress who has been to the Consumer Product Safety Commission and watched the good men and women out there do their work, I will tell you that it is startling with the amount of work that the amount of safety which they are asked to assure the small staff and the rather primitive working conditions that they face on a daily basis. They don't have the manpower to implement the law and they don't have the finances and they are vainly trying to meet the deadlines imposed, and they issue stays and enforcement, stay after stay after stay and enforcement, while trying to come up with solutions and the only real solution is Congress going back and fine-tuning some aspects of that legislation and fixing the mistakes that we made when that legislation was drafted. Section 104 of the Consumer Product Safety Improvement Act specifically requires the Consumer Product Safety Commission to study and develop safety standards for durable nursery products such as infant bath seats, infant walkers and cribs. The Consumer Product Safety Commission could have either made mandatory existing voluntary safety standards or provided a stricter federal safety standard, and the Consumer Product Safety Commission worked to initiate two rulemakings by August 2009 and two more rules every 6 months until all durable nursery products have a mandatory safety standard. But to date, the Consumer Product Safety Commission has only proposed safety standards for infant bath seats and infant walkers but not cribs, the course of 30 recalls.

The crib issue is an issue of failure of those trusted by the American public to act. During the last Administration, the rule regard-

ing crib safety was being advanced but a new Administration came in and this rule has never been finalized. Here we are a year later, we see the same problems as we have seen before, and really, Mr. Chairman, we have no one to blame but ourselves for not regulating not one single product, and especially cribs.

I yield back the balance of my time.

Mr. STUPAK. Thank you, Mr. Burgess.

Mr. Green for an opening statement, please, 3 minutes.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Thank you, Mr. Chairman, for holding this hearing, our oversight hearing on this important issue. There have been 30 recalls since 2005. The largest such recall happened just 2 months ago when more than 2 million cribs were recalled in November of 2009. Again on Tuesday, there was a recall of more than 600,000 cribs. These major recalls demonstrate what we need to do in setting safety standards for cribs and testing and enforcement of those standards.

As a grandfather of four under 5, I want to thank all our witnesses today but particularly the Cirigliano family for the loss of their child. It leaves a hole in your heart for your whole life.

I also want to thank our Consumer Product Safety Commission Chair Tenenbaum for being here today. I look forward to hearing what actions the Commission plans to take as it reviews safety standards for cribs that are required by the Consumer Product Safety Act of 2008.

ASTM International, which provides voluntary technical standards manufacturers can follow, amended their standards last month and removed standards for what had been one of the most dangerous types of cribs, a drop-side crib, especially making any drop-side crib noncompliant with the ASTM standards. There is a serious problem in that these types of cribs are not addressed sooner either by ASTM or the CPSC when it was the drop-side crib that led to so many recalls because of the safety hazards they pose to infants and children.

In 2007, a 7-month-old in my hometown of Houston died due to a malfunctioning drop-side crib made by Simplicity. The CPSC recalled cribs made by that manufacturer but the overall issue of dangers posed by drop-side cribs is not addressed. Without knowing it, the family of the 7-month-old put the drop-side crib on upside down, the rail, and because of that the hinge on the rail broke. That allowed a gap between the mattress and the rail and the gap is where the child suffocated to death with their head against the mattress. This is not a unique problem on drop-side cribs but is one that was not specifically addressed until December 2009 when ASTM removed standards for this type of crib. CPSC now has the authority provided by the Consumer Product Safety Improvement Act to move forward with strengthening regulations relating to crib safety, and I hope it is not just setting standards but enforcing testing to ensure unsafe cribs never make it into consumer homes in the first place.

I am also concerned about the secondary market for cribs, whether it be through garage sales or resales, similar to car seats. You

can buy a car seat on the side of the road in Houston. It may be 20 years old but it doesn't meet the safety standards of today.

Again, I want to thank the chairman for holding this hearing and look forward to the testimony from all our witnesses on what Congress can do to help protect infants from these terrible accidents. I yield back my time.

[The prepared statement of Mr. Green follows:]

Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
"Crib Safety: Assessing the Need for Better Oversight"
January 21, 2010

Thank you Mr. Chairman for holding this oversight hearing on this important issue.

There have been 30 recalls since 2005 – the largest such recall happened just two months ago, when more than two million cribs were recalled in November 2009, and again on Tuesday, there was a recall of more than 600,000 cribs.

These major recalls demonstrate we need to do in setting safety standards for cribs and in testing and enforcement of those standards.

I want to thank Consumer Product Safety Commission Chairwoman Tenenbaum for being here today, and I look forward to hearing what actions the Commission plans to take as it reviews safety standards for cribs as required by the Consumer Product Safety Improvement Act of 2008.

ASTM International, which provides voluntary technical standards manufacturers can follow, amended their standards last month and removed standards for what has been one of the most dangerous types of cribs, the drop-side crib, essentially making any drop-side non-compliant with the ASTM standards.

There is a serious problem however, that these types of cribs were not addressed sooner either by ASTM, or the CPSC, when it was

the drop-side crib that led to so many recalls because of the safety hazard they posed to infants and children.

In 2007, a 7 month old in my hometown of Houston died due to a malfunctioning drop-side crib made by Simplicity.

The CPSC recalled cribs made by that manufacturer, but the overall issue of dangers posed by drop-side cribs was not addressed.

Without knowing it, the family of the 7 month old put the drop rail on upside-down and because of that, a hinge on the rail broke.

That allowed a gap between the mattress and the rail, and that gap is where the child suffocated to death with her head against the mattress.

This is not a unique problem among drop-side cribs, but one that was not specifically addressed until December 2009 with ASTM removed standards for this type of crib.

CPSC now has the authority provided by the Consumer Product Safety Improvement Act to move forward with strengthening regulations relating to crib safety, and I hope it is not just setting standards, but enforcing testing to ensure unsafe cribs never make it into consumers' homes in the first place.

I again want to thank the Chairman for holding this hearing today, and look forward to the testimony from our witnesses on what Congress can do to help protect infants from these types of terrible accidents.

Mr. STUPAK. Thank you, Mr. Green.

Ms. Christensen, opening statement, please.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman, and I want to also thank you, Chairman Stupak and Ranking Member Walden, for holding this important hearing.

Becoming a parent marks the most important event in someone's life, and as parents and consumers, we trust that the products that we buy are safe for our children and we need to have that reassurance. However, we are here this morning because some of those products are not safe, in particular, faulty cribs that have resulted in injuries and even death, and I would like to also add my word of welcome to the Cirigliano family and extend my sympathy to them as well, and also commend them for being here today and turning their tragedy into a crusade to save lives and preventing other parents from experiencing the same misfortune.

We can all agree that we need to work diligently to strengthen crib standards and standards for every child entity and to ensure that they are meeting the highest of safety measures and providing protection to children in a manner that they are supposed to be designed to do, and I would also like to extend a thank you to all of the other witnesses for being here today and look forward to their testimonies.

Mr. STUPAK. Thank you.

Ms. Schakowsky, opening statement. I know you are probably at the other hearing but I mentioned your leading role in the Act that we just passed in 2008 and your interest in this area, so thanks for being here and thanks again for your diligence on this.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. I am happy that we are holding this hearing.

This is a life-of-death issue, the safety of cribs. Attending hearings where we hear testimony from families of children who have died in preventable accidents is one of the hardest things I do as a Member of Congress but of course nothing compared to what it means to the families like the Ciriglianos who mustered the incredible courage to come here and tell us their story so that they can prevent these accidents from happening to other children.

The Consumer Product Safety Improvement Act has taken a lot of heat over the last year or so, and it is true that under previous leadership the CPSC's implementation of the law as problematic and produced widespread confusion, particularly among small business owners, but we can't lose sight of why this legislation was passed: to protect children, children like Danny Keysar, for whom the bill is named, and Bobby Cirigliano, whose parents are brave enough to share their son's story today.

For years we have heard stories of the horrible injuries and deaths of children in cribs and it has been mentioned many times how literally millions of cribs have been recalled in the last few years. No need to go through that again. But I authored the provision in the CPSIA that requires the Consumer Product Safety Commission to develop the strongest possible mandatory standards for

durable infant and toddler products including cribs. It is my understanding that the CPSC has proposed rules for the first two products, infant bath seats and infant walkers. I am concerned that a year and a half after the bill became law, there is still no rule for cribs, and I am eager to hear from Chairman Tenenbaum, who I welcome today, about how we are moving forward on such a rule, and I also want to welcome other witnesses including Nancy Cowles, a leader with whom I have worked for years on children's product safety issues, and again, I thank you, Mr. Chairman, and yield back the balance of my time.

Mr. STUPAK. Thank you. That concludes all the opening statements of members.

I would like to call our first panel of witnesses now. Robert and Susan Cirigliano, if you would please come forward? I have a chair there. As you know, the Ciriglianos are from New York, and unfortunately and tragically they lost their son Bobby.

It is the policy of this subcommittee to take all testimony under oath. Please be advised that you have the right under the rules of the House to be advised by counsel during your testimony. Do you wish to be represented by counsel?

Mrs. SUSAN CIRIGLIANO. No, thank you.

Mr. STUPAK. The witnesses indicated they did not. Therefore, I am going to ask you to raise your right hand to take the oath.

[Witnesses sworn.]

Mr. STUPAK. Let the record reflect that the witnesses have replied in the affirmative. They are under oath. I would now ask for an opening statement, 5-minute opening statements. It will be part of the record, so if you want to submit a longer statement, you may, and it is my understanding, Susan, you are going to testify?

Mrs. SUSAN CIRIGLIANO. Yes.

Mr. STUPAK. Would you pull that mic up a little further and press the button. A light should go on there.

TESTIMONY OF SUSAN CIRIGLIANO, MOTHER OF BOBBY CIRIGLIANO, ACCOMPANIED BY ROBERT CIRIGLIANO

Mrs. SUSAN CIRIGLIANO. Good morning. We are Robert and Susan Cirigliano, also known as Daddy and Mommy, but we have only heard three of our four children call us that because our son Bobby never had the chance.

On September 15, 2004, Bobby was 6 months and 3 days old when his head and neck were caught in the detached side rail of his crib. After the drop-side detached, Bobby's head was caught between the side rail and the mattress. With his face pressed against the mattress, he suffocated. Bobby was taken from his crib, put into an ambulance, arrived at the hospital and never came home.

We miss Bobby every day, but what is most important is what Bobby misses. Bobby has an older sister who never had the chance to teach him how to get in and out of trouble. Bobby has a younger brother and sister that he has never met. Bobby has two grandfathers that he never played catch with, two grandmothers whose cookies he was never able to taste. Bobby never had a chance to wear his first Halloween costume. He didn't get to sit on Santa's lap, and never blew out a birthday candle.

Our smiles have dulled and our family will never be complete again. Other than Mommy's and Daddy's arms, Bobby was in one of the safest places, his crib. The reality is, his crib was not safe and our lives will never be the same. We refuse to allow any other families to suffer the pain we have.

While we are happy to hear about the millions of crib recalls, we are convinced that the only answer is a complete ban on drop-side cribs. We do not believe that parents realize the severity of placing their children to sleep in a drop-side crib. The one place that you would leave your child alone has become a threat. If they cannot purchase a drop-side crib, they would have no option but to purchase a stationary crib. We do not believe a repair kit is the answer. If a crib has the ability to kill a child, it should not be manufactured. The recalls are downplaying the number of children that have been suffocated in a drop-side crib. Our son Bobby was not included in the CPSC's reports. Their reason for this is the location his drop-side rail detached was not the same as the other infants. Our problem with this is the investigator's report stated the bottom left rail was not secure while Bobby's rail detached on the lower right side. The point is, bottom left, bottom right, Bobby was asphyxiated and died when his drop-side rail detached and he was trapped between the mattress and the side just like infants before him and just like infants after him. The number of infants reported should not be determined where the rail detaches but by the end result.

We have in the last 5 months worked with Legislation in Suffolk County having a bill passed banning the sale of drop-side cribs. We have worked with Nassau County Legislation banning the sale of drop-side cribs and are waiting the bill's signing. We are currently working with Rockland County Legislation to have the ban passed there also, which by the way, it passed on Tuesday night.

We appreciate Congress inviting us to be here today to share our story. We hope you think of Bobby while you determine how to keep our babies safe. We are all they have. Their lives depend on it. Thank you.

[The prepared statement of Mrs. Cirigliano follows:]

Testimony of Susan Cirigliano
Before the House Committee on Energy and Commerce
Subcommittee on Oversight and Investigatious
"Crib Safety: Assessing the Need for Better Oversight"
January 21, 2010

We are Robert and Susan Cirigliano also known as Daddy and Mommy. But we have only heard three of our four children call us that because our son Bobby never had the chance. On September 15, 2004 Bobby was six months and three days old when his head and neck were caught in the detached side rail of his crib. After the drop side rail detached Bobby's head was caught between the side rail and the mattress. Wit his face pressed against the mattress, he suffocated. Bobby was taken from his crib, put into an ambulance, arrived at the hospital and never came home.

We missed Bobby everyday but what is most important is what Bobby misses. Bobby has an older sister who never had the chance to teach him how to get in and out of trouble. Bobby has a younger brother and sister that he has never met. Bobby has two grandfathers that he never played catch with. Two grandmothers whose cookies he was never able to taste. Bobby never had a chance to wear his first Halloween costume. He didn't get to sit on Santa's lap and never blew out a birthday candle.

Our smiles have dulled and our family will never be complete again. Other than Mommy and Daddy's arms Bobby was in one of the safest places - his crib. The reality is his crib was not safe and our lives will never be the same. We refuse to allow any other family to suffer the pain we have.

While we are happy to hear about the millions of crib recalls we are convinced that the only answer is a complete ban on drop side cribs.
We do not believe that parents realize the severity of placing their children to sleep in a drop side crib. The one place that you would leave your child alone has become a threat. If they cannot purchase a drop side crib they would have no option but to purchase a stationary crib.

Another reason we feel strongly about the ban is the CPSC's approach with the recalls. We do not believe a repair is the answer. If a crib has the ability to kill a child it should not be manufactured. The recalls are downplaying the number of children that have been suffocated in a drop side crib. Our son Bobby was not included in the CPSC's reports. Their reason for this is the location his drop side rail detached was not the same as the other infants. Our problem with this is the investigator's report stated the bottom left rail was not secure while Bobby's rail detached on the lower right side. The point is bottom left, bottom right Bobby was asphyxiated and died when his drop side rail detached and he was trapped between the mattress and the side rail just like infants before him and just like infants after him. The number of infants reported should not be determined by where the rail detaches but by the end result.

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We appreciated Congress inviting us to be here today to share our story. We hope you think of Bobby while you determine how to keep our babies safe. We are all they have. Their lives depend on it. Thank you.

Mr. STUPAK. Mr. Cirigliano, would you like to say anything at this time? Okay. That is no. Thank you again for being here and thank you for sharing your story.

Mrs. SUSAN CIRIGLIANO. You are welcome. Thank you for inviting us.

Mr. STUPAK. We are going to have members ask you questions, okay?

Mrs. SUSAN CIRIGLIANO. Okay.

Mr. STUPAK. Let me ask you this. In your statement, you said, "Our son Bobby was not included in CPSC's reports. Their reason for this is the location of the drop-side rail detached was not the same as other infants." Can you explain that?

Mrs. SUSAN CIRIGLIANO. When we saw an interview on television regarding the manufacture of our crib's recall, the chairperson at the time was asked why Bobby's death wasn't included in the recall, and her response was because of the location of where his drop-side rail detached.

Mr. STUPAK. There was no doubt that the rail detaching was the cause of his suffocation, it is just the location of it for——

Mrs. SUSAN CIRIGLIANO. Yeah.

Mr. STUPAK [continuing]. Their rules and regulations? Is that your understanding?

Mrs. SUSAN CIRIGLIANO. Yes.

Mr. ROBERT CIRIGLIANO. The recalled crib, the manufacturer highlighted the piece that malfunctioned on my son's crib, and that was one of the two pieces for the recall, and we would still like an explanation for it actually. We never got one. You know, the manufacturer put a picture on their website of the same exact piece that malfunctioned on my son's crib also.

Mr. STUPAK. Did you report your son's death to the CPSC, Consumer Product Safety Commission?

Mr. ROBERT CIRIGLIANO. They came down to the medical examiner's office and they inspected the crib.

Mr. STUPAK. But do you have any personal knowledge—I don't mean to push you on this. I am just trying to figure out, because it is my understanding, there is really no requirement to report it, so we really don't know how many deaths have been caused or even the number of injuries. Was there a requirement that you know of to report to the CPSC the injury to your son?

Mrs. SUSAN CIRIGLIANO. Well, I don't understand. I am sorry. Were we required to report it?

Mr. STUPAK. Right.

Mrs. SUSAN CIRIGLIANO. I don't know.

Mr. STUPAK. I mean, your son went to the hospital and unfortunately died.

Mrs. SUSAN CIRIGLIANO. Right.

Mr. STUPAK. Then who has the responsibility then to report it so we have accurate information of the information the——

Mr. ROBERT CIRIGLIANO. The last thing you are thinking about is reporting it to the CPSC.

Mr. STUPAK. I agree.

Mr. ROBERT CIRIGLIANO. But after a couple of weeks, we realized that they came down and inspected the crib, because at that point we didn't know what had happened.

Mr. STUPAK. When you say they came down and inspected the crib, "they" would be local officials or——

Mr. ROBERT CIRIGLIANO. I am not sure, but there was a report and actually there was some parts of the report that didn't make sense. The bottom right drop side was the malfunctioning side. They reported the bottom left, so that was wrong also, and also they said that they asked the medical examiner if they could come and interview us and they said the medical examiner said no, don't bother the family, and that turned out not to be true.

Mr. STUPAK. Okay.

Mr. ROBERT CIRIGLIANO. So I don't know. There is just a lot of in there that——

Mr. STUPAK. Well, that is what we are trying to——

Mr. ROBERT CIRIGLIANO. Right, and we would like some answers. That would be nice.

Mrs. SUSAN CIRIGLIANO. I am curious too because when you are in a situation like that. The last thing that goes through your mind is to contact anybody, you know what I mean? And I understand your question and it is a great question. From what I have on our CPSC report, they received their information from one of the newspaper articles, but that is a wonderful question. You know, as a parent when you are in that position, the last thing you are thinking about——

Mr. STUPAK. Nor should the burden be on you.

Mrs. SUSAN CIRIGLIANO. Right, and I am wondering, maybe the local police department, you know, somebody has to contact.

Mr. STUPAK. What we are looking for is a way to make sure that the Consumer Product Safety Commission and public authorities have the most complete information on this product or any product. I mean, just listening to the opening statements, Mr. Braley mentioned one in his area, Mr. Green mentioned one. We have you. We have at least four deaths reported in 2009. I will bet you there are many more in 2009 but no one knows because how do you get the information there, who is required to give it, in what timely manner, and then there is always the escape clause, if you will, that you have to have reason to believe whoever is doing the reporting that the crib is the one that was actually the cause of death, and there is always a way to see, well, it really wasn't the product, it was something else.

Mrs. SUSAN CIRIGLIANO. Right.

Mr. STUPAK. And in many of these cases, it looks like a lot of times they say well, the parents did this wrong. So that is why, and I don't mean to push you. I won't expect you to know who to report it to. I am just trying to——

Mrs. SUSAN CIRIGLIANO. No, I understand. We are trying to figure out the chain of, you know, how is it supposed to get to where it should be.

Mr. STUPAK. Correct. That concludes my questions.

Mr. Walden, questions, please.

Mr. WALDEN. Yes, I think you have covered most of it, Mr. Chairman, very well.

I guess the question I would have is, do you think that the new system for reporting, the early warning system and all, can be effective, as effective? I realize it wasn't in place in your situation,

the tragedy, but it looks like perhaps out of your situation and that of others. They have said, okay, we have to fix how we collect these data and how we evaluate them and how we spread that out so somebody catches these problems quicker. Are you familiar with the new early warning system? Do you think it would have made a difference in your situation?

Mr. ROBERT CIRIGLIANO. Well, yeah, there has been a lot of recalls from the early warning system, and, you know, basically the problem was that one agency wouldn't know what the other agency reported, and they couldn't get their data together and put the similarities together, and I think that is a big step that the CPSC has taken. I think it is working. I think they need—I think the big thing is to make it a mandatory. Every single crib needs to be tested and it shouldn't be voluntary. And we all know that. You know, and the other big problem is these countries that are importing these cribs into the United States and, you know, they are making them a lot flimsier. You can just tell. I mean, the plastic spring pegs have been a big issue and it is a little three-quarter-inch piece of plastic that is supposed to hold a whole side rail up, and, you know, back in the day they used to make them out of metal, and you know, they are just trying to make a cheap—they are making a cheaper product and that needs to be tested. Every single crib needs to be tested.

Mr. WALDEN. And the new standards that are coming out, and came out, I guess, the recommendations in December of last year, have you had a chance to review those, the ASTM standards?

Mrs. SUSAN CIRIGLIANO. No, I haven't seen them.

Mr. WALDEN. I would be curious to—and I realize you probably have other things going on in your life too than this, but I can certainly understand why this is such an important issue for you, but I would be curious to get your feedback at some point on the ASTM standards, because I think they address some of these issues.

Thank you, Mr. Chairman. That is all I have.

Mr. STUPAK. Thank you, Mr. Walden.

Mr. Braley for questions, please.

Mr. BRALEY. Mr. Cirigliano, I want to follow up on that point you just made because my recollection of the crib that was in our family for years is exactly as you described. The quality of the wood itself, you could probably run a tank into and it wouldn't have collapsed. I took 4 years of high school shop classes and I have assembled a lot of consumer products and I apply a lot of torque to make sure that they are properly tightened and yet I remember the one that I assembled. Even though it was on wheels and on a hardwood floor, there was a flimsiness to it just in the way that it stood there that I don't remember on the one that my parents owned. As a parent, can you just share with us where Bobby was in the number of children you had? Was this the first child you had this crib for, the second, the third? Tell us a little bit about that.

Mr. ROBERT CIRIGLIANO. No, we had the crib for my daughter, and at the time she was——

Mrs. SUSAN CIRIGLIANO. Well, we bought it for her when she was born.

Mr. ROBERT CIRIGLIANO. And when my son started using it, I guess 3 years later, and we never took the crib apart. I remember

putting it together. You know, you try and tighten everything down as tight as you can, and, you know, when you go and buy a crib, they have got all these safety labels on it. Maybe you have a false sense of security, and at that point we never realized that there were all these problems with these cribs. You just—it just wasn't out there. If it was, we would have never bought one. And I think that is a very important piece here, and Congress's voice is going to be huge in this. Getting the word out to everybody that has these cribs, they could be in the garage, up in the attic, and they go to bring it back out for a newborn in the family, they need to throw those out. They are no good. And I think the voice of Congress is going to be huge in this.

Mr. BRALEY. Mrs. Cirigliano, I want to talk to you about the safety certification on cribs in the marketplace because a lot of parents, a lot of young parents are constantly trying to educate themselves about product safety. They want to buy products that are going to take care of their children. We have seen information in preparation for this hearing that the thing that makes a crib unique, it is one of the few devices that an infant uses where you expect that child to be safe absent the constant attention of a parent. That is the whole underlying premise for having a crib so that you can go to sleep yourself at night with the confidence that child is going to wake up healthy and alive in the morning.

Mrs. SUSAN CIRIGLIANO. Right.

Mr. BRALEY. So one of the things we know is that most manufacturers who sell cribs in this country use this certification, meeting voluntary safety standards through the Juvenile Products Manufacturing Association and they certify with a seal on the product that it has been tested by independent labs and meets all current mandatory and voluntary safety requirements, and if you look up here on the screen, I believe this is the seal that is used. Is that your understanding?

Mrs. SUSAN CIRIGLIANO. Yes.

Mr. ROBERT CIRIGLIANO. Yes.

Mr. BRALEY. So was this crib that you bought for your daughter originally and that was used by Bobby, did that bear this seal?

Mr. ROBERT CIRIGLIANO. It looks very familiar. I am not sure exactly but I know it did have two seals on it, and that was one of the things that we were looking for when we went to go purchase a crib.

Mr. BRALEY. And when you look for that and see it on there, as parents, what does that say to you?

Mr. ROBERT CIRIGLIANO. It is safe, it has been tested.

Mrs. SUSAN CIRIGLIANO. It gives you a sense of security.

Mr. BRALEY. Would it surprise you to learn that the cribs involved in these latest CPSC recalls were certified by JPMA as meeting all applicable safety standards?

Mr. ROBERT CIRIGLIANO. It wouldn't surprise me, no.

Mr. BRALEY. In your opinion as parents who have purchased this product, what value does that certification seal have to parents?

Mrs. SUSAN CIRIGLIANO. Now or when we purchased the crib?

Mr. BRALEY. Now.

Mr. ROBERT CIRIGLIANO. It has no value right now.

Mr. BRALEY. And why is that?

Mr. ROBERT CIRIGLIANO. Because we've been doing a lot of research and it seems like, I mean, you are looking at millions and millions and millions of cribs that have been recalled, and the reasons for the recalls, you know, just little pieces of plastic that—and springs. You know, how long is a spring reliable?

Mrs. SUSAN CIRIGLIANO. You are talking about a spring and a plastic piece that are exactly what you use in a Bic pen. It's basically the size of what it is, and how long does a Bic pen last? I would think a majority of families do not go out and buy a new crib every time a new child is born. Most families buy one crib and they, you know, use it for the length of all of their children.

Mr. BRALEY. Well, I couldn't agree more, and Mr. Chairman, I hope that we will use this hearing as a way to identify ways to improve the safety certification process to protect the rights of consumers and the safety of infants, and I yield back.

Mr. STUPAK. Thank you, Mr. Braley.

Mr. Burgess for questions.

Mr. BURGESS. Thank you, Mr. Chairman, and thank you both for being here. I think you have already answered this with Mr. Braley, but this was a crib that you had purchased new yourselves?

Mrs. SUSAN CIRIGLIANO. Yes.

Mr. BURGESS. So this was not a hand-me-down, it was one that you had. Was this crib, did it end up on a recall list?

Mrs. SUSAN CIRIGLIANO. Yes.

Mr. ROBERT CIRIGLIANO. Yes.

Mr. BURGESS. How did you receive the notice of the recall?

Mrs. SUSAN CIRIGLIANO. By watching television.

Mr. BURGESS. So it was after the fact?

Mrs. SUSAN CIRIGLIANO. Yes.

Mr. ROBERT CIRIGLIANO. Right.

Ms. BURGESS. Now, I think, Mr. Cirigliano, you referenced this, the way the data is managed, the way the data is collected is obviously critical and the CPSC is trying to build a registry, so clearly that would be something that would be helpful and yet I get the impression from listening to your testimony that with the drop-side design, that even the registry is really insufficient, it is the design itself of the drop side. Is that correct?

Mrs. SUSAN CIRIGLIANO. That is my belief, yes.

Mr. BURGESS. And yet the drop side presumably developed at some point because someone thought it would be worthwhile to save wear and tear on mom's back as baby gets bigger and bigger and bigger to be able to change him, attend him and move him in and out. So there may be a tradeoff there but at the same time safety ought not to be the thing that we trade off, and I agree with Mr. Braley, consumers need to be informed about the potential dangers of the drop side if that indeed is what they are going to purchase. There are advantages but there are disadvantages as well. Do you think if CPSC had had registry when your crib was recalled, would that have been helpful to you all? I am worried that we don't get the word out. Now, you bought your crib new so if there was a warranty card that you returned or a website that you registered, that is one of the things that we struggled witb when we did 4040, the big improvement act on consumer product safety that we did a year or two ago, but I will tell you, I am not good

about those warranty cards myself, and as I remember cribs from my kids were little, my wife's dad got a crib down from the attic in Arkansas and brought it down to Texas and that was a crib for a couple of years, and then it went on to its next life in her sister's home for a while, and I don't know where that crib is today but I think it is still probably in circulation out there. I don't know how, you know, if that crib were on a recall list, I don't know how folks would ever know. Where that becomes important in the resale industry, the Goodwills, the Christian Community Action stores in my district that do good work for providing low-cost products to young families who don't have the wherewithal to go out and buy new products, how do you get that information to them, and that is one of the things that we struggled with when we did 4040, and I guess listening to you today, sir, it would just be if a resale shop has a drop-side crib, they need to be very, very circumspect about whether or not they go ahead with resale to another family because at least the more recent product manufacturer has left you feeling that there is going to be some danger involved in that product. Am I overstating that?

Mrs. SUSAN CIRIGLIANO. No, I agree. I definitely think there's going to be danger. That is why we feel like the ban is very important, and we have been doing a lot of media and word of mouth. I am small but I have a large mouth when it comes to this and I make sure that every person I talk to, and sometimes I feel I am being a little hurtful to the pregnant mom that I am walking up to by explaining my story to her but I think that is the only way to get it out there.

Mr. BURGESS. Well, let me just ask you, and you heard my opening statement about whether or not these safety standards be voluntary or mandatory. Do you have a feeling about that? Should the standards be voluntary?

Mrs. SUSAN CIRIGLIANO. I think they should be mandatory.

Mr. BURGESS. And the last question I have, again, you already answered it. What would you fix about the drop-side crib? Well, you would fix it by not having it. Probably fix it with an ax.

Mrs. SUSAN CIRIGLIANO. We say we would break them, burn them and throw them away.

Mr. BURGESS. I can't even tell you the crib that my kids were in. It was probably manufactured in the 1930s, and like Mr. Braley's experience, I mean, I tried hard, I think, to destroy it trying to fit it in the back of U-Hauls over several moves, and that thing was—I mean, you just couldn't destroy it.

I think we have to be careful how we proceed, Mr. Chairman. We got into a lot of difficulty with the unintended consequences when we did that big 4040 bill. I got motorcycle dealers in my district who sell used motorcycles and they are banned from selling them in case the kid eats the battery, he could get lead poisoning. I mean, that is ridiculous. And we haven't gone back and fixed that. So I do want us to be careful at the same time. I mean, here is a problem, I have got a list of crib recalls going back to the 1970s, 2 million in 2009, 1 million in 2007, 104,000 in 2005, 6,000 in 1997, 1,600,000 in 1986, 400,000 in 1979, 70,000 in 1978. I mean, clearly there is a problem here that we need to solve.

All right. I will yield back the balance of my time.

Mr. STUPAK. Thanks, Mr. Burgess. Most people don't eat batteries so I don't think it is really necessarily the law but maybe the way we apply it, and that is the reason why the testimony of the Ciriglianos and others are very helpful. I agree with you, some of the applications of the law as it was passed have not been the best by any Administration, and that is part of our job, to make sure they are done properly.

Mr. Green for questions, please.

Mr. GREEN. Thank you, Mr. Chairman, and hearing both from Congressman Braley and Congressman Burgess. When my daughter was expecting, I went up to the attic and got our crib from our children, which is the 1970s. My wife explained to me very quickly that, you know, they were too far apart, and instead of putting it out on the curb, I actually took a sledgehammer to it so nobody else could use it, and that is what bothers me, I guess, because, you know, I was going to try and use it from generation to generation. It doesn't work. Our grandchildren actually stay in a Pack and Play when they come to our house.

But I want to go to the instructions that you all received, because the child, the 7-month-old in Houston who passed away, the parents actually put the rail upside down, and did you have problems with the instructions? Having put together lots of stuff, it sometimes is real difficult, and don't torque it too much because you might have to take it off and put it back together again. Did you all have problems with the instructions?

Mr. ROBERT CIRIGLIANO. I don't remember having problems with the instructions, but the one thing I found odd was, our instructions were on the mattress board. That is the board that is put under the mattress. So you are actually putting the instructions in place, and I just remember, I mean, it was just the oddest thing and I to this day can't believe that that was done. It wasn't a piece of paper. It was on a mattress board.

Mr. GREEN. The least they could do is make it on the upside so you can read it.

Mr. ROBERT CIRIGLIANO. It was pretty bizarre.

Mr. GREEN. And I think that is something that I——

Mr. ROBERT CIRIGLIANO. That is another problem.

Mr. GREEN. They need to make sure that, one, they are easily readable, but they are also common sense-wise that you have it. And again, for the loss of your child, like I said, we have had three in the Houston area over the last few years. What a tragedy.

I yield back my time, Mr. Chairman.

Mr. STUPAK. Thank you, Mr. Green.

Ms. Schakowsky for questions, please.

Ms. SCHAKOWSKY. I will pass on questions but I just really, really want to thank you for informing us with what is probably the most compelling testimony of all, and that is your personal experiences and your advice. I think right now there is some voluntary standards about not having any drop-side cribs. We want to make sure that they are eliminated from the marketplace so no one else has your experience, and I admire you for going up to pregnant women. It may be the most important piece of advice that they get during their pregnancy, and, you know, being pushy in that sense is a really good thing. So thank you very much for being here today.

Mrs. SUSAN CIRIGLIANO. Thank you.

Mr. STUPAK. Ms. Sutton for questions, please.

Ms. SUTTON. Thank you, Mr. Chairman, and thank you very much for your testimony, for coming forward today. We are so sorry for your loss.

Mr. Chairman, I want to thank you very much for holding this hearing because, you know, it is clear with millions of cribs being recalled because of problems with drop sides, it is time for the CPSC to take action, to protect the infants and address millions of parents' concerns. You know, we have the responsibility to act to ensure that parents can lay their infant down without fear in their crib, and I am deeply concerned also that when we hear about problems, oftentimes products that recalled were manufactured in other countries, and it is unconscionable when companies and importers pay more attention to cost than to our safety. Product safety has to always be the primary focus, and so parents, as I said, should not have to worry about laying their infant child in a crib and being exposed to grave danger. And so while we are happy that recalls advise parents but it is after the danger, you know, is present and identified. The products need to be safe when they are manufactured and put on a store shelf.

Now, Mr. Chairman, one of the reasons why I appreciate this hearing and your testimony also is that it sort of draws attention to this problem where we have products coming in that consumers assume are living up to our safety standards, and they may not even know—it is impossible to subject foreign manufacturers to U.S. law, and I am going to be introducing soon a bill called the Foreign Manufacturers Legal Accountability Act to protect American consumers and businesses from defective products manufactured abroad because we need to make sure that the products being consumed in this country are safe for consumption.

So thank you again for your testimony. We are very, very sorry for your loss. But thank you for being here.

Mrs. SUSAN CIRIGLIANO. Thank you.

Mr. STUPAK. I thank you both for being here, and thanks for your testimony and really helping us understand the issue more, and we are going to continue with this hearing. You are welcome to stay if you like but we will dismiss you now, and thanks again and thanks for working with us.

Mrs. SUSAN CIRIGLIANO. Thank you.

Mr. ROBERT CIRIGLIANO. Thank you.

Mr. STUPAK. I will call our next panel of witnesses. On our second panel we have Nancy A. Cowles, executive director, Kids in Danger, and Michael Dwyer, executive director, Juvenile Products Manufacturers Association, if they would come forward?

It is the policy of this subcommittee to take all testimony under oath. Please be advised that you have the right under the rules of the House to be advised by counsel during your testimony. Do you wish to be represented by counsel? Both indicated not. Then I am going to ask you to raise your right hand to take the oath.

[Witnesses sworn.]

Mr. STUPAK. Let the record reflect both our witnesses answered in the affirmative. They are under oath. We would ask for an opening statement of 5 minutes. If you have a longer statement and

supporting documents, we will be happy to make it part of the record. Ms. Cowles, would you like to go first?

Ms. COWLES. Sure.

Mr. STUPAK. Just pull that mic up and press the button. Thank you, and good morning.

TESTIMONY OF NANCY A. COWLES, EXECUTIVE DIRECTOR, KIDS IN DANGER; AND MICHAEL DWYER, EXECUTIVE DIRECTOR, JUVENILE PRODUCTS MANUFACTURERS ASSOCIATION

TESTIMONY OF NANCY A. COWLES

Ms. COWLES. Good morning, Chairman Stupak, Ranking Member Walden and committee members. First let me thank the House Subcommittee on Oversight and Investigation for holding this very important hearing on crib safety and for giving us the opportunity to participate. I do have a much lengthier statement, which I believe I have already submitted, so I will read very briefly through a shorter statement for this purpose.

Kids in Danger is a nonprofit organization—we are based in Chicago—dedicated to protecting children by improving children's product safety. As Congresswoman Schakowsky mentioned, we were founded in 1998 by the parents of Danny Keysar, who was killed in a portable child crib at his childcare location. Even though the home had just been inspected days before, the crib had been recalled 5 years earlier, had already killed four children, and yet there was no publicity. No one knew that it was recalled in that home. And our mission is to prevent this from happening to other children, to promote the development of safer children's products, advocate for children, and educate the public about these important issues.

And I think it has been said, the crib is first and foremost a safety device. Cribs are the only children's product that is made to leave a child unattended so that someone so aptly said, you can get a few hours sleep yourself. But concerns about this issue are not new. Crib durability, more strenuous testing, hardware failures, assembly problems have been raised at almost every one of the voluntary standard-setting meetings that I have attended since I joined that body in 2001 and yet there has been until very recently little or no change to the standard for years. And the mandatory standard has been stuck even farther back in time. Any new changes at all were made to the voluntary standard. Even the vital safety measure of banning corner posts on cribs, which led to many deaths, does not appear in the current federal standard.

The failure of the voluntary system to adequately protect children is what led Congresswoman Jan Schakowsky to first introduce the legislation that is now in the CPSIA calling for stronger mandatory standards and third-party testing back in 2001. Had we done it then, we may have a different outcome to Susan and Rob's story here. So it isn't that the problem wasn't known, rather it is that CPSC lacked the resources and authority and manufacturers lacked the will to strengthen the standards. Now with the statutory requirement in the CPSIA, we will be seeing a strong standard.

As has been mentioned, since September 2007, over 7 million cribs have been recalled by the CPSC. Most were tested to the voluntary standard and certified by the Juvenile Products Manufacturers Association. Many were recalled for hardware failures, drop-side failures, but some were recalled for clear violations of the mandatory standard. They were painted with lead paint or they simply did not meet the required dimensions. If manufacturers are making cribs that don't meet standards that can be confirmed with a tape measurer and a lead test swab, then how can we expect that they can be safe in terms of design to keep babies safe unattended?

This current situation leaves parents in a horrible position. We often get calls from parents asking for advice, what to do, especially as they hear about all these new recalls. We can be of limited help. We can't say to look for the JPMA label, even though it does indicate some minimum testing, since all of the recalled cribs primarily were certified to that standard. We can say to stay away from drop-side cribs but there is also incidents with mattress supports, hardware failure and breaking crib slats, and the last thing any of us want is for parents to get the idea that other places are safer for their baby than a crib. Babies are safest in a safe crib, and that is why this is so urgent that we solve this problem now.

Let me briefly talk about consumer use of cribs. Parents will use a crib for more than one child. They will pass them on to their sister or friends and sell them secondhand. It doesn't mean it is a 20-year-old crib they are passing on, it could be a 2- or a 3-year-old crib. I think we can assume that if someone spends, you know, up to $1,000 on a product, they aren't going to use it for 2 years and then throw it out. It is not consumer misuse when a crib is assembled, taken apart and reassembled more than once. In addition to military families—I was an Air Force brat myself who moved frequently—other families move and many parents on the advice of their doctors start with the crib in their bedroom and then need to move it to the child's bedroom later on. In these tough economic times and in the midst of a growing green mindset, manufacturers should expect that this is what will happen to their products. They will be used for more than one child or even more than just two children in a row.

So if a crib can't handle being reassembled, it should not be sold. If the crib falls apart, losing screws or the little safety plugs or has a drop side that won't stay up, parents are going to try to fix it. They aren't engineers and they do not clearly understand the risk of that action. We need to give parents a crib that lasts, hardware that doesn't fall out and clear instructions on how to use that product. We are glad that CPSC is finally moving to a strong mandatory standard. In our written statement, we have a lot of suggestions for that. But I would just like to again talk about the misassembly. Far from seeing misassembly as solely a consumer use problem, I would assert that products designed in such a way that parts can be assembled in more than one way including ways that lead to death is a design problem and not a consumer misuse problem. As I said, I have specific things, but I would also like to just mention the public consumer incident database that the CPSC is working on because I think that will also be very important for safety. That way parents can get the information themselves. If

they are about to buy a crib or have a problem with their crib, they can find other people who have the same problem. So I applaud CPSC for moving ahead with that.

And secondly, I have something I would suggest for this committee, and that is, the big problem is recall effectiveness. These cribs remain out there once they are recalled. So of the 7 million cribs recalled, more than half of them are probably still in use. We need to improve recall effectiveness. One way you could help do that is to require CPSC to report to you annually on their recall effectiveness for each of these recalls. Each manufacturer is required to file a monthly corrective action report that says how many consumers have contacted them, how many products they have replaced or fixed. If that information was public—right now it is a very difficult FOIA process to get it—I think that alone would make manufacturers work much harder to get those products out of use.

So again, thank you so much today. I appreciate it, and I would be happy to answer any questions.

[The prepared statement of Ms. Cowles follows:]

KIDS IN DANGER℠

Protecting Children by Improving Children's Product Safety

Testimony of Nancy A. Cowles
Before the House Subcommittee on Oversight and Investigations
Crib Safety: Assessing the Need for Better Oversight
January 21, 2010

Good morning Chairman Stupak, Ranking Member Walden and committee members. First, let me thank the House Subcommittee on Oversight and Investigations for holding this important hearing on crib safety and for giving us the opportunity to participate.

Kids In Danger (KID) is a nonprofit organization dedicated to protecting children by improving children's product safety. The organization was founded in 1998 by Linda Ginzel and Boaz Keysar, after the death of their son Danny Keysar in a poorly designed, inadequately tested and finally recalled portable crib. KID's mission is to promote the development of safer children's products, advocate for children and educate the general public about children's product safety.

KID works closely with other consumer groups, especially the Consumer Federation of America, Consumers Union and Keeping Babies Safe on the issue of crib safety and urge the committee to seek input from these groups as well. This testimony today represents the views of Kids In Danger along with the Consumer Federation of America.

Importance of Crib Safety

KID has always had a special interest in sleep environment safety, including cribs. The crib is first and foremost a safety device – meant to keep a child safe while sleeping and more importantly while the caregiver is sleeping. Cribs are the only children's product meant to be safe enough for a helpless infant to use while unattended by an adult.

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The issue of sleep environments is larger than just cribs and yet the safety issues are similar across all products meant for sleeping –

- Again, cribs must be safe enough to leave the child unattended while sleeping, with the assumption that a baby will also spend some time awake, but unattended, in the product.
- Parents must understand the age, weight, height and developmental limits of each product. Bassinets can be used only until the time a baby starts to roll over or push up on her hands and knees. Crib mattresses must be lowered as a child grows. And most cribs are considered safe sleeping environments only until a child can attempt to climb out – usually around age two, but sometimes earlier.
- Cribs are usually set up in the home by the consumer. Rarely do they come pre-assembled or does a professional from the manufacturer or retailer come to the consumer's home for installation.
- Cribs are probably the most expensive nursery item parents buy. It should be expected that parents plan to use cribs for more than one child or sell or hand it down when their children outgrow it.
- Cribs are often taken apart and reassembled, either between children or while moving or changing location in the home. In between, they may be stored in attics, basements or garages until needed again.

History of crib standards and safety efforts

While we appreciate the committee taking the historic step of holding a hearing about crib safety, concerns about this issue are not new. Back in 1984, the parents of Danny Lineweaver started the Danny Foundation after their Danny was strangled on the corner post of a crib. Their experience led to changes in the voluntary standard (ASTM F 1169) on that issue and others. I joined the ASTM

International subcommittees on juvenile products in the spring of 2001. Since that time, and even before, crib durability, more strenuous testing, hardware failures and assembly problems have been raised at every meeting, addressed by task groups, and the subject of testing on everything from humidity to side impact – with little or no changes to the standard for years.

At the same time, the mandatory standard has been stuck in time as well. All new changes have been made to the voluntary standard – even the vital safety measure of banning corner posts on crib was integrated into the ASTM voluntary standard and does not appear in the Federal standard.

In 2001, Marla Felcher's book, **It's No Accident, How Corporations Sell Dangerous Baby Products**[1], was published. All the concerns raised here today are addressed in that book. The failure of the voluntary system to adequately protect children is what led KID to support the drafting of strong mandatory standards for cribs and other juvenile products and to require third party testing to those standards. Congresswoman Jan Schakowsky first introduced legislation calling for this in 2001; it was included in the Consumer Product Safety Improvement Act of 2008 (CPSIA) and has led to U.S. Consumer Product Safety Commission (CPSC) now developing a mandatory crib standard.

In the spring of 2005, working with freshman engineering students at Northwestern University through KID's Teach Early Safety Testing (TEST) program, KID asked students to review incident data from crib injuries or failures and design a product that would address a prevalent hazard. The students chose to develop an aftermarket device that parents could install to prevent drop-side failures. Nineteen year old students could see more than four years ago that this was a likely failure scenario.

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[1] Felcher, E. Marla. *It's No Accident: How Corporations Sell Dangerous Baby Products*. Monroe, ME: Common Courage, 2001. Print.

So, it is not that the problem wasn't known; rather it is that CPSC lacked the resources and authority, and manufacturers lacked the will, to strengthen standards. Now, with the statutory requirement in the CPSIA, a strong standard must be developed.

Current State of Crib Safety

Since September 2007, 5.8 million cribs have been recalled in the U.S. – this number does not include at least a million more of the same cribs that were recalled in Canada. Most were certified by the Juvenile Products Manufacturers Association, indicating compliance with the ASTM standard for full-size cribs, which includes the mandatory federal standards as well. Many were recalled for hardware failures and drop-side failures, but some were recalled for clear violations of the current mandatory standard – painted with lead paint or not meeting the required dimensions to keep a baby safely contained in the product. If manufacturers are making cribs that don't meet standards that can be confirmed with a tape measure and lead testing swab, it is not surprising that their designs lead to hardware failures that cause entrapments and deaths.

But recalls don't paint the full picture. Cribs still on the market have similar hardware and drop-side failure incidents to those that have been recalled. KID received information from an attorney[2] that detailed an incident in a Dorel Juvenile Group crib that appears identical to those involving both Simplicity and Storkcraft cribs that have been recalled. Kids In Danger is currently working with a mother whose new Graco crib's drop-side fails continually and yet the companies involved won't replace her product. A recent document sent to the ASTM task group that met these last two days on the crib standard listed more than 300 incidents.

[2] Kelly, Charles, Hersh & Hersh,. "Citizen Letter on Dorel Industries Inc. Drop-Side Cribs." Letter to Theresa Nelson, CPSC. 7 Dec. 2009. MS.

The current situation leaves parents in a horrible position. Kids In Danger get calls often asking which cribs are safe, which ones won't be recalled. We can be of limited help. We can't say to look for the JPMA label, even though it does indicate minimum testing – since most of the recalled cribs were certified. We can say to stay away from drop-side cribs, but there are also incidents and deaths with mattress support issues, fixed side failures, other hardware failure and breaking crib slats. Other parents, who may already have a drop-side crib, now hear of the move away from this design and wonder what to do with their crib. The last thing any of us want is for parents to begin to believe other places are safer for their baby than the crib. That is what gives urgency to the development of a strong standard with rigorous testing requirements – so parents can rest assured while their baby sleeps at night that the crib is safe.

Consumer Use of Cribs

Let me address consumer expectation and use of cribs and other sleeping environments. There is not a consumer out there who expects to pay anywhere from $200 to over $1000 for a crib, use it for two years for one child and then destroy it. We welcome the addition of 'lifetime products' that allow parents to convert a crib to a toddler bed and then an adult bed – increasing the likelihood a new crib will be bought for a new child. But in reality almost every crib is used for more than one child, for more than 2 years. Using the same crib for all of your children, even if you have many; lending it to your sister, donating it to charity or even selling it, is not a misuse of a product. In these tough economic times and in the midst of a growing 'green' mindset, it is exactly what manufacturers should expect will happen to their products.

At ASTM meetings, currently the only forum for discussing cribs, CPSC brings incident data on these products for the committee to review and consider if changes to the standard are needed to address a safety hazard. Automatically, the manufacturers in the room want to dismiss any incident in a crib older than five

years that has been used more than once – somehow blaming the family for thinking their product should last through more than one child. Here are the facts of consumer use:

- Parents will use a crib, bassinet and portable crib for more than one child. They will offer these products to their family and friends and even sell them secondhand. It isn't consumer misuse when a crib is assembled, taken apart and reassembled more than once. In addition to our military families who move frequently, other families do move and many parents, on the advice of their doctors, initially set up a crib in their room and then move it. Portable cribs are meant to be set up and taken down numerous times. So if a crib can't handle being reassembled – it should not be sold.

- If a crib falls apart, losing screws or little safety plugs, or has a drop side that won't stay up – parents are going to try to fix it. They aren't engineers in most cases and don't clearly understand the risk that a different screw or even duct tape might pose. Give parents a crib that lasts, hardware that doesn't fall out and clear instructions on how to assemble, store, and use the product.

CPSC Development of a Strong Mandatory Crib Standard

CPSC staff, in particular Patricia Edwards and Jonathan Midgett, have been strong advocates for standards and testing requirements to address the failures being reported to the agency. KID is confident that now, as they work on the mandatory standard required by the CPSIA, that the staff will continue to press for a strong standard that will assure parents of the safety of their crib. KID applauds the CPSC's decision to move up the development and release of that standard to this year – it is a crisis situation that needs an immediate response.

There are not adequate performance requirements in either the mandatory or ASTM voluntary standards pertaining to: (1) the durability of drop-side systems

and related hardware, (2) the durability of other crib hardware, (3) wood strength or quality, (4) the hazards that can result from incorrect assembly and reassembly/storage issues and (5) warnings to parents to ensure safe usage.

ASTM just spent two days at CPSC working to address these shortcomings in the voluntary standard. Once this process is complete, hopefully at the full ASTM juvenile product subcommittee meeting in March, CPSC can more easily integrate the voluntary standard into the new mandatory one.

We also urge CPSC to look beyond ASTM and consider all current test methods in other standards, including crib standards from Underwriters Laboratories (UL) developed in 2001, British Standards Institute (BSI), Health Canada, and the International Organization for Standardization (ISO), as well as retailers' internal testing methods that have been shared with CPSC (such as those from Toys"R"Us). The UL standard was developed with input from many parties and appears to be the most rigorous standard currently available – exactly what is needed to stop the myriad failures seen in the field.

Recommendations for a Strong Mandatory Standard

The ASTM F1169 standard now contains an effective ban on the drop-side design of cribs. While the need for durability testing for drop-side hardware and other hardware issues has been discussed for years, the ban on the design was a new proposal in the past year. While it solves the problem for drop-side crib failures, it does nothing to subject cribs to more strenuous testing that would weed out designs that weren't durable and bring to light hardware issues. Consumer groups support the ban – the injury and death rate in these cribs has been too high, but still believe the durability question of hardware in general needs to be addressed.

One of the most important provisions to include in a CPSC mandatory crib standard is a durability test which is sometimes called a "racking test." This test

includes moving the crib and applying forces that more accurately imitate a child in a crib for longer periods of time and might loosen hardware or stress plastic parts.

The ASTM standard also addresses the issue of wood slat strength, after thousands of cribs were recalled because slats were breaking – some with only the force of a toddler waking up from a nap. CPSC should closely examine the performance standard and tests included to make sure they are adequate to address the hazard.

In 1997, Brandon Dorian was found hanging through the side rail of his Cosco metal crib[3]. His face was pressed against the mattress and he was suffocated. When assembling the crib, Brandon's grandfather had inadvertently replaced one of the side rails with the mattress support. The parts fit perfectly with one deadly difference – the slats were farther apart on the mattress support, allowing Brandon's body to slip through while his head was trapped. And Brandon wasn't the only baby trapped – the CPSC had 47 reports of misassembly and 27 reports of additional entrapments. After Brandon's death, the company recalled the crib, but due to the ineffective nature of recalls, another baby was trapped and killed a year later.

So here it is 2010 and cribs are still easily misassembled and assembly instructions are confusing and unclear. The new standard must address assembly issues as well as the likelihood that a product will be taken apart, stored and reassembled at least once in its useful life. The standard should address what type of hardware should be allowed for parts a consumer will assemble, how parts fit together and ways to increase the likelihood it will be properly assembled or reassembled. Far from seeing misassembly as solely a consumer use problem, I would assert that products designed in such a way that parts can be assembled in

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[3] "Plaintiff vs. Cosco, Inc., Montgomery Ward, and Juvenile Products Manufacturers Association." Summons & Complaint, State of Michigan Circuit Court for the County of Oakland, Case #97 547894-NP, July 16, 1997
KID Testimony, page 8

multiple ways, including ways that lead to death, is a design problem that must be solved.

In the new mandatory standard, CPSC should carefully review the warning labels and instructions. Consumers need basic straightforward information written not to appease the lawyers, but to communicate clearly to parents what is safe and what is not. Warnings should be placed where parents as well as occasional caregivers will see the information. When possible, hazards should be eliminated rather than warned against. So rather than warning parents to avoid putting the side rail on upside down, manufacturers should design the crib so that isn't possible. To avoid parents going to the local hardware store to get replacement parts, manufacturers can make screws and bolts an unusual size or shape to make that unlikely.

As CPSC writes a new mandatory standard and develops a strong third party testing program for cribs, the process must be open and inclusive. Manufacturers are an important sector of the standards setting process –their knowledge and experience is vital– but other stakeholders must be involved in the process. In particular, the process by which products are tested and certified to meet the new mandatory standard must be transparent, with testing results available to consumers and others.

Other Actions to Keep Cribs Safe

In addition to the new standard that is underway and a rigorous and transparent testing program, CPSC can do more to improve crib safety.

First, CPSC should continue work already started on the public consumer incident database. This important source of safety information is scheduled to be up and running by March of 2011. The database is a vital approach to get safety information to consumers, even before there is a recall and will provide essential data to CPSC to act quickly on emerging hazards or troubling products.

Second, CPSC, with oversight from Congress, must strengthen recall effectiveness. It is not enough to recall a product if CPSC's own data shows that

most of the dangerous items remain in use. Just this week, while preparing for this testimony, I found an Evenflo Happy Cabana Portable Crib for sale through eBay, without the manufacturer's 'fix' for the hazardous product. This product was recalled in 1997 after the death of Jared Adams[4]. The provision in the **Danny Keysar Child Product Notification Act**, part of the CPSIA which require a product registration program for cribs and other durable infant and toddler products, will help get unsafe products out of consumer use. CPSC must be rigorous in monitoring not only the collection of the data and its use in a corrective action plan, but in publicizing the value in participating in the manufacturers' program as well as registering for CPSC's own recall notices.

This Committee, as part of your ongoing oversight role, could ask CPSC for an annual report on recall effectiveness. The report could include information from the monthly Corrective Action Plan reports that manufacturers file with CPSC. Currently that data is only available to the public through the lengthy FOIA process at CPSC and filings appear to be incomplete. By making this information public, the Committee will provide incentive to companies to improve their recall programs.

Finally, CPSC should use their enforcement powers to require adequate corrective actions for recalls. While manufacturers might prefer to send out a new plastic part to fix the plastic part that broke, it is often in the best interest of the consumer to replace or refund the product. A recent survey KID conducted with families in Illinois showed a marked increase in participation when a refund or replacement is offered.

Again, many thanks to CPSC staff for their hard work on crib safety and for beginning this process for a strong mandatory standard. And thanks to this Committee for airing these issues and taking seriously Congress's role of oversight of consumer safety.

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[4] Jared, a toddler from Antioch, was the third child to die in the Evenflo portable crib, a product that has the same flawed design as the Playskool Travel-Lite that killed Danny Keysar. Another child died in 2003 in Wisconsin.
KID Testimony, page 10

Mr. STUPAK. Thank you.
Mr. Dwyer, your opening statement, please, sir.

TESTIMONY OF MICHAEL DWYER

Mr. DWYER. Thank you. Good morning, Chairman Stupak, Ranking Member Walden and members of the committee. I appreciate the opportunity to testify today about crib safety. The timing of this hearing is fortuitous since my fellow witness, Nancy Cowles, and I just spent two very productive days at the CPSC developing the new voluntary standard for full-sized cribs which the CPSC is hoping to promulgate later this year as a new federal standard. JPMA has long advocated the adoption of the more expensive ASTM F–1169 as a mandatory federal standard. At the behest of Chairman Tenenbaum, juvenile products manufacturers, ASTM and consume advocacy groups have worked with CPSC technical staff to update CPSC crib regulations. This rulemaking comes on the heels of similar rulemakings for infant walkers, bath seats and upcoming rulemakings on toddler beds and bassinets and cradles. These rulemakings are all occurring pursuant to section 104 of the CPSIA passed by Congress in 2008 with extensive input from the full committee.

JPMA has been working and will continue to work collaboratively with all stakeholders towards our common goal of promoting the safest and most effective juvenile product safety standards in the world. Our members produce products that help prevent injuries to our children. While tragic accidents often occur or may occur, these products save many lives. As an example, child restraint seats or car seats save an untold number of children's lives in motor vehicle accidents. Similarly, cribs have helped assure that children are placed safely to sleep.

JPMA offers a certification program to manufacturers who are willing to have their products tested to ASTM standards by independent third-party CPSC-accredited laboratories. The certification program was created in 1976 when manufacturers approached ASTM through the association about setting a voluntary safety standard for high chairs. That standard has evolved but it is still in effect today. Since then, JPMA has expanded the certification program to cover 19 additional products with two more pending. ASTM is one of the largest voluntary standard-setting organizations in the world with over 22,000 members worldwide. ASTM standards are developed on a consensus basis by all interested parties. Any reputable stakeholder can join a standards development committee and vote on all aspects of the standard. Every standards development committee member with a vote can influence this process.

For years, JPMA has worked alongside consumer advocacy organizations such as Consumers Union, the Consumer Federation of America, Keeping Babies Safe and Kids in Danger on the development of a variety of juvenile products standards including the full-size crib standard. The first federal full-sized crib standard was promulgated in 1973, as we heard earlier, and ASTM developed its first full-size crib standard in 1988. The voluntary standard fully incorporated the federal standard and added numerous performance testing requirements including corner posts, height restric-

tions and additional warning labels and instructional requirements. Since then it has been modified multiple times to address emerging hazards including last December's modifications which eliminated traditional drop sides and established crib slat integrity criteria and testing procedures.

F–1169 has been extremely effective. During a 2007 hearing on the CPSIA, the CPSC testified to an 89 percent reduction in crib-related fatalities due to the establishment and effectiveness of the voluntary standard. The federal standard has been updated once since its inception 37 years ago. The CPSC has relied on the ASTM voluntary standard as the best tool for promoting crib safety in the marketplace. The JPMA certification program provides consumers the best way to know that their crib meets both the mandatory and the voluntary standards.

Here is how the program works. A manufacturer must apply to participate in the program and agree to have all of its models and product category tested to the applicable ASTM standard. We do not test products ourselves nor do we maintain our own standards. JPMA relies on the experts at independent third-party CPSC-accredited labs to verify compliance to the applicable ASTM standard. JPMA has never used or promoted its own safety standards. All products including full-size cribs bearing the JPMA certification logo must meet all parts of the applicable ASTM standard.

Achieving compliance, however, is just the beginning of a manufacturer's obligation under the program. Manufacturers must also submit to ongoing testing. This testing occurs quarterly for at least 25 percent of their models so that all models are tested at least once per year. In addition, an independent third-party CPSC-accredited laboratory pulls JPMA-certified products at random from retail shelves and tests those products for compliance. JPMA is proud of our role in promoting safe sleep for the most vulnerable segment of our population.

According to First Candle, one of the Nation's leading nonprofit organizations dedicated to safe pregnancy and the survival of babies through the first years of life, there are about 4,700 incidents each year involving infant sleep environments. At least 80 percent involve parents and caregivers putting their children in an unsafe place outside the crib. A properly assembled, fully functional ASTM-compliant crib remains the safest place for our babies to sleep. Unfortunately, tragic accidents can occur with improperly assembled, second use or heirloom cribs. We believe that better information and education can help reduce these rare fatalities involving missing hardware or improperly assembled or reassembled cribs. That is why JPMA has designated safe sleep as the theme for this year's Baby Safety Month, which takes place in the ninth month of each year. JPMA is working with the CPSC, our retail partners and any interested consumer safety advocacy groups to promote safe crib assembly and safe sleep practices. JPMA welcomes all efforts in this regard.

Again, I thank you for the opportunity to appear tnday.

[The prepared statement of Mr. Dwyer follows:]

Statement of Michael Dwyer, CAE
Executive Director of the Juvenile Products Manufacturers Association
House of Representatives Committee on Energy & Commerce
Subcommittee on Oversight & Investigations
Hearing On "Crib Safety: Assessing the Need for Better Oversight"
Thursday, January 21, 2010

The Juvenile Products Manufacturers Association, Inc. (JPMA) is a national industry association representing 95% of the $2.7 billion juvenile products industry (in manufacturers' sales). JPMA was formed in 1962 with 29 industry companies and has grown to include more than 250 member companies in the United States, Canada and Mexico. These companies manufacture and/or import infant products such as cribs, car seats, strollers, bedding, and a wide range of accessories and decorative items, but not toys and not apparel. Our members produce some of the most effective, life-saving infant products in use.

Core Mission –

The core mission of JPMA is to be an information source, and to provide leadership for the industry and consumers on the production and safe use of infant products. Towards this goal, JPMA publishes *Safe & Sound for Baby*, a full-color, 16-page brochure to promote baby product use and safety. The brochure outlines safety measures for the home and car that will help ensure baby's safety and is available in English and Spanish. More than 4 million copies of the complimentary brochures have been distributed to consumers through our retail partners and the JPMA website.

JPMA also sponsors Baby Safety Month each September to help educate parents and other child caregivers on the safe selection and use of all baby products. Retail outlets and the media use Baby Safety Month to increase consumer awareness about baby safety. In the past, JPMA has partnered with CPSC and NHTSA on this program. We have also partnered in the past with Safe Kids Worldwide to promote infant safety.

Focus On Improving Safety –

The juvenile products industry has a long history of ensuring that juvenile products are built with safety in mind. Our mission is safety, and the recent recalls of drop sided cribs concern us greatly. As a father blessed with three healthy children, I know the importance of crib safety, including the proper storage, assembly and disassembly of drop sided cribs.

The primary goal of JPMA is to develop consumer education programs related to product safety. JPMA wants all parents to be confident the juvenile products they purchase are designed and built with baby safety in mind. For this reason, JPMA initiated a voluntary certification program in 1976 with the introduction of a program for high chairs. JPMA worked with consumer advocacy groups, representatives from the U.S. Consumer

Product Safety Commission, and other interested parties to develop the standard on high chairs under the auspices of ASTM International (formerly the American Society for Testing and Materials), a highly regarded non-profit organization that publishes numerous, well-regarded standards for materials, products, systems and services.

The CPSC is also a valued partner in the voluntary standard setting process and JPMA is very proud of our 30+ year relationship with the agency.

How the JPMA Certification program works –

Currently there are 20 product categories in the JPMA Certification Program: bassinets/cradles, bath seats, booster seats, carriages and strollers, changing tables, children's folding chairs, frame infant carriers, full-size cribs, gates and enclosures, hand-held infant carriers, high chairs, infant bouncers, infant swings, play yards/non-full size cribs, portable bed rails, portable hook-on chairs, soft infant carriers, stationary activity centers, toddler beds, and walkers. With the recent publishing of new ASTM standards, JPMA is also currently working on adding commercial cribs and infant bath tubs to the program. Currently, 80 companies participate in the JPMA Certification Program and we saw an increase of 15% in participation in the program in 2009.

Manufacturers seeking the JPMA Certification for their products must apply to participate in the program. They must agree to have all of their models in a product category tested by one of two official, independent third party CPSC accredited laboratories, Bureau Veritas or ITS (Intertek Testing Services). JPMA does not test products itself - we rely on the experts at certified product testing laboratories. Nor does JPMA maintain its own safety standards. Manufacturers participating in the program must have their products tested to the relevant ASTM standard for that product.

ASTM and the standards setting process –

ASTM works with regulators, safety advocates, other outside experts, and industry to develop and publish voluntary consensus standards for a wide range of products and services. Committees within ASTM, which are comprised of a balance of manufacturers, consumer groups, representation from the U.S. Consumer Product Safety Commission and other interested parties, develop and revise the standards as necessary. A full consensus standard is developed by a cross-section of stakeholders with an interest in its use. When there is a need for new standards, requests can come from trade associations, government agencies, and professional societies that do not create their own standards. Manufacturers, consumer groups, and even individuals may also request a standard. The request is presented to an ASTM technical committee and the process of standards development begins.

The ASTM process transcends what entities could do individually because it bridges gaps of technology, combines resources and overcomes bites of competition. The result is a product of the highest credibility, integrity, and marketplace acceptance.

ASTM standards are developed through a three-tiered hierarchy of main committees, subcommittees, and task groups. Task groups perform most of the "leg-work" and research that forms the basis of draft standards. Once the group completes its work, it forwards these drafts through the hierarchy for review and voting. The standard must gain subcommittee, main committee, as well as full Society approval before becoming an official ASTM International standard (there are currently 22,000 members of ASTM). At each level, voting requirements are enforced to ensure fairness. When a draft standard has been reviewed and accepted at all levels, the draft becomes an ASTM standard and is published. Depending upon the need for the standard, drafting and approval can occur in a few months, a year, or more. Fairness in ASTM standards development is ensured through: 1) a required balance of interest between producers, users, and general interest members and 2) a voting process that ensures due process.

Ongoing commitment to infant safety –

Once a manufacturer has become JPMA Certified, their testing responsibility does not end. Manufacturers must test 25% of their models each quarter with the goal that all models are tested at least once a year. If a manufacturer has invested in its own testing lab, it can perform the quarterly testing itself only if it also agrees to send the test reports to an independent lab for review, and submit to site inspections by that third party lab to ensure the manufacturer's lab is capable of performing the required tests on an ongoing basis. Otherwise, a manufacturer seeking JPMA Certification must send its products to an indepeadent third party CPSC accredited lab to meet the regular follow up testing requirements we impose.

To provide additional rigor to the program, the third party lab also pulls product from retail shelves on a quarterly basis and performs testing to all or part of the appropriate ASTM standard.

A manufacturer may only use the JPMA seal on its products after it has fully complied with these program requirements, including full safety testing of all product models to the ASTM standard by independent third party testing labs and submission to the ongoing quarterly testing requirements. Manufacturers who agree to these requirements may place the seal on their products, packaging, and in advertisements (a copy of the seal is attached herein as Attachment A). The manufacturer must adhere to all the guidelines of the program in order to remain a JPMA Certification Program participant.

JPMA publishes a *Directory of Certified Products* which is available to retailers. The directory lists the manufacturers and the products bearing the JPMA Certification Seal. It

is updated twice a year, and is also posted on the JPMA Web site for access by consumers, retailers, media, and the public.

In a 2007 Senate hearing on the reauthorization of the U.S. Consumer Product Safety Commission (CPSC), the CPSC testified that an 89% reduction in crib-related fatalities and an 84% reduction in serious injuries related to the use of infant walker was due to the establishment and effectiveness of ASTM Standards for these products.

Crib Safety –

The safety of our nation's children is always a concern to us. As a result of our extensive experience in this area, JPMA has been positioned to be part of the solution to solving children's product safety issues for over 30 years. JPMA has led the way on crib safety development from the outset. Last year JPMA members took the lead in addressing crib slat integrity and drop side failure issues, working with the ASTM crib subcommittee, which includes representatives from the CPSC and consumer advocacy groups as well as crib manufacturers. Our members' efforts resulted in a modified voluntary standard which incorporates a new crib slat integrity test and the elimination of traditional drop side mechanisms. That updated standard has just been published.

We are also proud of our history of working with advocacy groups such as the Danny Foundation, with whom JPMA collaborated to improve crib safety. Working with the CPSC, the Danny Foundation and the industry, cribs today are safer and fewer children die from corner posts, catch points, problems with structural integrity and other unsafe crib designs. When the Foundation started its programs of education and advocacy, baby cribs caused approximately one hundred deaths per year. According to recently released data from the U.S. Consumer Product Safety Commission, annual crib deaths have been reduced 89% from these levels. JPMA was involved in urging updates to the voluntary ASTM standard to address the hazards that could be addressed by improved designs and dynamic performance testing. Similarly, JPMA has worked to promote crib round-ups with the CPSC for products that have previously been recalled.

The ASTM voluntary standards process is often able to more quickly address evolving safety issues than the mandatory federal standards. The previous changes in the standard regarding crib corner posts is another example. Together, these changes demonstrate that standard setting is an evolving process in which JPMA and our members, as well as the CPSC and the advocacy groups, have been actively involved. This process works because it's based on consensus, and it provides the flexibility necessary to address emerging hazards.

The JPMA Certification Program is a verification process, similar to that included in the Consumer Product Safety Improvement Act. As noted above, products are provided to an independent third party CPSC-accredited lab to verify that they meet the requirements of the ASTM standard. When products are tested, they are assembled and used in accordance with the manufacturer's stated intent as embodied in the assembly and use

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instructions. If the instructions are not followed, risks associated with use of any product may be exacerbated.

Not all recalls occur because of a violation of a regulation or product standard. In addition, recalls do not account for certain factors typically not measurable in a lab, such as unintended use, improper assembly, and excessive wear and tear over time. Most of the reported fatalities with cribs involve multi-use or heirloom cribs that may not have been properly maintained or assembled. Other heirloom cribs handed down do not meet current or recent safety standards.

Tough standards don't necessarily mean a product won't ever get recalled. JPMA is dedicated to promoting the development through ASTM of effective safety standards and promoting infant safety and well being, wherever there are defined risks. JPMA frequently conducts information and education campaigns to remind parents: not to use any crib with missing, broken, or loose parts; to check hardware from time to time to keep the crib sturdy; to make sure the drop side or any other moving part operates smoothly; to check all sides and corners of the crib for disengagement; and not to use tape, wire, rope or any makeshift hardware to re-assemble any crib.

Safe Sleep –

A very important fact to remember is that cribs remain, by far, the safest place for infants to sleep. Between eighty and ninety percent of the 4,700 or so incidents involving sleep environments and children each year involve parents and care givers putting their children in an unsafe sleep environment that can result in entrapments, suffocation or positional asphyxiation (on the floor on pillows, on adult beds or other household furniture, certain co-sleeping conditions, makeshift sleep environments, etc.).

According to First Candle, a leading infant health organization, research and statistics continue to indicate that babies who sleep in adult beds are at up to 40 times greater risk of dying than those sleeping on their back in a safe crib. In fact, in many jurisdictions, makeshift sleep arrangements are directly implicated in more than 50 percent of all sudden, unexpected infant deaths.

Properly assembled, functional cribs remain the SAFEST place for a baby to sleep. JPMA believes that experts and opinion leaders should take care to stress that point even if a particular crib model is recalled for any reason.

Attachment A

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Mr. STUPAK. Thank you. We will go to questions from members.

Ms. Cowles, let me ask you, in your statement, and explains a little bit more on page 2 and going on the top of page 3, you talk about the corner post of the crib. In fact, both of you mentioned the corner post of the crib, and then you go on to say at the top of page 3, "At the same time, the mandatory standard has been struck in time as well. All new changes have been to the voluntary standard. Even the vital safety measure of banning corner posts on cribs was integrated into ASTM voluntary standard does not appear in the federal standard." So it was mandatory and now it is voluntary?

Ms. COWLES. No, it was never mandatory. It has always been in the voluntary standard. They first—as Mr. Dwyer mentioned, that standard was passed in 1988 but they first started working on it in 1984 after unfortunately another child named Danny died when he strangled on his corner post of his bed. So it has always been in the voluntary standard.

Mr. STUPAK. So right now I could make a crib. I could have this post here. It is a voluntary standard not to do it?

Ms. COWLES. You could have it. You would probably have difficulty if you wanted to sell it through traditional retailers, who probably wouldn't take it, but certainly with the extent of the Internet and CPSC would probably recall it if they got it, but you could certainly try and sell it. It does not violate the mandatory standard.

Mr. STUPAK. Does not violate the mandatory standard?

Ms. COWLES. Right.

Mr. STUPAK. Mr. Dwyer, let me ask you this. The Consumer Products Manufacturers Association—we will just call it JPMA—is a trade association that represents the manufacturers of children's products, of course. You offer your members a certification, as you testified, and there is a fee that certifies a product such as a crib meets all applicable mandatory standards as well as voluntary standards of the ASTM, correct?

Mr. DWYER. That is correct, sir.

Mr. STUPAK. The JPMA encourages its members to use your seal of approval. I think we had it on the board there at one time. And then they are advertising to show consumers that they are JPMA certified. I want to show you this ad. I think it is in tab 11 there, if you want to look at it right there in the book in front of you. In this ad the JPMA ran in several magazines for new parents, this ad says, and I quote, "Be confident that juvenile products you purchase are designed and built with safety in mind." What does safety in mind mean in the ad?

Mr. DWYER. That parents can be assured that the products that we certify meet the applicable voluntary and mandatory standards for those products.

Mr. STUPAK. In a way, would it be safe to say you are certifying the cribs as being safe then?

Mr. DWYER. We are verifying that the manufacturers who meet at ASTM along with all other stakeholders to discuss incident data, and Ms. Cowles mentioned the data, that is used to drive the activity of the committee, and if there are issues related to a product concern, that they address those and incorporate those into the standard and that the manufacturers meet those standards.

Mr. STUPAK. So what you are really saying is, we met all the standards, this product meets the standards, whether voluntary or mandatory, not verifying safety, just that the standards are met. Is that what we are saying?

Mr. DWYER. We believe that by meeting all of the standards that the products are safe and that manufacturers take into account certainly the safety of their ultimate customers, our babies, when they build these products.

Mr. STUPAK. The ad goes on, and again I want to quote from the ad. It says, "Buying a JPMA-certified product in any of the below categories ensures that the product has gone through an extra set of rigorous testing." Over the past several years, and we have heard testimony today, cribs involved in some of the largest recalls are Simplicity, Delta, Stork Crafts, all earned the JPMA seal of safety certification. So my question, Mr. Dwyer, would be, has JPMA changed the requirements for the certification program in light of the recalls we have seen? In fact, even Tuesday we had one of 635,000 cribs. Have you changed the certification that would be found in this ad?

Mr. DWYER. Well, just to make sure everybody is clear, the certification is a verification that they meet the standard.

Mr. STUPAK. Correct.

Mr. DWYER. The standard—as the standard changes, the certification changes inasmuch as that is what it is, it is a verification to the change in the standard. I am not quite sure I understand the question.

Mr. STUPAK. Since the recalls in 2008 and 2009, Stork Craft had two big recalls, have those standards changed at all?

Mr. DWYER. The ASTM standards?

Mr. STUPAK. Yes.

Mr. DWYER. The standard changed with a recent change in December that would ban the drop sides and also added a slat integrity test and requirements to the crib standard as well——

Mr. STUPAK. So——

Mr. DWYER [continuing]. In December of 2009.

Mr. STUPAK. So when you certify now, so when you run this ad, that means the slat has been changed and no more drop side, right?

Mr. DWYER. It verifies that the cribs meet the standards. However, the certification program does allow for 180-day sell-through period, so we will certify to the new version of the standard 6 months after it has been implemented.

Mr. STUPAK. When is the 6 months up?

Mr. DWYER. It will be in June. I don't know the exact date.

Mr. STUPAK. Right.

Mr. DWYER. But I do know that manufacturers at this point to move product out of the marketplace, they are no longer manufacturing drop-side products.

Mr. STUPAK. Right, but just so we are clear, we have until June. So there still could be drop-side cribs out there right now for sale with the JPMA certification because they have until June, 180 days, right?

Mr. DWYER. That is correct.

Mr. STUPAK. I guess my time is up. Mr. Walden, questions?

Mr. WALDEN. And that would be unless CPSC recalls that?

Mr. DWYER. That is correct.

Mr. WALDEN. So that would be the only check then, is if there is an identified problem, and CPSC could step in, issue a recall and take those out of the marketplace but parents may still have those cribs, legacy cribs, if you will?

Mr. DWYER. That is correct.

Mr. WALDEN. Ms. Cowles, you were recently quoted in the press as saying the same problems have existed for 10 years and nothing has been done and we are glad to see that it is now a crisis and people are acting. Do you want to talk about that quote?

Ms. COWLES. Sure.

Mr. WALDEN. So nothing has been in 10 years?

Ms. COWLES. Well, I have sat on the ASTM committee since 2001 and there have been other consumers who have been on those committees before that, and in those committee meetings the same issues that we are talking about here today, the same issues we talked about the last 2 days where we actually finally made real progress such as putting in a test that has been in Canada during all that time. It is called a racking test. It subjects the crib to much more rigorous shaking and testing, much more similar to——

Mr. WALDEN. Like a child would do.

Ms. COWLES. Like a child might do, and we have asked repeatedly since 2001 to add that test to the ASTM standard and it was never added.

Mr. WALDEN. So on the ASTM standards, and your committee, I am not familiar with how that operates. How many members are on that committee?

Ms. COWLES. Mike might know better than I do. I would say around 50 but I am——

Mr. WALDEN. Mr. Dwyer.

Mr. DWYER. I would say actively participated in F-15, it is at least 50.

Mr. WALDEN. So 50 members, 15 that actually participate?

Ms. COWLES. Fifty.

Mr. WALDEN. Fifty, five zero?

Ms. COWLES. Correct.

Mr. WALDEN. And during that 9-year period that you have been on it and this has been an issue floating around, have there been recommendations that have gone forward that you voted against because they are not strong enough or——

Ms. COWLES. Yes. As one of the sometimes three, sometimes four consumers in the room out of those four, our votes unfortunately did not go too far.

Mr. DWYER. Can I just follow up on that?

Mr. WALDEN. Yes, Mr. Dwyer.

Mr. DWYER. I mean, and again, I don't—I am not representing ASTM, they are not here at the table, but I do participate in the process as Nancy does, and, you know, anybody who participates in that process has the opportunity to cast a negative vote on any ballot, and if that ballot is—if that argument is found persuasive through the ASTM process, it can be upheld and modifications can be made to the ballet before the final rule is issued. I just want

to be very clear that everybody that participates in the process has an equal vote in that process.

Mr. WALDEN. Okay. And then Mr. Dwyer, I wanted to—in light of recent events, do these companies like Stork Craft lose their membership status in your organization?

Mr. DWYER. No, they would not lose their membership status. The certification program is separate and apart from membership in the organization.

Mr. WALDEN. Okay, so same for Delta and other brands that are JPMA certified?

Mr. DWYER. Correct.

Mr. WALDEN. Okay. So they can still be a member?

Mr. DWYER. Correct.

Mr. WALDEN. Okay, even though they have these—in your testimony, JPMA lists over 20 product categories that are currently in your certification program and including cribs and infant carriers. Which products should CPSC list as their top priorities for safety issues and issue safety standards for as soon as possible?

Mr. DWYER. In my opinion, sir, which products?

Mr. WALDEN. Yes.

Mr. DWYER. I would say cribs, and that is why we spent 2 days and why the chairman reached out to the manufacturers and the consumer groups and asked us, as I testified, to please help us accelerate rulemaking on full-size cribs.

Mr. WALDEN. And Ms. Cowles, are you satisfied with the new recommendations that came out in December?

Ms. COWLES. I think banning drop-side cribs is an important step. However, the real problem with drop sides, as the family testified, is the hardware failures, using plastic hardware, and those hardware pieces are still in other parts of the crib so we do believe we still need this stronger racking test to test hardware for durability, and that in fact is being talked about in the meetings that we have been to, so we are satisfied that the new mandatory standard will have sufficient strength in it once we get to that point.

Mr. WALDEN. And did you all vote then on this new standard that came out in December?

Mr. DWYER. Not yet. The process——

Ms. COWLES. In December, he is asking.

Mr. DWYER. Oh, I am sorry.

Mr. WALDEN. And did you support that then?

Ms. COWLES. Yes.

Mr. DWYER. I abstain from voting on the ASTM committees. We support an administrative role but I do support the activities.

Mr. WALDEN. Okay. You know, I think that is—yes, that is a good point. The manufacturing problems I think is probably the issue we are all kind of looking at here. What should be done there?

Ms. COWLES. In terms of the manufacturing of the product itself? Well, I would submit, and I will talk to that, but just let me briefly say, many of these are design issues, if you design a product with bad hardware, but manufacturing, and I think one of the reasons the older cribs that people are talking about that seemed to have held up well were made under the same lax regulations but were made, you know, here under our—so I think that manufacturing

plays a role and I am hoping that both JPMA, CPSC in their oversight role, you know, work to make sure that, you know, if you choose to make a product overseas that you are selling to American consumers, you need to make sure it is as safe as if you made it here. That is really the manufacturer's responsibility.

Mr. WALDEN. Thank you.

Mr. Dwyer, do you want to comment on that?

Mr. DWYER. Manufacturers of these products are incredibly responsible. Ultimately their customers are babies. I am the father of three children. I used a drop-side crib that was handed down to me by a friend of a friend, disassembled it three times, put it together three times, took care to follow the instructions every time, and manufacturers—ultimately children's lives are the most precious commodity and I believe manufacturers have always had that—

Mr. WALDEN. You know, if I can interrupt you just a second, the family behind you made the comment about the instructions being on the bottom of the mattress or the bottom of the slat and sort of glued on there. Is that done so that it continues on if somebody takes it apart?

Mr. DWYER. Correct.

Mr. WALDEN. Because I don't know anybody that keeps the instructions for anything we put together.

Mr. DWYER. Correct. It is part of the standard because just that, so that the instructions don't get lost if the crib is handed down or if it disassembled in between each child, which a product should be made to be able to disassembled multiple times, as Nancy indicated, and the instructions are on there so they don't get lost.

Mr. WALDEN. That is why they are glued on there?

Mr. DWYER. Correct.

Mr. WALDEN. Okay. Thank you, Mr. Chairman. I know I have exceeded my time. Thanks for your courtesy.

Mr. STUPAK. I thank you, Mr. Walden.

Mr. Braley for questions.

Mr. BRALEY. Mr. Dwyer, I want to follow up that last comment you made, manufacturers of these products are incredibly responsible. You stand by that statement?

Mr. DWYER. I do.

Mr. BRALEY. In the statement you submitted, it indicates that your manufacturers association has grown to include more than 250 member companies in the United States, Canada and Mexico, and that these companies manufacture and/or import infant products. So do you have members that are manufacturers in China and Vietnam?

Mr. DWYER. No, we do not.

Mr. BRALEY. Okay.

Mr. DWYER. That actually are manufactured in the country or manufacture in those countries.

Mr. BRALEY. Right, but my point is, since you have the word "import" in there I assume some of your members are importing products that are being manufactured, and that is who the manufacturer is you are referring to when you said manufacturers are incredibly responsible?

Mr. DWYER. The manufacturers that are members of the association must have a place of business in North America but yes, some of them do manufacture their products overseas or import their products from overseas.

Mr. BRALEY. Right, and isn't it customary that the inspections that you rely upon are done at the point of manufacturing?

Mr. DWYER. The inspections for the certification program?

Mr. BRALEY. Yes.

Mr. DWYER. They are done both domestically and overseas.

Mr. BRALEY. Okay. And you are aware that it is much more difficult to ensure the integrity of those inspection processes when they are being done in a country like China which has very strict controls on access?

Mr. DWYER. Our members take great care to visit with their factories overseas every year and to make sure that quality control practices are taking place at the highest levels.

Mr. BRALEY. Have you ever tried to serve a Chinese manufacturer of a defective product that is marketed in the United States?

Mr. DWYER. Serve?

Mr. BRALEY. Serve for legal process.

Mr. DWYER. No, I have not.

Mr. BRALEY. Do you know what is involved in that process?

Mr. DWYER. I do not, sir.

Mr. BRALEY. Do you know that international treaties have to be complied with and that service has to be performed domestically through the Chinese government that erects roadblocks that can prolong the actual accountability of foreign manufacturers who are selling defective products in this country for years and years if you are ever successful?

Mr. DWYER. I am not familiar with that process, sir.

Mr. BRALEY. Are you aware that certain States like my home State of Iowa have domestic laws that provide immunity to sellers of products like some of your members if the manufacturer is accountable and can be served and that may put you into this endless limbo of trying to get service in a country that doesn't want its manufacturers to be served? And that is exactly what Representative Sutton is talking about in this bill she is about to introduce. Are you familiar with that problem from your work with these many people selling products that affect infants' lives and safety in this country?

Mr. DWYER. No, sir, but, you know, our program is built with safety in mind and we have testing. We have multiple testing. We had multiple testing before the Consumer Product Safety Improvement Act was even implemented. Our program, section 104, the requirements of certification, are more robust and they mirror what this Congress, what this committee has put together. I am not familiar with the challenges with serving Chinese manufacturers with, you know, warrants for defective products but we are here to talk about our certification program, the ASTM standards.

Mr. BRALEY. Well, in your certification program, have you ever encountered incidents where the instructions on assembly are written in that country of origin, in some form of English that would not make sense to anybody in this room and yet is being used by the manufacturer and the subsequent seller of that product as a

guide for people in assembly of that product. Are you aware that takes place?

Mr. DWYER. There is pretty clear guidelines both at the voluntary and the mandatory level for the standards that dictate how the instructions should be put together, and I am not aware that there are issues with communication on the instructions. It is an issue that the group is working on and looking at adding some additional warnings and looking at instructions. Eliminating moving parts would help with any disassembly issues, but I am not aware that there are any issues with instructions, sir.

Mr. BRALEY. As part of your certification requirement, do they look at the assembly instructions being supplied by the manufacturer?

Mr. DWYER. Yes, they do.

Mr. BRALEY. And do they look at whether or not the language that is being used is in plain English that can be easily understood and adapted by the consumer in the assembly of that product?

Mr. DWYER. Well, the product and the certification program, the product has to be assembled to the manufacturer's instructions and so that is a requirement.

Mr. BRALEY. Well, and that is my point. My point is, the manufacturer in the latest recall is located in China, located in Vietnam, and they sometimes have a very different understanding of the English language than American consumers putting that product together. I am not just taking about from a professional standpoint. I am talking from the standpoint of a parent who has assembled many of these products and is frequently mystified by what the intention is in the assembly process because it is obviously being written by somebody who doesn't live in this country.

Mr. DWYER. Are you specifically talking about the Dorel recall, the Dorel Asia recall?

Mr. BRALEY. Yes.

Mr. DWYER. Six hundred and thirty-five thousand units?

Mr. BRALEY. Yes.

Mr. DWYER. Which are not JPMA certified, and I am well aware of extenuating circumstances in that case where that crib was put together with duct tape by parents, and criminal charges were charged against those parents for endangering their child.

Mr. BRALEY. And I would like to bring that up before I close, Mr. Chairman, because what happens in these cases is everybody engages in finger pointing, and one of the first people on the line are the parents dealing with the tragic loss of their child who are frequently blamed and subject to criminal prosecutions which are many times later dropped, and I think that it is important that if there are manufacturers profiting from the sale of these products, they take a good look in the mirror and do everything they can to address the problem, not always blame the parents, and that is why this work we are here for today is so important, and I yield back.

Mr. STUPAK. Thank you, Mr. Braley. It should be noted too in that case where the parents, charges were brought, they were dropped, and so just so the record is clear.

Mr. Burgess, when he comes back, I will reserve his spot. So I guess we are to Ms. Schakowsky for questions.

Ms. SCHAKOWSKY. I want to talk a little bit more about the role of parents. In November of last year, we talked about this, but the CPSC and Stork Craft recalled more than 2 million cribs due to reports of broken or missing drop-side hardware. As part of that recall, Stork Craft crated an instructional video and posted it on YouTube—and so whoever is working on that, let us get it up there—to show consumers how to identify problems with their cribs and how to install the repair kits the company supplied, so if you will play that.

[Video playback]

Ms. SCHAKOWSKY. So let me ask you, Ms. Cowles, it is responsible or realistic, rather, to expect that parents will follow this recommendation in the real world?

Ms. COWLES. No, I don't think any parent does that every time they put a baby in a crib any more than you open your hood and check everything before you get in your car to drive. It is certainly something that we might expect them to do occasionally but no, I think parents assume they put together a crib, it is going to stay together.

Ms. SCHAKOWSKY. Mr. Dwyer, do you think that a tired mother or father, baby wakes up at 2:00 in the morning and you put the baby back in bed is going to go around and do a crib inspection every time before putting the baby back to sleep?

Mr. DWYER. Having been a very tired father at one time, no, ma'am.

Ms. SCHAKOWSKY. So Mr. Dwyer, the JPMA put together a frequently asked questions page about drop-side cribs. It is on tab 10 of the document binder. And here is what your association FAQ sheet says: "JPMA reminds parents and caregivers that when you assemble a crib to the manufacturer's instructions and use it properly, a crib provides the safest sleeping environment for a baby." What do you mean by—what does JPMA mean by use it properly?

Mr. DWYER. That it is assembled according to the manufacturer's instructions.

Ms. SCHAKOWSKY. And inspected every time, right?

Mr. DWYER. We would recommend that parents be aware that inspection may be needed and we also have safe sleep guidelines for what not to put in the crib that is part of the whole process such as heavy blankets or pillows or that type of thing.

Ms. SCHAKOWSKY. Stork Craft's CEO Jim Moore issued a statement after the November recall in which he asserted that parents improperly used the drop-side cribs implicated in infant entrapments. Here is how the news accounts quoted Mr. Moore: "In the majority of instances, the cribs were being used with broken parts, parts with pieces missing, parts that were damaged or with modified or homemade parts." So Ms. Cowles, what do you think of the Stork Craft response?

Ms. COWLES. Well, I think that it is particularly damaging to the recall process, that when manufacturers come out, and as Mr. Dwyer has done here, continue to blame the individual parent whose child either has died or was hurt. It basically says to every other parent using that crib, oh, I am sure you don't need to worry about your crib because you are a smart parent who is using it correctly, and so I think that kind of language, especially after the

CPSC has to spend time negotiating what is in the press release and they come to an agreement of what is going to be said about it, then the company comes out later that day or the next day with those kind of damaging comments I think again both discourages parents from participating with the recall because they think theirs must be okay because they obviously put it together right and downplays the problem. I mean, all that list of things, if that crib wasn't falling apart, parents wouldn't have to do any of those things, so it is the crib, I think, that we are here to talk about and not how individual parents may decide to fix the problem when their crib does in fact break.

Ms. SCHAKOWSKY. And Mr. Dwyer, what were you saying kind of I felt sort of self-righteously about how these parents were on the Dorel Asia cribs charged with criminal negligence or whatever it was.

Mr. DWYER. I just wanted to clarify for Mr. Braley that those products were not certified by the association and that I was aware, made aware that there were extenuating circumstances, that that crib, that there were photos of the crib that showed duct tape holding the pieces of the crib together, and that one side was broken from the crib and had been pushed against the wall, and I was aware that criminal charges had been brought for child endangerment, and also there were drug charges. I was not aware that those charges had been dropped but I was specifically addressing we do not want those cribs that were recalled lumped into because they were not certified by the association.

Ms. SCHAKOWSKY. Did you want to comment, Ms. Cowles?

Ms. COWLES. I just wanted to say about the charges, I know that is not why we are here today but having worked with many parents whose children have been killed, more times than you can imagine, that is at least threatened or brought before the medical examiner can ascertain that the product itself was defective, so I have had parents charged with that, with child abuse, with all kinds of things. And so the initial charge made by the police is no indication of what is actually responsible for that child's death, especially in a case like this where the charges are dropped.

Ms. SCHAKOWSKY. Thank you.

Mr. STUPAK. Ms. Sutton for questions, please.

Ms. SUTTON. Thank you, Mr. Chairman, and I want to follow up on two things. First of all, Representative Braley's line of questioning about foreign manufacturers, and I just want to invite all of our colleagues to seriously consider getting on this bill—it is a bipartisan bill—to make sure that we can serve process and submit people who are selling products in this country to the jurisdiction of our courts and the enforcement of our laws. That is what I think the American people expect, and those are the consumers. Your customers are infants with parents, and they are counting on us to deliver a degree of safety.

But I also want to follow up with Ms. Schakowsky's line of questioning because I think this idea of parental error versus product defect is an important one, and along the same lines, in September of 2007, CPSC recalled more than a million Simplicity-brand dropside cribs in one of the many recalls involving this company, and the CPSC noted that some consumers installed the drop side unin-

tentionally down, upside down. In this situation, the drop side would function upside down, it would function that way, and it would weaken the hardware and in some cases detach from the crib. The Stork Craft drop-side cribs recalled last year had the same problem, had similar problems. So Stork Craft asserts that this drop-side problem is not the company's fault. In a Stork Craft position paper provided to the committee located at tab 8 in the document binder, the company states, and I quote, "It is absolutely unreasonable to expect Stork Craft to reasonably foresee that a consumer would install the drop-side rail upside down." Mr. Dwyer, do you agree with Stork Craft's statement? It is unforeseeable that a consumer might improperly install the drop side upside down when the drop side will still function that way?

Mr. DWYER. I am not intimately familiar enough with the product. Obviously if the product is manufactured in such a way that it could be installed upside down, as was the case with this product, that that would be the case.

Ms. SUTTON. I don't understand your answer.

Mr. DWYER. Your question was, is it foreseeable for that product, for that rail to be installed upside down. Apparently that is the case, that it is—it was not—it is foreseeable if it can be installed upside down.

Ms. SUTTON. So you disagree with Stork Craft's statement that it is unreasonable to expect that to be foreseen?

Mr. DWYER. I would say based upon the information, the limited information I have about the specific product as I read it here, I would say that I would disagree with that statement.

Ms. SUTTON. Thank you.

And Ms. Cowles, I understand that you were a part of a task group assigned to examine the improper drop-side installation after the Simplicity recall. Is that correct?

Ms. COWLES. That is right.

Ms. SUTTON. Okay. And the Consumer Product Safety Commission produced an e-mail to the committee, which is located at tab 1 of the document binder, and it relates to this issue. This is an e-mail chain between you, Jonathan Midget of CPSC and other members of the group tasked with looking at improper assembly of drop sides. Dr. Midget, who is an engineering psychologist, comments as follows: "The best way to prevent misassembly is to limit the consumer's ability to put parts in the wrong place. The least effective strategy is to modify the instructions or create a list of warnings." To his workers at CPSC, Dr. Midget notes in an e-mail that the crib industry has been, and I quote, "freakish in its insistence that instructions of cribs are at fault. This only makes sense if you don't want to change any of the shapes of your crib hardware and would rather blame the consumer." Ms. Cowles, is this observation consistent with your experience negotiating crib safety standards?

Ms. COWLES. I think that this is very consistent both with my experience on the committee. I think I mentioned in my longer testimony that the committee will not even look at incidents that happen in cribs older than 5 years old, even though as we heard from the family, that could have easily been a crib that was just in one place and not reassembled, because they consider it old. They are

very quick to blame when they account things to what the consumer did rather than to their crib, and again, I think as I said today, that if a product is made so you can put it together in a way that causes death, that is a design problem, not a consumer problem.

Ms. SUTTON. Thank you, Ms. Cowles, and I appreciate again, Mr. Chairman, that you are holding this hearing. These e-mails illustrate the risk of relying on voluntary industry safety standards, and I yield back.

Mr. STUPAK. Thanks. If I may, just one question or two. I think Mr. Burgess will be here in a minute. Let me just ask this. Mr. Dwyer, I asked about this ad that you put out saying that you certify products.

Mr. DWYER. Yes, sir.

Mr. STUPAK. And we talked about recalls. Do you ever take out similar ads in the same magazines advertising there has been a recall, like on the cribs?

Mr. DWYER. I am sorry. I didn't understand the question.

Mr. STUPAK. Does your association, the Juvenile Products Manufacturers Association, you put out these ads advertising these products, that they are certified safe. Then when they are recalled, do you ever take out an ad saying these things have been recalled so consumers would know?

Mr. DWYER. No, we don't name specific products and put ads for a recall in any magazine.

Mr. STUPAK. But wouldn't that be a good idea?

Mr. DWYER. I believe that is the role of the agency. We can, you know, communicate. We issued statements and we provided statements based upon when the Stork Craft products were recalled to help parents and concerned consumers understand the implications. We link to recall.gov on our website. We——

Mr. STUPAK. So other than your website, that is all you do to let parents know that——

Mr. DWYER. We do not take out ads in magazines to promote the fact that products are recalled. This is part of a product safety campaign that involves multiple communication——

Mr. STUPAK. Sure. These are all products with your seal on it so if your seal products are being recalled, I would think you want to let people know that, target these audiences.

Mr. DWYER. We do communicate but we don't take out ads in magazines.

Mr. STUPAK. Okay. I would like to thank this panel for their testimony. Thank you, witnesses, and thanks for being here. As Mr. Walden reminds me, we are going to have votes here pretty quick, so let us see if we can't finish up this hearing. I will ask the chairperson to come forward, please, the Hon. Ms. Tenenbaum of the Consumer Product Safety Commission. Let the record reflect that before you have your opening statement, it is the policy of this committee that you have the right under the rules of the House to be advised by counsel during your testimony. Do you wish to be represented by counsel?

Ms. TENENBAUM. No, sir.

Mr. STUPAK. And then Ms. Tenenbaum, I would ask you as the chairperson of the Consumer Product Safety Commission to take the oath, please. Raise your right hand.

[Witness sworn.]

Mr. STUPAK. Thank you. Let the record reflect Ms. Tenenbaum is under oath, and please present your opening statement.

TESTIMONY OF THE HON. INEZ MOORE TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Ms. TENENBAUM. Good morning, Chairman Stupak, Ranking Member Walden and members of the Subcommittee on Oversight and Investigation.

The overall safety of cribs is a critical concern of the CPSC and a personal priority of mine. Getting unsafe cribs off the market and out of the home has always been a key part of the CPSC's mission, but I strongly believe that we must do more and have strong federal safety standards that prevent cribs with design flaws or safety defects from ever making it into the stream of commerce or into nurseries.

Since the inception of the agency in 1973, the CPSC has been deeply involved in issues of crib and infant sleeping environment safety. In November 1973, the Commission promulgated the first mandatory safety standard governing full-size cribs. Since that time, the CPSC has also worked diligently with other standards-developing organizations such as the ASTM International on voluntary cribs standards. These mandatory and voluntary standards combined with substantial outreach efforts have undoubtedly prevented numerous infant and child injuries.

However, one question that has arisen in some media reports is the issue of why the CPSC's mandatory crib standards have not been revised since 1982. The main answer is that the Commission has limited authority to do so under section 9 of the Consumer Product Safety Act. Under that section, which was revised by the CPSIA, the Commission was generally required to rely on voluntary standards that would likely result in the adequate reduction of risk and injury and where there would be substantial compliance with the standard. This reliance on voluntary standards worked well in many areas but it also left some substantial gaps that voluntary-standard-developing organizations were either unwilling or unable to confront. This provision was modified by the CPSIA to give the Commission additional authority to promulgate rules, even when a voluntary standard is in existence.

In addition, the CPSIA also included section 104, the Danny Keysar Child Product Safety Notification Act, which directs the Commission to promulgate new standards for 12 groups of durable infant and toddler products. I strongly support these additional authorities and have directed the CPSC staff to make crib safety a key priority starting with immediate recall of cribs that have been shown to present a substantial risk of danger and injury to children.

One example of the Commission's efforts to remove potentially hazardous cribs from the marketplace has been the two recent recalls of Stork Craft drop-side cribs. In January 2009, Stork Craft agreed to voluntarily recall over half a million impacted cribs due

to a bracket defect. At that time the CPSC was also investigating instances regarding a potential drop-side issue with the cribs. These incidents, however, involved a large population of cribs with different styles of drop-side hardware and a different mode of drop-side failure.

After my arrival at the Commission, I requested weekly Commission briefings from the Office of Compliance on pending consumer product investigations. The subject of the September 24, 2009, briefing was nursery products and included the Commission's investigation into drop-side cribs. During that briefing, I learned about the developing compliance case regarding Stork Craft drop-side cribs as well as the tragic June 2009 death in Louisiana that involved a Stork Craft drop-side crib. Following this briefing, I directed the staff to give immediate priority to the recall of Stork Craft cribs and this drop-side hazard. On November 23, 2009, the Commission and Stork Craft announced the largest crib action recall in CPSC history, and as you know, this involved 2.1 million Stork Craft cribs.

We also recently recalled the Dorel Asia cribs, which I will not go into detail to save time because you are very well aware of that recall.

Now, since these recalls, and since my tenure as chairman, I have decided that we need a new safe sleep initiative, which has six points that I want to talk to you about. In my brief statement this morning, I will just talk about the highlights and then you can ask me questions later.

I think the CPSC has very talented staff that has worked diligently for years on these issues of safe cribs but I also think that we could have for a variety of reasons including funding, inadequate statutory authorities and competing priorities move quicker to have mandatory and stronger voluntary standards and I want you to know and make very clear to this subcommittee that those days are over at the CPSC. This morning I am pleased to announce the details of the Safe Sleep Initiative.

First of all, you have heard from other speakers that the first part of this initiative is to expedite the rulemaking and have mandatory standards under section 104 for cribs, and I might want to add that when I came to the Commission, the schedule for this rule for cribs was scheduled for 2012. When I learned about it, I pulled it in front of other rules and said we have to have this standard now. Second, we are going to expand the Commission's successful early warning system by having an early warning team for bassinets, cribs and other sleep environments for children. Three, we will also increase the monitoring of recall effectiveness and corrective actions on take rates on crib recall cases. We want to know how effective are these recalls. Fifth, we are going to continue with our additional media outreach. For example, when we recalled Stork Craft, we estimated that 200 million people saw the television clips of those recalls. And sixth, we are going to have an internal management review of how we do recalls not only for cribs but for other products. When I came to the Commission, I realized that the Commission needed a new strategic plan. It also needed consultants from the outside to come in and look at the operations and the management of that agency, so we went through the pro-

curement process and I am pleased to announce that just recently we have secured Booz Allen Hamilton to do a top-to-bottom review of the CPSC and help us in this area.

And Mr. Chairman and Ranking Member Walden, I thank you for having this meeting. It is very important that you show everyone involved in crib safety how important it is to you, and I look forward to answering your questions.

[The prepared statement of Ms. Tenenbaum follows:]

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

Before the Subcommittee on Oversight and Investigations

"Crib Safety: Assessing the Need for Better Oversight"

January 21, 2010

Good morning, Chairman Stupak, Ranking Member Walden, and Members of the Subcommittee on Oversight and Investigations. I am pleased to be here today to discuss the actions we are taking at the U.S. Consumer Product Safety Commission (CPSC) to ensure the safety of cribs and promote a safe sleep environment for all children in the United States.

Let me begin by saying the overall safety of cribs is a critical concern of the CPSC – and a personal priority of mine. Parents across this country expect cribs to be a sanctuary for their children, regardless of that crib's price or size. I share this belief, and have made crib safety a cornerstone of my work as Chairman of the CPSC.

Since 2007, the Commission has taken action to recall almost 7 million cribs for various defects. Getting unsafe cribs off the market and out of homes has always been a key part of the CPSC's mission. But I strongly believe that we must do more – and have strong federal safety standards that prevent cribs with design flaws or safety defects from ever making it into our stream of commerce or into nurseries.

In my testimony today, I will provide the Subcommittee with a brief overview of the Commission's past efforts with regard to crib safety and the recent Stork Craft recall. More importantly, however, I will also outline my overall Safe Sleep Initiative to prevent deaths and injuries from crib design flaws and defects, and promote a safe sleeping environment for all babies.

Overview of CPSC Efforts to Prevent Crib Defects and Injuries

Since the inception of the agency in 1973, the CPSC has been deeply involved in issues of crib and infant sleeping environment safety. In November 1973, the Commission promulgated the first mandatory safety standards governing full-sized cribs. These standards included regulations governing rail height, spacing of crib components (slats, crib rods and corner posts), and the hardware used in the construction of the crib. These standards were updated in 1982 to impose requirements regarding the crib "cut-outs," or the parts of cribs where the various component parts fit together.

The CPSC has also worked diligently with other standards developing organizations, such as ASTM International, on voluntary crib standards. In 1988, CPSC participated in the ASTM subcommittee that adopted the F1169 standard for full-size cribs. CPSC staff was also actively involved with this subcommittee when it revised the F1169 standard to:

- Include a performance requirement addressing slat detachments in 1999;
- Integrate a requirement governing the design of crib corner posts in 2003;
- Update crib warnings and labeling in 2007; and
- Adopt a restriction of drop-side cribs and new slat strength requirements in November 2009, which was published on December 10, 2009.

Furthermore, the CPSC has worked for decades on education and outreach initiatives. CPSC has partnered over the years with the American Academy of Pediatrics, the National Institute of Child Health and Development, Gerber, the Juvenile Products Manufacturers Association (JPMA), The Danny Foundation, and the Black Entertainment Network (BET) on:

- The landmark Back-to-Sleep campaign aimed at preventing Sudden Infant Death Syndrome (SIDS) related deaths;
- An initiative encouraging parents to create a sleeping environment free of pillows and other soft bedding that could pose a suffocation risk to babies; and
- A special campaign aimed at educating African-American parents about how to keep babies safe in the crib.

These mandatory and voluntary standards, combined with substantial outreach efforts, have undoubtedly prevented numerous infant and child injuries.

However, one question that has arisen in some media reports is the issue of why the CPSC's mandatory crib standards have not been revised since 1982. The main answer is that the Commission had limited authority to do so under Section 9 of the Consumer Product Safety Act. Until that section was revised by the Consumer Product Safety Improvement Act of 2008 (CPSIA), the Commission was generally required to rely on any voluntary standard that was "likely to result in the elimination or adequate reduction of the risk or injury" and where it was "likely that there would be substantial compliance with that standard." This reliance on voluntary standards worked well in many areas, but also left some substantial gaps that voluntary standard developing organizations were either unwilling or unable to confront.

Due to the hard work of the full Committee and many other members in both Houses of Congress, this provision was modified in the CPSIA to give the Commission additional authority to promulgate rules, even when a standard is in existence. In addition, the CPSIA also included Section 104, the Danny Keysar Child Product Safety Notification Act, which directs the Commission to promulgate new standards for twelve groups of durable infant and toddler products – including full-size cribs and nonfull-size cribs. Section 104 gives the Commission regular rulemaking authority not just to adopt existing voluntary standards, but to adopt standards that are more stringent "if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products."

As Chairman, I strongly support these additional authorities and have directed CPSC staff to make crib safety a key priority – starting with the immediate recall of cribs that have been shown to present a substantial risk of injury to children.

The Stork Craft Recall

One example of the Commission's efforts to remove potentially hazardous cribs from the marketplace is two recent recalls of Stork Craft drop-side cribs.

In early 2008, our Early Warning System (EWS) team brought concerns about Stork Craft cribs to the attention of our Office of Hazard Identification and Reduction and Office of Compliance and Field Operations. This led to a request to the company in August 2008 for information about potential problems with both the cribs' drop-sides and mattress support brackets. The investigation established a pattern of defect on the support brackets used on certain cribs. The metal brackets used were of insufficient strength, leading to cracking and posing a potential entrapment hazard. In January 2009, Stork Craft agreed to voluntarily recall over a half-million impacted cribs. CPSC was also investigating incidents regarding a potential drop-side issue with the cribs. These incidents, however, involved a large population of cribs, with different styles of drop-side hardware and different modes of drop-side failure.

After my arrival at the Commission, I requested weekly Commission briefings from the Office of Compliance on pending consumer product investigations. The subject of the September 24, 2009, briefing was nursery products, and included the Commission's investigation into drop-side cribs. During that briefing, I learned about the developing Compliance case regarding Stork Craft drop-side cribs, as well as the tragic June 2009 death in Louisiana that involved a Stork Craft drop-side crib. Following this briefing, I directed the staff to give immediate priority to the recall of Stork Craft cribs for this drop-side hazard. On November 23, 2009, the Commission and Stork Craft announced the largest crib action in CPSC history, involving the recall of approximately 2.1 million Stork Craft drop-side cribs.

Throughout this investigation, Stork Craft has maintained that there is no evidence of a pattern of defect and, in the end, voluntarily recalled the cribs without admitting that the cribs were defective.

My Safe Sleep Initiative

During my brief tenure as Chairman, I have reviewed past actions of the Commission in the crib safety area. The CPSC has a very talented staff that has worked diligently in this issue for many years, and their past efforts to ensure safe cribs and safe sleeping environments are to be commended.

At the same time, however, I also recognize that the Commission may not been as vigilant in this area as it could have been in recent years for a variety of reasons – including funding, inadequate statutory authorities, and competing priorities. I want to make it clear to the Subcommittee this morning that those days are over.

This morning, I am pleased to announce the Safe Sleep Initiative. This six-part action plan takes a holistic, multi-pronged approach to the issue of crib safety and focuses not

just on new crib safety rules, but also new methods of identifying existing hazards in the fastest way possible, increased monitoring of recall effectiveness, increased public outreach, and internal management reform.

1. Expedited Implementation of the Section 104 Crib Rulemaking

Section 104 of the CPSIA requires the Commission to promulgate product safety standards for two categories of infant and durable toddler products every six months "beginning with the product categories that the Commission determines to be of the highest priority." Among these twelve categories are full-size cribs and nonfull-size cribs.

All of the categories listed in Section 104 are important. In light of recent recalls, however, I believe crib regulations should take on a higher priority. Accordingly, I have directed CPSC staff to accelerate – to the maximum extent possible – the rulemaking for cribs under Section 104.

2. Expansion of the Early Warning System (EWS)

In November 2007, the CPSC implemented what was then a pilot program called the Early Warning System (EWS). This EWS is a multi-disciplinary team of CPSC staff consisting of compliance officers, attorneys and technical staff from CPSC's Engineering, Epidemiology, Human Factors and Health Sciences organizations that focuses solely on three product categories: cribs, bassinets and play yards.

This team was formed in an effort to catch serious risks of injury or death, patterns of defect, and regulatory violations as early as possible. The EWS team meets on a weekly basis and reviews all incoming bassinet, crib and play yard incidents reported to the agency. Incident reports specific to products evaluated by the EWS pilot team are drawn from the CPSC's epidemiological databases (EPIR) that reside on the CPSC network and are appended into the specific EWS database. As part of its review process, the EWS team electronically codes the failure mode of each product-related incident. By electronically capturing the technical coding for each incident, the EWS team is able to create a historic record that can support more expeditious identification of potential emerging hazards. During the weekly review, the EWS team also assigns in-depth investigations (IDIs) of incidents, reviews completed IDIs, evaluates collected product samples, and makes recommendations to the Office of Compliance on cases to open for possible recall.

Overall, the EWS team does an excellent job of quickly identifying emerging nursery product hazards. Nevertheless, under current CPSC database and Information Technology (IT) infrastructure, identifying emerging hazards and patterns of defect is labor intensive and requires significant staff involvement to manually go through much of the information that is received. In some cases, staff manually receive reports within 48 hours and are able to initiate an investigation. In other cases, however, there can be a significant lag between the time reports are received and when they are entered into the

database. For example, in the case of incidents reported to CPSC staff via manufacturer reports, Medical Examiners and Coroners Alert Project (MECAP) reports, and news reports, there can be a lag of up to a month or longer before incoming data reports are available in EPIR and extracted for entry into the EWS database. This "data utilization lag" is currently too long. To address this, the Commission is currently taking two steps to improve the data flow.

First, the Commission is engaged in a major upgrade of its IT systems as part of its mandate under Section 212 of the CPSIA to create a product incident database that is easily searchable by the public. In response to that mandate, the agency is developing a single, integrated web-based environment, the Risk Management System (RMS) that will support the database and other associated data collection activities. Specifically, RMS will capture CPSC subject matter experts' assessments of the failure mode and severity associated with product incidents – and share those coded historic incidents with all other CPSC staff. This feature does not currently exist outside of the EWS program, and will greatly improve our information sharing abilities. In addition, this feature will also support advanced data-mining capacities that will analyze various information flows – including public product incident reports, Injury or Potential Injury Incidents (IPII), and information from the National Electronic Injury Surveillance System (NEISS) – and issue "red flags" for products that may present evidence of a new or emerging hazard.

Second, the Commission is working to enhance staffing in our Office of Compliance to recognize and react to the "red flags" generated by these new sources of information. With the new funding available in the Fiscal Year 2010 CPSC budget, we anticipate being able to hire new staff that will focus on priority areas – such as cribs. This, in turn, will allow us to more quickly initiate recalls and other corrective actions when hazards are identified.

3. Creation of a New Safe Sleep Environment Team

As I reviewed the great strides made to date by the EWS team, I also identified an opportunity to take that approach to the next level of responsiveness in the overall context of children's sleep environments. To that end, I have created a new "Safe Sleep Environment Team," which is a pilot project to bring the same EWS team of compliance officers, attorneys, epidemiologists, and other technical staff to work on issues related to the sleep environment. The compliance officers and attorneys involved will be exclusively dedicated to this new team.

As a dedicated, interdisciplinary team, I am confident that this will allow the CPSC to use the information harnessed by EWS and act faster and more efficiently not just with crib defects – but also for all defects related to a child's sleep environment. In addition, their work will be critically important in pointing out new ways to effectively utilize the increased amount of incident reports that will be generated by the RMS upgrade and the public database required by section 6A of the CPSIA.

4. Increased Monitoring of Recall Effectiveness and Corrective Action "Take-Rates" in Crib Recall Cases

Recalls are only effective if parents and caregivers avail themselves of the corrective action offered, and either return, replace, or fix the defective product in a manner that will ensure a baby's safety. Nowhere is this more important than crib recall cases, where a corrective action is critical to ensuring a safe sleeping environment.

The CPSC has already taken one critical action to address the effectiveness of crib recalls using the power Congress provided us in the CPSIA. In addition to the product safety standard requirements for durable infant and toddler products, Section 104 also mandated that registration cards be included with cribs and other durable infant products. On December 29, 2009, the Commission published a final rule requiring manufacturers of such products, which includes cribs, to establish and administer a registration program for their products.

Specifically, the rule requires that each manufacturer: 1) provide a postage-paid registration form with the product; 2) keep records of consumers who register their products; and 3) permanently place the manufacturer's name and contact information, model name, number, and date of manufacture on each product. The rule covers the twelve specific product categories identified in the CPSIA (full-size cribs and nonfull-size cribs; toddler beds; high chairs, booster chairs, and hook-on chairs; bath seats; gates and other enclosures for confining a child; play yards; stationary activity centers; infant carriers; strollers; walkers; swings; and bassinets and cradles), as well as six additional products the Commission specified in the rule (children's folding chairs, changing tables, infant bouncers, infant bath tubs, bed rails and infant slings). The rule will take effect for the first twelve products, including cribs, on June 28, 2010, and for the additional six products on December 29, 2010.

I strongly believe that these new registration and marking requirements will improve the effectiveness of future recalls involving cribs and other infant and toddler durable products. At the same time, however, I am also very concerned about recalled cribs that remain in the stream of commerce. In particular, I am concerned about the low response rates associated with numerous recalls of cribs made by Simplicity, which is now bankrupt and out of business. Millions of their cribs were sold over the past decade, and millions of them have a deadly defect. To date, eleven babies have become entrapped and died in the various crib models – and there are still far too many parents who have not responded to the recall announcements. As a result, I ordered another major education effort last November to stop consumers from using Simplicity cribs with drop-sides.

In addition to outreach, we must also ensure that consumers with recalled cribs and other durable nursery products take advantage of corrective actions offered by manufacturers. To this end, I have directed CPSC staff to increase monitoring of corrective action plans. Specifically, I have asked staff look at the take-rates of repair kits offered by

manufacturers in several recent recalls, how fast those kits are being shipped, and the quality of materials in the repair kits.

We are also examining the effectiveness of repair and retrofit kits that are currently offered to most consumers in crib and other durable infant and toddler product recalls. During the April 2009 Roundtable on Cribs and Infant Sleep Environments, several parties – including the Illinois Attorney General's Office – suggested that we require manufacturers or importers to offer either a refund or store credit when cribs are recalled. It is an idea that is worthy of full Commission consideration. Such a requirement would certainly incentivize many consumers to discard and replace defective cribs – and might have a significant impact on removing defective cribs from homes and secondary markets. At the same time, however, the Commission must also be cognizant of the financial situation of manufacturers involved and the fact that this type of remedy might push them into financial distress or bankruptcy – and foreclose the possibility of any corrective action.

5. Additional Media Outreach and Education to Foster Safe Sleep Environments

In the days after the Stork Craft recall, the Commission engaged in a very aggressive media outreach mission in announcing the Stork Craft recall. The day after the recall was announced, I appeared on all three of the major network morning shows to discuss the recall, and emphasized the need for impacted parents to take action to move their children to another safe sleep environment until they obtained the repair kit to fix their cribs.

In addition, the agency sent out a video news release (VNR) that was shown on numerous local television outlets and has received more than 200 million views to date. Information was also distributed utilizing all the social networking resources of CPSC 2.0 – including Twitter, our blog, and YouTube. CPSC also targeted the minority and traditionally underserved communities through the Neighborhood Safety Network (NSN).

Overall, we believe that the media outreach conducted with this recall was among the most comprehensive ever conducted by this agency. However, I believe we can still do more to ensure that every consumer impacted by a recall is "touched" in some form by the CPSC or the manufacturer of the recalled product.

Therefore, I have directed CPSC staff to look at further efforts to reach the public in cases of crib and durable infant and toddler product recalls. As noted above, the registration card rule is a very positive step forward – but we have to ensure that this information is maximized in the case of a recall. Similarly, I also want the Commission to examine new opportunities with other technologies. Currently, consumers can sign up for e-mail alerts for all new recalls. I would like to expand on these efforts, and work on other notification technologies – such as those to mobile devices – to further expand the Commission's reach to younger and more mobile consumers.

As part of my Safe Sleep Initiative, we will also implement a targeted program aimed at increasing awareness of hazards associated with cribs, as well as best safe sleep practices for babies. This outreach initiative will use various tools, including multi-media (print, radio, television and social media), grassroots (community-based events), and partnerships with crib advocacy groups (including Keeping Babies Safe, Safe Kids USA, and the National Safety Council).

6. Internal Management Review and Reform

Finally, I would like to touch briefly on the issue of internal management reform. In a time of increasingly tight Federal budget constraints, it is critical for all agencies to maximize their resources and always strive to identify new efficiencies. The CPSC is no exception. Over the past two years, the agency has been rewarded with substantial funding increases to beef up staffing and enforcement efforts. My goal is to ensure that these resources are utilized to their fullest extent.

To that end, the CPSC recently engaged Booz Allen Hamilton to complete a top-to-bottom review of the CPSC, and help us complete a new agency Strategic Plan. They will look at all aspects of the agency's current management practices and organizational structure. In particular, I have requested that they review our current practices in the Office of Compliance and recall area – and recommend areas where we can improve our responsiveness to removing hazardous products from the marketplace and consumers' homes.

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Chairman Stupak and Ranking Member Walden, thank you again for giving me the opportunity to update the Subcommittee on the critical issue of crib and sleep environment safety.

I now look forward to answering your questions.

Mr. STUPAK. Thank you, and let me thank you on behalf of the whole committee and our staffs for your work and cooperation in this area and also for being here all morning. You have sat through all the panels and we appreciate that, and we think that helps in what we are trying to achieve here.

You said your Safe Sleep Initiative, that was starting today?

Ms. TENENBAUM. We have already started it. It started really several weeks ago.

Mr. STUPAK. And part of that you said in your testimony, when Stork Craft announced a recall, that 200 million saw that.

Ms. TENENBAUM. We went on every morning show to announce the recall and we are using all of our social media—Twitter, YouTube, CPSC 2.0, but we estimate over 200 million saw those—had access to those television tapes.

Mr. STUPAK. When you do a recall here, especially like with Stork Craft, the 2 million that were recalled here in November, that is a voluntary recall, right?

Ms. TENENBAUM. It is a voluntary recall, and——

Mr. STUPAK. And you have to convince the manufacturer to do it. You don't have authority to say that is it, we are recalling these cribs, correct?

Ms. TENENBAUM. We could if we wanted to go into an administrative action, which would probably result in litigation and take more time, but the compliance officials and the lawyers at the CPSC have said to me, if we can get a voluntary recall, we can get the remedy to the consumer quicker and it takes less time, but you have to negotiate.

Mr. STUPAK. You have to negotiate. And if you look at tab 7 there, I want to talk a little bit about that, because you asked to negotiate with the company that does not believe that their product is defective, right?

Ms. TENENBAUM. That is correct. In fact, Stork Craft maintains to this day that the product is not defective.

Mr. STUPAK. Still maintains that even though we recalled 2 million cribs in 2009. So if I look at tab 7, if I understand this correctly, starting on May 6, 2009, staff sent an e-mail to Stork Craft advising them to stop the sale of drop-side cribs, right?

Ms. TENENBAUM. That is correct.

Mr. STUPAK. And then there is a number of entries in here about what staff was doing, conversations, discussions, and that wasn't really completed until about October 9. Stork Craft submits a press release and then you have negotiations of the press release begins.

Ms. TENENBAUM. That is correct.

Mr. STUPAK. So it takes you about 6 months to convince them to do a recall, correct?

Ms. TENENBAUM. It just depends on the circumstances.

Mr. STUPAK. But in this one it took about 6 months?

Ms. TENENBAUM. It took about 6 months.

Mr. STUPAK. And then why do we begin negotiations of a press release? That is October 9th, and it is my understanding—again, I have another whole page of all the entries that went through in trying to negotiate a press release on a recall which infant children possibly died because of defects in these cribs, and that takes us

to press release issuance of October—excuse me—November 24. So that is another 6 weeks. You negotiate 6 weeks for a press release.

Ms. TENENBAUM. That is correct. We negotiate every word of that press release. We are required to under 6B with the company. Now, 6B under the CPSIA was amended which gives us more flexibility but we negotiate press releases, and——

Mr. STUPAK. Six weeks here. You know, being where I am sit, and maybe I am a little skeptical, but this is sort of like the Christmas season. That is when people are buying things. Do you think part of the negotiations is to drag out the press release, a 1-page press release for 6 weeks, is to get into the Christmas season to sell more cribs that are defective that are being recalled?

Ms. TENENBAUM. Well, I have asked my staff why it takes so long, once you have made the decision for recall, why it takes 6 weeks, and that is the standard procedure, the standard amount of time, and they produced a document for me with everything that has to be done, particularly if you are going to do a recall repair. You have to manufacture the repair, you have to test it, and then inside the company, in Stork Craft Company, you know, those decisions, if you are talking to someone, they have to run it all the way up to the CEO or whomever is at the level to make the decision, but it is the truth. I mean, it takes an inordinate amount of time, and all during this time the consumers don't know that their crib needs a repair kit.

Mr. STUPAK. Correct, and then even after you do the recall, now this is well over 6 months from when we started this process and 6 weeks to get a press release out, but then now on top of that they have another 6 months they can sell the product to the American people, right? Don't they have another 6 months?

Ms. TENENBAUM. No, we stop sale.

Mr. STUPAK. Pardon?

Ms. TENENBAUM. Once the recall is announced, we stop sale. In fact, the retailers have a way to in their computers put the serial number of the product and it stops——

Mr. STUPAK. I thought from Mr. Dwyer, I thought we had another 180 days after that. Maybe I misunderstood.

Ms. TENENBAUM. No, after the—at the recall, it stops sale.

Mr. STUPAK. That is the certification, I guess. Okay. I had it wrong. Why does it take so long? I mean, you had a number of recalls. In fact, you had one Tuesday here, 635,000 more cribs. Why does it take so long? Why does it take 6 months?

Ms. TENENBAUM. Well, it shouldn't take 6 months, and that is why under our Safe Sleep Initiative, we are going forward going to have a safe sleep team where everyone works together, the compliance officers, the attorneys, the epidemiologists, the engineers so that we can all work together to move a case forward quicker. I think 6 months personally is too long. And you can also if the company is not cooperating and keeps insisting, you know, they shouldn't have a recall, we can issue a unilateral press release, which we have threatened to do. I have also told our staff, use every enforcement power you need to move cases forward; don't let a company push back on you if you have the science and the engineering complete and you know this is a product that needs to be recalled. So they know that leadership is behind them in these re-

calls. We also have instituted since I came to the Commission where once a week all five commissioners meet and we have weekly compliance briefings, and then we have monthly compliance briefings so we know the status of cases and can give the staff our thoughts on how urgent we think these recalls are.

Mr. STUPAK. Well, hopefully the next time the press release doesn't take 6 weeks. Six hours should be enough. If not, you can issue a unilateral one.

Mr. Walden for questions, please.

Mr. WALDEN. Thank you very much, Mr. Chairman.

Now, Chairman, I thought I heard you say you have the authority at CPSC to unilaterally issue a press release.

Ms. TENENBAUM. That is if the company does not cooperate.

Mr. WALDEN. Okay. So——

Ms. TENENBAUM. And we have threatened that.

Mr. WALDEN [continuing]. What the chairman is talking about, a 6-week delay in getting a press release, was the company not cooperating in that process?

Ms. TENENBAUM. The company was at that point—they were cooperating once we told them we were going to do the recall but when it said 6 weeks, it is not really—I mean, there were other things going on in that period of time.

Mr. WALDEN. And what other things were going on?

Ms. TENENBAUM. Okay. I can give you the recall notification process. I can talk to you—I mean, first of all, you have to determine the scope of the product to be recalled. You have to request——

Mr. WALDEN. And this is CPSC has to do this or the company?

Ms. TENENBAUM. Yes, the Commission has to do this. You have to look—I mean, it is a 2-page-long or 3-page-long document of everything that has to occur before you can recall a case, and you have to make sure the 800 number and the website are operational. You have to test the kit. The company has to manufacture the kit, and——

Mr. WALDEN. These are required by your rules?

Ms. TENENBAUM. These are required to have a successful recall so that——

Mr. WALDEN. In your rules, though, right? These are CPSC rules you are talking about?

Ms. TENENBAUM. I don't know that they are rules, they are just procedures.

Mr. WALDEN. But you control the procedures at CPSC?

Ms. TENENBAUM. The Consumer Product Safety Commission, yes. We control it but we also have to make sure the recall is done appropriately.

Mr. WALDEN. I fully concur with that, but I am just trying to get at this issue of why it took 6 weeks to get a press release out.

Ms. TENENBAUM. Well, this was a staff member's notes, and I don't know if they——

Mr. WALDEN. So you don't think those are accurate maybe?

Ms. TENENBAUM. No, I am not saying that, Mr. Walden. I am saying that it might have reflected that it was going on 6 weeks but we do have to negotiate every word. They might go up to their supervisor or to the CEO, come back to us and say we really dis-

pute this death, so that was a good example. The death in the Dorel Asia case, the company felt like that we should not mention the death. So when you get in whether or not you are going to mention a death, the lawyers on both sides have to get into it. You have to do an investigation. So it can take 6 weeks. If we want to say no, we are going to list, say, four deaths, then you have to say in Stork Craft there were four deaths. You had to go back and make sure your facts were true on every death and——

Mr. WALDEN. And do you think that is an unfair process?

Ms. TENENBAUM. Do I think it is unfair? We have to make sure that it is correct.

Mr. WALDEN. Right. I would concur.

Ms. TENENBAUM. I think what I would like to see on the front end is for us now that we are going forward and we have our team that is going to be working together, I hope we can shorten the part of the point leading up to the recall.

Mr. WALDEN. Do you think that the early warning system has been toothless? Do you think that has worked?

Ms. TENENBAUM. The early warning system was formed after the Simplicity recall, and it puts together a team of people—lawyers, compliance officers—to look at the data that is submitted to us.

Mr. WALDEN. It tries to get everybody in your agency, right, to talk?

Ms. TENENBAUM. Right. Earlier on, you mentioned—you asked me if—or you asked one of the Ciriglianos, you asked them if they had a duty to report, and they did not.

Mr. WALDEN. No, that was the chairman who said that.

Ms. TENENBAUM. Right, and that is one of the issues. We do not get reports sometimes until years after an incident has occurred and the sample is gone. So one of the issues that we were going to say in terms of improving the process which would take probably statutory authority is to require States to report events to us. Medical examiners' reports, we purchase. We work with other—we work voluntarily with hospitals. We have the NICE system. We have a number of ways. We go through press releases, newspapers. We do everything to find out about incidents but there is no duty to report from the State coroners or medical examiners.

Mr. WALDEN. Thank you. That is helpful information to have as we go forward. I have just 45 seconds left here, and we have got votes on, so let me ask you this. Is it the industry trade group's duty to come up with these new standards, or if there is a gap in safety, is it CPSC's duty to put in mandatory standards? You have that authority. Your predecessors have had that authority. You can step in and put a standard in that says we are not going to have drop-side cribs or we are not going to have this type of manufacturing process, right?

Ms. TENENBAUM. I think the ASTM should always have state-of-the-art, robust standards for all the products.

Mr. WALDEN. I agree.

Ms. TENENBAUM. But I also see, when you see patterns of this kind of thing that go on for years, then it is time for the CPSC before it gets this late to have a mandatory standard, and that is why when I came to the Commission we started looking at the cribs. We changed the schedule so that this year we will have the mandatory

standard. We asked the ASTM. I called them personally, got them on the phone, you need to work with us right now to have the best voluntary standard possible. They voluntarily said yes, we would love to work with you. They came and spent yesterday and the day before and worked all day long, and they have come to an agreement that we need to increase the wood quality. Now it is a 50-pound standard. They agreed to an 86-pound standard. We need to test the hardware, given the Canadian racking method. I understand that is 9,000 times the hardware is put under stress to be tested. They outlawed wooden screws, and they also, you know, talked about other issues that would make the voluntary standard robust.

Mr. WALDEN. Good. Thank you. Thank you for your work and thanks for your response to questions.

Mr. STUPAK. Thanks, Mr. Walden.

Ms. Schakowsky for questions, please.

Ms. SCHAKOWSKY. So let me get it clear. We are going to have a mandatory standard for cribs that will prohibit drop sides?

Ms. TENENBAUM. Yes, ma'am, we will.

Ms. SCHAKOWSKY. And when will that be?

Ms. TENENBAUM. It will be 2010. We hope by early summer to have the NPR published in the Federal Register. We have to have 75 days of comment and then we will have the standard by the end of the year. We are also pushing the ASTM to go ahead and adopt voluntary standards with this, and the good thing about having a mandatory standard that you put in the CPSIA is that it will be retroactive. It will cover cribs that are in public places like hotels and childcare facilities so that the drop side will be banned in the public places. But we still worry about cribs in homes that continue to have the drop side.

Ms. SCHAKOWSKY. And in the meantime, how are we going to keep these cribs—are all of them with drop sides recalled?

Ms. TENENBAUM. Well, we have recalled 6 million of them, and all these are voluntary recalls where we have repair kits and we have to keep continuing to educate people in the home who have cribs that there is a repair kit that they need to purchase and so it will still be in the home. And we also want to reach out to the minority communities through the neighborhood safety network, the minority outreach program. Also, we are looking at how we can communicate through every State agency that licenses childcare facilities so that we can send out e-mails to say don't use this brand crib, children have been injured or killed with these drop sides. So it is up to us to continue with our public information campaign.

Ms. SCHAKOWSKY. But there still will be until—so after the 75-day comment period, when are we going to say a ban nn drop-side cribs?

Ms. TENENBAUM. Well, prospectively the ASTM has banned them, and I asked the director of DHS—well, I asked——

Ms. SCHAKOWSKY. Ban the manufacture but not all of them have been recalled?

Ms. TENENBAUM. I don't think every crib has been recalled.

Ms. SCHAKOWSKY. Drop-side cribs.

Ms. TENENBAUM. Drop side, but it is banned prospectively. I will have to get back with you on that. I know that——

Ms. SCHAKOWSKY. But under CPSC, after the—what does that take us to? There is a 75-day comment period——

Ms. TENENBAUM. I would hope by December to have our mandatory rule done, and I hope we can do it sooner. And the work that has been done the last 2 days by the ASTM should allow us to have information, plus the agency put out an ANPR in 2008, so we are going to try as fast as possible to have this done.

Ms. SCHAKOWSKY. Okay. I want to get the letters right. The JP—what is it?

Ms. TENENBAUM. JPMA?

Ms. SCHAKOWSKY. Voted against having a mandatory standard, or what was it? I mean, I am trying to understand the relationship with the industry, and for a long time I have been concerned about the issue, for example, of these press releases, and I understand, of course, getting the accuracy but it doesn't take that long to figure out if someone has—if a child has died or four children have died, and the fact that the industry doesn't want that in a press release, who cares? Why do we have to negotiate that? Why should it take so long if this is a threat of life? Do we have to do more? How does our new Act, the Improvement Act, change the rule about these press releases?

Ms. TENENBAUM. Well, I will give you an example. Just this week we recalled Dorel Asia and the Today show and other morning shows are very helpful to us and they say we will announce this so that people can get the word on this, and we had had it in the press release that a child had died. The people representing Dorel Asia were talking to Tom Castello up until right before he went on the air saying do not mention that death, and so that is how we have to deal with this, and he mentioned it because we asked him to.

Ms. SCHAKOWSKY. Well, under the new Act, you said that there has been some improvements in that. What was improved?

Ms. TENENBAUM. Well, the time under 6B. It just shortened the period of time. But still the negotiations about whether or not a death is, you know, because of the hardware or some fault of the consumer, and that goes back and forth and we have to be really hard about pushing forward that we are going to list this death.

Ms. SCHAKOWSKY. I think we really have to do something about that, because don't you think that the impact of a statement where a death has occurred is much more powerful than——

Ms. TENENBAUM. Yes. I mean, if parents know that your child can tragically die by being entrapped, they will go in that room and look at that crib immediately, we hope, or even when a child is injured and we can show parents, this is not something that you can fix yourself, please get the repair kit, and if the crib is in such bad shape, please do not use it.

Ms. SCHAKOWSKY. Well, as far as I am concerned——

Mr. STUPAK. I have got to cut you off.

Mr. Burgess, we have 2 minutes left to vote.

Ms. TENENBAUM. Thank you, though, for bringing this up.

Mr. STUPAK. Mr. Burgess, questions, please.

Mr. BURGESS. Thank you, Mr. Chairman, and thank you, Commissioner, for being here today. I hope we have—I know we have

a request in to your office to have a meeting. I hope we are able to have that soon.

Mr. Chairman, I will also say, having taken a trip out and seen the testing facility at CPSC, I would encourage a field hearing at the testing facility sometime. I think it would be important for us to see how they do a good job with really sometimes some pretty rudimentary tools, and if we behave ourselves that day, they will even let us test some of the toys if we promise not to break them.

Now, I am a little confused on the—that you have banned the manufacture of drop-side cribs. Is that correct?

Ms. TENENBAUM. ASTM has.

Mr. BURGESS. ASTM has?

Ms. TENENBAUM. And we will put that in our mandatory standard.

Mr. BURGESS. Who needs to ban the import? Because a drop-side crib could still be imported by a retailer.

Ms. TENENBAUM. Well, what the ASTM is a voluntary standard and they are saying in the standard, which they voted on in December of 2009, that it will no longer meet standards if it is drop side. But, you know, we will have a rule this year, and I don't want to whine but I want to tell you that we have had 48 Federal Register notices since the passage of the CPSIA. There are so many rules under that we pushed forward that that is why it takes a while to finish these rules, but anyway, I got you off your train of thought. I am sorry.

Mr. BURGESS. Well, some of the things we have been through before with the lead-up to the CPSIA was the problem that we have with stuff that is made overseas, read China, and then brought to this country that doesn't meet our standards. If we decided that it is the design of the drop-side crib that is the problem, then it doesn't matter where it is made, in my opinion. If it is made overseas, then we should not allow its import. Now, what do we have to do with the World Trade Organization and all of our treaties and border stuff, what do we do to keep those cribs from coming in and being sold in retail outlets in this country?

Ms. TENENBAUM. If we ban the drop side, we could stop it at the port.

Mr. BURGESS. Have we banned it?

Ms. TENENBAUM. We will in the rule.

Mr. BURGESS. Which is going to happen when?

Ms. TENENBAUM. In 2010 we are going to finish that. It was originally scheduled for 2012 and we have expedited that to move it up to 2010.

Mr. BURGESS. Yes, the notes I have from the U.S. Consumer Product Safety Commission, Office of General Counsel, required actions pursuant to the Consumer Product Safety Improvement Act of 2008, and this is dated September 2008, that we would do this by August of 2009, so I guess that slipped a little bit?

Ms. TENENBAUM. I guess it did. We did the durable nursery equipment items, there were 12 of them, baby baths and baby walkers.

Mr. BURGESS. Shouldn't cribs have been up at the top of that list of 12?

Ms. TENENBAUM. Cribs, in my opinion, yes. That is why I have expedited it.

Mr. BURGESS. So we on this committee can expect you to issue a mandatory ban on drop-side cribs sometime in 2010?

Ms. TENENBAUM. Yes, sir, and that will be retroactively applied for cribs in public places such as childcare facilities and hotel rooms but it won't apply to bans in homes, so the consumer would still have it under section 104.

Mr. BURGESS. Well, if they had existing ones, but will they still be able to go to a retail outlet and purchase one?

Ms. TENENBAUM. No.

Mr. BURGESS. Would a retailer be able to import one for sale?

Ms. TENENBAUM. No, not after we say that they don't meet the standards.

Mr. BURGESS. So we will be able to stop those at the border?

Ms. TENENBAUM. Yes, sir.

Mr. BURGESS. Let me just ask you, one of the things we struggled with during the run-up to the bill in 2008 was the funding and personnel levels at the CPSC. Where are we with that now?

Ms. TENENBAUM. Well, we are at the level of having 530 FTEs, full-time equivalents, and we now employ as of today 479. So we are—but we have 45 recruitments in the process of being hired, and it is our goal to be at the top of the 530 this year.

Mr. BURGESS. Now, we were given—both Nancy Nord and Mr. Moore felt that the funding levels we were providing CPSC in past years were not satisfactory. Those were increased. What actions are you taking now? We are going to be in a tough budget yet. Guess what? It is going to be real tough. And yet this is one of the more important functions but still very low on the totem pole of things that get funded. So what actions are you taking now to ensure that your funding does not slip?

Ms. TENENBAUM. Well, when we—I go and meet personally with OMB and I go myself, just talk to them about how important it is to be able to implement the CPSIA and other statutes. I ask them to hold our agency harmless. And so I have said, you know, $10 million to the CPSC is a tremendous amount. Ten million dollars to a mega agency would not have the same effect. And we keep demonstrating to them how we are using it. Also with Booz Allen Hamilton, which is the company that is going to be doing a management, operational and strategic plan for us, they will be looking at what additional resources we need or how we use existing resources to accomplish our goal, which is keeping consumers safe.

Mr. BURGESS. Well, I would just say, don't forget you have friends on this committee if the appropriators aren't treated you squarely.

Thank you, Mr. Chairman. I know we have got to go vote.

Ms. TENENBAUM. And thank you, Mr. Burgess.

Mr. STUPAK. Thank you. That concludes all questioning. First I ask unanimous consent Mr. Waxman's opening statement and the attachment from the Consumers Union be made part of the record.

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

Mr. STUPAK. And that concludes all questioning. I want to thank our witnesses for coming today and for their testimony. The committee rules provide that members have 10 days to submit addi-

tional questions for the record. I know there are questions as to manufacturers have a duty to report deaths and injuries, and after you do a recall, we have seen going in the stores, there is no notification. So there are going to be other questions. We will follow up probably with you, Madam Chairperson.

So I ask unanimous consent that the contents of our document binder be entered into the record provided that the committee staff may redact any concerns about privacy, business proprietary or other law enforcement-sensitive issues. Without objection, documents will be entered in the record.

That concludes our hearing. This meeting of the subcommittee is adjourned. Thank you all for being here.

[Whereupon, at 12:18 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Opening Statement of the Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
Hearing on
"Crib Safety: Assessing the Need for Better Oversight"
January 21, 2009

Thank you, Mr. Stupak and Mr. Walden for this hearing. Approximately 4 million babies are born in the U.S. every year and their parents want the cribs they buy and place their babies in to be safe. The recent recalls of millions of cribs raise fresh questions about the safety of our juvenile products and the effectiveness of the U.S. Consumer Product Safety Commission.

Lately, the threat has come from drop-side cribs, which may pose risks of entrapment and or suffocation. It seems that the risk becomes especially great when parts are not properly assembled, are lost, or they break from age and use. I want to know if the drop-side crib design is inherently unsafe and dangerous. If it isn't a basic design flaw, then I want to know the reason for the increase in the number of incidents and recalls associated with these types of cribs. Some manufacturers have drop-side

cribs in the marketplace that do not show any problems and have not had recalls. I want to know why.

I would like extend a very warm welcome to Susan and Robert Cirigliano from New York who have traveled here to share their story. I look forward to listening to their ideas and suggestions on how we can increase crib safety and improve the recall process and communication between crib-makers, retailers, industry, regulators, and parents.

I also look forward to hearing from our other witnesses including Nancy Cowles from Kids In Danger and Mike Dwyer from the Juvenile Products Manufacturers Association. They will be able to offer different viewpoints on several issues relating to this topic.

Chairman Tenenbaum from CPSC is here to discuss the Commission's role in this matter and I hope she can assure us that the CPSC is handling the recalls and their repercussions in a fair and effective manner. She can also speak to us about the changes to the Commission since Congress passed the Consumer Product Safety Improvement Act of 2008 (CPSIA). That legislation gave the Commission new authorities and resources to effect quicker recalls and requires the Commission to promulgate new mandatory standards for infant products, including cribs and play yards.

Lastly, I want to get Chairman Tenenbaum's commitment to transparency and robust discussions among the five Commissioners and all of CPSC's stakeholders. An effective Commission is one that listens more than it talks, and one that bases its regulatory decisions on hard science and expert coosensus.

So I look forward to hearing from our witnesses, and I yield back.

Opening Statement of Rep. Henry A. Waxman

Chairman, Committee on Energy and Commerce

"Crib Safety: Assessing the Need for Better Oversight"

Subcommittee on Oversight and Investigations

January 21, 2010

More than 25 years after safety standards for cribs were first established, neither the crib industry nor the government can gaurantee today that drop-side cribs are safe. Problems remain with our products, and our safety oversight, recall, and enforcement systems need improvement.

Parents who put their babies to sleep in a crib should not have to be afraid of what might happen in the night.

Since 2005, the Consumer Product Safety Commission (CPSC) has recalled more than 7 million cribs for a variety of hazards. Most of these recalls have occurred in the last three years, as CPSC experts have identified and responded to a disturbing pattern of child entrapments, injuries, and even deaths associated with drop-side cribs.

The CPSC created an Early Warning System in late 2007 to track emerging product safety hazards. According to the CPSC, the Commission has evaluated more than 2,800 crib-related incidents identified through the Early Warning System. In the last two years, CPSC has identified almost 700 crib-related incidents that merit extensive in-depth investigations. As a result, the Office of Compliance has opened more than a dozen investigative cases pertaining to crib hazards, resulting in the recall of millions of cribs.

This is an unacceptable state of affairs, and today's hearing examines these issues in full.

The CPSC has not updated its mandatory crib safety standards since 1982, instead deferring to the voluntary safety standards developed by ASTM International, a private organization that develops voluntary standards for a range of industries.

As Nancy Cowles from Kids In Danger will testify today, the ASTM committee that is devoted to setting voluntary standards for cribs has discussed its concerns about the durability of drop-side cribs for years but took little action until last month.

As a testament to the shortcomings of existing standards, the drop-side cribs implicated in each of the major recalls over the last three years — Simplicity, Delta, and Stork Craft branded cribs—carried the Juvenile Products Manufacturers Association (JPMA) safety certification seal. JPMA calls this seal a "symbol of confidence," which demonstrates that certified cribs meet all mandatory and voluntary ASTM standards, and are made, "with safety in mind.". We will examine today whether existing safety standards are truly strong enough to merit parents' confidence in these products.

While CPSC's data on the number of crib incidents investigated and cribs recalled is extremely disturbing, the agency's actions also demonstrates its renewed commitment to identifying emerging product hazards and responding quickly to remove dangerous products from the marketplace.

The CPSC has new authority under the Consumer Product Safety Improvement Act to develop tougher mandatory safety standards for cribs and other children's products. I look forward to Chairman Tenenbaum's plans for this rulemaking.

Today's hearing will also address the November 2009 recall of two million Stork Craft drop-side cribs as a case study of the CPSC recall process. Chairman Tenenbaum acknowledged in the press that the CPSC has not responded quickly enough to reports of crib safety hazards. I am eager to hear more from the Chairman about the lessons she learned from her first major crib recall as the head of the Commission.

Finally, it is also important, in the context of these issues, that we discuss personal responsibility and corporate responsibility.

Too often, the crib industry is quick to blame parents for an incident involving a broken crib. Following the November 2009 crib recall, Stork Craft told the Canadian press that most drop-side cribs implicated in infant entrapment incidents were used improperly, and I quote, "with broken parts, parts with pieces missing, parts that were damaged or with modified or homemade parts."

The Juvenile Products Manufacturers Association, as part of its crib safety resource guide, warns against alarming parents and emphasizes the need to educate them about "the importance of the proper use, assembly, and reassembly of cribs and how to provide the safest sleep environment for a child."

Parents are indeed responsible for doing the best they can to ensure the health and safety of their children. But the crib manufacturers have a responsibility too. They are responsible for manufacturing cribs that are durable and can withstand normal consumer use, such as disassembly and reassembly, without easily

breaking or losing parts. Overall, they are responsible for manufacturing cribs that parents can trust and must be held accountable for that responsibility.

I want to thank our witnesses for appearing at our hearing today, especially the parents who are here to share the tragic story of their son. Thank you for your testimony and for helping this Committee understand what is at stake.

Consumers Union

January 21, 2010

Honorable Henry A. Waxman
Chairman, House Energy & Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

Honorable Joe Barton
Ranking Member, House Energy & Commerce Committee
2322A Rayburn House Office Building
Washington, D.C. 20515

Honorable Bart Stupak
Chairman, Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, D.C. 20515

Honorable Greg Walden
Ranking Member, Subcommittee on Oversight and Investigations
2322A Rayburn House Office Building
Washington, D.C. 20515

Re: "Crib Safety: Assessing the Need for Better Oversight"

Dear Chairmen Waxman and Stupak and Ranking Members Barton and Walden:

Consumers Union (CU), the non-profit publisher of Consumer Reports® magazine, writes to commend the Subcommittee on Oversight and Investigations of the Energy & Commerce Committee on holding a hearing on crib safety.

Parents and caregivers place a lot of trust in cribs. So much trust, in fact, that they leave children in cribs overnight, unattended. As the seemingly endless series of crib recalls over the past few years have demonstrated, however, there are urgent safety concerns with cribs. In the past few years alone, there have been at least 37 recalls involving more than 7 million full-size cribs, play yards and bassinets. Between 2004 and 2006, the last 3-year period for which there is complete data, there have been 93 deaths associated with cribs. In 2008, there were 11,500 estimated hospital-treated injuries associated with cribs.

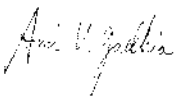
CU has long advocated for mandatory crib safety standards, and we are pleased that the Consumer Product Safety Commission (CPSC) is moving forward on this matter. In addition to concerns about the safety of cribs, we are also concerned about the speed and thoroughness of information given to

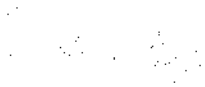
consumers after cribs are recalled. When the CPSC issues recall announcements for cribs it consistently recommends that owners stop using them immediately and contact the manufacturer, which often supplies repair kits. However, we have heard complaints from our readers that those fix-it kits sometimes take too long to arrive from the manufacturer. As a result, parents often cannot provide a safe sleeping environment for their babies until the repair kit arrives.

Our goal is to provide consumers with up-to-date safety information, including tips and information on what to do if their crib is recalled. (See our Safety Blog, [illegible]) But as you know, recalls attempt to fix a problem after an unsafe product has entered consumers' homes. We share your goal of ensuring that cribs are ultimately safer, and that fewer recalls are necessary.

We recognize that current industry voluntary safety standards are grossly lacking, and we welcome much-needed improvements to crib safety and crib recalls. We thank you again for holding this hearing, and look forward to assisting you as you move forward on crib safety.

Sincerely,





Ami Gadhia
Policy Counsel
Consumers Union
1101 17th Street, NW, Suite 500
Washington, D.C. 20036

Donald L. Mays
Senior Director, Product Safety and Technical Policy
Consumers Union
101 Truman Avenue
Yonkers, NY 10703

CPSC008863

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

May 14, 2008

Mr. Bill Suvak
Chairman, ASTM Crib Standard Subcommittee
1010 Keller Drive NE
New Salisbury, IN 47161

Re: ASTM F1169 *Standard Specification for Full-size Baby Cribs*

Dear Mr. Suvak:

This letter presents recommendations from the U.S. Consumer Product Safety Commission (CPSC) staff[1] regarding revisions to ASTM F1169 *Standard Specification for Full-size Baby Cribs* to address hazards posed by cribs with sides that can be assembled backwards or upside-down. Some crib designs give the appearance of proper assembly with the drop-side inverted. In this configuration, the drop-side can detach from the crib, possibly creating a dangerous gap that may lead to the entrapment and suffocation of infants. CPSC staff is aware of four deaths where the crib's side was installed upside-down[2]. These deaths included a 6-month-old child, a 7-month old child, a 9-month-old child and a 1-year-old child.

Crib failures can result from a combination of hardware and crib design, which allows consumers to install one or more of a crib's components (a side or mattress support platform) in an incorrect orientation while giving a visual appearance that the crib was assembled correctly and without affecting the crib's first or primary use. In some circumstances, such improper assembly can result in unforeseen stresses on the hardware used to secure that component to the rest of the crib. This may contribute to the component detaching from the crib. When a crib side or the mattress support detaches in one or two corners, it creates a gap that can entrap infants. At the April 1, 2008 ASTM subcommittee meeting on full-size cribs, a requirement for drop sides that are assembled by consumers was proposed by the task group assigned to this matter. The requirement stated that a drop side intended to be installed in a defined orientation must meet one of two conditions:

1. It can only be assembled to the crib in one orientation and function as specified in the instructions, or

[1] The views expressed in this letter are those of the CPSC staff and have not been reviewed or approved by, and may not necessarily represent the views of, the Commission.
[2] 061129HBB2115, 071114HCC1107, 070726CAA3587, and 050615CWE5015

2. If it can be assembled in any other orientation, a label must be provided to clearly indicate the proper orientation.

In order to properly address this hazard, CPSC staff recommends that the requirements proposed by the task group be expanded to include all sides and the mattress support platform and that a third requirement be added as follows:

Crib designs that permit backwards or inverted assembly of the drop sides, stationary sides, mattress support platforms, headboards or footboards, shall pass all applicable performance tests in the misassembled state.

If you have any questions regarding this recommendation, please feel free to contact me. Thank you for your consideration of this important consumer product safety concern.

Sincerely,

Jonathan Midgett, Ph.D.
Directorate for Engineering Sciences

cc: Len Morrissey, ASTM International
Colin Church, CPSC Voluntary Standards Coordinator

CPSC020919

From: Nicholson, Dollie
To: Jim Moore; [redacted]storkcraft.com;
cc: Tarnoff, Howard; Rauchschwalbe, Renae; Woodard, Dean;
Subject: FW: StrkCraft Letter and Poster
Date: Tuesday, November 24, 2009 4:58:06 PM

Jim & Jude,

We have gotten emails from retailers that said they did not receive notice from Stork Craft. This is a bit troubling as we received confirmation from you that all retailers, in particular those that were cited in the press release, had received notification. The retailers that we sent notification letters and posters include:

- Target
- Sears
- Burlington
- Meijer

What actions are you proposing to ensure that ***all retailers*** have or will be officially notified about the recall and receive posters? CPSC investigators have already gone out to several retail stores today and the results have been negative, meaning no notification and no posters up in stores. I'll send you the names and addresses.

Dollie

Dollie W. Nicholson
Compliance Officer
U.S. Consumer Product Safety Commission
Office of Compliance and Field Operations
4330 East West Highway (4th Floor Mailroom)
Bethesda, MD 20814
[redacted]

Jim Moore

From: Nicholson, Dollie [redacted]
Sent: February-25-09 2:15 PM
To: Jim Moore
Cc: Jude Eminace; Rauchschwalbe, Renae
Subject: Recalled Stork Craft Cribs Press Release

Dear Mr. Moore,

Many of the consumers that contact CPSC about the recall tell us that they cannot reach Stork Craft because the lines are constantly busy or the web site is not responding to their requests for replacement brackets. Other consumers state they have not received repair kits even though requests were made when the press release was issued. What is Stork Craft doing to resolve these issues? I am asking Stork Craft to provide a detailed plan of action for what it has done or will be doing to correct these problems.

Two consumers have threatened to tell their stories to the news media. This would be damaging to both CPSC and Stork Craft.

Also, I spoke to Jude two weeks about taking down the Stork Craft Advisory on cribs. The advisory remains on the web site. Please remove the advisory as the wording conflicts with the intent and wording in the press release.

Please email pictures, names and model numbers of fisher-price and storkling logo cribs. And, provide a description of each and the number of cribs distributed from 2000 to present.

Regards,

Dollie Nicholson

Compliance Officer

[redacted]

[redacted]

CPSC023932

From: Edwards, Patricia
To: Tarnoff, Howard;
Subject: RE: Voluntary Crib Standard-- dropsides
Date: Friday, September 25, 2009 11:18:51 AM

In September 2002, Staff (me) wrote a letter to the ASTM subcommittee chair on cribs expressing our concern with the number of hardware related incidents we had seen and asked the subcommittee to step up efforts to address these problems in the standard. Task groups were formed and for 5 years, there was activity in the task groups but it never resulted in any change to the standard. At the March 2007 ASTM meeting, during a discussion of the lack of progress regarding the hardware task groups (raised by me), a manufacturer's representative proposed that abolishing drops sides from cribs should be considered. At that time, there was much opposition to it, mostly due to the unknown – would that create additional hazards.

Six months later, in Sept 2007, I wrote a second letter to ASTM, pointing out that nothing has changed in the standard in the 5 years since I wrote my original letter, and that we continue to see more hardware incidents. I recommended some specific options that could be undertaken, including: ***"eliminate the use of plastic hardware on any moveable component of a crib (drop sides and mattress support systems). An additional consideration, which was posed at the last ASTM crib subcommittee meeting by a participating member, would be to explore ways to amend the standard in order to abolish drop sides from cribs altogether."***

Since that letter, the task groups were taken over by one individual (Dave Campbell) who put considerable effort into trying to develop a test requirement for drops sides. Many laboratories participated, including CPSC. The conclusion was reached that an adequate, reliable and repeatable test procedure was a long way off. At that point, the focus turned toward writing a requirement that would eliminate the common movable drop side on cribs. In the winter of 2008/2009 Bill Suvak (the subcommittee chairman) developed a draft requirement to eliminate drop sides, along with a wood slat strength requirement, and reviewed it with CPSC staff in a closed meeting. This draft was presented for ballot at the March 2009 ASTM meetings and was approved as written. The ballot received a few negatives (from a manufacturer and an inventor of a new drop side hardware system). A supplemental meeting was held in July

CPSC023933

2009 to review the ballot results. The negatives were found to be non-persuasive which means it must go out to ballot again to uphold finding the negatives non-persuasive. That ballot was sent out Aug 27th and votes are due back Sept 27th. Assuming it is upheld, then the new requirement will go forward to ASTM for inclusion in the standard. This typically takes 1 – 2 months to get through the edit, review and approval stages of ASTM. Thus, by the end of the year, I anticipate that it should be part of the ASTM standard.

Patricia L. Edwards

Directorate for Engineering Sciences

Consumer Product Safety Commission

[redacted]

[redacted]

From: Tarnoff, Howard
Sent: Friday, September 25, 2009 10:39 AM
To: Edwards, Patricia
Cc: Tongele, Tongele
Subject: Voluntary Crib Standard-- dropsides

Patty,

Please give me a summary of the effort to modify the voluntary standard for cribs regarding the presence of dropside rails.

Thanks,

Howard

CPSC009182

From: Midgett, Jonathan
To: McLaurin, Hugh;
cc: Ochsman, Robert; Kumagai, Mark; Hackett, Patricia;
Subject: FW: Crib Instruction /Assembly Task Group
Date: Thursday, March 13, 2008 10:27:00 AM

Below is a thread of an ASTM task group that is (supposedly) addressing the fatalities that we saw last year with the Simplicity cribs. The crib drop sides were installed upside down. The task group was not going to form at all, except that Nancy Cowles of Kids in Danger loudly protested and got the subcommittee to form it. The task group is headed by Jerry Drobinski of Revmark and Ken Waldman of Simplicity.

Their approach has been freakish in its insistence that the instructions of cribs are at fault. This only makes sense if you know that you don't want to change any of the shapes of your crib hardware and would rather blame the consumer. I tried to gently suggest the best course of action in my email below. The response from Drobinski is evasive and just outright wrong. Since then, the committee has been gathering instructions, but has not scheduled a conference call or done **anything else**, which in my opinion is blatant malingering.

I am drafting a letter to ASTM to explain exactly what needs to be done to prevent this hazard from occurring again. It is totally easy to do and will not cost much. If they don't adopt our recommendation, I believe we have a case for rulemaking.

Thank you all for your kind support,
jonathan

From: JJDSKI [redacted]
Sent: Mon 11/19/2007 1:42 PM
To: Midgett, Jonathan; [redacted]kidsindanger.org; [redacted]babyappleseed.com; [redacted]babysdream.com; [redacted]bassettfurniture.com; [redacted]jardco.com; belliniwest[redacted]childcraftindustries.com; [redacted]deltaenterprise.com; [redacted]dddllc.com; [redacted]evenflo.com; [redacted]innovativecribdesigns.com; [redacted]lajobi.com; etoiledesigns[redacted] [redacted]nettocollection.com; [redacted]nurseryworks.net; [redacted]domusindo.com; [redacted]storkcraft.com; [redacted]westwoodbaby.com; [redacted]stanleyfurniture.com; [redacted]
Cc: [redacted]deltanyc.com; Hackett, Patricia; [redacted]alm.com; [redacted]memo.ikea.com; [redacted] Dreamonme[redacted]consumer.org; [redacted]lockerlaw.com;

CPSC009163

[redacted]intertek.com; [redacted]reinerinc.com;
[redacted]simplicityforchildren.com
Subject: Re: Crib Instruction /Assembly Task Group

Jonathan,

I and co-chair Ken Waldman agree with what you and Nancy are saying. But we think we need to start with the instruction sheet and build from there. To be sure, some of the things you are suggesting are already being done and/or can easily be incorporated. Once we can agree to a format for the instruction sheet and make it uniform, we can recommend addition of some identifiers to the crib that would help assembly. One of the MOST important parts is to make sure we do not make these too wordy and confuse the customer. Also, adding warning is NOT the answer, in fact, we should narrow down the warnings, so that the customer will read them.

Jerry

In a message dated 11/19/2007 10:12:08 A.M. US Mountain Standard Tim, JMidgett[redacted].

> Nancy makes an erudite point.
> Human factors psychologists would say that the best way to prevent misassembly is to limit the consumer's ability to put parts in the wrong place. For instance, changing the shape of part-to-part interconnections so that they can only fit in a single orientation, like a key, is extremely effective. This would be the first choice solution.
> Second choice would be to place unpleasantly textured or colored surfacing on the bottom rail so that consumers intuitively recognize that side should face the floor, out of view. An ugly orange stripe with tire treads along the bottom of the rail would help.
> The third choice would be to put a label that says, "This side down!" on the bottom of the rail.
> The least effective strategy is to modify the instructions or to create a list of warnings.
>
> jonathan
>
> ---
>
> **From:** Nancy A. Cowles [redacted]
> **Sent:** Mon 11/19/2007 10:37 AM
> **To:** JJDSKI[redacted] [redacted] [redacted]babyappleseed.com; [redacted]babysdream.com; [redacted]bassettfurniture.com; [redacted]jardco.com; bellniwest[redacted] [redacted]childcraftindustries.com; [redacted]deltaenterprise.com; [redacted]

CPSC009164

[redacted]evenflo.com; [redacted]innovativecribdesigns.com; [redacted]lajobi.com; etoiledesigns[redacted]nettocollection.com; [redacted]nurseryworks.net; [redacted]domusindo.com; [redacted]storkcraft.com; [redacted]westwoodbaby.com; [redacted]stanleyfurniture.com; [redacted]
Cc: Midgett, Jonathan; [redacted]deltanyc.com; Hackett, Patricia; [redacted]memo.ikea.com; [redacted]Dreamonme[redacted]consumer.org; [redacted]lockerlaw.com; [redacted]intertek.com; [redacted]reinerinc.com; [redacted]simplicityforchildren.com
Subject: RE: Crib Instruction /Assembly Task Group

I don't mean the assembly instructions, I mean how the crib parts are manufactured and labeled to avoid putting it together wrong – for instance, so that the side rails cannot be attached if they are upside down through design and hardware, not just instructions.

Nancy A. Cowles
Executive Director
Kids In Danger
116 W. Illinois, Suite 5E
Chicago, IL 60610
www.KidsInDanger.org
[redacted]

Kids In Danger is a nonprofit organization dedicated to protecting children by improving children's product safety. Learn more at www.KidsInDanger.org.

Raise money for Kids In Danger by searching the Internet or shopping online with GoodSearch - www.goodsearch.com - powered by Yahoo!

From: JJDSKI[redacted]
Sent: Monday, November 19, 2007 9:36 AM
To: [redacted]kidsindanger.org; [redacted]babyappleseed.com; [redacted]babysdream.com; [redacted]bassettfurniture.com; [redacted]jardco.com; belliniwest[redacted]childcraftindustries.com; [redacted]deltaenterprise.com; [redacted]evenflo.com; [redacted]innovativecribdesigns.com; [redacted]lajobi.com; etoiledesigns[redacted]nurseryworks.net; [redacted]domusindo.com; [redacted]storkcraft.

CPSC009165

[redacted]westwoodbaby.com; [redacted]stanleyfurniture.com;
[redacted]
Cc: jmidgett[redacted] [redacted]deltanyc.com;
[redacted]cpsc.gov; [redacted] [redacted]memo.ikea.com;
[redacted] Dreamonme[redacted]
[redacted]consumer.org; [redacted]lockerlaw.com; [redacted]
[redacted]intertek.com; [redacted]reinerinc.com;
[redacted]simplicityforchildren.com
Subject: Re: Crib Instruction /Assembly Task Group
Nancy,
Generally instruction sheets include assembly instructions.
Jerry
In a message dated 11/19/2007 8:16:47 A.M. US Mountain Standard Time, [redacted]writes:

> Jerry,
> Again, I thought that the task of the group was broader – to also consider assembly of the product - -maybe looking at ways to prevent incorrect assembly. This might involve performance standards or labeling in addition to the instructions.
> Nancy
> Nancy A. Cowles
> Executive Director
> Kids In Danger
> 116 W. Illinois, Suite 5E
> Chicago, IL 60610
> www.KidsInDanger.org
> [redacted]
> [redacted]
> Kids In Danger is a nonprofit organization dedicated to protecting children by improving children's product safety. Learn more at www.KidsInDanger.org.
> Raise money for Kids In Danger by searching the Internet or shopping online with GoodSearch - www.goodsearch.com - powered by Yahoo!
>
> **From:** JJDSKI[redacted] [redacted]
> **Sent:** Monday, November 19, 2007 12:05 AM
> **To:** [redacted] [redacted]babyappleseed.com;
> [redacted]babysdream.com; [redacted]bassettfurniture.com; [redacted]
> [redacted]jardco.com; belliniwest[redacted]
> [redacted]childcraftindustries.com; [redacted]deltaenterprise.com;

CPSC009166

[redacted] [redacted]evenflo.com; [redacted] [redacted] [redacted]innovativecribdesigns.com; [redacted]lajobi.com; etoiledesigns[redacted] [redacted] [redacted]nettocollection.com; [redacted]nurseryworks.net; [redacted]domusindo.com; [redacted]storkcraft.com; [redacted]westwoodbaby.com; [redacted]stanleyfurniture.com; [redacted]

Cc: jmidgett[redacted] [redacted]kidsindanger.org; [redacted] [redacted]eltanyc.com; [redacted]cpsc.gov; [redacted] [redacted]memo.ikea.com; [redacted] Dreamonme[redacted] [redacted]consumer.org; [redacted]lockerlaw.com; [redacted] [redacted]intertek.com; [redacted]reinerinc.com; [redacted]simplicityforchildren.com

Subject: Crib Instruction /Assembly Task Group

All,

At the last ASTM Meeting Session for Cribs, it was decided that a task group would be formed to make recommendations for standards modifications which would lead to improved instructions. This task was undertaken since, due to the analysis of IDI data provided by CPSC, it was determined that a significant number of incidents involved cribs which were incorrectly assembled by consumers.

You are receiving this correspondence because you are identified as the contact person for the JPMA program

In order to have a bank of information for comparisonson, we are requesting that all of the manufacturers involved in the JPMA Certification Program forward to us one or more examples of the instructions they are currently using. It would be preferred that the instructions could be forwarded in PDF format to make distribution to the task group more efficient. In addition to your instruction/assembly information, if you have any suggestions or comments in the area of assembly, we would be grateful for that input as well.

Thank you in advance for your cooperation.

Jerry Drabinski

CPSC009167

Jerry Drobinski
Co-chair of Task Group
Phone: [redacted]
Fax: [redacted]
Phone - [redacted]
[redacted]

15000 Commerce Parkway, Suite C
Mt. Laurel, NJ 08054
856-638-0420
jpma@atlint.com
www.jpma.org

JPMA Certification Program and ASTM Standards

FREQUENTLY ASKED QUESTIONS

How many juvenile products are currently certified through the JPMA Certification Program?
Approximately 2,000

How long does a certification last?
Until the company chooses to leave the program or if they no longer pass the testing.

Do companies have to renew each year?
Yes, companies must renew each year to continue participation in the program.

How often are products re-tested?
There are quarterly testing requirements for the program. Each product model has to be tested at least once a year through the quarterly testing. Also, the program includes random retail testing where the test lab will purchase the product at the retail level and test the product. This is in addition to the quarterly testing.

Why would a company not want to certify their product?
Sometimes they can't get certified because there is not a program for that type of product category.

What product categories are available for JPMA Certification?

Currently there are 20 product categories in the JPMA Certification Program: bassinets/cradles, bath seats, booster seats, carriages and strollers, changing tables, children's folding chairs, frame infant carriers, full-size cribs, gates and enclosures, hand-held infant carriers, high chairs, infant bouncers, infant swings, play yards/non-full size cribs, portable bed rails, portable hook-on chairs, soft infant carriers, stationary activity centers, toddler beds, and walkers. JPMA is currently working on adding commercial cribs and infant bath tubs to the program.

Why doesn't JPMA offer more categories?
The development of a certification program for a product is based upon several factors. JPMA adds new categories to the certification program as new standards are developed by ASTM. The development of standards is typically driven by incident data provided by the CPSC. If there is data which demonstrates performance or safety issues with a product, ASTM will facilitate the establishment of a standard.

Is the certification international or domestic only?
The products are tested to U.S. standards.

Is the whole line of strollers etc. certified or just those that were tested?
If a manufacturer wants to participate in the carriage/stroller certification program, then all of their carriage/stroller models must be tested and pass the ASTM standard prior to certification being granted.

Why are car seats not part of the certification program?
All car seats manufactured today must be designed to meet stringent safety standards set by the Federal government. In fact, child restraints sold in the United States are required to satisfy the rigorous performance standards established by the National Highway Traffic Safety Administration (NHTSA), and are certified by their manufacturers as compliant before they can be offered for sale.

What does "ASTM standard" mean?
The testing is done to voluntary standards that are developed and published by ASTM International (formerly The American Society for Testing and Materials). Participants in the development of standards for juvenile products within ASTM include representatives from the federal government, including the Consumer Product Safety Commission, along with manufacturers, retailers, test labs, consumer advocate groups, and individual consumers.

How are the ASTM standards developed?
The ASTM standards are developed for juvenile products based on hazard data, which provides each of the subcommittees insight into how the products are used by consumers and, in some cases, misused. Some products even have comprehensive federal mandatory standards that all manufacturers of those specific products must meet in order for the products to be sold in the U.S. Each standard's requirements are specific to the individual product. The testing

requirements reflect "real world" injuries and are intended to address typical use as well as reasonably foreseeable abuse of the product(s).

For example, the following are some requirements incorporated into ASTM standards for cribs that go beyond mandatory federal requirements of full-size baby cribs (16 C.F.R. 1508), and non-full-size baby cribs (16 C.F.R. 1509):

- Cribs
— Corner post vertical extensions
— Dynamic impact testing for crib structural integrity
- Crib interior dimensions and component spacing
Impact testing of crib side rails

In addition, each of the standards contain specific requirements for labeling and marking of both the product and packaging. These warnings/markings are intended to alert parents/caregivers to specific issues involving each product.

What is the process for developing or revising an ASTM Standard?
ASTM subcommittees are responsible for the development and/or revision of an ASTM standard. The subcommittees via meetings and appointment of task groups work on the requirements included in the standard. Proposals are sent out to ballot to ASTM members to vote on and then those comments are considered by the subcommittee and either included in the standard or it is determined that additional work needs to be done. ASTM subcommittees include representatives from the federal government, including the Consumer Product Safety Commission, along with manufacturers, retailers, test labs, consumer advocate groups, and individual consumers and must have a balance of official voting members.

Has there been any indication that voluntary standards work?
Yes, in fact, in a 2007 Senate hearing on the reauthorization of the U.S. Consumer Product Safety Commission (CPSC), authorities cited an 84% and 89% reduction in fatalities and injuries due to the establishment and effectiveness of ASTM Standards for baby walkers and cribs, respectively.

If the standards work, then how can a JPMA Certified product be recalled?
When products are tested, they are assembled and used in accordance with the manufacturers stated intent as embodied in the assembly and use instructions. If the instructions are not followed, risks associated with use of any product may be exacerbated. Not all recalls occur because of a violation of a regulation or product standard. In addition, recalls do not account for certain factors typically not measurable in a lab, such as wear and tear over time.

To alleviate confusion that is in the media regarding the recently announced recall of certain drop-side cribs, the Juvenile Products Manufacturers Association (JPMA), the not for profit trade association that promotes infant safety and the development of recognized ASTM International product safety standards, reassures the public regarding the safety of properly used, drop side cribs.

All new cribs on the market today must meet minimum government requirements. In addition, there are consensus performance standards, which are established by ASTM with involvement of the government and recognized experts, to which JPMA certifies cribs and other durable infant products. JPMA also reminds parents and care givers, that when you assemble a crib to the manufacturer's instructions and use it properly, a crib provides the safest sleeping environment for baby.

Recent media reports notwithstanding, cribs are intended to last for years (or multiple births) when properly cared for. Crib instructions which are attached to cribs include information on assembly, maintenance, cleaning, storage and use.

"JPMA believes that instead of alarming parents, we should work together to educate them about the importance of the proper use, assembly and reassembly of cribs and how to provide the safest sleep environment for a child," said Mike Dwyer, JPMA Executive Director. "The safest place for a child is in a fully functional, properly assembled crib. Parents are urged to closely inspect the hardware and stability of their cribs to ensure all parts are in place and secure when assembling and re-assembling cribs."

Each year hundreds of deaths occur when children are placed in a sleep environment that is not specifically designed for children. Parents should continue using properly assembled cribs in good condition as it provides the safest sleep environment for children.

JPMA suggests the following safety tips to sustain the proper lifespan of your crib:

- Parents should not use any crib with missing, broken or loose hardware parts. Crib slats or spindles should be spaced no more than 2 3/8 inches apart, and none should be loose or missing. Also NEVER use a crib with corner posts over 1/16 of an inch above the end panels (unless they're over 16 inches high for a canopy).

- NEVER place infants to sleep on pillows, sofa cushions, adult beds, waterbeds, beanbags, or any other surface not specifically designed for infant sleep. NEVER place the crib near windows, draperies, blinds, or wall mounted decorative accessories with long cords.

- When using a drop side crib parents and care givers should check to make sure the drop side or any other moving parts operate properly. Parents should be sure that hardware is installed properly. When assembling and disassembling drop side cribs, parents should always confirm that the parts are reassembled following the manufacturers guidelines as listed in the instructions.

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15000 Commerce Parkway, Suite C Mt. Laurel, NJ 08054 856.638.0420 856.439.0525
Email: jpma@jpma.org Web site: www.jpma.org

Additional safety tips to sustain the proper lifespan of your crib:

- Always check all sides and corners of the crib to assure proper assembly with no openings that may entrap a child. The crib mattress should fit snugly with no more than two fingers width, one-inch, between the edge of the mattress and the crib side. Otherwise, the baby can get trapped between the mattress and the side of the crib.

- Do not try to repair any side of the crib without manufacturer approved hardware.

- Putting a broken side up against the wall does not solve the problem and can often make it worse.

JPMA is pleased to note that the Consumer Product Safety Commission (CPSC) recognizes the importance of urging parents and caregivers to closely inspect the hardware and stability of their cribs to ensure all parts are in place and secure when assembling and re-assembling cribs.

Recent recalls of juvenile products highlights the importance of proper assembly and use of cribs. Many older cribs do not meet all current safety standards. Even if you are on a tight budget, you should not purchase an old crib at a garage sale or accept a hand-me-down crib that may not meet current Federal and ASTM standards.

For additional tips on how to keep baby safe, including a list of JPMA Certified cribs, please visit www.jpma.org .

"We are all committed to making sure that baby's sleep environment is as safe as possible," said Amy Chezem, JPMA Communications Director and mother of two. "We have consistently promoted safe sleeping practices and the importance of ensuring proper assembly and use of products that have long provided the safest place to sleep for babies."

The Juvenile Products Manufacturers Association is a national trade organization of more than 250 companies in the United States, Canada, and Mexico. JPMA exists to advance the interests, growth, and well-being of North American prenatal to preschool product manufacturers, importers, and distributors marketing under their own brands to consumers. It does so through advocacy, public relations, information sharing, product performance certification, and business development assistance conducted with appreciation for the needs of parents, children, and retailers.

For more information, please visit www.jpma.org.

# # #

To alleviate confusion that is in the media regarding the recently announced recall of certain drop side cribs, the Juvenile Products Manufacturers Association (JPMA), the not for profit trade association that promotes infant safety and the development of recognized ASTM International product safety standards, provides answers to some frequently asked questions by parents and caregivers.

Question 1 of 3:
As a parent or care giver, should I discontinue use of my drop side crib?

Answer:
As long as they are properly assembled, full functional and not subject to a recall, drop side cribs can be safely used.

If you own a Stork Craft crib that is part of the recall announced on November 24, 2009, we strongly recommend that parents follow corrective action of the company (Stork Craft) and the CPSC relative to this recall. For additional information, contact Stork Craft toll-free at (877) 274-0277 or log on to www.storkcraft.com.

Parents can be confident that **properly assembled fully functional cribs, that are not part of a recall**, that are in good condition are safe for use and provide the safest sleep environment for children. This recall highlights the importance of periodically checking the hardware on your crib for any loose or broken parts and to make sure all fasteners and screws are tight. Parents are also urged to closely inspect the hardware and stability of their cribs to ensure all parts are in place and secure when assembling and re-assembling cribs.

Question 2 of 3:
What should I inspect on my drop side crib?

Answer:
When using a drop side crib parents and care givers should check to make sure the drop side or any other parts are not missing or damaged and that they operate properly. Parents should be sure that hardware is installed properly. When assembling and disassembling drop side cribs, parents should always confirm that the crib is reassembled following the manufacturer's instructions. Instructions are attached to all cribs when sold; if they are missing, contact the manufacturer for a replacement copy.

Question 3 of 3:
Should I stop using a properly working drop side crib?

Answer:
No. The safest place for a child is in a fully functional, properly assembled crib that is not part of a recall that is in good condition as it provides the safest sleep environment for children. This is true for ALL cribs. Each year hundreds of deaths occur when children are placed to sleep in an environment that is not specifically designed for them. Many times more infants die each year when they are placed in unsafe sleep environments.

NEVER place infants to sleep on pillows, sofa cushions, adult beds, waterbeds, beanbags, or any other surface not specifically designed for infant sleep. NEVER place the crib near windows, draperies, blinds, or wall mounted decorative accessories with long cords.

JPMA reminds parents and care givers, that when you assemble a crib to the manufacturer's instructions and use it properly, a crib provides the safest sleeping environment for baby.

About JPMA
The Juvenile Products Manufacturers Association is a national trade organization of more than 250 companies in the United States, Canada, and Mexico. JPMA exists to advance the interests, growth, and well-being of North American prenatal to preschool product manufacturers, importers, and distributors marketing under their own brands to consumers. It does so through advocacy, public relations, information sharing, product performance certification, and business development assistance conducted with appreciation for the needs of parents, children, and retailers. Each year, JPMA sponsors Baby Safety Month in September. JPMA initiated Baby Safety Month to educate parents and caregivers on the importance of the safe use and selection of juvenile products.

For more information, please visit www.jpma.org. For additional information regarding product recalls, please visit www.cpsc.gov.


CERTIFIED

Stork Craft Manufacturing, Inc.'s Position Paper
Re: CPSC File No. CA 090072; Stork Craft Cribs that Contain Plastic Drop-Side Hardware

I. No Defect Exists with Stork Craft's Cribs which Contain Plastic Drop-Side Hardware

A defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. 16 CFR § 1115.4. Defects may be the result of a manufacturing or production error, or they may arise from misuse or incorrect operation of the product. *Id.* The CPSC has recognized that not all products that present a risk of injury are defective. *Id.* In determining whether a risk of injury associated with a product could make the product "defective", the Commission has set forth a number of factors which it considers including the case law in the area of products liability and other information that sheds light on the product and patterns of consumer use.

Case law does not require that a product be accident-proof or incapable of doing harm. *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 101 U.S. App. D.C. 32 (1957). It would be unreasonable to require that a manufacturer warn or protect against every injury which may result from the use of its product. *Id.* In fact, no state imposes a duty on the manufacturer to make its product accident proof or foolproof. *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802, 804 (1950).

With regard to products liability, courts have concluded that a seller is required to manufacture a product that is not unreasonably dangerous when used for a purpose and in a manner that is reasonably foreseeable and that if the product is not unreasonably dangerous when used for a purpose and in a manner that is reasonably foreseeable, it is not defective, and the seller will not be liable. *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 596-98, 495 A.2d 348 (1985). When applying a "foreseeability" test, courts must be extremely careful because, with the benefit of hindsight, any accident could be foreseeable. *Id.* One court concluded that without care, the imposition of strict products liability could result in a manufacturer's becoming an insurer for every injury that may result from its product. *See, e.g., Phipps v. General Motors Corp.*, 275 Md. 337, 363 A.2d 955 (1976).

In the present case, Stork Craft has been made aware of fifteen incidents by the CPSC. Of those fifteen incidents, seven resulted in no injury, four resulted in bruising and minor injuries not requiring hospitalization, and four resulted in death. Thus, the majority of complaints resulted in no injury or minor injuries that were treated at home. Furthermore, in two of the four incidents resulting in death, it is unclear whether the hardware failed or was loose before or after the incident. Furthermore, in one of the other incidents resulting in death, the consumer installed the drop side rail upside down, with a broken claw and a missing screw.

Furthermore, with respect to one specific instance where a plastic claw was retained by the consumer and tested by Stork Craft, it was determined that the deformation on one side of the claw caused by stress was the result of isolated human error in manufacturing. *See* Expert Report of Dr. Marek Gnatowski. Dr. Gnatowski opined that injection molded parts are taken hot from the mold to reduce manufacturing time and increase productivity and can be easily

damaged or deformed during removal from the mold. *Id.* Dr. Gnatowski found that the deformation of this particular claw was consistent with this type of manufacturing deficiency. *Id.* This type of human error during the injection molding process of the plastic claw is impossible to eliminate 100% in manufacturing. *Id.*

II. No Substantial Hazard Exists with Stork Craft's Cribs which Contain Plastic Drop-Side Hardware

The Commission defines a "substantial product hazard" as either (1) a failure to comply with an applicable consumer product safety rule under the Act or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. 15 U.S.C. § 2064(a).

Section 15(a)(2) of the CPSA lists the following factors to be considered in determining whether a defect creates a substantial risk of injury:

(i) "Pattern of defect: The Commission and the staff will consider whether the defect arises from the design, composition, contents, construction, finish, packaging, warnings, or instructions of the product or from some other cause and will consider the conditions under which the defect manifests itself.

(ii) Number of defective products distributed in commerce. Even one defective product can present a substantial risk of injury and provide a basis for substantial product hazard determine under section 15 of the CPSA if the injury which might occur is serious and/or if the injury is likely to occur. However, a few defective products with no potential for causing serious injury and little likelihood of injuring even in a minor way will not ordinarily provide a proper basis for a substantial product hazard determination.

(iii) Severity of the risk. A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped).

(iv) Other considerations. The Commissions and the staff will consider all other relevant factors."

16 C.F.R. § 1115.12(g).

In the present case, the fifteen incidents cited by the Commission allegedly arise from the sale of cribs with plastic drop side hardware manufactured by Stork Craft from 1993 to the present. During that time, approximately 2,187,526 Stork Craft cribs with plastic drop side hardware were sold. Thus, looking at the total number of cribs with plastic drop side hardware

sold and the number of investigative incident reports prepared by the Commission, the percentage of Stork Craft cribs allegedly involved in an incident is .00000686%. Stork Craft's US sales can only be determined from 2003 to the present. During that time, Stork Craft sold 810,179 cribs with plastic drop side hardware in the US. Even if we assume that all fifteen incidents investigated by the Commission were manufactured between 2003 and the present (when there is evidence that suggests at least two of the cribs were manufactured before 2003), the percentage of cribs allegedly involved in an incident is .00001851%.

With regard to the severity of the risk, while the Commission investigated four incidents that resulted in death, the majority of the alleged incidents involved no injury at all. Furthermore, the Commission specifically states that it takes into account **the intended or reasonably foreseeable use or misuse of the product.** In two of the four incidents resulting in death, it was unable to be determined whether the hardware had failed or was loose before or after the incident. Furthermore, in one of the other incidents resulting in death, the consumer had installed the drop side rail upside down, with a broken claw and a missing screw. Clearly, these consumers misused the product – by not tightening the screws and hardware and by installing the hardware upside down with broken and missing pieces.

It is absolutely unreasonable to expect Stork Craft to reasonably foresee that a consumer would install the drop side rail upside down, or to expect that a consumer would use broken pieces or allow use of the crib with missing pieces or without properly tightening all of the pieces. Furthermore, as discussed above, the pattern of defect and other considerations such as case law in the area of products liability demonstrate that Stork Craft's cribs do not pose a substantial hazard. Thus, based on an analysis of the factors that the Commission considers, Stork Craft cribs do not pose a substantial hazard.

III. No Imminent Hazard Exists with Stork Craft's Cribs which Contain Plastic Drop-Side Hardware

The CPSC has defined an imminently hazardous product as one "which presents imminent and unreasonable risk of death, serious illness, or severe personal injury." 15 U.S.C. § 2061(a). By way of example, in May 1985, the CPSC published an Advance Notice of Proposed Rule Making concerning three and four wheeled ATVs due to a number of deaths and injuries involving that product. *See* 50 Fed. Reg. 23,1139 (May 31, 1985). In addition, the Commission sought to have ATVs declared an "imminent hazard". *Id.* at 23,142-43. The Commission cited 161 deaths associated with ATVs during a three-year period and 66,956 ATV-related injuries treated in hospital emergency rooms in one year alone. *Id.* at 23,139-40. Subsequent to the Commission filing an imminent hazard lawsuit or a mandatory recall, Honda Motor Company and the Commission reached a Final Consent Decree, which focused on additional warnings to be given to the consumer.

For all of the reasons stated above, Stork Craft cribs containing plastic drop side hardware are not imminently hazardous. Looking at the total number of cribs with plastic drop side hardware sold and the number of investigative incident reports prepared by the Commission, the percentage of Stork Craft cribs allegedly involved in an incident is .00000686%. In addition, the majority of the complaints investigated by the Commission resulted in no injury. The complaint against Honda Motor Company, however, was due to an alleged 161 deaths during a

three-year period associated with the use of its ATVs and nearly 67,000 injuries requiring treatment at a hospital in one year alone. By comparison, Stork Craft cribs cannot and do not pose an imminent hazard.

Timeline for Stork Craft, CPSC File #CA090072

1/09 Stork Craft Mattress Support Bracket Recall - In January 2009, staff was concentrating on the mattress support bracket pattern of defect associated with Stork Craft cribs. Specifically, CPSC and Stork Craft announced the recall of 532,000 units in January 2009. The company offered replacement mattress support brackets approved by technical support staff. This release was re-issued in April 2009 to include 92,000 Fisher-Price cribs.

04/24/09 Emailed to Stork Craft IDI Report 090304HCC2424 ("non-injury" incident that occurred in 2/09) that demonstrated broken lower track and drop-side detachment. Stork Craft had collected the broken claws from the consumer for evaluation.

05/06/09 EWS meeting in which technical staff expressed concern that hardware may be similar to Simplicity hardware.

05/06/09 Staff sent an email to Stork Craft advising them to stop sale of drop-side cribs. Stork Craft's response was that crib hardware was not similar to Simplicity. Staff responded back to Stork Craft to say it would send Stork Craft all IDI reports on drop-side detachments.

05/20/09 Telephone discussion with Stork Craft regarding staff's request to stop sale of Stork Craft cribs. Stork Craft asked staff to retract request to stop sale of drop-side cribs because CPSC technical staff had not evaluated hardware. Request on hold. Stork Craft agreed to send staff Stork Craft's technical reports on drop-side hardware.

06/23/09 New Iberia, LA incident involving the death of a 7-month-old Caucasian male on 5/26/09 that became entrapped in the space between the crib and drop-side. The Stork Craft crib was installed upside-down and the claw was broken.

06/25/09 Staff emailed death report to Stork Craft.

06/25/09 Compliance staff met with OGC staff to review IDIs involving prior deaths with Stork Craft cribs.

City/State	Age	Death Dates	Ethnicity	Crib Type
Bronx, NY	9 month old male	4/10/01	African- American	Fisher-Price
Summerville, WV	6 month old male	1/16/07	Caucasian	Stork Craft
Gouverneur, NY	7 month old female	5/01/07	Caucasian	Stork Craft

06/25/09 Staff issued assignment to field to complete IDI on New Iberia, LA incident.

07/01/09 Staff telephoned Stork Craft requesting broken claws (from IDI 090304HCC2424) be sent for CPSC technical evaluation.

07/10/09 Receipt of consumer claws and brackets from Stork Craft (regarding IDI 090304HCC2424).

07/28/09 PSA request submitted to evaluate claws and brackets and compare Stork Craft plastic drop-side hardware to Simplicity plastic drop-side hardware.

08/10/09 ESME PSA 0866.09 completed. ES staff determined that the predominate failure mode was drop-side disengagement where the drop-side separated from the rest of the crib at one or more corners. The probable causes of the drop-side disengagements include broken plastic parts, drop-sides installed upside-down, stripped/missing screws, deformed plastic parts, missing metal springs, deformed mattress support brackets and undetermined causes.

In addition, ES staff compared Stork Craft hardware with the Simplicity hardware and determined that the designs are fundamentally the same in shape and function. They have the same mechanical elements (stopper, tab, metal spring insert), the manner of operating the drop-sides to lower and upper positions is identical, and they have some of the same failure modes as seen in the IDIs.

08/20/09 CA090072 Stork Craft case opened in Section 15 data base on plastic drop-side hardware.

09/02/09 Stork Craft case opening letter dated, faxed, and certified mailed.

09/03/09 Assigned Limited Inspection (LI) at Stork Craft Manufacturing USA, Inc. in Bellingham, WA (See 090903CRC1583).

09/24/09 Stork Craft agreed to meet with the CPSC staff on 10/05/09.

09/25/09 Strategy meeting with Chairman staff and Cherly Falvey, Howard Tarnoff, Gib Mullan, Marc Shoem, Dean Woodard, and Dollie Nicholson

09/25/09 CA090087 opened with Fisher-Price.

09/25/09 PSA 1076.09 assigned to Human Factors. Focus of the PSA was to evaluate the old and new crib instructions to determine if the instructions did or did not adequately warn consumers about and to prevent the improper installation of drop-sides upside down.

09/28/09 Fisher-Price case opening letter faxed and certified mailed.

09/28/09 PSA 1076.09 completed.

09/29/09 Stork Craft submitted its Full-Report.

09/30/09 Incident data spreadsheet prepared which integrated all reported USA incidents with reported Canadian incidents.

10/02/09 Pre-meeting - CPSC staff met to prepare for Stork Craft meeting on 10/05/09. Pre- preliminary determination discussions.

10/05/09 CPSC and Department of Justice staffs met with Stork Craft (Jim Moore, President, Jude Emnace, COO; and, outside attorney [redacted] and paralegal, [redacted]. Stork Craft agreed to voluntarily recall all drop-side cribs manufactured with plastic trigger and one-hand hardware systems. The recall will also include cribs manufactured with the Fisher-Price logo. The recalled cribs would have dates of manufacture and distribution between 1993 and October 2009.

Stork Craft presented for staff review a prototype deigned to immobilize the drop-sides on cribs with one-hand hardware. The prototype design was not applicable to trigger hardware cribs; therefore, Stork Craft understood that it had to come up with a fix for those cribs as well.

10/06/09 Evaluation of prototype 1 – This was not a good fix.

10/07/09 Telephone Conference Meeting – Stork Craft and the staff. Stork Craft agreed to immediately stop sell of 35,000 crib units in stock. Notification to online buyers of a "0" inventory was completed by Jim Moore. Stork Craft will do the VNR and will brief Health Canada about the recall and stop sale. Discussions of prototype evaluation – This was not a good fix. ES and HF went over possible solutions to drop-sides. Stork Craft concurred. Stork Craft will be sending in a second prototype for evaluation.

10/09/09 Staff approved the 2nd version"fix" for one-hand hardware system drop-side cribs.

10/09/09 Stork Craft submits draft press release. Negotiation of the press release begins.

10/09/09 Stork Craft briefed Health Canada on the voluntary recall of its drop-side cribs. Health Canada received diagrams of the proposed retrofit kit for evaluation by its engineers.

10/13/09 Fisher-Price submitted its Full-Report.

10/14/09 Received limited inspection report from field staff.

10/21/09 Received 1st draft of retrofit instructions from Stork Craft.

10/30/09 Approval given from the staff to Stork Craft for the one-hand system fix.

11/05/09 Staff approved instructions for one-hand hardware system.

11/05/09 Draft press release emailed to Fisher-Price.

11/05/09 CPSC staff provided feedback to Stork Craft on 1st draft of instructions for retrofit.

11/12/09 Fisher-Price comments received.

11/13/09 OIPA includes Fisher-Price comments. Revised press release emailed to Health Canada, Stork Craft & Fisher-Price. Issuance of release date changed to 11/24/09. Stork Craft, Fisher-Price and Health Canada agree on date.

11/16/09 Received updated instructions that addressed all of the staff's comments.

11/17/09 Staff drafts poster and retailer letter.

11/18/09 Staff approved the "fix" for trigger hardware system drop-side cribs.

11/18/09 **Final Clearance** - Stork Craft, Fisher-Price & the staff agree on the joint press release and clearance proceedings start.

11/18/09 Draft poster and retailer letter emailed to Stork Craft & Fisher-Price.

11/19/09 Stork Craft & Fisher-Price comments incorporated into poster and letter.

11/20/09 Staff accepts poster and letter for distribution to retailers.

11/23/09 Public Affairs purchased satellite feed time for VNR.

11/23/09 Stork Craft issued notification letters and posters to retailers.

11/23/09 Press release issuance date changed from 11/24/09 to 11/23/09 due to unforeseen circumstances. Health Canada & Fisher-Price notified via emails. Stork Craft was notified via telephone by managers within the Office of Compliance & Field Operations.

11/25/09 Accept CAP letter faxed to Stork Craft.

12/02/09 Fisher-Price web site notification posted.

CPSC001550

TO: File

FROM: Dollie Nicholson
Compliance Officer

DATE: October 22, 2008

SUBJECT: Closed Meeting with Stork Craft

Jude Emnace, Chief Operating Officer, met with CPSC staff today. Mr. Emnace presented an overview of Stork Craft's business structure. He discussed the company's commitment to making safe and reliable cribs to its customers and purchasers. The company takes exception to allegations that the brackets currently installed on Stork Craft cribs are defective.

Metal mattress support brackets were originally manufactured in Canada and installed on Stork Craft cribs from 1994 through 1999. In 1999, Stork Craft stopped producing brackets in Canada. In early 2007, Stork Craft closed the Canada plant and sold its machinery.

According to Emnace, the factory in China started manufacturing the brackets subject to CA080066 in 1999 to present; while the installation of brackets on Stork Craft cribs started in 2000.

Stork Craft has one primary supplier in China that builds parts, test and inspects the cribs and boxes them up. Since March 2000, approximately 1 million crib units were sold with the currently installed hardware system. The prototype crib was tested 44 lbs @ 150 cycles and passed all crib test requirements.

Emnace reported that Stork Craft received a total of four incidents regarding the brackets. Three of the four incidents involved 1 of 4 brackets breaking into 2 pieces. In one of these incidents a 22-month-old male became entrapped in the gap created between the mattress corner and drop side. All three incidents involved the Heather Stages crib (Model 04588-478 and 321) with manufacture dates 7/06, 1/31/07 and 4/07. The Aspen crib was involved in the other crib model (date of manufacture unknown).

To correct the problem of brackets breaking, Stork Craft decided to take the following approach:

1. Reduce flexibility of the bracket's base by increasing the thickness of the brackets, thereby reducing stress points on the brackets. Jude submitted four redesigned units for staff assessment (see sample #09-302-0424);
2. Develop a crib assembly poster and insert in inside crib packages. The poster could be hung on walls as a reference point for consumers;

3. Stork Craft has started the elimination of drop-side cribs to be replaced with stationary side cribs. Emnace did not give a date for when the elimination process started nor when all drop-side cribs would be totally phased out. According to Emnace, Stork Craft has convinced Wal-Mart to sell Stork Craft stationary side cribs.

Patty Hackett, Engineer strongly recommended that Stork Craft recall its drop-side cribs due to mattress support bracket failure and provide replacement brackets as a remedy to consumers. Staff stressed to Emnace the importance of Stork Craft being proactive by offering the new brackets to consumers primarily because of staff's failing test results on the brackets and IDI/incident reports. Staff was certain to see additional consumer complaints of bracket failures. Emnace stated that it was impossible for a child to become wedged in the gap as demonstrated in IDI 080201HCC3397. He also said that because there have been no injuries, the brackets were not defective. Emnace said that at this time, Stork Craft had no intention to replace consumer brackets with the redesigned brackets.

ESME will examine the bracket samples provided by Stork Craft. Staff will submit its findings to Stork Craft.

Emnace said Stork Craft would do the following:

1. Trace from 2066 to present any and all requests for brackets; and,
2. Have a risk assessment performed on the brackets.

Patty Hackett gave Stork Craft a test methodology. Stork Craft should get the crib component (brackets) to fail and trace back to define what was good and bad. Stork Craft should show us how the crib failed and how much force it took to get the crib to fail. Stork Craft agreed to do this.

Stork Craft has purchased three Canadian companies, Regatzi, Status Furniture, and Kenwood.

CPSC Attendees:
Patty Hackett
Renae Rauchschwalbe
Marc Schoem
Gib Mullan
Dollie Nicholson

Stork Craft Attendee:
Jude Emnace

March 5, 2010

Congressman Henry Waxman
Chairman, House Committee on Energy & Commerce
Congressman Bart Stupak
Chairman, Subcommittee on Oversight
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Chairman Waxman:

As requested, enclosed please find responses to Congressman Markey's questions of February 19, 2010.

The undersigned hereby certifies that he has made and/or has directed to be made by JPMA staff, a diligent effort to collect data responsive to your requests. JPMA expressly reserves the right to supplement, clarify, revise or correct any or all of the responses herein at any time.

Sincerely,

Michael Dwyer, CAE
Executive Director

Attachment

Cc: Rick Locker, JPMA Counsel; Robert Waller, JPMA President

Juvenile Products Manufacturers Association, Inc.
[illegible]

I'm concerned about the effectiveness of recalls – there have been reports that parents aren't getting the information or repair kits they need. In fact, a quick search on *eBay* on January 20 found more than 30 MacLaren umbrella strollers, all of which were recalled in November because of risk that children's fingers would be amputated by the hinge mechanism, and a search on the DC area *Craig's List* found a number of recalled drop-side cribs for sale.

1. Crib manufacturers often pay to advertise their products in parenting magazines. Can you think of an instance in which your organization or a crib manufacturer whose crib were recalled paid to advertise the recall in these same publications? If so, when?

   Recalls are individually negotiated between the manufacturer involved and the CPSC. Each recall has specific remedies that are developed to address the hazard that has been identified. JPMA has never been a party to the negotiations, but does provide links from our Web site for consumers to www.recalls.gov. Some manufacturers have placed trade advertisements promoting their recalls but television advertising is generally not prevalent in the industry.

2. In your testimony you cite several examples of work your organization does to help promote infant safety. What specifically does your organization do to publicize and promote awareness about specific product recalls?

   We produce statements that are posted on the JPMA Web site (www.jpma.org), samples of which we provided to the Committee prior to the hearing. We also provide a link to www.recalls.gov on our Web site. We are currently working to implement the establishment on our Web site of direct HTML links to recall announcements on the CPSC Web site and have also linked to the CPSC RSS Feed and Recall Subscription List Widget.

   JPMA has also participated in "Recall Round-ups" with CPSC and with several not for profit Consumer Organizations and has urged retailers and sellers of second hand products to assure that product sold are not subject to recall (or not repaired in accordance with terms of a particular recall) and meet current applicable mandatory and ASTM standards.

3. Your organization publishes a directory of "certified products" that have been independently tested and found to meet safety standards. How many of the 7 million or so cribs that have been recalled in recent years were in that directory?

   The JPMA Certification Seal on a product tells consumers this product has been verified as conforming to the requirements established by ASTM existing at the time they are originally sold, through independent laboratory testing and follow-up on-site inspection of the manufacturer's production line. The manufacturers that participate in the JPMA Certification Program are held to the highest

standards and are obligated to meet those principles with every certified product.

Of those cribs recalled, the following were JPMA Certified as having met the requirements of the ASTM F-1169 standard for full size cribs:

Simplicity – 1 million (drop side)
Graco – 104,000 (drop side)
Delta – 600,000 (drop side)
Delta – 985,000 (drop side)
Stork Craft – 2.1 million (drop side)
Stork Craft – 500,000 (mattress support)
LaJobi – 4,900 (crib slat breakage, drop side)
Jardine – 472,000 (slat breakage – only applies to those cribs manufactured in 2005 or later)

Total (estimated) Certified: 5,765,900

Of those cribs recalled, the following were not JPMA Certified:

Generation 2 – 500,000 (drop side)
Dorel Asia – 635,000 (drop side)
Caramia – 1,000 (slat breakage)

Total (estimated) Non-Certified: 1,136,000

A review indicates that the underlying reasons for these recalls vary, but it is significant to note that recalls occur for a variety of reasons. On its face, based upon a review of CPSC announcements, these recalls cribs did not occur due to a violation of mandatory or ASTM crib standards to which JPMA Certification independently verifies sample conformance.

4. Does that directory get immediately updated whenever a recall of one of those products is announced? If not, when would such information appear in the directory? For example, would a consumer that is in the market for a second-hand crib who wishes to utilize your directory to ensure they are buying something that is safe and be able to ascertain, based on an examination of an old JPMA Directory, that a particular model was recalled? If not – don't you think you immediately take steps to alter these products?

As noted not all recalls are a result of a product not complying with ASTM International or mandatory standards. The Web version of the Directory is updated on a regular basis to provide the most current information on manufacturers who participate in which categories. It does not contain any recall

information. As cited above, we have links from our Web site to CPSC's Web site that contains the most current recall information.

JPMA does not recommend that parents caregivers purchase second hand products of any type. We appreciate that it is very difficult for consumers to know whether a second hand product they are purchasing has been recalled (or if it has been damaged), and in most cases, the product does not meet the most current version of the ASTM standards.

To your last question posed here, we believe that providing recalled product information on the JPMA Web site is a good step in communicating to the consumer when these products are recalled. JPMA also often has instituted campaigns in collaboration with CPSC and other consumer organizations directed at ensuring consumers purchase and use only product that conforms to current safety standards.

5. Knowing that consumers have come to rely on the JPMA certification mark as an indication of safety, what checks and balances are in place to ensure that certified cribs remain in compliance with standards? Is there market surveillance or independent, third party certification of compliance?

In order for a manufacturer to be JPMA Certified, they must submit an application and contract to the Juvenile Products Manufacturers Association (JPMA) to participate in the certification program. They can be either a member or non-member of the association. They must have all of their current models in a product category tested by the official laboratory, which is an independent, 3rd party CPSC-accredited lab. The testing is done to voluntary standards that are developed and published by ASTM International. Committees within ASTM are comprised of a balance of manufacturers, consumer groups, representation from the U.S. Consumer Product Safety Commission (CPSC) and other interested parties, and they develop and revise the standards as necessary. Approval of a standard is consensual.

Once a manufacturer has become JPMA Certified, its testing responsibility does not end. Manufacturers must test 25% of their models each quarter with the goal that all models are tested at least once a year. Manufacturers can either perform the quarterly testing in their certified lab and send the reports to the official lab, or have a CPSC accredited lab do the testing for them. If the manufacturer is performing the quarterly testing in its own lab then the official lab will do a site visit once a year to verify the manufacturers' capability of performing the tests.

Random Retail Testing is also performed on a quarterly basis by independent 3rd party (currently CPSC-accredited) laboratories. In this part of the program, the official lab purchases participants' products from retail stores and performs testing to all or part of the appropriate ASTM standard. JPMA provides the manufacturer a certification seal to use on their products and packaging, and in

advertisements. The manufacturer must adhere to all the guidelines of the program in order to remain a JPMA Certification Program participant.

JPMA's certification seal also specifically notes that it is evidence that a sample has been verified by an independent accredited test laboratory as complying with mandatory and ASTM standards. Also we note that since January of 2009, under Section 102 of the Consumer Product safety Improvement Act of 2008 (CPSIA), that all cribs must be certified by manufacturers as meeting mandatory CPSC requirements. We have repeatedly noted in our CPSC filings that the ASTM standards are significantly more comprehensive than existing mandatory CPSC standards. This is why we promote adherence to such standards. Section 104 of the CPSIA requires CPSC to consult with stakeholders and by rule update their standards commensurate with the more expansive requirements of the ASTM standards.

6. What does the JPMA do when they find a crib with a JPMA label to be out of compliance with standards?

Once JPMA becomes aware that a certified product is not in compliance with the ASTM and/or mandatory standards, we issue a Corrective Action Request (JCAR) that requires a manufacturer to respond within 14 days as to what they will do to correct the issue. For additional details on this process we reference the JPMA Procedural Guide (included with our original submission). If the manufacturer does not assure substantive compliance with applicable safety based standards, they are subject to de-listing.

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

March 5, 2010

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman:

Attached please find responses to the written questions for the record submitted by certain Members of the Committee in connection with the January 21, 2010, hearing of the Subcommittee on Oversight and Investigations entitled: "Crib Safety: Assessing the Need for Better Oversight." An electronic version of these responses will also be provided to Early Green, Chief Clerk of the Committee.

Thank you again for the opportunity to testify before the Subcommittee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Very truly yours,

Inez M. Tenenbaum

Attachment

"Crib Safety: Assessing the Need for Better Oversight."
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
January 21, 2010

Responses of Chairman Inez M. Tenenbaum to Questions for the Record

Questions from the Honorable Bart Stupak

Manufacturers, importers, distributors, and retailers are required to report to CPSC within 24 hours of obtaining information if a product does not comply with a safety rule issued under the CPSA, or contains a defect which could create a substantial risk of injury to the public or presents an unreasonable risk of serious injury or death. However, as we learned from our investigation, Stork Craft still believes to this day that mechanical problems by their cribs did not cause "substantial risk of injury to the public or present an unreasonable risk of serious injury or death."

1. Does CPSC have the authority to assess a penalty on companies that do not meet the reporting requirements?

Response: Under section 20 of the Consumer Product Safety Act ("CPSA"), the Consumer Product Safety Commission ("CPSC") has authority to seek a maximum civil penalty of $15,000,000 for a party who knowingly fails to report defect information, required under section 15(b) of the CPSA, or otherwise fails to report or to provide information required under the CPSA. The CPSC lacks authority to "assess" such a penalty through its own administrative process, however, and must pursue a party in court if the party does not agree to the penalty.

2. Does CPSC believe that the current reporting requirements are set too high? How would you change the reporting requirements if you could?

Response: No. The CPSA requires in section 15(b) that any manufacturer, distributor, or retailer of a consumer product "who obtains information which reasonably supports the conclusion that such a product," fails to comply with an applicable standard, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death, must immediately report such information to the CPSC. This is a broad obligation and necessary for the CPSC to receive complete and timely information about possibly unsafe products. Reporting is required when a company receives information about a possible defect and the CPSC may conclude that no defect exists or require appropriate corrective action. Therefore, the reporting obligation does not appear to be too high. Indeed, one court has applauded "Congress's decision to impose penalties for reporting violations without requiring proof of a product defect," because it

encourages companies to provide all necessary information to the CPSC regardless of whether a defect exists. See *United States v. Mirama Enterprises, Inc.*, 387 F.3d 983, 988-89 (9th Cir. 2004).

3. Does CPSC believe manufacturers under-report? If so, why do you believe manufacturers are under-reporting?

Response: As noted above, the CPSA requires in section 15(b) that any manufacturer, distributor, or retailer of a consumer product "who obtains information which reasonably supports the conclusion that such a product," fails to comply with an applicable standard, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death, must immediately report such information to the CPSC. We believe some parties underreport based on a narrow interpretation of what information they view "reasonably supports" a conclusion that a product presents a hazard or risk.

As also noted above, however, the CPSC has authority to seek civil penalties when a party knowingly fails to make required reports, and the CPSC staff regularly collects such penalties from firms to enforce reporting obligations. In FY2009, we collected the largest amount of civil penalties in the CPSC's history, and from the largest number of firms.

Consumers are not required to report safety information if they know a product is endangering an infant.

4. How does the CPSC encourage parents to report safety incidences to the CPSC?

Response: CPSC uses all means at its disposal to connect with parents and provide easy pathways for these parents to communicate to the CPSC issues, concerns, or problems with products in their home. To reach parents, our communications include not just traditional methods such as speeches, interviews, presentations, and a website, but we are also active in social media arenas like Twitter and YouTube. We also offer both a telephone hotline as well as a website reporting feature to receive information from parents. A link to report unsafe products is also part of our Neighborhood Safety Network Tool Kit, an innovative program designed to help underserved communities promote safety and health. We are always seeking to improve the accessibility and ease-of-use of each of these information channels.

In addition, the Consumer Product Safety Improvement Act of 2008 ("CPSIA") requires CPSC to create a public portal and a publically accessible, searchable database of consumer product incident reports. Through the public portal, consumers will be able to report potential product safety hazards to CPSC in ways that improve the quality, value, and accuracy of the data collected. This database is under development, and is scheduled to launch in March of 2011 with broad public outreach and education.

Questions from the Honorable Edward J. Markey

It seems to me as though recalls of cribs whose drop-sides were trapping and suffocating children have been occurring for years now. More recently, Graco strollers were recalled because they use a hinge that has been shown to amputate children's fingers – but that follows an almost identical situation in which MacLaren strollers were recalled for the very same reason.

1. Why can't the CPSC move to recall ALL cribs that use the same sort of drop-side mechanisms, or ALL strollers the same sort of hinges?

Response: The CPSC does achieve recalls for similar product designs. For example, in FY2009, the CPSC recalled essentially all Roman shades and roll-up blinds in the United States based on a common strangulation hazard.

Such recalls, however, can be challenging. While CPSC does watch closely for any common problematic features across product classes, unique manufacturing or design characteristics often make a generalized defect analysis difficult. For example, a hinge made of high quality materials could be safe while the same part of lesser quality materials could break in a hazardous way. Further, because the particular manufacturer, distributor, or retailer is responsible for the remedy of their specific products, recalls remain particular to the responsible party. That is to say, a recall of all strollers for the same sort of hinge, as you describe, would still need to be considered with regard to each particular manufacturer, distributor, or retailer to ensure an adequate remedy.

2. Why do we have to wait until each brand or model is demonstrated to kill or maim someone?

Response: CPSC always strives to take action before any injuries occur and very often obtains voluntary recalls before any such injuries occur. Indeed, based on four incidents – none of which involved any injuries – the CPSC achieved the recall of 500,000 Stork Craft cribs in January 2009 due to a risk of entrapment or suffocation from mattress support bracket failures.

CPSC is constantly on the lookout for hazards and our Early Warning System, described in greater detail below, helps identify emerging hazards in certain children's products. Nevertheless, it is often very difficult to identify and address problems in a consumer product before patterns of defect emerge.

3. What is the CPSC doing to proactively identify and recall or otherwise regulate classes of products that all share known hazards?

Response: The CPSC Office of Hazard Identification and Reduction, particularly the Division of Hazard Analysis within our Directorate for Epidemiology, is tasked with monitoring information that could identify a common problematic feature across a product class. Given particular sensitivities related to children's products, in November

2007, the CPSC implemented what was then a pilot program called the Early Warning System ("EWS"). This EWS is a multi-disciplinary team of CPSC staff consisting of Compliance Officers, attorneys and technical staff from CPSC's Engineering, Epidemiology, Human Factors and Health Sciences divisions that focuses solely on cribs, bassinets, and play yards.

This team was formed in an effort to catch serious risks of injury or death, patterns of defect, and regulatory violations as early as possible. The EWS team meets on a weekly basis and reviews all incoming bassinet, crib and play yard incidents reported to the agency. Incident reports specific to products evaluated by the EWS pilot team are drawn from the CPSC's epidemiological databases. During the weekly review, the EWS team also assigns in-depth investigations ("IDIs") of incidents, reviews completed IDIs, evaluates collected product samples, and makes recommendations to the Compliance Division on cases to open for possible recall.

Building on the success of the EWS team, I have recently created a new "Safe Sleep Environment Team," which is a pilot project to bring the same EWS team of compliance officers, technical staff, attorneys, and epidemiologists to work on the particular issues related to the sleep environment for children.

Finally, with regard to regulatory matters, I will continue the sort of proactive efforts we took with regard to cribs to involve stakeholders and the American Society for Testing and Materials ("ASTM"). The results of our direct outreach in that case demonstrate the effectiveness of proactive involvement of voluntary standards organizations and interested parties to consider regulatory approaches as safety issues emerge across a class of products.

4. In addition to voluntary or mandatory recalls, what authority does CPSC have to inform the public about risks to particular products or classes of products? For example, could it issue a press release that included a recommendation that consumers not purchase drop-side cribs and indicate that the Commission was planning to take regulatory action involving all of these products? If so, how often has the Commission taken such action?

Response: The CPSC has authority to inform the public about risks to particular products and classes of products and regularly uses it to alert the public to both specific and general issues.

Under new authority in the CPSIA, CPSC can make certain public health and safety findings and disseminate information to the public in an expedited manner about a risks posed by a particular product. Such public health and safety findings have been undertaken twice since implementation of the CPSIA.

With regard to classes of products, the CPSC can make public general warnings. For example, in October of 2008, the Commission issued a press release announcing that defects identified by the EWS system demonstrated the need for stronger mandatory

standards for drop-side cribs, and urging parents and caregivers to inspect closely the hardware and stability of their cribs to ensure that all parts were securely in place given the entrapment risks associated with those cribs. A similar general message regarding the safety of children's products and recalls was the focus of a September 2009 video released by CPSC on YouTube and through our blog, "OnSafety." The CPSC also undertakes regular outreach efforts each year to make seasonal alerts and provide information to the public about risks presented by fireworks, carbon monoxide poisoning, and pools, for example.

* * *

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2011

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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NOTE: Under Committee Rules, Mr. Obey, as Chairman of the Full Committee, and Mr. Lewis, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

LEE PRICE, BOB BONNER, ANGELA OHM, and ARIANA SARAR
Subcommittee Staff

PART 7

Printed for the use of the Committee on Appropriations

PART 7—FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2011

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2011

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LEE PRICE, BOB BONNER, ANGELA OHM, and ARIANA SARAR
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PART 7

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FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2011

THURSDAY, MARCH 4, 2010.

FISCAL YEAR 2011 BUDGET FOR THE CONSUMER PRODUCT SAFETY COMMISSION

WITNESSES

INEZ TENENBAUM, CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

NANCY NORD, COMMISSIONER, U.S. CONSUMER PRODUCT SAFETY COMMISSION

INTRODUCTION OF WITNESSES—CHAIRMAN SERRANO

Mr. SERRANO. The committee will come to order. We welcome you to this very cozy room.

Today the subcommittee meets to discuss the fiscal year 2011 budget request of the Consumer Product Safety Commission. Joining us today are the Chairman of the CPSC, Inez Tenenbaum, as well as CPSC Commissioner, Nancy Nord. We thank you both for joining us today.

CHAIRMAN SERRANO'S OPENING STATEMENT

For fiscal year 2011, the budget request for the Consumer Product Safety Commission is $118.6 million. The agency has seen its responsibilities grow enormously for the last few years. In response to a large number of product hazards and product recalls, Congress enacted the Consumer Product Safety Improvement Act of 2008. This law, together with other recent legislation addressing pool and spa safety and the protection of children from gasoline burns, provides for important consumer protections but has also essentially doubled the workload of the CPSC. It is important to determine whether the agency staffing levels are adequate to fulfill these responsibilities.

In 2007, when I became Chairman of this subcommittee, the agency had fewer than 400 full-time employees. Funding increases provided by this subcommittee have enabled the CPSC to grow to 530 full-time employees in fiscal year 2010, a more than 30 percent increase in staffing in 3 years. However, this is still far less than the agency staffing 30 years ago when it had 978 employees.

A strong CPSC is more important than ever. This is particularly evident in the area of imported products. The volume of imported products has doubled in the last 15 years, and while imports account for 20 percent of all consumer product purchases, they account for more than 80 percent of recent product recalls. GAO re-

ported last August that the CPSC's ability to monitor imported products is limited by staffing shortfalls. The Fiscal Year 2010 Appropriations Act included funding to help address this problem, and I am pleased that the fiscal year 2011 budget requests additional resources for the agency and for the import safety initiative. It is important for this subcommittee to determine whether these resources are truly adequate to ensure the safety of imported products.

The Commission has worked hard to implement the many provisions of a Consumer Product Safety Improvement Act. At the same time, we have heard about confusion among manufacturers, distributors and retailers about particular requirements. I am interested in knowing how implementation is going right now, whether industry is complying, and whether the CPSC is devoting adequate resources to enforcing the new laws, and many important consumer protections.

In addition to implementing these consumer protections, the new law directed CPSC to establish a public Internet-accessible database on the safety of consumer products. The agency is also preparing to move into a modernized laboratory facility designed to enhance its research on product hazards. Furthermore, the agency has begun an effort to work more closely with manufacturers and regulators in China by opening an office in Beijing. I am interested in hearing about the status of all of these efforts and how budget requests will enhance them going forward.

Chairman Tenenbaum joined the Commission in June 2009. She has a long history of public service, including 8 years as South Carolina's State superintendent of education.

Commissioner Nord is no stranger to this subcommittee. This is her third appearance before us. She has served on the CPSC since 2005 and served as Acting Chairman from 2006 to 2009.

We thank you both for your testimony. We look forward to a very informative discussion. And I also look forward to a great baseball season where the Cardinals will do almost as good as my Yankees.

Mrs. EMERSON. Hey now, we have really, really done a great job on recruitment this year, so I am not certain of that, Mr. Chairman, I must add. But Debbie and I are actually the cochairs of the congressional softball team, and we start our practice next week. You will be happy to know that since we are playing the women of the press, that we actually think we will prevail this year since at least there is not such an age differential where we set ourselves up for failure last time and Debbie broke her leg. But other than that, we are getting all ready, we are getting all ready for a wonderful, wonderful baseball season. And I truly am excited. I don't know anything about this new Brad Penny, this new pitcher we have gotten, but he has been around a while. Do you know anything about him?

Mr. SERRANO. Yes. He is good, unfortunately.

Mrs. EMERSON. Thank you. Thanks, Mr. Chairman.

Mr. SERRANO. Jo Ann Emerson, ladies and gentlemen.

Mrs. EMERSON. I have the app on my phone so I can get all the Cardinals news, like Google alerts, Cardinals alerts.

Mr. SERRANO. Who says Members of Congress are not regular people?

MRS. EMERSON'S OPENING STATEMENT

Mrs. EMERSON. I do love my Cardinals, I must tell you.

Anyway, thanks for holding this very important hearing. Thank you all very much for being here today. We do welcome you for your first appearance, Madam Chair.

And, Commissioner Nord, thank you for being back for the third time? Third time.

Anyway, as the Chairman said, you all have received large funding increases since 2007 compared to other agencies, and I really am anxious to hear how you all are spending those funds and hiring the necessary people to do the important work that we keep laying upon you all.

I also want to say that I did vote for the Consumer Product Safety Improvement Act. And I, like most members of the committee, believe that protecting consumers should be our top concern of the business community and the regulatory community. And facilitating those goals should be one of our most important, if not the most important, responsibility we have.

But we are also charged here in Congress with addressing the unintended consequences of its actions. And with respect to the CPSIA, this means realizing that in addition to the benefits of the statute, there has been some avoidable damages to small businesses, domestic manufacturers, thrift stores and charities. And I think we can all agree upon that. However, our economy isn't as resilient today as it has been in the past, so it is really very, very important that we not ignore those jobs lost or those that could be lost due to unnecessary aspects of this statute.

The 2010 appropriations bill directed the Commission to provide recommendations to the Congress on changes needed to CPSIA, and for whatever reason that I cannot understand, I don't know why these recommendations have become politicized in this body, but it appears, as usual, that logic and sensible actions are not immune from partisanship in Washington.

Let me close by stating that regulation is a balancing act so that consumers, especially children, are protected, but businesses are able to operate without unnecessarily burdensome requirements. And I want to say this because as we try our best to jump-start the economy, I have met with hundreds of small business people over the last month, all of whom tell me that you can give me a tax credit, you can take away my—the need for me to pay payroll taxes, but at the end of the day, it is the uncertainty in the economy and the burdensome regulations that are thrust upon my business each and every day that no other country or competitor faces that are causing me not to hire people. This is what they have said across the board. So that is worrisome, and that is why I am hopeful that we will all be able to work together to maximize the benefits and minimize the detriment of this statute and the work that you all are doing.

So thanks, and I look forward to hearing your testimony.

Mr. SERRANO. Thank you.

Mr. SERRANO. Now we will take your testimony. Please keep in mind that we would like you to keep your testimony to 5 minutes. And then, of course, your full text will be included in the record.

CHAIRMAN INEZ TENENBAUM'S OPENING STATEMENT

Ms. TENENBAUM. Thank you. Good morning, Mr. Chairman, Ranking Member Emerson and Members of the Subcommittee on Financial Services and General Government. I am so pleased to be here to discuss the U.S. Consumer Product Safety Commission's fiscal year 2011 budget request.

During the past 8 months, as Chairman of the CPSC, I have had the great opportunity to see firsthand the great work that the Cnmmission undertakes every single day, from new regulations to ensure the safety of cribs to enforcement actions against children's jewelry with harmful levels of lead, cadmium and other toxic metals, the CPSC is once again an agency that means business when it comes to protecting the safety of the American consumer.

Much of this progress would not have been possible without the reauthorization of the Commission through the Consumer Product Safety Improvement Act of 2008 and the additional funding received by the agency in 2009 and 2010. I greatly appreciate the increased resources that members of the subcommittee have supported all through the past 2 years and can assure all of you that those resources have been put to good use through increased staffing, improved import surveillance, and rapid and robust responses to new and emerging hazards.

The results of this new commitment to the CPSC are really very encouraging. One concrete example of this is the increased staffing and resources at the agency. During 2008, the number of CPSC full-time employees had dropped to only 385. This was the lowest level in the agency's history and down from a high of 978 in 1980. Section 202 of the CPSIA required the agency to increase its FTEs to at least 500 by the end of 2013, and I am pleased to report to you that we have already reached that milestone and currently have approximately 501 FTE positions filled at the CPSC as of March 1, 2010. In addition, we are currently interviewing another 16 FTE positions, and have open announcements for another 9 FTE positions. Taken as a whole, this puts us well on track to meeting our approved FTE ceiling of 530 in 2010.

But employee numbers are only one indicator of change. Another key metric is results. One concrete example is that of our ability to stop dangerous products before they enter the stream of commerce. In fiscal year 2007, the CPSC collected approximately 750 samples of suspect products entering our country. In fiscal year 2009, that number rose to almost 1,600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls, from 563 in 2008 to 466 in 2009.

The Commission's proposed 2011 budget request of $118 million, $600 thousand is designed to accelerate this forward momentum by continuing internal modernization and rebuilding efforts. It is noted in my written statement the proposed fiscal year 2011 is only $400,000 over our 2010 level, but it will allow the Commission to support the key above areas of emphasis by reallocating $13.9 million in funds used for 2010 nonrecurring activities.

Specifically, the proposed budget will allow the Commission to pursue new and enhanced initiatives in four key areas. The first is the Commission's compliance initiative. Since passage of the

CPSIA, Commission staff have worked diligently to promulgate and implement the numerous rules required by that law. In 2011, the CPSC's work will shift from developing rules mandated by the CPSIA to enforcing those rules, both within our borders and at ports of entry. To further facilitate those efforts, the CPSC's 2011 budget requests $4.6 million and the addition of 41 full-time employees to support additional responsibilities associated with three key elements of the compliance program, and that is regulatory enforcement, import surveillance and defect investigation.

The second area is information technology modernization and the Commission implementation of a searchable public database of consumer product safety information. Section 212(b) of the CPSIA requires the Commission to upgrade its information technology systems and develop a database that allows consumers to submit incident reports that can subsequently be reviewed by all members of the general public. In response to this mandate, CPSC is developing a single integrated Web-based environment, the Consumer Product Safety Risk Management System, the RMS, which will change the way the Commission receives and analyzes data.

The Commission has already allocated approximately $20 million to fund many of the initial planning and design costs of the RMS and deeply appreciates this subcommittee's past support of this program. In fiscal year 2011, funding requirements will largely shift from design and build costs to maintenance costs. Therefore, the 2011 budget requests $1.8 million for staffing combinations of eight FTEs and other contract positions to maintain the system and comply with the OMB's requirement for information technology governance, cybersecurity and privacy.

Now, the third area of focus is consumer outreach and education. Providing consumers with recall and product hazard information that helps make families and communities safer is one of my top priorities. This year and in fiscal year 2011, the Commission plans to accelerate efforts to conduct grassroots education and advocacy in hard-to-reach and vulnerable populations. In August 2009, the GAO released a report recommending that the CPSC increase its focus on reaching minority populations. Mr. Chairman, I know that this is a key priority for you. Since becoming the Chairman of the CPSC, I have directed the Commission staff to explore additional outreach efforts to underserved populations, and this will remain a key priority going forward.

We also continue to focus on public education and outreach efforts to prevent drownings and entrapments involving children in residential and public pools. Congresswoman Wasserman Schultz has been a tireless advocate of increased safety measures and outreach in this area. And I am pleased to note that the 2011 budget contains $1 million specifically to continue the pool and spa safety education. This funding will build on the previous funding of $8.1 million in fiscal year 2009 and 2010 to continue to help the agency drive down the 300 child drownings each year.

And fourth, the 2011 budget proposes an additional $200 million for CPSC to support the National Nanotechnology Initiative. In the last few years, there has been increasing public concern over the potential health impacts associated with the technology. Although nanomaterials may have the same chemical composition as non-

nanomaterials, at the nanoscale they may demonstrate different physical and chemical properties and behave differently in the environment and in the human body. The $2 million proposal will allow the Commission to conduct exposure and risk assessment of nanomaterials, allow database updates to properly flag reports of nanotechnology incident reports in consumer products, and conduct consumer outreach efforts such as public meetings.

Mr. Chairman, Ranking Member Emerson, thank you again for the opportunity to testify on the proposed 2011 budget for the U.S. Consumer Product Safety Commission. And I look forward to working with you and other members of this subcommittee on the budget request. And I will be happy to entertain your questions after Commissioner Nord makes her statement.

Mr. SERRANO. Thank you so much.

[The prepared statement of Chairman Inez Tenenbaum follows:]

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

Before the

House Committee on Appropriations

Subcommittee on Financial Services and General Government

March 4, 2010

Good morning, Chairman Serrano, Ranking Member Emerson, and Members of the Subcommittee on Financial Services and General Government. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's (CPSC) fiscal year (FY) 2011 budget request.

During the past eight months as Chairman of the CPSC, I have had the opportunity to see first-hand the great work that the Commission undertakes every day. From new regulations to ensure the safety of cribs to enforcement action against children's jewelry with harmful levels of lead, cadmium and other toxic metals, the CPSC is once again an agency that means business when it comes to protecting the safety of American consumers.

Much of this progress would not have been possible without the reauthorization of the Commission through the Consumer Product Safety Improvement Act of 2008 (CPSIA), and the additional funding received by the agency in FY 2009 and 2010. I greatly appreciate the increased resources Members of this Subcommittee have supported over the past two years, and can assure all of you that those resources have been put to good use through increased staffing, improved import surveillance, and rapid and robust responses to new and emerging hazards.

The results of this new commitment to the CPSC are already very encouraging. One concrete example of this is increased staffing and resources at the agency. During FY 2008, the number of CPSC full-time employees (FTEs) had dropped to only 385 – the lowest in the agency's history. Section 202 of the CPSIA required the agency to increase the number of FTEs to at least 500 by the end of FY 2013. I am very pleased to report that we have already reached that milestone, and have 501 FTE positions filled at the CPSC as of March 1, 2010.

But employee numbers are only one indicator of change. Another key metric is results. One concrete example of that is our ability to stop dangerous products before they enter the stream of commerce. In FY 2007, the CPSC collected approximately 750 samples of suspect products entering our country. In FY 2009, that number more than doubled to almost 1600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls—from 563 in FY 2008 to 466 in FY 2009.

The Commission's proposed FY 2011 budget request of $118.6 million is designed to accelerate this forward momentum by focusing on modernization efforts that will flag emerging hazards – and help us to keep those products out of our country and the hands of children.

While this request is only $400,000 over the FY 2010 level, it will allow the Commission to increase the FTE level by 46 in FY 2011 (for a total of 576 FTEs), fund a broad new compliance initiative, implement the second phase of the Commission's continued Information Technology (IT) modernization, continue to improve consumer outreach, and direct $2 million in support of the federal National Nanotechnology Initiative by reallocating $13.9 million in funds used for FY 2010 nonrecurring activities.

The Commission's Compliance Initiative

Since the passage of CPSIA, Commission staff have worked diligently to promulgate and implement the numerous rules required by that law. In 2011, the CPSC's work will shift from developing rules mandated by the CPSIA to enforcing those rules – both within our borders and at ports of entry.

To further facilitate those efforts, the CPSC's FY 2011 budget requests $4,647,000 and the addition of 41 full-time employees (FTEs) to support additional responsibilities associated with three key elements of the compliance program: regulatory enforcement, import surveillance, and defect investigations.

Regulatory Enforcement:

Experience shows that enforcing new rules takes considerably more resources than enforcing an existing rule that has been in place for a number of years. The number of rules mandated by CPSIA during FY 2009 and FY 2010 are more than double the number of rules promulgated by the Commission since 1990 – and will result in a dramatic increase in enforcement responsibility.

The FY 2011 budget, therefore, requests $1,647,000 and 15 FTEs to enforce the new rules. This includes 4 new compliance officers, 5 field investigators, 3 lab testing and other technical specialists, 2 attorneys, and one FTE to coordinate with state and local authorities.

Import Surveillance:

The Commission's import enforcement workload will also increase as investigators ramp up efforts to verify testing certifications and collect increasing numbers of suspect product samples at our Nation's ports. The need for more staff and better coordination with U.S. Customs and Border Protection (CBP) was highlighted in an August 2009 Government Accountability Office (GAO) report, and the Commission is eager to fully address this issue.

Accordingly, the FY 2011 budget requests $1,965,000 to expand coverage at the ports, verify third-party testing certifications, collect samples of suspect products, and – most importantly -- stop unsafe products from entering the country. This request will support an additional 16 FTEs dedicated to import surveillance (5 investigators and analysts that will be stationed at ports, 2 compliance officers to process additional import samples, and 9 FTEs for lab testing and other specialties), as well as $100,000 for destruction of goods refused at the ports by CPSC.

Defect Investigations:

The number of product incident reports the Commission receives almost doubled between FY 2003 and now. With the rollout of the public database by March 11, 2011, we expect that the number of incident reports will grow exponentially. These reports often provide critical information and data to the CPSC. However, with current resources, CPSC staff is only able to thoroughly investigate a very small number (approximately 10 percent) of the total reports received.

Increased resources are needed to enhance our defect investigation capability, and ensure that the Commission can adequately review and process the rapidly increasing number of product incident reports. Therefore, the FY 2011 budget requests $1,965,000 and 10 additional FTEs (3 compliance officers, 5 field investigators, 1 technical specialist, and 1 attorney) to support this critical effort.

Information Technology Modernization

Section 212(b) of the CPSIA requires the Commission to upgrade its information technology systems and develop a database that allows consumers to submit incident reports that can subsequently be reviewed by all members of the general public.

In response to this mandate, CPSC is developing a single, integrated, web-based environment, the Consumer Product Safety Risk Management System (RMS), which will change the way the Commission receives and analyzes data. Current systems at the Commission are fragmented, and information flows often have to be manually sorted by staff to identify new and emerging hazard patterns.

With the new RMS, CPSC will be transformed. The Commission will have one powerful database for the input and analysis of multiple sources of data. This capability will be absolutely critical as data streams from the new public database start flowing into the Commission. In addition, the system will have new predictive "data mining" tools that will allow the CPSC to compare new incidents electronically with all prior incidents. Overall, this new capability has the potential to uncover more defect patterns for staff to examine. This, in turn, could lead to an increase in recalls of defective products and the prevention of injuries and deaths.

The Commission has already allocated approximately $20 million dollars to fund many of the initial planning and design costs for the RMS, and deeply appreciates this Subcommittee's past support of this program. In FY 2011, funding requirements will largely shift from design and build costs to maintenance items. Therefore, the FY 2011 budget requests $1.880 million for a staffing combination of 8 FTE and contract positions to maintain the system and comply with Congressional and Office of Management and Budget (OMB) requirements for information technology governance, cybersecurity and privacy.

Consumer Education and Outreach

Providing consumers with recall and product hazard information that helps make families and communities safer is one of my top priorities. Over the past year, the Commission has made great strides in consumer outreach by re-establishing our presence on network television, in national newspapers, and on the radio. The agency also launched "CPSC 2.0," a social media initiative that is reaching tens of thousands of consumers via YouTube, Twitter, FlickR, the OnSafety blog, and our Recall Widget. This year, the Commission plans to further accelerate this initiative by expanding the platforms we use to include cell phone text messages.

The Commission also plans to accelerate efforts to conduct grassroots education and advocacy in hard-to-reach and vulnerable populations. In August 2009, the GAO released a report recommending that the CPSC increase its focus on reaching minority populations. Mr. Chairman, I know this is a key priority for you. Since becoming Chairman of the CPSC, I have directed Commission staff to explore additional outreach efforts to underserved populations. In carrying out a special Minority Outreach initiative, we will increase our use of existing tools, such as the Neighborhood Safety Network (NSN) program – which provides vital information to more than 5,600 community organizations and leaders – as well as use new tools, such as targeted, grassroots programs for Hispanics, African-Americans, American Indians, and other minority groups. This will also remain a key priority of the Commission in FY 2011.

One of the most tragic subjects the Commission deals with are drownings and entrapments involving children in residential and public pools. Congresswoman Wasserman Schultz has been a tireless advocate of increased safety measures and outreach in this area, and I am pleased to note that the FY 2011 budget contains $1,000,000 specifically for continuing pool and spa safety education. This funding will build on the previous funding of $8.1 million in FY 2009 and FY 2010, and continue to help the agency drive down the 300 child drownings each year and increase compliance with the Virginia Graeme Baker Pool and Spa Safety Act.

Nanotechnology

The CPSC's FY 2011 budget also proposes $2 million to support the federal National Nanotechnology Initiative, and seeks to collect additional data and explore environmental, health, and safety issues related to the increasing use of nanotechnology in consumer products.

In the last few years, there has been increasing public concern over potential health impacts associated with this technology. Although nanomaterials may have the same chemical composition as non-nanomaterials, at the nanoscale they may demonstrate different physical and chemical properties – and behave differently in the environment and the human body.

The $2 million proposed will allow the Commission to conduct exposure and risk assessments of nanomaterials, allow for database updates to properly flag reports of nanotechnology incidents with consumer products, and conduct consumer outreach efforts such as public meetings. Perhaps even more importantly, it will also allow the Commission to take a very proactive approach to this emerging issue, rather than merely reacting to incident reports after they are received.

* * * * *

Mr. Chairman, thank you again for the opportunity to testify on the proposed FY 2011 budget for the U.S. Consumer Product Safety Commission. It provides the funding necessary to continue the transformation of this agency from what some have described as a "teething tiger" into the world's leading lion of consumer protection.

I look forward to working with you and other members of the Subcommittee on the Budget Request, and would be happy to now answer any questions you may have.

COMMISSIONER NORD'S OPENING STATEMENT

Mr. SERRANO. Thank you, Commissioner Nord. Welcome back.

Ms. NORD. Thank you so very much. I am delighted to be here with my friend and colleague Chairman Tenenbaum to fully support the agency's 2011 budget request. And I also want to thank this subcommittee for all of the support that you have given us to help us push forward our ongoing safety initiatives.

Chairman Tenenbaum has mentioned the initiatives that we plan to undertake in the next fiscal year, and these initiatives build on the growth and the progress that we have made over the last 2 years, and that is a direct result of the support that this subcommittee has given us.

Since Inez has given you a good overview of our request, I want to spend my time with you talking about a related issue, and that is the agency's implementation of the Consumer Product Safety Improvements Act. The CPSIA is landmark legislation. It gave the agency important new tools, tools which we requested, are grateful for, and which we are using. But as we implement the CPSIA, we have seen where more flexibility in the law would help us respond more appropriately to real-world situations in order to avoid consequences that we don't believe that Congress really intended.

You asked us for a report on ways in which to improve the CPSIA to help the agency better carry out its mission, and we sent that report in January. So let me suggest a couple of key issues on which we could all focus.

First, I think we need to focus on products that present real risks of injury. I know you want us to be using public resources in the most efficient way, to address the most pressing safety issues, and the CPSIA identifies lead poisoning as one of those. And to be very clear, all of us believe that lead should be removed from children's environments. That is not open to debate, as far as I am concerned. But under the law, we are spending immense amounts of staff time and resources to examine and regulate things that really do not present a lead risk to children.

Just to give you a couple of examples, we spent hours debating whether we needed to prohibit 12-year-olds from using ballpoint pens. The little tip that holds the ball in place has more lead than the law allows. So that was a real question that the agency had to deal with.

A question is presented whether your preteen daughter can have rhinestones and lead crystals on her ballet costume. Under the law right now, the answer is no. Any glitz is going to have to be plastic.

The question of children's bicycles. The little Schrader valve, the little air pressure tire valve, the tip of it has brass in it. It needs to be there for the threads. But brass has lead in it above the statutory limits, so it violates the statute right now. And speaking of brass, we have ruled that it has to be removed from children's products, even though our scientists have found that it does not pose a risk, and that they would have no qualms letting their children use the products that we are banning.

And finally, I think all of you have probably heard from your libraries. Older books may have lead in the ink that violates the

statute. So this presents a real question for libraries and what they are going to do loaning out older books.

We do not see a risk, real risk, with these products, but as currently written, things like pens, books, bikes are being pulled into this regulatory net.

Secondly, I think we need to focus on effective testing, trying to minimize needless burdens. Some facts here. I think all of us agree that a very rigorous testing program should be required to ensure the safety of children's products, but the law requires that all children's products be tested by a third-party independent testing laboratory. And in some cases, that probably isn't necessary. We certainly know it adds expense to the process, and it increases costs to consumers. And some flexibility, I think, needs to be given to the agency.

Representative Emerson referred to small businesses that I know all of you have heard from. We have, too. A small company just reported that they spent $50,000 having their inventory of educational products tested even though they knew there was no lead in them. I just talked last week to a U.S. furniture manufacturer who has decided not to go into children's furniture line, which he had been planning to do, because of CPSIA. We heard from a very small business with eight employees that adapts products, toys, for use for special needs children. They told us they probably can't survive because of this law. The agency needs some flexibility to deal with these situations while still giving safety in appropriate ways.

Finally, I think we need to be focusing prospectively rather than retroactively in how we regulate products. When I say retroactivity, what I mean is we are dealing with products—we are banning products that are already in the stream of commerce rather than looking at their manufacturing date. But that phenomenon really hits retailers, especially resellers, much more dramatically than others. The president of Goodwill Industries has written to us about his concerns, and to quote his letter, he says that the CPSIA unnecessarily puts local communities at risk. That is what he told us. The Kentucky Goodwill has advised our colleague Commissioner Northup that they have seen a very large drop in the number of child items through their stores across the State of Kentucky. The Honolulu Salvation Army has closed its entire children's section because of liability fears.

Surely Congress did not intend this, but the agency really needs the assistance of Congress to make this right. Our concern is that we are now regulating products that do not present a real risk, and it really does raise the question of best use of scarce public resources. Whether we have two Commissioners, three Commissioners or five Commissioners, all of us are committed to making this law work, but we have also united in our request for greater flexibility. We need your assistance, and we stand ready to do everything we can to, as you indicated, have this law maximize benefits and minimize burdens. That is what we all want.

Thank you so much.

Mr. SERRANO. Thank you.

[The prepared statement of Commissioner Nancy Nord follows:]

U.S. Consumer Product Safety Commission

TESTIMONY OF COMMISSIONER NANCY NORD, U.S. CONSUMER PRODUCT SAFETY COMMISSION

SUBMITTED TO THE SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

March 4, 2010

Saving Lives and Keeping Families Safe

www.cpsc.gov

1-800-638-CPSC

TESTIMONY OF COMMISSIONER NANCY NORD TO THE SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

MARCH 4, 2010

I am pleased to be here with our new chairman, Inez Tenenbaum, who is providing solid leadership at a time of exciting growth for the agency. I want to extend my personal appreciation for the long standing support and interest of Chairman Serrano, Ranking Member Emerson, and members of this subcommittee in the activities of the Consumer Product Safety Commission.

The Commission submitted a fiscal year 2011 budget request for $118.6 million that I fully support. The increased funding the agency has received over the past two fiscal years has enabled us to put in place the foundation on which the current budget request builds. We have made much progress, thanks to the support this subcommittee has given the agency.

As an example, Chairman Serrano has been a strong advocate of the agency, especially with respect to our efforts to improve outreach to underserved populations. We are building on our Minority Outreach Campaign aimed at increasing awareness of product safety in the home such as safe sleep for babies, TV/furniture tip over and poison and drowning prevention. Staff will expand the Neighborhood Safety Network program and also plans a more focused and concentrated effort to conduct a grassroots initiative to connect with hard-to-reach and vulnerable populations.

As another example, the Virginia Graeme Baker Pool and Spa Safety Act, which went into effect in December 2008, has generated a great deal of activity at the agency. Funding for the act has enabled us to initiate an expansive national education campaign on pool and spa safety. We have been working especially closely with Representative Wasserman-Shultz as we implement requirements of the act. Funding for the pool and spa safety education initiative is proposed at $1 million for FY 2011. This builds on the previous funding of $8.1 million used over the past two years to implement grassroots safety education and advocacy campaigns to address child drowning and the hidden hazard of drain entrapment. These campaigns are designed to warn the public, target underserved populations, and educate state and local jurisdictions and affected industries about requirements of the Virginia Graeme Baker Pool and Spa Safety Act. The act provides the CPSC an important opportunity to work with state and local health organizations as they are our on-the-ground partners at the community level.

In the past two years, our staff has grown from 396 to over 500 employees. With the recruitments pending, we are on target to reach our planned level of 530 staff for FY 2010. This has been an extremely aggressive and successful recruitment effort given that it takes an average of 115 days to bring a new employee on board. The FY 2011 request enables us to add an additional 46 staff people for a total of 576 employees. These new hires are necessary for the successful implementation and enforcement of our expanded authorities.

With passage of the Virginia Graeme Baker Pool and Spa Safety Act and the Consumer Product Safety Improvement Act (CPSIA) at virtually the same time, the agency has been challenged to promulgate a number of new requirements as well as advance its ongoing, existing safety agenda and meeting that challenge has been the agency's focus over the past two fiscal years. In FY 2011, work will shift from mandating new requirements of these laws to enforcing these rules, and that requires a dramatic increase in enforcement capabilities. The FY 2011 request includes a significant increase of $1,647,000 and 15

FTEs to enforce the growing number of rules issued under CPSIA. With the increased enforcement workload, we need more investigators and compliance officers, along with technical, laboratory and legal staff to support their efforts.

Critical to this expanded compliance effort is the Import Surveillance Division. Set up in 2008, the division started as a small program that provided the first full-time presence of CPSC investigators at key U.S. ports. It grew last year and is growing again in the budget before you with a request to fund five additional investigators to expand coverage at the ports.

Another related development to enhance compliance activities was the establishment of a CPSC office in China, an effort that has been in the works since early last year. We now have the first staff person located in China and anticipate hiring a second staffer to work on CPSC issues at the U.S. Embassy in Beijing. The CPSC staff in Beijing will facilitate efforts to promote a clearer understanding of U.S. product safety requirements by producers in China, the largest exporter of consumer products to the United States. Representative Kirk has been especially supportive of these efforts.

Our laboratory provides critical support to both the agency's compliance and hazard identification activities. As was reported to you in earlier budget presentations, we have undertaken a focused, multiyear effort to upgrade and improve our laboratory facilities. As a result, in the spring of 2009, we signed a lease for a new modernized facility. The build-outs are underway and we anticipate a move-in date later this year. This new, up-to-date testing laboratory facility will be a tremendous asset for our expanded enforcement and hazard identification activities.

When the agency asked for funding to overhaul our IT system to provide the foundation needed for the public database mandated by Congress, you gave it to us. Building on the success of our Early Warning System (EWS) pilot program that enables staff to mine data for similar hazard patterns for cribs, bassinets and play yards, we are developing a single, integrated web-based environment. Based on the positive results from the EWS, this predictive search capability will expand to all product categories and greatly enhance product hazard identification. The FY 2011 request allocates over $9 million for the integrated database that Congress directed us to establish. The CPSC will complete the first phase of the public database in March 2011. When fully operational, the database will allow the public to submit incident reports, have immediate access to safety information and will provide a single, integrated IT structure, with new data-mining tools that will greatly improve the way staff identifies hazards. We are currently tackling a number of issues as we reengineer our IT system, including assuring accuracy of information in the new public database. These issues will be the focus of our attention over the coming months.

The request before you proposes $2 million to continue support of nanotechnology research relating to the health and safety of consumer products, including exposure and risk assessment of nanomaterials. This is an area where I have an especially strong interest and am pleased to see the agency take a strong role as nanomaterials transition from the research laboratory to the consumer marketplace.

However, the bulk of the focus of the agency's work over the past 18 months has been implementation of CPSIA. This landmark legislation gave the agency many new authorities and resulted in a modernization of our statutes that has been very helpful. In addition, the new law also gave us significant new responsibilities to be implemented under aggressive deadlines. As the budget document before you notes, the number of rules mandated by CPSIA during 2009 and 2010 is more than double the number of rules promulgated by the Commission since 1990.

As the agency has worked aggressively to implement the law, we have found some problems that the agency cannot solve and will require Congressional action to fix. In the Consolidated Appropriations Act of 2010, this committee specifically asked for our views on the need for amendments to the law and the agency has been unanimous in its view that amendments giving us more flexibility would be useful (although we have differed on the substance of those amendments). Attached is a copy of my statement that accompanied the Commission Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117.

To summarize, I believe the statute would be strengthened by the following suggested changes:

- *Focus on products that present real risks.* The lead exclusion provisions of the law (Section 101) need to be amended so that the agency can focus its attention on products that actually present a risk rather than spending scarce public resources regulating products that do not present real risks, as is happening now. In this regard, various solutions have been proposed and they merit close examination. One suggestion put forward is to consider the "functional purpose" of the lead in the product. While there is no agreement over the reach of this language or the products it would actually cover, such an approach would result in a resource intensive product-by-product approval process. Instead the law should direct the agency to regulate products based on whether a child's interaction with a product results in a measurable increase in blood lead levels.

- *Focus on the most vulnerable population group.* The law treats all children--from infants to preteens--the same even though product interaction at various ages is quite different and the risks are different. The scope of the law should be narrowed to apply to products intended for younger children, especially since the agency has the authority to regulate other products if they indeed do present risks at higher age limits.

- *Focus on effective testing, without needless burden.* The law should provide more flexibility with respect to third party testing (Section 102) which adds costs to products and has proved to be especially burdensome on small manufacturers. The agency should have the ability to set appropriate testing requirements as long as those requirements provide for a reasonable testing program and provide reasonable assurance of compliance with the underlying safety standards.

- *Focus on prospective rather than retroactive implementation.* Another needed change is to limit the retroactive aspect of the law which hits especially hard on retailers, small businesses, charities and other resellers.

Small businesses have been especially hurt by the sweep of this law. The agency has not done a full economic impact on the effects of CPSIA on small businesses; however anecdotal information puts the impact in the billions of dollars range. We know that many small businesses have been put out of business or have left the children's products market.

There is only limited action the agency can take under CPSIA to ease the burden it places on small businesses while still protecting consumers. Nevertheless, we are trying to do what we can. For example, we have put out information and education materials to explain the law to the small business community and these activities will be enhanced by the budget we have submitted. The component testing enforcement guidance is intended to push testing obligations upstream and take some of the test burdens off the final producer, including the small manufacturer. The Compliance: Continued Testing Rule, which will come out this fall, will impose significant new testing obligations on producers in

addition to those now in place. We hope to ameliorate the adverse impact this rule will have on small businesses by delaying some of the testing burdens for small volume producers. While we hope that these actions will be helpful, we will not know the success of their efforts or their impact for some time. In the meantime, small businesses are suffering now and the agency needs the authority to ease unnecessary and counterproductive regulatory burdens. In my view, the component testing enforcement policy and a possible small volume provision for additional testing requirements, along with education, are not sufficient to address legitimate small business concerns. I recommend Congress give the Commission additional flexibility to ease the regulatory burdens on small businesses and charities while still providing the strong consumer protection that we all desire.

With the changes outlined above, the CPSIA could become a much stronger tool for consumer protection. These changes would allow the Commission to focus its efforts and its limited resources on the real hazards that impact consumers, a goal that we all can agree is needed.

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

STATEMENT OF COMMISSIONER NANCY NORD ON THE COMMISSION REPORT TO CONGRESS PURSUANT TO THE STATEMENT OF MANAGERS ACCOMPANYING P.L. 111-117

January 15, 2010

My fellow Commissioners and I, together with the agency's staff experts, have been working diligently to respond to the request of Congress for recommendations on how to change the CPSIA. Our bipartisan approach has produced a report that is a good step in the right direction. While the report identifies several recommendations with which all the CPSC Commissioners agree, it stops short of addressing all the issues that need to be considered before the CPSIA can truly become the constructive force for consumer protection envisioned by the Congress when it passed the legislation. The law contains a number of useful new tools, many of which were requested by the agency, to better position the CPSC to act more quickly and effectively to protect consumers. However, there are aspects of the law that limit the flexibility of the agency to act appropriately and, as a result, we have seen unfortunate, unintended consequences flowing from the law's implementation. I have been requesting for some time that the Congress address these problems and I appreciate the opportunity to contribute to that process. The recommendations in the report represent a good start, but the conversation about how to fix the problems with the CPSIA needs to go further. I have listed below some of the critical changes that need to be made to the law.

1. Lead Exclusions and the Process for Granting Exclusions

There is absolutely no disagreement over the need to limit children's exposure to lead. However, the language of the CPSIA is drafted so tightly that the exclusions process in the law, which Congress intended for the agency to use, is not workable. The law limits the agency's ability to focus on products that present actual injury or harm to children. The CPSC scientific staff has told us that they are not aware of any product that could meet the exceptions requirements of the law and hence have had to recommend denial of each of the petitions for exclusions that have been considered. This is in spite of the fact that staff has told us with each petition for exclusion that the products in question do not present a risk of harmful exposure to lead.

Over the past 18 months, staff has taken thousands of hours away from dealing with ongoing, significant safety concerns to consider issues such as the following:

- Determining whether to exempt ball point pens, which have a tiny brass tip that holds the ball. That brass tip contains lead over the statutory limit. After much deliberation, the Commission decided that a pen that is used by both adults and children is not a children's product and is not subject to the law but if that same pen is decorated with brightly colored cartoon characters it may fall within the reach of the law and if so, could not be sold.
- Determining that it is illegal to sell children's products containing crystals or rhinestones which, by necessity, contain more than the statutory amount of lead and for which there is no suitable substitute. This is true even though the lead in rhinestones and crystals does not easily leach out and even though a child could be exposed to more lead from products that meet the statutory requirements than from

exposure to rhinestones and crystals.

- Determining how to allow for the continuing sale of children's bicycles even though some parts contain lead, e.g. the Schrader valve used to put air in the tire. Many bicycles are made with recycled metal that also may contain lead at levels that are unpredictable and not easily controllable but which may exceed the statutory limits. In this case, a stay of enforcement was the only way to avoid an unacceptable regulatory result – banning children's bicycles – flowing from applying the statute to this product.
- Determining that a brass collar and other brass components of die-cast toys are prohibited even though staff reported there is no real risk of harmful lead exposure. The implications of this decision for other products containing brass, not only those in the home, but also in our schools – such as desk hinges, locker handles and coat hooks – are significant and far-reaching.

The agency needs flexibility to deal with products that contain lead over the statutory limits but which do not present a risk to children. The Congress specifically asked the agency to look at risk and exposure in crafting a solution to this problem. To solve the problems we have had in applying the exclusions language of the current statute, Congress needs to give the agency the flexibility to look at whether there is a real risk of lead exposure based on the child's interaction with the product and the extent to which that interaction results in a measurable increase in the child's blood lead levels, rather than the absolute language that is now in the statute. This would address the conferees direction to look at risk and exposure and the many concerns expressed by individual members of Congress, including primary sponsors of the law, who have indicated that they thought the statute contained this flexibility. As we do this analysis, it is important to look at how other jurisdictions and agencies address lead exposure so that we consider consistent requirements where appropriate.

In addition, additional thought should be given to the scope of the law. There are certain products – most toys and children's metal jewelry, for example – that warrant aggressive regulation with respect to lead. There may be others – books, educational products, sporting equipment and apparel, for example – where there is less concern. Congress should either write the law specifically to spell out what they want included and excluded, or they should give the agency sufficient flexibility to regulate appropriately. This could be done either by product category or by age. With respect to age, the agency has extensive experience in dealing with the ways that children of different ages interact with consumer products. The CPSIA does not allow flexibility for the agency to utilize this expertise. It treats all children – infants to pre-teens – the same, and, as a result, our regulatory decisions cannot be tailored to meet the requirements of the age of the child and thereby apply the most effective solution for the greatest risk and exposure. Lowering the age requirements of the statute and making clear the agency's ability to regulate upward as safety circumstances warrant, would go a long way to solving many of the problems in the law and keeping the agency's resources focused on providing real protection for consumers.

2. Testing and Certification/Small Manufacturer and Crafter Concerns

The agency and the Congress have heard from many small manufacturers and crafters that are being severely and adversely impacted by the CPSIA. Indeed, a website has been established that tracks the demise of businesses attributed to the law. The testing and certification requirements are at the heart of the complaints being made by small manufacturers and crafters. The agency has worked hard, within the confines of the statute, to deal with the issues small manufacturers and crafters are facing as they struggle to meet CPSIA's requirements, but our options are limited. Our report points to the guidance booklets we have published, the component testing enforcement guidance and possible regulatory relief in the so-called '15-month rule' dealing with frequency of ongoing testing. It is not clear that the problems small manufacturers and crafters are having now can be adequately addressed with more education, a policy on components that is still unimplemented and unproven, and by the promise of future regulatory action, months from now, that treats only part of the problem.

While independent third party testing is the most robust way to provide assurance of compliance, it is also the

most costly and least efficient. The requirement that all children's products be third party tested has raised the cost and added to the complexity for many small producers of children's products. The application of this requirement to handcrafted products made by individual artisans has raised serious concerns about their continued viability. While we hope that our component testing enforcement policy will address some of this concern, we have been told that this is not a panacea and more must be done. In addition, small producers face higher testing costs, are receiving conflicting information from testing labs about what must be tested, and are facing barriers from retailers who are requiring redundant testing or additional testing to be done by laboratories they specify, often at prohibitive cost.

Given all this, Congress should consider whether child safety can be served by other testing alternatives that will assure adequate compliance testing without the cost and complexity of third party testing. Specifically, the agency should have the ability to establish, by rule, alternative testing requirements for certification under section 102 of the CPSIA for manufacturers based on small volume or other appropriate criteria, as long as the requirements provide for a reasonable testing program and such other provisions as the Commission deems necessary to provide reasonable assurance of compliance with underlying consumer product safety rules.

3. Retroactivity

The report's recommendation that retroactivity not apply when the lead provisions of the statute transition from 300 ppm to 100 ppm is the minimum that must be done to address the significant losses that businesses have incurred because of the retroactive nature of the statute. The problems with retroactivity have been exacerbated by retailers who have required the lower limits ahead of their implementation dates in the statute, stranding safe inventory that cannot be sold. Although it is unfortunate that a recommendation could not have been made and acted upon a year ago to forestall the economic losses that have already been suffered, it is imperative that it be implemented as soon as possible.

We are seeing the same phenomenon occur with respect to phthalates, where the testing process to determine the presence of phthalates is much more difficult than is that for lead. The CPSIA permanently banned three types of phthalates and banned, on an interim basis, three other types until more health data could be assembled and analyzed. A Chronic Hazard Advisory Panel is being convened according to the timetable set out in the CPSIA, to look at the health effects of the various phthalates banned on an interim basis by the statute. The Commission is trying to define the universe of products to which the phthalate ban is applicable, is still working on a test method to determine the presence of phthalates in those products, and has not yet approved a laboratory accreditation process. Unlike lead, there is no screening test to more easily determine the presence of phthalates. It is unreasonable to require that retailers and resellers either face potential liability or go back through their inventory to try to determine the presence of phthalates when we do not even have a test method in place, putting aside questions of testing practicality and affordability. Congress should consider clarifying that this provision will not apply in a retroactive manner. At the very least, retroactivity should apply only to the three permanently banned phthalates.

Finally, the recommendation with respect to retroactivity does not go far enough since it does not treat sales by charities, consignment shops and other resellers. For example, we have been told that many of the charities are not selling children's apparel because of the potential liability imposed by this law. Obviously, it is crazy for people not to be able to buy their children winter coats or boots at a Goodwill store or at a yard sale. Yet that is where the CPSIA leads us and I doubt Congress really intended this result. The agency has an excellent working relationship with charities such as Goodwill and the Salvation Army, and our regulation of these groups should focus on stopping the sale of recalled products. Congress should act to assure that the products parents need to buy are available in the resale market.

Conclusion

This statement is not intended to be a comprehensive description of all the implementation issues we have seen with respect to the CPSIA. I have focused for the past 18 months on the major challenges we have faced in implementing this law. As Congress reflects on the implementation issues presented by the CPSIA, there are a number of other things - both technical and substantive - that should be considered, including coordination with the state attorneys general in enforcing the law and issues related to improving the agency's database.

Please be confident that the Commission shares the commitment of the Congress to assure American families that products on store shelves do not present an unreasonable risk of injury. These recommendations are given in the spirit of finding a path forward that, while minimizing unnecessary regulation, assures parents that the products they buy are as safe as possible for their families.

Mr. SERRANO. And thank you both for your testimony.

Let me put aside for a second the questions I had prepared, because you bring up an interesting point and one I think that merits both dealing with the points you bring up, Commissioner Nord, and also with a little bit of history. And my question then would be how do we create a fair and just balance? Perhaps Congress legislated in a way that it has created some issues that we have to address. That is possible. It happens all the time. But why did Congress legislate? Because of the lack of oversight in the past and the ability to give everybody flexibility created an unsafe environment for children and for all Americans. So every so often in this country, we do this. We do this with everything, not just legislating. We do it with all kinds of issues in the House where there is a crisis, and we react to it, and then we go perhaps beyond what we were supposed to. I am not suggesting that is what we did. That is what you are suggesting.

So my question is how do we now make sure that we don't have to legislate a few years from now or a generation from now to deal with the fact that we had such a problem before us? Yes, there are Salvation Armies and Goodwill and other people who are saying you did too much. But we had to because we had a mess on our hands, and we had a very unsafe environment for our children and for our citizens.

So my question is how do we adjust that that we have to adjust if it is true we have to adjust, if there is a need, without going back to the days where no one cared what came into the country and what happened? This was not done because one day Members of Congress got up and said, oh, what do we do today? Okay, let us pass a new consumer law. No. It was because we were being hit hard and people were demanding action from us. I remember the time. People were saying, you have got to do something. We are trying to do something. How do we balance it?

Ms. TENENBAUM. First nf all, we have been working very hard to implement the CPSIA, and we very much are mindful of the strains on small businesses and low-volume manufacturers. We responded to your request to come up with the report. We all worked on this report. It was a bipartisan, unanimous report that we sent to Congress asking for flexibility.

But in the interim we at the Consumer Product Safety Commission have tried to provide flexibility as well. We have issued 41 Federal Register notices, and we will have 12 more additional rules in the next 8 weeks, because industry has told me, "We want to have predictability. Hurry up with these rules so we know how to respond."

Second of all, you had inaccessibility, and you had lead in electronic products as an exemption to the lead requirements. So what we also came up with were lead determinations for textiles, for other materials that we said you don't have to test. If you make a shirt we know it won't have lead in it. Now, if you buy buttons from a button maker who can say they are lead-free, then you don't have to test the shirt at all.

So we have tried to use common sense in the implementation. We put out a guide for small businesses and reseller stores like the Goodwills. I have been on many nonprofits, and so has my husband, that have sponsored these resale stores. We try to educate these resellers on what they can look for in products to pull them from the shelves. We have done this kind of education with resellers.

We also have come up with an enforcement policy which would allow for component part testing so that if you buy a component part, and it is lead free—like, if you are making blue jeans, and you buy lead-free zippers, which YKK is making now, the button manufacturers are making lead-free buttons, then you don't have to test if you buy it and you have a reasonable assurance that it does not contain lead.

So we are working to do all of this, but at the same time we, in that report to Congress, realized that we needed flexibility. And we all agree that the "any lead standard" was something that was a little too tough. It was tough for bicycles and ATVs, and we gave a stay of enforcement so we would not be enforcing this law against them. It was too tough for books in terms of those published prior to 1985. The books that are now published don't really have a lead problem because the process does not contain lead. If you have a book with a spiral binding, you might have a different problem because it might contain lead. But the publishers now know what to do, and they don't have to go test every book because they are lead-free.

But we have asked to have this flexibility, and now it is in the Commerce Committee. We are working with them to try to see what is the best way to approach the flexibility. We propose that if you could show us that the lead was needed because it was impractical to remove, or it really did not pose any measurable adverse health effect to the consumers, then that was the functional purpose.

Now, we understand that there are some people in the ATV industry that have supported that amendment to the CPSIA. The bicycle industry supported that. So now it is the issue of whether we have functional purpose or whether we have a risk-based approach. Any way you approach it, it is going to be more work for the CPSC.

What you [Congress] did was establish a bright-line test. You said no more than 300 parts per million, which is where we are now, in the content of lead in a product, or 90 parts per million in terms of lead paint. So that is what we enforce. But what we have all agreed on is that the ATVs and bicycles do not pose the risk to the consumer, and the ATV industry has also assured us that they can manufacture an ATV where the rider does not come in contact with lead. So this would work for us.

FLEXIBILITY IN CPSC IMPLEMENTATION

Mr. SERRANO. Let me ask you, Commissioner, you were very clear in supporting the report that says, give us flexibility. But in the meantime are you satisfied with some of the steps that have been taken to give some flexibility outside Congress giving you that?

Ms. NORD. Well, the agency is doing what it can within the confines of the law. But on the Commission level, on the staff level, we are very clear that our hands are tied in a number of different ways. As the Chairman said, we are looking at component testing, but that is out in the future. Hopefully that will help small businesses. We don't know yet. We are doing some other things. But we don't have the ability to address the underlying systemic problems that we have seen come up.

Your question is important. When the crisis with imports hit, obviously the Congress was very concerned, the agency was very concerned, and we were all working together at that time to get our arms around this, also working with an admittedly and incredibly constrained budget.

Perhaps the most effective thing to address this issue is the fact that you all gave us resources to set up an import surveillance division so that we would have people at the ports. And our strategy has been to push safety as far back up the manufacturing chain as we possibly can and then have an ability at the ports to look more broadly at the products that are coming in, and that is because of our agency is working with this subcommittee and your Senate counterpart to make that happen, and that has been really effective.

Now, obviously we understand that Congress was concerned about this and wanted to address it, but the provisions in the CPSIA do tie our hands in a number of different ways. And it really ends up making us focus on all products with lead whether the child is exposed to the lead or not. And that is the concern we have, and that is what we would like to address.

Mr. SERRANO. I can speak for myself, but I tell you, I think Congress would be open to revisit, but I don't think Congress on either side of the aisle is interested in going back to the days when the situation got so out of hand, it created the situation where we had to react.

Mrs. Emerson.

LEAD STANDARD CHANGE

Mrs. EMERSON. I am not disagreeing with you, Mr. Chairman, that we need to keep the bill, but here is just a list for you of all the companies that have either been hurt or closed as a result of this act, all of which are small businesses, I might add.

Chairman, you mentioned 300 parts per million of lead, and that is due to be reduced to 100 parts per million by August.

Ms. TENENBAUM. If technologically feasible.

LEAD CHANGE FEASIBILITY

Mrs. EMERSON. If technologically feasible. But it is pretty darn hard for a lot of companies to meet even the 300 parts per million. In other words, companies are having to decide to use different types of materials to make things, and, of course, they break, and it costs the companies money. There is just a chain reaction, if you will. So how do you determine if it is going to be technologically feasible, number one? And number two, what is going to happen if companies cannot, cannot find the products that they need with-

in that 100 parts per million to make whatever item it is they are making?

Ms. TENENBAUM. Well, we are grappling with that now at the CPSC on what will companies have to show us to prove that reducing it to 100 parts per million is not technologically feasible. Our scientists and engineers will review the criteria that companies present us to determine if the lead is needed in the product to make it stronger. If you need the lead, then we will allow you to continue the 300 parts per million.

And so the other thing is that in the report to Congress in January that we filed, we asked that that 100 parts per million be applied prospectively and not retroactively, because there are companies now who are meeting the 300 parts per million standard. They will be applying to keep that standard if they feel like it is not technologically feasible to go down to 100. While we are reviewing their application and making these findings, we don't want stores to be in limbo or the companies to be in limbo on what the limit will be. So we are asking that to be applied only prospectively.

Mrs. EMERSON. I would hope so, given the fact that we have all these companies.

But let me hear from Commissioner Nord on this question.

Ms. NORD. One of the concerns that I have about migrating down to 100 parts per million is in order to hit the technologically feasible standard, companies are going to have to individually come in and make that case to us. So it could potentially be an incredible drain on resources for the agency, because, for example, as I indicated, brass has got lead in it, but we can't give an across-the-board exemption. We will have to be looking at these things on a case-by-case basis.

We also get into the situation where perhaps it is technologically feasible. I mean, it is technologically feasible. Recycled metal has lead in it. You can have virgin metal. It is technologically feasible. It is very expensive. But you can meet the 100 parts per million requirement, but to do it is requiring these companies to spend resources reengineering their products in a way that hits the statute, but doesn't necessarily address safety or advance safety.

Again, my concern is that the agency really needs to be focusing on products that are unsafe and that harm children. That is our mission, not dealing with ballpoint pens and bicycle tire valves where nobody gets lead poisoning from riding a bicycle. So we would like to get off that and back onto our core mission.

JOB LOSS AND CPSIA

Mrs. EMERSON. Okay. So then I will pose the question to you, which is obviously not part of your core mission, but the question is begged nonetheless, and that is has the Consumer Product Safety Commission or any other agency in the Federal Government or executive branch, I should say, estimated the number of jobs that will be lost as a result of this new law?

Ms. NORD. The agency has not done an economic analysis of the impact of this law. I think it would be something that would be very, very helpful.

Mrs. EMERSON. What do you think, Chairman?

Ms. TENENBAUM. No, we do not have the ability to do that, but I have not seen any other agency in federal government who has done it as well.

But going back to what the Chairman mentioned, this law was passed because of a number of egregious cases where there were high levels of lead in paint, and in toys. Congress spent hours listening to testimony on how lead affects the developmental and brain development of children. It was mentioned many times that there are no safe levels of lead.

Now, Commissioner Nord talks about that the staff does not think that there are risks. What the staff at one point, before you passed the CPSIA, had to rely on was the Federal Hazardous Substance Act, and at that point, they had established that 1 microgram per deciliter, a blood lead level increase was the standard. That was the standard until Congress set this bright line of 300 parts per million, and 100 parts per million if technologically feasible, and 90 parts per million for lead in paint. So it has helped the industry to know where the bright line is. We are struggling with the same thing now on cadmium, cadmium and other heavy metals, that we found in high levels in jewelry.

CADMIUM REPLACEMENT FOR LEAD

Mrs. EMERSON. Is cadmium now being used to replace lead?

Ms. TENENBAUM. I have sent a strong warning in my speech to the APEC, the Asian Pacific Economic Council, in my speech to APEC in January. I said, do not use cadmium and other metals in place of lead. The AQSIQ, which is our counterpart in China, has made that same stern warning just in the last few days to manufacturers,"Do not use cadmium and antimony, barium and other heavy metals in place of lead."

So we have warned them, but we also are looking now at establishing what the limits are on cadmium in children's jewelry that we find safe and unsafe. And that is what we had to do on lead repeatedly, item by item.

ECONOMIC IMPACT ANALYSIS

Mrs. EMERSON. I understand. In my district, 97 percent of all the lead that is mined in the United States comes from my district, and I am very sensitive about having lead in soil and harming children, and that is why I was very supportive of this particular bill. But I dn think that sometimes things get out of hand, as you all well know.

May I ask if both of you, even though you don't do it today, would you support having an economic impact analysis done on the effects of this law on jobs in the United States?

Ms. TENENBAUM. I would have no problems at all having someone do an economic analysis.

Ms. NORD. I think that would be incredibly helpful. How can you regulate if you don't know the impact of your regulations? I think it is something we desperately need.

Ms. TENENBAUM. But we also want to make sure that we maintain a very high level of safety for children, and that economic impact does not override the concern for safety. And we really agree that we need flexibility. All five Commissioners think we need

flexibility on lead. How we get there is how we disagree. There were some who want to set a *de minimis* level, and there are three of us that would rather have a level where you have to show that you really need this lead in the product, and it is impracticable for you to remove it, and that you can show that there are no reasonable or demonstrable or measurable health risks to children.

So we agree on this but not on how we get there. And Congress will have to determine what is the most common sense way to get there.

Ms. NORD. There is a great deal of agreement. I guess my response would be that once you have shown that there is no risk, then isn't that the end of the analysis? I mean, that is really what we are trying to focus on is deal with risky product, harmful product. If the product has no risk, then I think we don't have any business regulating it.

Mrs. EMERSON. Okay. There are so many questions, and it is complex, but maybe we should let Debbie go.

Mr. SERRANO. Before we turn to Debbie, again, this is an issue, in my opinion, of balance, because at the expense of making the business community angry, which I tend to do at times, if Congress said, let the business community write all consumer protection laws in this country, the end result might be zero consumer protection laws in the country. It was never the intent, nor should it ever be the intent, to legislate on behalf of the consumer and the American public by getting rid of jobs. But also we can't take an economic crisis and assume that everything we legislate here is going to cost jobs, so we can't do health care because it will cost jobs, we can't get out of Afghanistan because it will cost defense jobs, we can't do Consumer Product Safety Commission stuff because it will cost jobs. I am not sure that that is—really at the end of the road what happens.

So we have to continue to be protective of the people we represent, while being sensitive to the fact that you are right, if something is found not to be harmful, then maybe we will move away and do something else. But I can tell you that as I turn to her, when Debbie Wasserman Schultz spoke about pools and spas, I was asked by reporters, why are you dealing with that? In fact, one had the nerve to say there are not too many pools in the South Bronx. I say that is not the point, right? Well, no one questioned that what she did was very important. What a build-up.

Ms. WASSERMAN SCHULTZ. Thank you.

Mr. SERRANO. And we do have a couple of pools in the South Bronx.

CPSIA FLEXIBILITY

Ms. WASSERMAN SCHULTZ. Thank you very much, Mr. Chairman.

I can appreciate the need for flexibility. Flexibility is fine, but I think that, Commissioner Nord, you are starting from an unfounded premise that somehow the size of the business and what it manufactures makes it more likely to manufacture a safe product versus a large business. So it is popular now to carp about the need to protect small businesses and to save jobs and make sure that we cannot lose jobs. I agree with all of that. But I come to this debate as the only person around this table with young children.

Mrs. EMERSON. I have grandchildren.

Ms. WASSERMAN SCHULTZ. I mean, I am the mother of twin 10-year-olds and a 6-year-old. And I will just give you my own anecdotal example. While it might not seem like a ballpoint pen with lead in it at the tip is a dangerous product or poses a potential risk to any child—the other day when I came home from Washington, I saw a scratch up my son's arm from about midforearm to midbicep, and I asked him how he got it. And he said, Mom, I accidentally scratched myself with a pencil.

Now, I mean, it was a scabbed scratch. Now, my son is not self-mutilating. This was just an accident. But it happens. And if there is an unsafe level of lead, a pencil, pen, it could have easily have happened with a ballpoint pen. Fortunately he is in elementary school, and they are still requiring the use of pencils and not pens, but that could cause him harm.

And during the whole debate on the CPSIA, I found that I had one of those products in my home—this was at the time my youngest daughter was 4—that had those little pieces that were not meant to be placed in any child's mouth, but that children were placing in their mouth, and they were lead balls basically. Here is another example of a product that was manufactured by a small business. You just recalled baby bracelets and pacifier clips last month because of high levels of lead, and that was manufactured by a small business.

CPSC RESOURCE NEEDS

Commissioner Nord, with all due respect, in 2007 I had an exchange with you prior to the passage of this law, and you argued that the Commission didn't need more resources and didn't need more staff. So today you are praising the fact that you have more resources and more staff. So your position is inconsistent, with all due respect.

Ms. NORD. Thanks for the question because it gives me an opportunity to clarify what my position was. I have never—and I think we can go back to the record, and I would love to do that with you—argued that we should not have more staff. What I did, Commissioner Moore and I presented a budget that allowed us to do certain things with the budget in front of us, but when asked, I have always welcomed more resources.

Ms. WASSERMAN SCHULTZ. The exchange was with me, Commissioner, and I asked you specifically. My recollection is clear. You said specifically that you didn't ask for more resources, you didn't think it was necessary, you just thought the size of the staff was adequate to do the job that you needed to do. That was our exchange.

Ms. NORD. With all due respect, I would disagree. My recollection is different.

But nevertheless, getting to the core question, no one is arguing that small businesses by definition will never produce an unsafe product. What we are arguing is that we need to be focusing in on the products that cause harm, not regulating things across the board in the kind of rote way that we are doing it now. And that is what the CPSIA does not allow us to do.

With respect to minimizing regulatory burdens on small businesses when we don't think there is going to be a risk, that is what we don't have——

LEAD IN TOYS

Ms. WASSERMAN SCHULTZ. Let me ask you, since you are making that argument. From the perspective of what parents think, we think—and I think I can speak for lots of parents—that it is really not understandable why a product has to have lead in it. There are some products that I agree, the lead, but why is it that there are certain toys that have more lead than necessary? Why can't they just reduce the amount of lead below the limit?

Ms. NORD. If the toy has lead in it that is going to expose the child to the lead in any kind of measurable amount——

Mr. WASSERMAN SCHULTZ. I just gave you an example from this week.

Ms. NORD. I am sorry to hear about your child, but the scratch on his arm is not going to give him lead poisoning. Lead poisoning is a chronic hazard. And the question should be should we remove ballpoint pens from children's environments.

Ms. WASSERMAN SCHULTZ. Why not just reduce the lead in the tip of the ballpoint pen?

Ms. NORD. The problem is that the lead is there for a purpose. And, yes, we could do that, and your child would not be using ballpoint pens because they would be unaffordable. As I said, brass is the example I used.

Ms. WASSERMAN SCHULTZ. I am sorry. That is a blanket statement that you have no qualification to back up.

Ms. NORD. I am more than happy to provide you with that.

Ms. WASSERMAN SCHULTZ. Ballpoint pens would be unaffordable unless we have lead in the tip of them?

Ms. NORD. The lead serves a purpose there. It would meet the functional purpose.

Ms. WASSERMAN SCHULTZ. So if we don't have lead in the tip of ballpoint pens, they would be unaffordable?

Ms. NORD. You would replace it with something more expensive.

Ms. WASSERMAN SCHULTZ. Unless you can show me a documentation and economic analysis of that, I have a hard time understanding that.

Ms. NORD. I would be delighted to give you what we have. But again, if the agency had done more economic analysis of these issues, we would be in a better place to regulate, and that is something I think we do need to be doing.

Ms. WASSERMAN SCHULTZ. I support flexibility. I do not support making sure that children are exposed to lead unnecessarily.

Ms. NORD. Then we agree.

Ms. WASSERMAN SCHULTZ. But we don't agree with the difference between the majority of the Commission and the minority in one which you serve where you allow a de minimis level of lead versus ensuring that it is inappropriate for—or not possible for a company to follow the law. The law was debated and discussed and supported for a reason, because there was an absence of regulation. There was no one minding the store. And parents became scared and tired of it. And I will tell you as a mother of young girls who

wear the jewelry around their necks, and I see them playing with it in their mouths all the time, even though that is silly and they shouldn't do that, if unbeknownst to them and to me it has an inappropriate level of lead in it, then they could get lead poisoning.

Ms. NORD. We all agree on that point, And I think there is no debate. And we want to work with you to make that happen.

POOL AND SPA SAFETY ACT GRANTS

Ms. WASSERMAN SCHULTZ. There appears to be some debate.

Turning, Mr. Chairman, if I can, just to two other subjects, one being my appreciation for you for providing the resources, and also to the Commission for your excellent enforcement of the Virginia Graham Baker Pool and Spa Safety Act, both under your chairmanships. I am a little bit frustrated that the grant program, the State grant program, even though it has been fully funded the last two fiscal years, has taken an extraordinarily long time for the Commission to get off the ground. So can you, Madam Chair, describe your progress? I mean, there is $2 million that is potentially going to expire in September, and I don't want to see that happen.

Ms. TENENBAUM. Well, first of all, we fully support the Virginia Graham Baker Act and appreciate your advocacy in getting this bill passed.

We have been working hard with the Centers for Disease Control and Prevention to establish the State grant program that the act calls for. We finalized the details of the plan just this week. The CDC in conjunction with the Commission will be releasing a funding opportunity announcement the beginning of April. And my understanding is the grant applications will be due in June, and the grant qualifying to States will be made in August.

POOL AND SPA GRANT QUALIFICATIONS

Now, it is important, however, that the states currently meet the statutory requirements. In fact, the states must pass legislation in order to qualify for this act. We have looked——

Ms. WASSERMAN SCHULTZ. We are in the middle of the legislative session season right now.

Ms. TENENBAUM. And we are following some States, Florida, Texas, to see if they will pass this legislation. We will be showing states what model legislation looks like and we have relayed the model legislation. In the event that it does not pass, it [the funding] stays at the Commission. What we want to assure you, that in the event states do not pass this legislation, we can take that money, and we would use it in the spirit of the Virginia Graham Baker Act to do more contracting with people to do education advocacy, if we are allowed to.

Now, the other thing is we have also asked Congress to consider whether it should be states or a municipality. For example, the city of Miami, could they apply for the grant? Could they pass an ordinance? It might be that the pool safety is closer to local government than state government. Should Fort Lauderdale, or—Jacksonville, any of your large cities pass an ordinance——

Ms. WASSERMAN SCHULTZ. Phoenix has a very strong one.

Ms. TENENBAUM [continuing]. That complied with this, they could then get the grant. And we were asking you to make amendments to the CPSIA so that we could—

Ms. WASSERMAN SCHULTZ. I would be glad to work with you on that, because whether we do it state by state or major city by major city, the idea is to make it more likely that we have tighter restrictions around pools.

Mrs. EMERSON. Can I add something? Those state grants really would be helpful, because I have small community pools that truly cannot afford the 10- or $15,000 that it is going to cost them to comply with the law. And I hate for the kids in these towns where there is no other place to have recreation to not have that ability to seek assistance here.

Ms. TENENBAUM. Well, in Columbia, South Carolina, the headlines in last summer's paper was the main community pool could not open because it had not met the requirements. So they scrambled around and got the equipment and met the requirements. But you are right, if we could provide some flexibility.

POOL AND SPA EDUCATION

If you wanted to know about the education outreach program, we have that information, too. We have given our grant to Widmeyer Communications and Omni Digital Studio to create the largest public education campaign the agency has ever done: $3.6 million will go to Widmeyer for a Website, for all kinds of educational materials for us to use in pool and spa safety; $200,000 for Omni Digital Studios; and then we have $4 million in which we will contract with third-party organizations to train and target education this week. So that would be something that a community organization or regional and State organizations could apply for those awards, and we would give them those awards to do education advocacy of pool and spa safety.

So we are working very hard. The initial launch in April for the rollout of the program will be at the National Drowning Prevention Association's conference in Pittsburgh, I think you have spoken to that conference several times. We will have a broader launch on Memorial Day, and I hope this is a press conference we can do it in Florida together. I know that you joined Commissioner Nord, Senator Klobuchar and the Taylor family for last year's kickoff. So we want to work with you again on that.

Ms. WASSERMAN SCHULTZ. Absolutely. I look forward to it.

Mr. Chairman, are you planning on having us come back?

Mr. SERRANO. We are in the process of having three votes, but as you can see from the yeas, it is going to be a while before it gets to a significant number there. So we will keep going here.

IMPORT SAFETY

On the issue of product recalls, we know that 80 percent of recent U.S. product recalls were imported items. The CPSC budget request would devote approximately 57 staff to the import safety initiative comprised of personnel stationed at ports, field support and other support staff. However, as GAO pointed out last August, the import staff of the Commission are significantly smaller than that of other agencies like the FDA, which has 700 people.

Does CPSC have a long-term plan for ensuring adequate oversight of imported products?

Secondly, has the Commission improved its information sharing with customs to ensure that the Commission has access to ship manifest data before products arrive at U.S. ports?

Ms. TENENBAUM. Well, thank you. Just to give a comparison, in 2009, we had 12 people in the Import Surveillance Division, 10 people actually at the ports, and for this year we had 18 in the whole division and 14 at the ports. We are trying to increase that to 23 in the division and 19 at the ports. But we also, if you add to that the field staff which we have in many of our states, also hazard identification and reduction, and also support from our attorneys and general counsel, the whole number is now 43 total for import surveillance program, and next year will be 57. However it is still woefully under what other agencies have in port surveillance.

We are trying to do is work through technology in cooperation with Customs and Border Protection so that we get this information from the manifest. We are asking for just $250,000 to implement the analysis and planning phases to develop an automated interface with ITDS operated by Customs and Border Protection. This will allow our system to talk to their systems and do data mining. This is only the planning stages.

We also had additional contract funds left over. We are looking at using $2 million to do a risk management system so that we can have the technology to look in those manifest systems and determine what is there that really we should be paying attention to.

So technology will help considerably, but once we phase it in this year, it is not inconceivable that next year if we do the risk assessment, we will come back to you and let you know where our gaps are.

We also have a contract with Booz Allen Hamilton. It has been since 2003 that we had a strategic plan, and we need a new operating plan as well. We need to look at all the requirements under CPSIA, what kind of information we are going to get on the public database in terms of the referrals and consumers letting us know about deaths and injuries and how we are going to respond to that. It will be more information than we have really handled before. So we, through that planning and strategic process with Booz Allen, will look at the service gaps and be able to tell you when we come back next year what the big needs are for this agency to function appropriately and have stronger surveillance in the ports.

Now, we consider ports not just to be ports on the coast, but ports of entry. So we have 300 ports of entries, and we have as you—19 people stationed at the ports. However, we do use the State field staff. So if we know that there are fireworks that were put on a train on a California coast, and they go to an inland city, and that is where they are unloaded, we can send field staff there to check on what the status of those—whether they are in compliance in terms of fireworks. We will be able to give you a better idea of need.

LEAD IN BOOKS

Mrs. EMERSON. Can I just ask you for a clarification real quick? This is quick. We started to talk about lead, and I want to talk

about the whole functional issue when we get back. You said books are lead-free. Are not the books that were pre–1985, don't those contain lead in the ink?

Ms. TENENBAUM. They do. Pre-1985 had lead in the ink. If you use the four-color process and modern printing now, the books that are printed in today don't have lead.

Mrs. EMERSON. But what happens to libraries and that sort of thing who——

Ms. TENENBAUM. That is why we needed some relief so that the libraries don't have to test. They are not selling books, but they are lending in the stream of commerce. But it is the pre-1985 books, that if we could just warn parents—maybe a warning would be adequate. If you look inside some of these 1985 books, it is the illustrations in the older books that have lead in the illustrations. So we want to advise parents not to let children mouth the books. And the books for little children aren't lasting since 1985. But if you go into schools, particularly in rural areas, and you go into libraries, you are going to see pre-1985 books.

Mrs. EMERSON. I still have all my Golden Books when I was a kid that I gave to my kids, who hopefully will give them to their kids.

Ms. TENENBAUM. Well, if you want to bring them to Washington, we will test them for you.

LEAD IN DOLLS AND COMPONENT TESTING

Mrs. EMERSON. I might do that.

And also then just very quickly, you said something about lead-free buttons on dolls. But do you not have to test every single part of dolls, including the rouge on the checks? You do not have to test every part of the doll?

Ms. TENENBAUM. We have implemented an enforcement policy on component part testing. In fact, I was just at the toy fair. We went in to see Legos. They thanked us for having the component part testing where they can buy the lead-free paint, and they don't have to take the whole Lego apart and chip off the paint.

Mrs. EMERSON. We are talking about dolls here.

Ms. TENENBAUM. Dolls. If you manufacture new dolls, and you use lead-free products, then you keep that certification, and you have a reasonably check up, just to make sure it is lead-free, then you wouldn't have to test the doll. You would not have to destroy a doll to find the lead. You would say, I bought lead-free paint, I bought lead-free buttons, here is my certificate. It is like Commissioner Nord said, the component part testing market has not developed, but it is a huge market for someone who wants to develop a hobby store with all lead-free component parts. It is a huge market for people.

Mr. SERRANO. Yes. We have three votes, so we will ask you for your help here in waiting for us.

Before I leave, one thing. So you mean those spiral notebooks that our great friends in the media use could be hurting them?

Ms. TENENBAUM. It is not a children's product for them.

Ms. NORD. It would explain a lot, wouldn't it?

[Recess.]

Mr. SERRANO. Okay. We will do the best we can. She is reading something there, which means something will come up soon.

CHANGING CPSC FOCUS

Some of the agencies under our subcommittee's jurisdiction, such as the Federal Communications Commission and the Securities and Exchange Commission, have had to change their regulatory approach in response to changing products in the marketplace. Chairman Tenenbaum, what are some ways you plan on changing the focus of the CPSC going forward in response to changes in the marketplace for consumer products?

Ms. TENENBAUM. Thank you, Mr. Chairman.

As incoming Chairman, my first obligation was to finish the rulemaking required under the CPSIA. That has been a top priority for me so that we would have the rules developed, and industry would know how to comply. We could go beyond just rulemaking and start enforcing the requirements of the CPSIA.

But even broader than that, we are not just a lead and phthalate agency. We also need to look at fires, carbon monoxide and other issues that cause injury and death. The database that Congress required us to develop will give us more information than ever before. Now we collect data from emergency rooms, death certificates and newspaper articles, as well as from our hotline and as many other sources as we can get, but sometimes we don't get the information until years after it has happened. The public database will allow consumers to give us information, and then we will have to respond as quickly as possible. If we know of a death, we can't let a death just stay in the database for months and not investigate. So we are going through this management and operations planning with Booz Allen Hamilton, the company we have hired to help us with our strategic planning, and we will look at the service gaps and gaps within our organization that would prohibit us from responding quickly.

But we are always looking at developing trends; nanotechnology, for example. We have asked for $2 million so that we can participate in the whole nanotechnology research project that is under way with all of the other Federal agencies. With this $2 million, we will be able to contract with them to ask them to review our products that we oversee to determine what problems they see in terms of nanotechnology that we need to be aware of.

So I think you always have to be looking at the marketplace, getting the best data possible, having relationships with the research agencies of the Federal Government, working with your state officials. Some states do research. The attorneys general also; we are working with them closely so that they turn over products that they find. We need to be open to getting information from all sorts of avenues.

COLLECTING DATA

Mr. SERRANO. And in the past, you say it was difficult to get this information, or you got it late. Any resistance to getting it now?

Ms. TENENBAUM. Well, we have ways of collecting data. One is the NEISS system, and through that system we pay emergency rooms to fill out forms on injury and deaths related to products,

and they give us that on a regular basis. We also get death certificates from states, and we look at that. We have five different silos of information at the Department, and we haven't had the ability to data mine. With the money that Congress has given us for IT modernization, we can now have a technology that allows CPSC to go through all of these systems and mine data so that we will have death and injury information on products quicker than ever before.

So with IT modernization, the public database, this risk management program that we want to do with Customs and Border Patrol, we will be able to get more data sooner and respond to it more effectively.

COMMUNICATING SAFETY INFORMATION

Mr. SERRANO. Now, in both of your testimonies, you spoke about communicating important safety information in minority communities. What has the Commission done, and what is it currently doing, to ensure that important product safety information, including information on recalls, is being disseminated in these communities, including communities where languages other than English is spoken, and particularly for families who do not have a computer at home?

Ms. TENENBAUM. We are well aware, and I come from a state where we have so many rural areas where there is a great digital divide where people don't have computers. So what we try to do is when we announce a recall is work with the media. For example, on crib recalls we had almost 200 million people get information. We go on all the national morning news programs. We use social media such as Twitter, and we will be using Facebook. We use as much of the free media as possible to get our word out.

But we also provide hard copies of the product recall. We can mail those to States, and we provide hard copies to child care providers and consumers who don't have access. We work with the Neighborhood Safety Network, which has 5,600 members, and through that Neighborhood Safety Network, which is very much in touch with minority communities, we get those safety messages out.

But we do have a dedicated Spanish-speaking spokeswoman, Arlene Fletcha, whom you met at the 2008 press event that you had with Nancy Nord at the Bronx library. And Arlene translates dozens of announcements for the Hispanic community and conducts interviews with Telemundo and Univision that reach millions of viewers.

We still plan to launch our special minority outreach campaign that will increase the use of the Neighborhood Safety Network, which is 5,600 community leaders. We are going to five cities this year for minority community outreach.

Mr. SERRANO. Which city; do you know?

Ms. TENENBAUM. I don't have that, but Scott Wolfson might know. We will get back to you. We are in the planning stages, working on that. But it will be the Hispanic, African American, Asian American populations.

We also translate our information on the Web in Chinese, too. We are very aware that we can't just have English only on our Web site.

Mr. SERRANO. What a phrase.
Mrs. Emerson.
Mrs. EMERSON. Sorry. You caught me chitchatting. I apologize.

FUNCTIONAL PURPOSE

Let us talk about functional purpose, which is kind of arcane to talk about. You have suggested, Madam Chair, that a way to fix the unintended consequences of the CPSIA is to add an exclusion for function purpose, which basically—I understand that would allow the Commission to exclude components with higher levels of lead if the lead was found to be essential for the function of whatever the item is. So can you elaborate for me how such an exclusion might work at the Commission, please?

Ms. TENENBAUM. Well, the term came from the Federal Hazardous Substance Act, and that term was a part of that act. So if someone came to you and said, we have chemistry sets, and we need this banned hazardous substance to be part of the chemistry set to teach chemistry, we were allowed to give a pass on substances that were ordinarily banned because the petitioner would say, we need it for a functional purpose. So it was a legal term that we have always used under the Federal Hazardous Substance Act for products that you had to have the ingredients because it was a functional purpose of the product.

Now, I want to clarify that I support the bright line, the lead limits under the CPSIA. I thought that was a step forward because you have 300 parts per million for the lead content and 90 parts per million for lead paint. I support that, and several other Commissions do as well. We are not talking about reducing those, but what we are talking about is for a person who has a product that cannot meet those levels to be able to say we need it for the functional purpose of this product. The amendment is being discussed in the Commerce Committee and it depends on what the components of that are. I don't really have the components at this time because it is under discussion.

So we support the bright-line test, and that was in the report to Congress. But when we wrote to Congress, we didn't recommend functional purpose or *de minimis*. Commissioner Northup and Commissioner Nord have said—Commissioner Northup has been very strong, and I think she put in her statement that she wanted a *de minimis* standard. But it would put the agency back in having to test every product for what is *de minimis* for product. Lead can bind, depending on the alloy it is attached to, we would have to go through and look at every product and to see how it would increase the blood lead level. And that is where we were before you passed the CPSIA. To give exclusions will require agency resources and staff; however, it depends on how the exclusion is written by the Commerce Committee on how extensive those resources will be.

Mrs. EMERSON. Commissioner Nord, how do you feel about the concept of functional purpose?

Ms. NORD. I have got concerns about it, as does my colleague, Commissioner Northup. Our concern is that it could be very, very subjective.

Mrs. EMERSON. Who makes the decision?

Ms. NORD. The agency would make the decision.

Mrs. EMERSON. So you would ask your scientists as opposed to you as Commissioners?

Ms. NORD. Does the lead in this particular product meet a functional purpose with respect to this product. And that is—at least in the legislative constructs we have seen today—is defined as highly impracticable to remove that lead. That term "highly impracticable" is well litigated. It has a meaning in the law which takes a bit of the functionality away from the functional purpose provision.

And we are alsn very concerned it is going to be very, very resource-intensive for the agency, and it is going to turn the agency into a product-approval-type agency.

With respect to the bright-line aspect of the law, I mean, because the law is a bright-line law, you end up with these anomalies that we have been talking about. Instead, what I would like to see is an amendment so that the law recognizes the expertise of the agency to define the risk and then regulate based on the child's interaction with the product. If it results in any kind of measurable increase in the blood lead level, whether it is a functional purpose or not, then I think we need to regulate it and take that product out of the marketplace.

Mrs. EMERSON. So taking it back to the book analogy, if you will, then if, in fact, the lead in the ink of the pre-1985 books doesn't have a functional purpose, but—so we still know that that poses no real threat to the kids. So how then, if that is the case, and you all have determined tbat the book industry is exempt, then does that mean you have to use that same—you would have to use the same criteria for any other perfectly safe products, too? Correct or not?

Ms. NORD. Right now under the functional purpose test as we understand it, the book industry would not be exempt. They would not be able to meet that. That is why we have had to ask for a separate exclusion for them. And the book example makes the point. It does not meet the functional purpose. However, we are not aware of any risk of lead poisoning to children using a 1985 book. It just doesn't happen. So that would be an example of where a negligible risk-type concept would accommodate all of these things.

IMPACT ON CPSC BUDGET

Mrs. EMERSON. I have to believe that going through, looking at all of the exclusions, that has got to have a huge impact on your budget.

Ms. TENENBAUM. So will the *de minimis* test. If we do away with the bright-line test, and everyone comes forward and says, you know, we are not going to raise the blood lead level, we will be back in the same position we were before the law was passed. We will have to test every product. And that is why we all agreed that we would tell Congress we needed flexibility, and you would listen and make the best determination.

FUNCTIONAL PURPOSE

But on functional purpose, the idea is to have 300 parts per million or 100 if technologically feasible and 90 parts for paint, because all the research in terms of scientific research has dem-

onstrated that there is no safe level of lead. And it is to incent people to take lead out.

For example, Commissioner Nord was talking about the little toy, the John Deere tractor, that had the lead in the tire. The company has already taken the lead out. They are manufacturing that without a lead ring. A lot of the button manufacturers have visited us and said, we are taking the lead out. They are going all the way up the supply chain, and using the raw materials that do not have lead. YKK visited us to report that they are making lead-free zippers. It provides incentives. It is 2 years out since the passage of the CPSIA, and manufacturers have complied. One company came to see me and said, "We read the law, and we didn't stop at 300 parts per million, we stopped at 100 parts per million." This major toy manufacturer has already gone to 100 parts per million because it could do that, and it didn't stop at 300.

So I see a lot of positive changes. I see also people struggling to enact this law. But we have tried to take a common sense approach and give guidance with component part testing, and determinations that whole lines of products don't even have to be tested in textiles. We are working through this. So we want flexibility, but we are trying to do it without making lead prevalent in the marketplace as it was before in children's products.

Mrs. EMERSON. Commissioner Nord, do you have anything to add?

Ms. NORD. Well, again, our objective is the same. We want to have a safe marketplace for children's products.

IMPACT ON CPSC BUDGET

With respect to agency resource issues, I am very concerned that the functional purpose test, if it is put into place, is indeed going to be very resource-intensive as opposed to some sort of negligible risk kind of standard, because we will have to be looking at each product and the functional purpose of the lead in that product. We won't be able to look across product lines at commodities, for example. We wouldn't be able to look at brass, for example, as it is used in all children's products under the functional purpose test, and that is of concern to me.

With respect to trying to work to get the lead out, again, we all agree that that is what the agency should be doing. But you do end up with the strange results where you have got a product that meets the standard in the legislation that could expose a child to more lead than a product that exceeds the lead levels. And it is those kinds of anomalies that are bothersome to us and we would like the flexibility to be able to address. That is what we are asking for.

Mrs. EMERSON. I just hope that, depending which way you all determine to go, or whether our legislation—our refinement legislation, that you will have the resources to do what you need to do, which if you go to—I mean, this sounds rather complicated, this whole functional purpose—and complex, I should say, that requires a lot of people touching it.

Okay. I better stop there. Thanks, Chairman.

Mr. SERRANO. I am just thinking. I really hope you both walk away from here today understanding that we understand that this

is not easy what has to be done, and we respect both of your views. My only problem is that I keep remembering back to where the SEC sat in front of me and told me, no, we are fine, we don't need any more money, and we are doing what we are supposed to do, and then we saw what happened. And so we had all of that happen because in the past the Commission was allowed to look at what it needed to look at and not what it was told to look at every so often. So we had major recourse.

But anyway, the gentlewoman from Florida.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman.

In fact, the CPSIA was in response to a significant problem.

Mr. SERRANO. Right. And it ended up passing—the behavior was always, let us do our thing, don't overburden us.

Ms. WASSERMAN SCHULTZ. And look where it got us.

CHINESE DRYWALL

I want to just change the subject for a moment and focus on Chinese drywall. I know that the CPSC, Madam Chair, HUD and CDC have been tasked with coordinating the investigation. I appreciate your meetings with the task force on the drywall, Chinese drywall crisis. My understanding is that the CPSC received the first reports of the problem over a year and a half ago, and since that point we have some homeowners that have lost their homes, many homeowners that have moved out or abandoned their homes.

My district is dotted with Chinese drywall. They are not able to live in their homes. Their homes are making them sick, and they are faced with not only not being able to live in them, but they can't sell them. Their insurance isn't covering them, so they have an asset that is only a burden to them, and how are they supposed to go pay for other housing? It is just really a huge, huge problem, particularly problematic in that insurance companies are denying coverage to homeowners, and that the foreign manufacturers are refusing to accept responsibility.

CHINESE DRYWALL REMEDIATION PLAN

So I know you have conducted studies, and you are cooperating with other agencies. Has the CPSC begun formulating a remediation protocol that can be accepted by the homeowners with confidence that it will fix the problem, and when can we expect to see that remediation plan?

Ms. TENENBAUM. We have been working with HUD on the remediation plan, and it should be available to the public by the end of April. We have a new study, the Lawrence Berkeley National Laboratory study, that has data that showed some Chinese drywall samples had significantly higher emission rates for hydrogen sulfide and other reduced sulfur gases compared to domestic samples and other imported samples. This has been consistent with the chemical analysis that we did in October 2009. It is also consistent with the November 23, 2009, 51 homes study, which found a strong association with the problem of drywall and hydrogen sulfide.

So last week, February 25th and 26th, brought together all of the experts from our contractors and our Federal partners. We had a 2-day discussion on what we learned about Chinese drywall. The studies we have done have been used in the multidistrict litigation

in Louisiana. So they have used our studies in terms of the plaintiffs' cases down in Louisiana, which has parties from all of the states.

We have spent $3.5 million on the investigation. It is the largest investigation we have ever done in the history of the CPSC.

I visited personally drywall homes in Florida and in Virginia. I feel deeply for the homeowners. They have had to move out. It really is tragic because so many of the young families with whom we have spoken and visited in their homes, this is all their equity. Everything is tied up in this home. They have moved in with relatives. We carry a heavy burden at the Department to get this finished in terms of our studies, and to get the remediation guidelines announced with HUD in April.

We also work with HUD, and we did a joint announcement with them that states could use the community block grant money, if it was not already designated, to help families remediate their homes. We also wrote a letter to the IRS regarding drywall asking them to do a casualty loss reduction. So we are looking at creative ways that we could allow the homeowner to have a write-off or deduction to help them financially.

Ms. WASSERMAN SCHULTZ. Now, they are getting a property tax break?

Ms. TENENBAUM. Right. They are getting a property tax break. But in Florida we have 1,723 reports. Overall, we have received 2,941. Florida has the highest with 1,723. But when we talked to the mayors and the Governors in all the other states, we think it could go as high as 5,000. We have investigated every death that we have read in newspapers where there were people that said there were deaths. We have investigated every one of those and have not determined that drywall was the cause of it.

CHINESE DRYWALL ILLNESS

Mrs. EMERSON. I actually have a constituent who is a drywall installer who is, we think, permanently disabled now because of just getting sick from all of the exposure.

Ms. TENENBAUM. Hydrogen sulfide. In Florida you have a home builder, Lennar. Lennar is going into the homes it built and stripping it down to the studs and taking out the drywall and then rewiring. There is another major homebuilder in Virginia that is also doing the same thing. And this remediation program will spell out what we think needs to happen for full relief.

CHINESE DRYWALL FINANCIAL IMPACT

Ms. WASSERMAN SCHULTZ. Do you know what the financial impact is?

Ms. TENENBAUM. Well, it just depends on the size of the house and the amount of drywall.

Ms. WASSERMAN SCHULTZ. I mean, the total financial cost for the remediation.

Ms. TENENBAUM. No. I had heard numbers of $75,000 per home to take out all the drywall, but that just depends—I think Lennar told me, or Dragus up in Virginia told me that. But it is the size of the home and the amount of drywall. In some cases the drywall

was upstairs, from China, but it wasn't downstairs, so you didn't have to take it all out.

CHINESE DRYWALL HEALTH EFFECTS

Ms. WASSERMAN SCHULTZ. Do you have a timetable for a report on the health side effects of the impact of the drywall?

Ms. TENENBAUM. Well, we had looked at the health effects, and we think this latest study from Lawrence Berkeley Laboratories will address that. But the original studies we did, the 51 home studies, was reviewed also by the CDC, and they found that the amount of hydrogen sulfide that was emitted did not contribute to a chronic or acute health problem.

But we have thought that all of the synergistics—if you get into a home that is tightly built, and in Florida you build a home and you often don't open the windows because you have the air conditioner on all year, we have found that all of that together can be an irritant.

CHINESE DRYWALL MANUFACTURER COOPERATION

Ms. WASSERMAN SCHULTZ. Are we getting any cooperation from the Chinese drywall manufacturers?

Ms. TENENBAUM. Well, we have not to date. In the multidistrict litigation, there is one Chinese manufacturer who has defaulted on the complaint. They are having a hearing, and they are going to assess damages in absentia for this drywall. Knauf is a German company that has manufacturing in China, and it has been working with the court. It has also been sued in the multidistrict litigation, and it has cooperated.

CRIB SAFETY

Ms. WASSERMAN SCHULTZ. And lastly, Mr. Chairman, I wanted to commend your leadership, Madam Chair, on the issue of crib safety. I passed legislation in Florida that actually was ultimately vetoed by Governor Jeb Bush despite overwhelming support for it, including from the industries it impacted, that would have made sure that cribs sold in Florida were safer and didn't have a lot of the problems that you have found that they still have. But they are still in hotels and places where cribs are repeatedly used over a long period of time. And we don't really know where they have been or where they—and they are beyond the reach of recall notices. So can you talk a little bit about your efforts in this area?

Ms. TENENBAUM. Well, thank you. And this is something that Commissioner Nord has supported with me, and really the whole Commission has stood up to the crib issue.

First of all, we will have a new crib rule in 2010, and that rule will outlaw or ban drop-side cribs. Once we write that rule, it can be applied retroactively to cribs in public places like child care facilities and hotels.

We still have concerns with cribs in homes, and so I have asked my colleagues and staff at the CPSC to continue monitoring the effectiveness of recalls and how many people are actually getting these repair kits, because the repair kits make the side immobile

so that the drop-side is not going up and down. You don't have that pull-out where the children fall into the crack and suffocate.

But we also work with the ASTM. We brought the Committee in and said this has gone on long enough, and we want you to work with us. They worked with us for 2 days, coming up with a new standard in which the ASTM, through their voluntary standards, banned the drop-side crib. It is now out for vote. In March we will have the results of the ASTM vote. We realize that this has really started something within the crib industry that all of them need to come out with a repair kit, if they have drop-side cribs, to make the side immobile.

The registration cards, which are part of the CPSIA, are for required people to fill out the information when they purchase a new crib. When you have a recall, all the people who have sent the registration card in will be able to be contacted. On crib recalls we go on all the national morning shows. We do as much media as possible. We also get coverage on national nightly news.

Ms. WASSERMAN SCHULTZ. Are these mandatory or voluntary standards?

Ms. TENENBAUM. These will be mandatory new crib standards.

MANDATORY CRIB STANDARD

Ms. WASSERMAN SCHULTZ. Because right now the crib standards are voluntary, aren't they?

Ms. TENENBAUM. Well, they are, and the CPSIA outlined a list of 12 durable nursery products that had to have mandatory standards. And cribs were scheduled for 2012 at the Commission, and I moved it up to 2010 so we would have a mandatory standard.

We also started this Safe Sleep initiative in January where we have a team of attorneys, compliance officers, engineers, public affairs specialists, who meet regularly weekly on all of the information we have on cribs and expedite the recalls of cribs that have been in the pipeline for several years.

So we are trying to do everything we can to get the old cribs off the market, or either to get repair kits, and to have a brand new standard which is state-of-the-art.

FOREIGN MANUFACTURE OF CRIBS

Mrs. EMERSON. Is foreign manufacturing any part of the problem?

Ms. TENENBAUM. A large number are from China. A large number are from China and from other countries. But probably the major manufacturers are from outside the country.

Mr. SERRANO. We are going to try to have one more round and then try to wrap it up because we have yet another series of votes coming.

CHINA OFFICE

You know, again going back to my other subject, this is why it is such a delicate balance, because we have the drywall issue that I am sure if we had started on voluntarily testing on Chinese drywall, you would have had a lot of people saying, why are you doing that, leave that alone, do something that is important, and

yet now we have a problem. So there is a balance. I don't envy the work you have to do, and I don't envy what we have to do in the future to assist your doing it.

I have one last question, and then I am going to submit the other questions for the record. You are setting up an office in China, and China is a big issue. So tell us what kind of cooperation you are getting in China to set up this office.

I would be remiss if I did not put in the usual Emerson-Serrano comment on—isn't it amazing that we can have an office of our government in China, but we can't even be allowed to visit Cuba? But anyway, that is another issue for another day.

I am all for it, but think of it. I am just wondering out loud. I think it is great. But if you had told—well, no. I was going to say Richard Nixon. He is the reason why we have relations with China. If you would have told somebody else that we were sending an office of our government to China, they would say, what are you talking about?

Ms. WASSERMAN SCHULTZ. Mr. Chairman, the track record of China really rings strongly towards expanding our outreach to Cuba. The results have been so incredibly good, haven't they?

Mr. SERRANO. It is good for the CPSC.

Mrs. EMERSON. They have got more staff.

Mr. SERRANO. They have got more staff.

So tell us what that office is like very quickly and what issues you have had. And what kind of support are you getting from the Chinese Government? And lastly and most importantly, what are we beginning to see in terms of cooperation for better products, safer products?

Ms. TENENBAUM. Well, thank you.

Because China is the largest single source of imported consumer products, it will and has been the focal point of CPSC's external efforts. First of all, we are seeing great cooperation from the American Embassy in China. Ambassador Jon Huntsman has been very helpful. In fact, our office will be in the American Embassy in China, and we have hired one person, Jenny Wang, who is at the CPSC for the next month receiving training. She is Chinese. She is a delightful person and will be helping Chinese manufacturers as well as U.S. manufacturers ensure that product safety is paramount with the manufacturers.

We also will be hiring an American employee, and we are working with the Chinese Government to try to get approval for that diplomatic post. Ambassador Huntsman is working closely with us to try to get that approved as well, and we expect we will have the American employee in place in the next few months.

Mr. SERRANO. One employee?

Ms. TENENBAUM. We will have two, a Chinese and an American, for right now to see how it works and see how it is utilized by the Chinese. They will be doing training.

Mr. SERRANO. Where is this office physically?

Ms. TENENBAUM. It is in Beijing in the American Embassy. So that is very good. We didn't have to go out and get our own space. They gave us space because the embassy is very helpful to us in all efforts in China. But training and outreach to China is a priority.

WORKING WITH CHINA

This year we had our biennial summit in China where we took our employees and also stakeholders, American businessmen and women, with us to China, and we focused on writing a new—not a memorandum of agreement, but a working document going forward. We are asking the Chinese government to emphasize best practices in manufacturing. Also, we have stressed that they had the responsibility to ensure that their manufacturers are meeting our standards.

We have had a successful Webinar in January with Chinese manufacturers, that was very highly attended. We also did training at the Hong Kong toy show in January. We had 120 manufacturers view a Webinar that we did over the Internet in December.

We will continue to work with the Chinese in a very agreeable fashion. It is not perfect. But they also assure us that they understand it is their responsibility to make sure manufacturers meet best practices and comply with the standards.

Now, this fall, we will go back to Shanghai, China and have a meeting with China, the European Union and the United States on safety standards. We have our Office of International Programs who regularly translates requirements and regulations on the Internet in Chinese so that the Chinese have access to this.

So we feel that our relationships with China are strong and very amicable, and we keep pushing forward to make sure they understand what are the best practices in manufacturing.

Do you want to add to that?

Ms. NORD. One of the themes ever since 2007 has been to push safety back to the source, and that means going to China. And I think the agency has been consistent over the last 3 or 4 years that that is very important.

One of the first things I did after the passage of CPSIA was to go to China to explain to the Chinese Government and to the Chinese manufacturers the changes that were in store for them. And what was interesting, Mr. Chairman, was that right then is when the melamine in the milk crisis in China hit, and that was killing Chinese children. And I have to tell you that the change in attitude was striking.

So I think the Chinese are starting to get that product safety is important. It is not only important for their export markets, it is important for their population.

Mr. SERRANO. Because they sell it to themselves, too, right?

Ms. NORD. Exactly. And that was such an instructional experience to be on the ground and see that happen. That trip was our first venture over to China with our counterpart from the European Union, and I have to say it was a very, very powerful message for the world's two biggest markets to be standing there and saying to the Chinese that product safety is a core value, and we expect it from those who export to America.

Ms. TENENBAUM. I might say that one of the things we continue to see in China, though, is counterfeiting and that looks like the real product. So it is very important that third-party testing be required for importers bringing children's products into the United

States from China, because that is allowing us to stop at the port those goods that are not meeting the requirements of the CPSIA.

INTELLECTUAL PROPERTY THEFT

Mr. SERRANO. Which I had a question. Just your presence there in China. We know what your mission is, but does it have a side effect on the issue of intellectual property theft and so on? I mean, I know that is not your mission, but your presence there is important and historic in so many ways. What about that other conversation?

Ms. TENENBAUM. Well, we have not entered into that conversation. We have entered in trade conversations. When we were at the summit, one of the members of the delegation from China made some claims that the requirements, the safety requirements in the CPSIA were hurting trade. We were able to show them the trajectory, that the number of imported products from China continues to go up and be increased every year, and that the safety requirements was not inhibiting trade or dampening trade.

But the intellectual property needs to be addressed in China because they counterfeit products. The manufacturer is going out of its way to buy lead-free zippers and lead-free components to put on their products, so when they counterfeit, they are buying from another source that has not tested the product, and it is a serious safety problem.

Mr. SERRANO. Well, Ms. Wasserman Schultz left before Mrs. Emerson and I had told her if we ever do establish relations with Cuba, you won't be asked to test rum, cigars, music or baseball players, because they are known to be of world-class quality. Thank you so much.

Mrs. EMERSON. I love it. I love it.

CHECKING CHINESE MANUFACTURERS

Do you all actually get into the—get into the lab? Do you actually expect to do spot checking of manufacturing facilities in China? I mean, how are you going to determine with two people whether or not things are either copies or they are original, or is that going to be the third—go ahead.

Ms. TENENBAUM. When you have third-party testing, the children's products have to go to a private laboratory or either a laboratory that is operated by the company and firewalled to assure that they meet the lead limits. That is how we ensure that they have a certificate of third-party testing, and that they meet the lead and the phthalate limits required under the CPSIA.

Mrs. EMERSON. Have you found any fake certificates?

Ms. TENENBAUM. Well, we are certainly aware that that counterfeiting of certificates and this is something that we have to watch for constantly.

Mrs. EMERSON. Yeah, because actually even with a whole different issue—I have a company in my district who is in competition with a Chinese company, and technically—and there is some anti dumping—there is an anti dumping situation going on. But nonetheless, there is all sorts of fake certificates of things that get routed through South Korea, for example. So I was just curious if you were—

Ms. TENENBAUM. But we are aware that is an issue on which we have to have surveillance. And we have also told the Chinese that this is their responsibility from their ports to make sure that the certificates aren't counterfeit.

Mrs. EMERSON. And you feel good that they get it?

Ms. TENENBAUM. Well, anytime you are in a regulatory position and you are a regulator, you have to have a program whereby you provide oversight to make sure the quality is there and call them out if you find one. We certainly can't turn our back on any company. We have to continue to insist that they take responsibility for products coming out of their country, and that they have a certificate. The Chinese government requires companies to certify that it meets the requirements.

Mrs. EMERSON. Do you have anything to add?

Ms. NORD. I think you have identified a key problem that we are going to see more and more going forward, and that is fake certificates. I think it is probably going to be a growth market that we will probably have to watch closely.

Mrs. EMERSON. We probably shouldn't discuss this here today.

TESTING LABORATORY

Let me ask you about your testing laboratory, and then I am going to submit the rest of my questions, Mr. Chairman, because there—I have several more.

Your budget justification for 11 mentions that you carried over $6 million in previously appropriated funds for modernization of—I have the worst time saying modernization for some reason. Now, does this signify——

Mr. SERRANO. Try it as English as a second language.

Mrs. EMERSON. How do you say it in Spanish?

Mr. SERRANO. I cannot say it in Spanish.

Mrs. EMERSON. Does this signify a delay in your move to the new laboratory? Or maybe you should fill us in on the current schedule.

Ms. TENENBAUM. We will move into the laboratory by the end of the year. That is our goal. Now, the cost of the facility is 16.1 million in Federal funds, plus 3 million that the landlord is putting in, for a total of 19.1 million. So the funds are carried over to renovate the lab, to provide the kinds of testing spaces that we need.

But we are very excited, and I will give Nancy Nord credit for really starting this process under her leadership. The new laboratory will be in Rockville. The space was built as a laboratory, so it was not a building that we had to go in and put in all of the cabinets and all of the labs. So it will not only be a state-of-the-art lab, it will also he office space, as well as storage space.

And there are a number of new features that it will allow in that it will have a dedicated testing area for children's electrical, combustion, and sports and recreational products that we don't have now. It will enhance the fire-testing spaces with modern safety and environmental features, and the provisions for more accurate observation of fire developments in products. We think that it will reduce facility operations because now we have a series of little buildings, and this will be under one roof.

Mrs. EMERSON. So it will obviously be more efficient?

Ms. TENENBAUM. It is a total cost of $16.1 million, and we have an annual recurring rent of $2.2 million. The rent is really $2.8 million, but we will use the $600,000 that we pay rent on now. It will be a state-of-the-art facility that we have needed for a very long time. And you might want to say something, since it was under your leadership that you kicked this off.

Ms. NORD. Well, we have been working towards this goal for sometime. It became very apparent when I became Acting Chairman that we needed this, and we went out and did what we needed to do to get it, again with funds that you all provided and which we are so thankful for.

TESTING CHOICES

Mrs. EMERSON. So describe what current testing is conducted at the—at your testing laboratory now. And I am just curious, how do you determine what is going to go out to a third-party lab, for example? I am just curious.

Ms. TENENBAUM. Well, third-party labs are used by importers and domestic manufacturers to test their products, the children's products, to ascertain the level of lead and phthalates. So that is where you use the third party.

Our lab will be where we do our own testing. For example, with cadmium, we had "The Princess and the Frog" jewelry. It had the Disney logo, and we went out and bought that jewelry. We were successful in getting Walmart to do a recall, because we tested the jewelry and found that it was well over what the Federal Hazardous Substance Act allowed.

So we do those kinds of tests. We do a number of tests, engineering, toys, cigarette lighters, mattresses, flammability in children's products. But if you allow me to give you a full description of what we do for the record, I would appreciate it.

Mrs. EMERSON. That would be great.

[Summary of CPSC Lab Testing follows:]

Current Testing Capabilities
March 2010

U.S. CONSUMER PRODUCT SAFETY COMMISSION
DIRECTORATE FOR LABORATORY SCIENCES
10901 DARNESTOWN ROAD
GAITHERSBURG, MD 20878

BACKGROUND

Mission

The laboratories support the overall CPSC mission to reduce unreasonable risk of injury associated with consumer products. This function requires selecting, procuring, calibrating, operating, and maintaining sophisticated laboratory equipment by knowledgeable and skillful personnel. Work results must be competent to successfully withstand the scrutiny of litigation.

The CPSC Laboratory tests and evaluates products for hazards under Sections 7, 8, 12, or 15 of the Consumer Product Safety Act.

Testing Capabilities

The flammability laboratory contains facilities for testing of regulated products such as children's sleepwear, general wearing apparel, mattresses and futons, carpeting, etc. The facilities include a 2-hour fire-rated burn room for large- and bench-scale ignition test, various hoods and test chambers for small-scale ignition tests, and a chemistry laboratory and chemical hood for fiber analysis and specialized (plastic film, chemicals and solids) flammability testing.

The electrical and mechanical test laboratories are used for testing various consumer products, such as ATVs, small electrical household appliances, cribs, baby walkers, and toys.

Class C pyrotechnic devices are tested for compliance with federal regulations in our fireworks laboratory.

CPSC's combustion products and appliances laboratory contains three specialized and highly sophisticated chambers and instrumentation for testing a range of residential appliances including furnaces, stoves, ovens, gas-fueled fireplace sets, unvented space heaters, and camp stoves and heaters. A temperature- and humidity-controlled carbon monoxide gas chamber used to test CO alarms is also situated in that space. Adjacent to these chambers is installed the apparatus of the mechanical test laboratory: a large fatigue cycle test frame, a 14-foot tall monorail head-form drop tester for helmet and playground surface testing, two tensile/compression strength testers for evaluating mechanical support structures (such as bicycle frames), and a hydraulic pressure test facility for evaluatiog fire suppression sprinklers. The laboratory contains a burn room which is comprised of a combustion chamber and an observation and instrument room. The burn room has been used to measure the fume spread of spilled gasoline, to evaluate small flame ignition of full-sized upholstered chairs, and, most recently, to test detector and controller performance for preventing stovetop cooking fires.

The chemistry laboratory houses all the analytical instrumentation used by the chemists to evaluate children's and consumer products and household chemicals. This laboratory contains four separate laboratory testing cells used for sample preparation where solvents and acids are used, the analysis of total acids and bases, testing for flash point and

viscosity analysis and extractions such as those used in the phthalate plasticizer project. The Instrumentation Laboratories house the inductively coupled plasma spectrometer, which is used for analysis of metals, two Gas Chromatograph Mass Spectrometers, a Fourier Transform Infra-red Spectrophotometer, and two small indoor air quality exposure chambers.

Ms. TENENBAUM. Because that is where we could give you a full picture of how hard our people work in such limited conditions.

Mrs. EMERSON. I think that would be a fun field trip for us to make, Chairman.

Ms. TENENBAUM. We would love for you to come to the new lab.

Mr. SERRANO. We can test the lack of bipartisanship in the House.

Mrs. EMERSON. They can test how much lead.

Mr. SERRANO. These four people here should be an example, right?

Ms. TENENBAUM. We would like for you to come out. You can either visit now or toward the end of the year. Our goal is to get into it by the end of the year, and we would like to take you out and visit there. That would be excellent. If anytime you ever want to go to a port, too, we have now a full-time staff member at CTAC, which is looking at all of the information that is coming in to Customs. But we can take you to a port and show you how the containers come through and how we test and look at the certificates and seize products.

Mrs. EMERSON. That would be interesting. And I appreciate you allowing that. Maybe if we plan a date to go see the lab that way, you will be forced to get it finished on time.

Ms. TENENBAUM. That is right. And I would invite you to Charleston, South Carolina, where you could visit that port. That would be a nice trip. That is a wonderful port.

Mrs. EMERSON. Thank you.

Thanks, Mr. Chairman. I am done for now.

Mr. SERRANO. Okay. Thank you so much for your testimony, both of you. Thank you for the work you do. We will continue to try to be helpful in making your job easier, making your challenge less challenging. And don't ever lose sight of the fact you may not be the most famous agency in the government, but you certainly have the safety of people, especially children, in your hands. So it is something to be proud of, and we are proud of the work you do. Thank you so much.

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

HEARING

ON

THE FY 2011 BUDGET REQUEST OF THE CONSUMER PROTECTION SAFETY COMMISSION

Questions for the Record

for

The Consumer Protection Safety Commission

March 4, 2010

"The FY 2011 Budget Request of the U.S. Consumer Product Safety Commission"
House Committee on Appropriations
Subcommittee on Financial Services and General Government
March 4, 2010

Responses of Chairman Inez M. Tenenbaum to Questions for the Record

Questions for the Record Submitted by Chairman Serrano

1) With regard to the Consumer Product Safety Improvement Act, since the Commission has delayed until 2011 its enforcement of testing and certification requirements for many children's products, how can consumers be assured that the law is being followed, and that children's products are safe? Overall, how is implementation of the Consumer Product Safety Improvement Act progressing, and how are you working to educate manufacturers and retailers about their new responsibilities under this law?

Response:

On December 18, 2009, the CPSC voted to extend the stay of enforcement on testing and certification of many regulated children's products.[1] The stay of enforcement will remain in effect for certain categories of children's products while the CPSC continues to promulgate requirements for third-party testing of specific products. As these requirements are implemented, additional products will become subject to the testing and certification requirements. For example, on February 10, 2010, the stay on third-party testing and certification was lifted for bicycle helmets, bunk beds, infant rattles, and dive sticks.

In addition, it is important to note that third-party testing and certification was never stayed for the requirements applicable to lead-in-paint, small parts, the lead content of children's jewelry, full and nonfull-size cribs, or pacifiers. Furthermore, while the enforcement of certain testing and certification requirements have been stayed, all children's products still must comply with all applicable rules and bans, including the lead content limits.

In order to ensure the safety of children, the Commission has greatly increased the number of products it is screening and testing for compliance with safety requirements. We collected a record number of samples at the ports last year (almost 1,600) and expect to break that record again this year. This is due to several factors. First, the recent increases in appropriated funds have permitted us to increase staff at the ports of entry, in the field, and at our laboratory. Second, we are looking for ways to use new technology to increase our reach. For example, we are employing X-Ray Fluorescence (XRF)

[1] This document can be found on the CPSC's Web site at http://www.cpsc.gov/cpscpub/prerel/prhtml10/10083.html.

technology to screen children's products for lead. Using this technology, in just a few minutes we can screen out products that do not have high levels of lead and save the much greater time and expense of testing them at our laboratory, not to mention the time and cost needed to package them safely and ship them to the lab.

The overall implementation of the CPSIA is progressing rapidly. Since my arrival at the CPSC last summer, the Commission has published over 45 *Federal Register* documents to help implement the CPSIA, including:

- July 2009: a policy statement providing guidance on section 103 tracking labels.
- August 2009: a final rule providing gnidance on whether parts of a product may be considered inaccessible and exempt from the lead limits of section 101.
- August 2009: a final lead determinations rule that exempts many common materials from the testing and certification requirements for lead content because they do not contain lead above the 100 parts per million lead content limits.
- December 2009: a two-day work shop on testing and certification, and issuance of a policy permitting component part testing for lead content and lead in paint.
- January 2010: adopted a final rule establishing alternative lead limits for electronics parts of children's products.
- March 2010: approved a proposed rule interpreting the term "children's product."
- April 2010: approved a proposed rule outlining how the new public database will function.
- Currently: considering a proposed rule on continuing testing and component part testing under section 102(d) and will soon consider proposed rules on the definition of "children's toy" and "child care article."

Despite the extraordinary pace of our efforts, the Commission still has more work to do to fully implement the CPSIA. We are hard at work on several different standards relating to durable nursery products. We expect to issue at least five of these in 2010, with more than a dozen additional standards planned for the next few years. The agency is keenly focused on issuing these durable infant nursery standards and other CPSIA activities, including the Chronic Hazard Assessment Panel (CHAP) on phthalates, the upgrade of the mandatory toy standard, and enforcement of the many new CPSIA requirements.

Against this backdrop of rapid change, the Commission has stepped up its efforts to keep manufacturers (including importers) abreast of their responsibilities under the law. We have conducted numerous workshops and webinars for manufacturers both here and abroad, with special attention to the problems of small manufacturers and resellers. We have also developed guides that small manufacturers, in particular, can use to determine which requirements apply to their specific products.

2) The CPSC's new product testing laboratory is slated to open later this year. Compared to the CPSC's current laboratory, how will the new one enhance the CPSC's work, and how will consumers ultimately benefit?

Response:

The new product testing laboratory will enhance CPSC's work in several ways. The new laboratory is larger, providing room for additional equipment and personnel. For example, the new laboratory will permit CPSC to approximately double the chemical laboratory space. This additional space will allow CPSC to add an Inductively Coupled Plasma – Mass Spectrometer (ICP-MS), that will improve our lead testing throughput and extend our testing capabilities to more complex samples and lower detection limits for many elements.

CPSC is also adding a calorimetry burn room in the new laboratory. This new burn room will significantly enhance our fire and flammability work, providing the in-house capability to perform conformance testing in accordance with existing regulations and support test efforts required to develop new or revise existing regulations. Having our own capability enhances sample security, eliminates scheduling issues when using other facilities, and, dramatically reduces the costs of sample transport and storage, facilities reimbursement/rental, staff travel costs, and lost time to staff travel.

The various testing areas in the new lab allocated to mechanical and children's product testing will allow CPSC to test more items than we can today. The new lab will have an Outdoor Power Sports Equipment test lab with an integral tilt table that will be used to characterize many tip-over characteristics of ATVs, ROVs, and other related equipment in a controlled environment. The tilt table will permit the indoor testing of ATVs to all the ANSI/SVIA standards, including the parking brake holding test. An exhaust system will permit safe indoor engine operation and allow the functional testing of engine controls per the performance standards. The lab will also house new crib testing equipment.

The new lab will house a pool and spa test facility capable of testing a much broader range of safety vacuum release systems (SVRS), pool drains, and drain covers year around in accordance with the provision of the Virginia Graham Baker Pool and Spa Safety Act. The test facility at the current lab is located outdoors and must be shut down during the winter months. The new lab will also house two new environmental test chambers designed to test a broader range of products known to generate hazardous quantities of carbon monoxide, including portable generators.

The new equipment and additional personnel allows CPSC to expand testing to a broader range of consumer products and to test a larger volume of products, in support of CPSC's expanded compliance activity, thus ultimately benefiting the American consumer.

3) **As you know, the Consumer Product Safety Improvement Act also prohibits the export to other countries of toys containing substances banned in the U.S. What resources has the Commission dedicated to enforcing this provision? Are you aware of any instances of toys containing banned substances being exported to another country since the new law was signed in August 2008?**

Response:

The Consumer Product Safety Improvement Act (CPSIA) strengthened CPSC's control of exports in several important ways, but it did not prohibit *all* exports of toys containing substances banned in the United States. The CPSIA added a new paragraph (15) to Section 19(a) of the Consumer Product Safety Act. This provision now makes it unlawful to export *for purpose of sale* a toy that is or contains a banned hazardous substance, unless the Secretary of Treasury permits the export pursuant to section 17(c).

This provision does not reach all toys containing substances banned in the United States; rather, the toy must be or contain a "banned hazardous substance within the meaning of section 2(q)(1) of the Federal Hazardous Substances Act." Toys that contain lead above the limits prescribed by the CPSIA meet this description as a consequence of section 101(g) of the CPSIA. Section 108, by contrast, did not characterize all toys containing banned phthalates as banned hazardous substances. In addition, the CPSIA left undisturbed section 18(a) of the Consumer Product Safety Act that makes the whole Act, including the new prohibition in section 19(a)(15), inapplicable to any consumer product that is *manufactured for export*, with certain exceptions.

As section 19(a)(15) itself makes clear, even if a toy is a banned hazardous substance, its export is not always unlawful; rather, it is still possible to export such a toy for purposes other than sale. Also, the Secretary of Treasury has authority to allow the export a toy that is stopped at import, even if the purpose is for sale.

A party that wishes to export a toy (other than a toy that is manufactured solely for export and never distributed in the United States) must notify CPSC at least thirty days in advance of a proposed export. Under the CPSIA, unless the destination country affirmatively agrees to the export, the Commission has authority to prohibit the shipment. The resources dedicated to export control are primarily involved with this process rather than with attempting to find unauthorized exports more generally.

The Office of Compliance staff has not identified any instance of toys containing banned substances being exported to another country since the CPSIA took effect.

Questions for the Record Submitted by Ranking Member Emerson

Regarding the Consumer Product Safety Improvement Act of 2008:

1) **Has there been sufficient analysis to identify all the industries that may be impacted, and has their comment been solicited?**

Response:

Many of the rules promulgated by the Commission pursuant to the CPSIA have undergone a Regulatory Flexibility analysis. The purpose of this analysis is to identify the industries that are likely to be affected and evaluate the impact of those rules on small businesses. Throughout this process, the Commission has been very sensitive to the concerns of small business and, in some cases, has explicitly solicited their opinions. One example of this is the December 2009 workshop the Commission conducted on the continuing testing rule and component part testing. Another example is a series of webinars that senior CPSC staff conducted on March 25-26, 2010, with members of the Etsy community and Handmade Toy Alliance to discuss how the CPSIA is being implemented and enforced.

2) Has sufficient analysis been given to the consideration of industries that should be exempted?

Response:

Under the statutory framework of the CPSIA, the Commission does not have the authority or discretion to exempt entire industries or subclasses of industries. However, the Commission has given extensive consideration to the issues faced by all industries in crafting regulations.

One example of this is the lead determinations rule, which stated that certain products – such as paper, cotton and untreated wood – will never exceed the lead limits under section 101 of the CPSIA and, therefore, do not need to be tested and certified under section 102 of the CPSIA. Another example is our efforts in the context of the third-party testing to allow component testing and certification by component suppliers in many cases rather than to require all third-party testing by the final product manufacturer.

3) Has the regulation received adequate review in an effort to avoid the unintended inclusion of industries that were not originally within the scope of regulation?

Response:

The CPSIA sets, by statute, the industries and products covered by its jurisdiction. However, in an attempt to give clear guidance to industry on which products are subject to regulation, the Commission has promulgated a proposed interpretative rule defining

what constitutes a children's product and will soon issue proposed interpretative rules on what constitutes a children's toy and child care article. These interpretative rules will help to give industry certainty and predictability in determining whether their products are subject to regulation.

4) Do the industries affected have the expertise to be reasonably expected to have the ability to comply with the regulations without creating an undue burden?

Response:

As noted above, the Commission has undertaken substantial efforts to educate all industries – and especially small businesses – on the steps necessary to achieve compliance with the requirements of the CPSIA. Some industries, however, will incur additional costs (such as outside technical expertise and third-party testing) to comply with the Act.

5) Has there been adequate and appropriate consideration regarding the financial impact of the industries affected?

Response:

As noted above, the Commission has conducted a Regulatory Flexibility analysis on many of the new regulations required by the Act, and conducted significant outreach to affected industries. However, the Commission does not have the resources to conduct a "global" analysis of any economic impact resulting from the CPSIA. The Congressional Budget Office (CBO) or the Government Accountability Office (GAO) would be more appropriately situated to conduct that sort of economic analysis.

6) Is there sufficient clarity of definition and are the material resources readily available to those who are held accountable for compliance?

Response:

As stated in the response to question 1, the Commission has made every effort to reach out to small businesses and other industries impacted by CPSIA to make sure that the requirements of the Act, and regulations promulgated pursuant to the Act, are fair and clear to all stakeholders. It is likely, however, that some affected businesses may require outside technical resources to comply with the Act.

Questions for the Record Submitted by Congresswoman Lee

Question on Testing of Imported Products

1) What percentage of imported products are currently tested and can we expect that someday soon every product sold on store shelves in America has been tested for safety?

Response:

Before enactment of the Consumer Product Safety Improvement Act (CPSIA), most consumer products imported into the United States were not required to be tested unless they were subject to one of about a dozen mandatory standards. The CPSIA strengthened testing requirements in a number of ways. First, it required testing for a much broader array of mandatory standards. Second, it required CPSC to adopt many additional standards for which testing will also be required. These include standards for many different types of durable infant and toddler products, as well as standards for toys and all-terrain vehicles (ATVs). Third, for children's products, the CPSIA required testing to be conducted by third-party test laboratories whose credentials have been recognized by the CPSC.

CPSC has also increased the number of imported products it is screening and testing for compliance with mandatory standards. Last year, we set the all-time record for import samples collected. As we begin to take advantage of our new laboratory in the near future, we expect to be able to expand our testing even further.

However, despite these factors expanding the number of products undergoing testing before being imported, there are still many consumer products that are not required to be tested.

Questions on Fire Safety

Of course I support the work of the CPSC in reducing the tragic impact of injury and death due to fires in America, but I am concerned about some of the chemical fire retardants currently in use.

1) Are we replacing one danger, of fire, with another, of exposure to toxic chemicals, such as brominated flame retardants and other persistent organo-halogenated compounds and their descriptors, in our homes?

Response:

No. One of CPSC's objectives in the area of fire safety is to provide reductions in product-related fire risks without imposing potential health risks associated with flame retardant chemicals. This objective, along with other factors, guided the CPSC staff's

development of the recent flammability performance rules for mattress and (proposed) for upholstered furniture.

CPSC's flammability performance rules neither require nor prohibit any fire safety technologies, including flame retardant chemical treatments. Halogenated flame retardants are not currently used in the U.S. to meet any existing or proposed CPSC flammability performance rules.

2) Has the CPSC tested fire retardants for safety and the impact of long term exposure to retardant materials in furniture and clothing on children and adults?

Response:

CPSC has studied flame retardant chemical (FRs) safety extensively. Recently, in developing rules on mattresses and upholstered furniture, CPSC staff reviewed many toxicity data reports, conducted laboratory experiments to assess potential exposure, and developed estimates of human health risks associated with FRs that could be used to comply with various alternative regulatory approaches. While developing the Commission's 2006 mattress open-flame rule[2], CPSC staff conducted an exposure and risk assessment of possible fire retardant treated barriers that could be used to meet the Standard. The assessment included conservative assumptions for the calculations used to estimate the risk of health effects to consumers, and was subjected to external peer review. The staff concluded that there were fire retardant treated barriers that could be used in mattresses that would not pose an unreasonable risk of health effects to consumers.

In the case of upholstered furniture, the staff's evaluation of flame retardant fabric treatments (and a National Academy of Sciences report[3] on the subject) concluded that the most likely treatments would not pose significant health risks, but that data were lacking for other candidate treatments; the staff's evaluation of flame retardant polyurethane foam treatments concluded that one currently used candidate was unlikely to pose significant risks, but that complete data were lacking, and another currently used candidate could pose a significant risk. In view of these conclusions and other guiding factors, the Commission's 2008 proposed rule[4] is crafted such that neither fabric nor foam flame retardant treatments would likely be used as a method of compliance. The chosen approach would not result in consumer exposure to flame retardant chemicals.

The flammability performance requirements for children's sleepwear[5] do not mandate or prohibit any type of fabric or flame-retardant treatments. Due to fiber characteristics,

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[2] 16 Code of Federal Regulations Part 1633. Standard for the Flammability (Open-Flame) of Mattresses.
[3] Toxicological Risks of Selected Flame-Retardant Chemicals. National Research Council. National Academy Press, Washington, DC. 2000.
[4] U.S. Consumer Product Safety Commission. Standard for the Flammability of Residential Upholstered Furniture: Proposed Rule. 73 *Federal Register* 11701; March 4, 2008.
[5] 16 Code of Federal Regulations Parts 1615 and 1616.

however, some synthetic fabrics pass the test, but untreated cotton fabrics generally do not.

While not prohibited from doing so, apparel manufacturers have been reluctant to treat sleepwear fabrics with flame-retardant chemicals since the late 1970s. Sleepwear treated with flame-retardant chemicals, including the flame-retardant chemical tris (2,3 – dibromopropyl) phosphate, commonly known as Tris, was available in the 1970s. However, after it was determined that Tris caused cancer in test animals, almost all children's sleepwear garments treated with any type of flame-retardant chemical disappeared from the market.[6]

In 1996 CPSC amended the children's sleepwear flammability standards to exempt sleepwear sized for infants aged 9 months and younger and tight-fitting sleepwear for older children.[7] This allows parents to choose cotton sleepwear for their children, as long as it meets the tight-fitting requirements.

CPSC continues to monitor ongoing studies, including CPSC-requested chronic toxicity studies by the National Toxicology Program of the Department of Health and Human Services, which will contribute to the overall level of knowledge about FR chemicals among scientists and regulators.

3) **Does the CPSC have plans to consider including the costs of chemical exposure in their calculation of the impact of product hazards?**

Response:

CPSC does plan to consider potential costs associated with potential health effects, related to chemical exposures or otherwise, in the context of specific rulemaking activities. In the ongoing proceeding on upholstered furniture flammability, for example, CPSC staff plans to consider potential health costs in its regulatory analyses, to the extent that FR chemical additives could be used to comply with a rule or other alternatives. In keeping with the agency's objective to provide reductions in product-related fire risks without imposing potential health risks, this rule would not likely result in chemical exposures or attendant potential costs to consumers. In 2006 (the most current data), there were an estimated 2,280 deaths, 12,820 injuries and $6.3 billion in property loss associated with unintentional residential structural fires.[8] The estimated societal cost of these fire losses was approximately $20 billion.

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[6] The CPSC banned brominated Tris under the Federal Hazardous Substances Act and it disappeared from the market; the ban was later overturned. Subsequently, EPA issued and Significant New Use Rule (SNUR) for brominated Tris.

[7] U.S. Consumer Product Safety Commission. Standard for the flammability of children's sleepwear: sizes 0 through 6x; standard for the flammability of children's sleepwear: sizes 7 through 14. *Federal Register* 1996; 61 (175):47634-47649.

[8] Miller, D., Chowdhury, R. and Greene, M. 2004-2006 Residential Fire Loss Estimates. U.S. National Estimates of Fires, Deaths, Injuries and Property Losses from Unintentional Fires. U.S. Consumer Product Safety Commission. October 2009.

4) **When considering the safety of materials like lead, phthalates, cadmium, and toxic chemical in products, what consideration is given to the impact on consumer safety when those products reach the waste stream and possibly cause unsafe exposure through the air or water?**

Response:

While waste management and "end of life" product recycling is not within the Commission's jurisdiction, the CPSC does consider chemical risks from children's products in the context of overall chemical exposure by a child. For example, section 108 of the CPSIA requires that we look at a wide pattern of possible exposures in assessing the toxicity of children's products containing phthalates. We also coordinate with other agencies with relevant jurisdiction over waste, and specifically turn to the U.S. Environmental Protection Agency (EPA) for disposal guidance for products that contain toxic substances.

Questions on Minority Hiring and Contracting

1) **Does the CPSC have a written diversity outreach, hiring and contracting plan in place?**

Response: Yes, the CPSC outreach and hiring plan is detailed in our annual MD-715 report to the Equal Employment Opportunity Commission. A copy of the plan is enclosed. CPSC also has a diversity outreach management goal to address under representation written into its strategic plan. The Office of EEO and Minority Enterprise serves as the small and disadvantage business agency liaison. This office responds in writing to requests for information, networks, and conducts outreach activities with small and disadvantaged business communities through conferences and workshops.

2) **Will you provide the Subcommittee with information regarding the diversity of the professional full time employees at the CPSC broken down by job title or GS level?**

Response: Yes, a copy of career, professional full-time employees by job title and GS grade level is attached at Appendix A.

3) **What measures or procedures are in place at the CPSC to ensure that it is recruiting and hiring a diverse staff including from different race and ethnicities, for instance does CPSC recruit or have a internship programs at Historically Black Colleges and Universities and other Minority Serving Institutions?**

Response: CPSC has a diversity outreach management goal to address underrepresentation written into its strategic plan and conducts outreach activities with many organizations, including Historically Black Colleges and Universities (HBCUs) and

other Minority Serving Institutions as well as vocational rehabilitation offices and veterans groups for agency vacancies. CPSC has recently sent recruitment memoranda and brochures to all HBCUs, Hispanic Serving Institutions, and Tribal Colleges promoting the agency as the employer of choice.

When funding is available, CPSC works with the Hispanic Association of Colleges and Universities (HACU) to bring aboard a student engineering intern. CPSC has partnered with Howard University Law School to bring law interns into the agency. In addition, CPSC participates in job fairs including minority job fairs such as the recent Society of Hispanic Professional Engineer, Blacks in Government job fair, and will participate in the Office of Personnel Management Hiring Fair for Schedule A appointees.

We also take advantage of marketing our agency as an employer of choice through networking at conferences sponsored by Federally Employed Women, the Federal Asian Pacific Islander Council, the Urban League, the National Association for the Advancement of Colored People (NAACP), the National Council of La Raza, League of United Latin American Citizens (LULAC), and National IMAGE, Inc. CPSC also leverages its partnerships with other federal agencies, including using the National Council of Hispanic Employment Program Managers, to disseminate our vacancies in an effort to achieve a diverse applicant pool. Finally, we attend local elementary and secondary school career days and sponsor a career day and internships for a local high school.

4) On the procurement and contracting side, can you also provide us with information regarding the amount and percent of contracts that the CPSC makes with small and disadvantaged business enterprises, particularly women and minority owned firms?

Response: CPSC awarded a total of 886 contracts for $26,447,912.31 in FY 2009. CPSC awards for small businesses are shown in the table below. This data was compiled through the GSA Federal Procurement Data System - Next Generation (FPDS-NG) (info website: https://www.fpds.gov/fpdsng_cms/).

	CPSC Small Business Awards		
Type of Business	**Actions**	**Dollars**	**Percent (total contracts)***
Small Business	381	$11,402,341.69	43.1%
Small Disadvantaged	43	$7,532,679.89	28.5%
8(a) Procedure	27	$7,368,054.68	27.9%
Veteran Owned Small Business	14	$2,459,937.72	9.3%
Service Disabled Veteran Owned Small Business	7	$2,270,630.22	8.6%
Women Owned Small Business	140	$4,059,857.76	15.4%
Certified HUBzone Small Business	14	$2,666,862.65	10.1%

*Percents do not add to 100% due to overlap among the categories.

5) What proactive steps is the CPSC taking to ensure a diversity of companies can compete for any contracts that you offer?

Response:

CPSC's written directives on procurement encourage the use of set-asides, such as 8(a) set-asides and identification of 8(a) and other small business sources. These goals are further clarified during face to face acquisition planning for specific procurements. Anticipated open market procurements exceeding $25,000 are synopsized in FedBizOpps and are available for all business enterprises to review.

In addition, the agency sets aside all procurements for small businesses when two or more responsible small business sources have been identified. When possible, these are further set-asides for 8(a) small and disadvantaged business firms. We have had continued success in soliciting the participation of, and awarding contracts to, small businesses and small disadvantaged businesses, and veteran owned, service disabled veteran owned, women owned, and HUBzone businesses.

Also, CPSC staff from the Office of EEO and Minority Enterprise has participated in small and disadvantaged business fairs, which included veterans, women, and minority owned businesses and has conducted presentations about contracting opportunities for these groups. Additionally, this individual is exploring the establishment of a website link to a small business page that would describe and define opportunities for businesses.

Appendix A

CPSC PROFESSIONAL* WORKFORCE as of March 31, 2010

* Includes OPM Position Categories of Administrative and Professional

JOB TITLE	GRADE	TWO OR MORE RACES #	ASIAN #	BLACK #	HISPANIC #	AMER IND ALASKAN NAT #	WHITE #
ACCOUNTANT	12			2.			1.
ACCOUNTING OFFICER	14						1.
ADMIN SERVICES ANALYST	12			1.			
ADMIN SERVICES OFFICER	14			1.			
ADMINISTRATIVE OFFICER	14		1.				1.
ADMINISTRATIVE SERVICES SPECIALIST	09			1.			
ADMINISTRATIVE SERVICES SPECIALIST	12			1			
ADMINISTRATIVE SERVICES SPECIALIST	13						1
AED FOR COMPLIANCE & ADMIN LIT	00						1.
AED FOR ECONOMIC ANALYSIS	00						1
AED FOR EPIDEMIOLOGY	00						1.
AED FOR INFO & TECH SVCS	00						1
ASSOC EXEC DIR FOR HS	00						1
ASSOC EXEC DIR FOR LS	00						1
ASST EX DIR HAZ ID & RED	00						1.
AUDIOVISUAL PROD SPEC	11						1.
AUDITOR	13		1.	1			1.
AUDITOR	14						1
BUDGET ANALYST	07			1			1.
BUDGET ANALYST	12			1.			
CHEMICAL ENGINEER	14						1.
CHEMIST	09						2.
CHEMIST	11						1.
CHEMIST	12						2.
CHEMIST	13	1.	1.				1.
CHEMIST	14		1.				
CHEMIST	15						1.
CHIEF FINANCIAL OFFICER	00						1
COMPLIANCE INVESTIGATOR	12						4.
COMPLIANCE INVESTIGATOR	13				1		9.
COMPLIANCE OFFICER	07						3.
COMPLIANCE OFFICER	09	1		4	2.		1.
COMPLIANCE OFFICER	11		1.	1			
COMPLIANCE OFFICER	12			1			1.
COMPLIANCE OFFICER	13		3.	3.			9.
CONTRACT SPECIALIST	12			2			3.
CONTRACT SPECIALIST	13			1			
DEP DIR, OFFICE OF COMPLIANCE	00						1.
DEPUTY AED, HAZ ID & RED	00						1.
DEPUTY DIRECTOR	14			1.			
DEPUTY EXECUTIVE DIR	00						1.
DIRECTOR OF HUMAN RESOURCES	15						1.
DIRECTOR, INTL PROG & INTERGOV AFRS	15						1.
DIRECTOR, PROCUREMENT SERVICES	15						1.
DOCKET & HEARING COORD. SPEC	12			1.			
ECONOMIST	09		1.				
ECONOMIST	12						1.
ECONOMIST	13						2.
ECONOMIST	14						5.
ELECTRICAL ENGINEER	13		1.	1.			4.

CPSC PROFESSIONAL* WORKFORCE							
		TWO OR MORE RACES	ASIAN	BLACK	HISPANIC	AMER IND ALASKAN NAT	WHITE
JOB TITLE	GRADE	#	#	#	#	#	#
ELECTRICAL ENGINEER	14		1				
ELECTRONICS ENGINEER	13		1				
ENGINEER PSYCHOLOGIST	13						1
ENGINEERING PSYCHOLOGIST	13						1
ENGINEERING PSYCHOLOGIST	13			1			1
ENGINEERING PSYCHOLOGIST	14						3
EQUAL EMPLOYMENT MGR	15						1
EQUAL EMPLOYMENT SPECIALIST	13			1			
EXECUTIVE DIRECTOR	00						1
FIN & MGMT INFO SYS OFFR	15			1			
FINANCIAL MGMT SPEC	09			1			1
FIRE PROTECTION ENGINEER	13						1
GENERAL ATTORNEY	12						1
GENERAL ATTORNEY	13			1			1
GENERAL ATTORNEY	14				1		1
GENERAL ATTORNEY	15		1				10
GENERAL COUNSEL	00						1
GENERAL ENGINEER	13		1				
GENERAL ENGINEER	14						3
HR SPECIALIST (HR DEVELOPMENT)	13						1
HUMAN RESOURCES SPEC (HUMAN CAPITAL)	14			1			
HUMAN RESOURCES SPECIALIST	13			2			2
INFO TECH SPEC (APPL SOFTWARE)	12						1
INFO TECH SPEC (SYS ADMINIST)	12		1				
INFORMATION MANAGEMENT	09			1			
INFORMATION MGMT SPECIALIST	09			1			
INTERNATIONAL TRADE SPECIALIST	13						1
IT PROJECT MANAGER	14						1
IT SPECIALIST	13	1					
IT SPECIALIST (APPSW)	13		3				
IT SPECIALIST (CUSTSPT)	13		2	1			2
IT SPECIALIST (DATAMGMT)	13		1				
IT SPECIALIST (DATAMGT)	14		1				
IT SPECIALIST (INFOSEC)	13						1
IT SPECIALIST (INFOSEC)	14			1			
IT SPECIALIST (INTERNET)	13						1
IT SPECIALIST (NETWORK)	13				1		3
IT SPECIALIST (POLICY & PLANNING)	13			1			
IT SPECIALIST (POLICY AND PLANNING)	15						1
LEAD COMPLIANCE OFFICER	14			3	1		4
LEAD ENGINEERING PSYCHOLOGIST	14						1
LEAD GENERAL ENGINEER	14		1				3
LEAD MATHEMATICAL STATISTICIAN	14		1				
LEAD TECHNICAL INFO SPECIALIST	12						1
LEAD TOXICOLOGIST	14			1			
LEAD TRIAL ATTORNEY (GENERAL)	15						2
MANAGEMENT ANALYST	13						1
MANAGEMENT ANALYST	13						1
MANAGEMENT ANALYST	14						3
MATHEMATICAL STATISTICIAN	09		1				
MATHEMATICAL STATISTICIAN	11				1		1
MATHEMATICAL STATISTICIAN	13						5
MATHEMATICAL STATISTICIAN	15						1

CPSC PROFESSIONAL* WORKFORCE

JOB TITLE	GRADE	TWO OR MORE RACES #	ASIAN #	BLACK #	HISPANIC #	AMER IND ALASKAN NAT #	WHITE #
MECHANICAL ENGINEER	07						1.
MECHANICAL ENGINEER	09						1.
MECHANICAL ENGINEER	12						1.
MECHANICAL ENGINEER	13		2.	3.			8.
MGMT & PROGRAM ANALYST	14	1					
MGMT & PROGRAMM ANALYSIS OFFR	15						1.
MGMT AND PROGRAM ANALYST	13			1			
OPERATIONS RESEARCH ANALYST	09		1.				1.
OPERATIONS RESEARCH ANALYST	13						1.
PARALEGAL SPECIALIST	09			1			1
PARALEGAL SPECIALIST	11			1.			
PHARMACOLOGIST	13						2.
PHARMACOLOGIST	14						2.
PHYSIOLOGIST	13						2
PHYSIOLOGIST	14						1.
PROCUREMENT ANALYST	15						1.
PROD SAFETY INVESTIGATOR	11						1.
PROD SAFETY INVESTIGATOR	09	2		2.			2.
PROD SAFETY INVESTIGATOR	13		1.	1.	1		3.
PROD SAFETY INVESTIGATOR	12		3.	7.	4.	1.	44.
PROD SAFETY INVESTIGATOR	13						7.
PRODUCT SAFETY INVESTIGATOR	11						2.
PRODUCT SAFETY INVESTIGATOR	13						1.
PROGRAM ANALYST	11			2			2.
PROGRAM ANALYST	12		1.	1.	2.		2.
PROGRAM ANALYST	13	1	3	1.			3.
PROGRAM ANALYST	14						1
PROGRAM MANAGER	14			1.			2.
PROGRAM MANAGER	15				1.		3
PUBLIC AFFAIRS SPECIALIST	11			1			
PUBLIC AFFAIRS SPECIALIST	12						1.
PUBLIC AFFAIRS SPECIALIST	13			2.	1.		2.
SENIOR ATTORNEY ADVISOR	14	1					
SERVICES MGMT OFFICER	14						1.
SPECIAL ASSISTANT	15						1
STATISTICIAN (HEALTH)	13		1.	1.			2.
SUPERVISORY ECONOMIST	15						1.
SUPERVISORY GENERAL ATTORNEY	15		1.	1.			
SUPERVISORY GENERAL ATTORNEY (CR)	15						1.
SUPERVISORY PARALEGAL SPECIALIST	14			1.			
SUPERVISORY STATISTICIAN	14						1.
SUPERVISORY STATISTICIAN	15						1.
SUPERVISORY TOXICOLOGIST	15						1
SUPV ADMIN OFFICER	15						1.
SUPV CHEMIST	15						1
SUPV COMPLIANCE INVESTIGATOR	14						2.
SUPV COMPLIANCE OFFICER	15						1.
SUPV ELECTRICAL ENGINEER	15						1.
SUPV ENG PSYCHOLOGIST	15						1
SUPV GENERAL ATTORNEY (IG)	15						1.
SUPV GENERAL ENGINEER	15						1.
SUPV HUMAN RESOURCES SPECIALIST	14			1.			1.
SUPV IT SPECIALIST	15						1

CPSC PROFESSIONAL* WORKFORCE

JOB TITLE	GRADE	TWO OR MORE RACES #	ASIAN #	BLACK #	HISPANIC #	AMER IND ALASKAN NAT #	WHITE #
SUPV IT SPECIALIST (NETWORK)	14						1
SUPV IT SPECIALIST (APPSW)	14		1.				
SUPV IT SPECIALIST (CUSTSPT)	14						1.
SUPV MANAGEMENT ANALYST	15						3.
SUPV MECHANICAL ENGINEER	15		1.				1.
SUPV PHARMACOLOGIST	15						1.
SUPV PROD SAFETY INVEST	13						8.
SUPV PROGRAM ANALYST	14						1.
SUPV PUBLIC AFFAIRS SPECIALIST	14						1.
SUPV STATISTICIAN (HEALTH)	15						1.
SUPV TRIAL ATTORNEY (GENERAL)	15						1.
SUPVY PROGRAM ANALYST	13						1.
SUPVY GENERAL ENGINEER	15						1.
SUPVY PRODUCT SAFETY INVESTIGATOR	13						1.
SUPVY PROGRAM ANALYST	13			1.		1.	
SUPVY PROGRAM ANALYST	14						1.
SYSTEMS ACCOUNTANT	13		1.				
TECH INFO SPEC	09		1.				
TECH INFO SPEC	11			1.			
TEXTILE TECHNOLOGIST	12						1.
TEXTILE TECHNOLOGIST	13		2.				2.
TEXTILE TECHNOLOGIST	14						1
TOXICOLOGIST	12			1			
TOXICOLOGIST	13						2
TOXICOLOGIST	14						3
TRIAL ATTORNEY	12						4.
TRIAL ATTORNEY (GENERAL)	12						3.
TRIAL ATTORNEY (GENERAL)	14			1.			3
TRIAL ATTORNEY (GENERAL)	15						1.
VOLUNTARY STANDARDS COORD	15						1.
TOTALS = 432		**8**	**44**	**73**	**15**	**2**	**290**
		1.9%	10.2%	16.9%	3.5%	0.5%	67.1%

EEOC FORM 715-01 PART A - D	*U.S. Equal Employment Opportunity Commission* FEDERAL AGENCY ANNUAL EEO PROGRAM STATUS REPORT			
For period covering October 1, 2008 , to September 30, 2009				
PART A Department or Agency Identifying Information	1. Agency		1. US Consumer Product Safety Commission	
	1.a. 2nd level reporting component		N/A	
	1.b 3rd level reporting component		N/A	
	1.c. 4th level reporting component		N/A	
	2. Address		2. 4330 East West Highway	
	3. City, State, Zip Code		3. Bethesda, MD 20814	
	4. CPDF Code	5. FIPS code(s)	4. SK00	5. 24031
PART B Total Employment	1. Enter total number of permanent full-time and part-time employees			1. 439
	2. Enter total number of temporary employees			2. 22
	3. Enter total number employees paid from non-appropriated funds			3. 0
	4. TOTAL EMPLOYMENT [add lines B 1 through 3]			4. 461
PART C Agency Official(s) Responsible For Oversight of EEO Program(s)	1. Head of Agency Official Title		1. Inez Tenenbaum, Chairman	
	2. Agency Head Designee		2. N/A	
	3. Principal EEO Director/Official Official Title/series/grade		3. Kathleen Buffrey, Director, EEO and Minority Enterprise, GS-260-15	
	4. Title VII Affirmative EEO Program Official		4. Kathleen Buffrey, Director, EEO and Minority Enterprise	
	5. Section 501 Affirmative Action Program Official		5. Kathleen Buffrey, Director, EEO and Minority Enterprise	
	6. Complaint Processing Program Manager		6. Debbie Waterman, EEO Specialist	
	7. Other Responsible EEO Staff			

EEOC FORM 715-01 PART A - D	*U.S. Equal Employment Opportunity Commission* FEDERAL AGENCY ANNUAL EEO PROGRAM STATUS REPORT

PART D List of Subordinate Components Covered in This Report	Subordinate Component and Location (City/State)	CPDF and FIPS codes	
	None		

EEOC FORMS and Documents Included With This Report

*Executive Summary [FORM 715-01 PART E], that includes:	X	*Optional Annual Self-Assessment Checklist Against Essential Elements [FORM 715-01PART G]	NA
Brief paragraph describing the Agency's mission and mission-related functions	X	*EEO Plan To Attain the Essential Elements of a Model EEO Program [FORM 715-01PART H] for each programmatic essential element requiring improvement	NA
Summary of results of Agency's annual self-assessment against MD-715 "Essential Elements"	X	*EEO Plan To Eliminate Identified Barrier [FORM 715-01 PART I] for each identified barrier	NA
Summary of Analysis of Work Force Profiles including net change analysis and comparison to RCLF	X	*Special Program Plan for the Recruitment, Hiring, and Advancement of Individuals With Targeted Disabilities for agencies with 1,000 or more employees [FORM 715-01 PART J]	NA
Summary of EEO Plan objectives planned to eliminate identified barriers or correct program deficiencies	X	*Copy of Workforce Data Tables as necessary to support Executive Summary and/or EEO Plans	X
Summary of EEO Plan Action items implemented or accomplished	X	*Copy of data from 462 Report as necessary to support action items related to Complaint Processing Program deficiencies, ADR effectiveness, or other compliance issues	NA
*Statement of Establishment of Continuing Equal Employment Opportunity Programs [FORM 715-01 PART F]	X	*Copy of Facility Accessibility Survey results as necessary to support EEO Action Plan for building renovation projects	NA
*Copies of relevant EEO Policy Statement(s) and/or excerpts from revisions made to EEO Policy Statements	X	*Organizational Chart	X

The U.S. Consumer Product Safety Commission (CPSC) is an independent health and safety regulatory Agency, responsible for protecting the American public from unreasonable risks of injury and death from thousands of consumer products.

CPSC's mission is to address unreasonable risks of injury and death from consumer products and to assist consumers in evaluating the comparative safety of consumer products. The CPSC has two major programs: Reducing product hazards to consumers and identifying product hazards. CPSC uses a variety of tools to reduce the risks of hazardous consumer products including (1) developing and strengthening voluntary and mandatory safety standards; (2) initiating recalls and corrective actions of hazardous products and enforcing existing regulations; and (3) alerting the public to safety hazards and safe practices.

Under its work on strategic management of human capital under the President's Management Agenda, CPSC established recruitment and training goals to strengthen the Agency's Equal Employment Opportunity (EEO) program.

Summary of Agency's Annual Self-Assessment

The Agency's annual self-assessment against the essential elements of a model EEO program reveals the following strengths, weaknesses and plans to overcome identified weaknesses (bolded):

- **Element A – Demonstrated Commitment from Agency Leadership.**

  The Chairman's policy letters on Non-Discrimination in Employment and the Prevention of Harassment were issued to the entire workforce via email on July 21, 2009. **The Chairman will re-issue the EEO policy statement annually.**

  New employees are provided a copy of the policy letters, along with other EEO related material, upon in-processing. EEO materials, including the Directive on Reasonable Accommodation, are posted on the EEO intranet site. The Directive on Reasonable Accommodation is also posted on our public website. EEO has dedicated bulletin boards in the Headquarters building where materials and information, including the counselor poster, policy letters and No Fear Act information, are displayed. EEO related meterials are available in the personnel office.

  We conduct management training regarding their responsibilities under the procedures for reasonable accommodation as well as EEO policies and principles. We inform the workforce of what behaviors are inappropriate and the penalties for unacceptable behavior through training, email, and one on one counseling.

  Through our Directive on EEO and procedures for filing complaints of discrimination we reinforce managers and supervisors responsibilities to address concerns, resolve conflicts, and take appropriate corrective action.

  Managers and supervisors are evaluated on their support of EEO goals.

- **Element B – Integration of EEO into the Agency's Strategic Mission.**

The Director of EEO reports directly to the Chairman with clearly defined duties and the knowledge, skills and abilities to carry out the duties and responsibilities of the position. The Director has access as needed to the Chairman, Chief of Staff, and other senior management officials to inform them of the status of the Agency's EEO program on a regular basis.

The Chairman, Chief of Staff, Commissioners, managers and supervisors were provided the opportunity to identify barriers, develop action items, and report on the accomplishments listed in this plan prior to its submission. Senior leaders were asked to review Agency recruitment, retention, and advancement within their organizations and identify any new barriers to equal opportunity and commit to an action item to overcome any current or new barriers. Additionally, each senior official received a copy of this report prior to its submission for information and review as part of the State of the Agency briefing report.

The EEO office works with selecting officials in developing outreach initiatives to ensure the widest possible applicant pool. EEO provides advice and assistance to managers and supervisors on employment related issues and concerns.

The Agency has appointed a Disability Program Manager and in FY04 revised the Agency directive on the reasonable accommodation process. The directive is posted on the Agency directives and EEO intranet sites, and on the public web site. EEO staff work collectively and individually on a case-by-case basis with supervisors and employees on procedures for reasonable accommodation. EEO works closely with the Office of Human Resources Management (EXRM), Office of General Counsel (OGC), the supervisor and the employee providing assistance with accommodation issues. A central Agency fund exists for providing ergonomic assessments and equipment. The Agency has a memorandum of agreement with the Defense Computer and Electronic Equipment Program to provide other electronic and computer accommodations. In FY09, our bi-annual No FEAR Act training provided all employees training in reasonable accommodations.

The Agency has appointed Federal Women's Program, Black Employment Program and Hispanic Employment Program managers. The Agency has three EEO Counselors.

The EEO office is responsible for coordinating compliance with the Federal Equal Opportunity Recruitment Program (FEORP), Veterans Employment Programs and other special emphasis programs.

EEO training and education programs are made available to all supervisors and employees through a variety of methods. Headquarters training and programs are broadcast live and videotaped and posted on the EEO intranet site available to supervisors and employees teleworking full-time and for those Headquarters staff that may have missed the opportunity to participate. The EEO Director provides training at Field Managers meetings and regional employee meetings. Funding is adequate to support EEO program goals including funding for EEO materials, training, and the EEO complaints process.

This year, several EEO related training opportunities were conducted for employees, managers and supervisors including the ADA act of 2008, Ebbing the Tide of Reprisal Complaints, How to Stay Out of Legal Hot Water, Demystifying EEO (for employees), Workplace Harassment, and Conflict Resolution (Field Staff). A power-point refresher training on Mediation was provided to 100% of the workforce.

This past year, we have been able to fund training opportunities for collateral duty EEO counselors (EEO refresher training) and special emphasis program managers including the Blacks in Government (BIG) and Federally Employed Women (FEW) conferences. Training was funded for EEO full-time staff, including the Perspectives in Disability conference and the EEOC EXCEL conference.

EEO officials are provided a copy of weekly staffing reports to identify anticipated vacancies for outreach activities. EEO officials participate in Agency selections for executive level training. Additionally, EEO is included in the review of Agency documents, policies, and directives that may affect EEO.

- **Element C – Ensuring Management and Program Accountability.**

The EEO staff provides regular reports to the Chairman and senior staff on the status of the EEO program. The EEO Director ragularly sends out EEO-related information to senior Agency staff. This information includes case law updates, reports on best practices, Government Accountability Office (GAO), Office of Personnel Management (OPM), Merit Systems Protection Board (MSPB) and other reports on EEO and diversity. This information is posted on the EEO Outlook bulletin board and on employee exchange.

EEO meets weekly with the Executive Director, Deputy, Human Resource Director and Office of General Counsel to discuss employee relations and EEO issues of concern.

The Agency developed a training directive for supervisors, managers and executives, which include both substantive and procedural EEO training components. The Agency also developed a directive establishing a Federal Career Intern Program. **In 2005, the Agency reviewed and updated its merit promotion policy and procedures. The EEO office provided input into this review. The Agency is purchasing a Talent Management System that will assist managers in developing competencies for job series and subsequent training plans to close any employee skill gaps. This system will help senior managers identify leadership competencies to identify training plans to grow leaders at all levels.**

No findings of discrimination or breach of settlement agreements have occurred in the Agency in the past year.

There have been no instances of Agency noncompliance with Equal Employment Opportunity Commission (EEOC), MSPB, Federal Labor Relations Authority (FLRA), arbitrators, and District Court orders.

- **Essential Element D – Proactive Prevention.**

  EEO staff and senior managers collaborated on the barrier assessment, analysis, objectives and accomplishments forming the framework of this plan. This assessment included trend analyses of workforce profiles, major occupations, grade level distribution, compensation and reward systems, and a general review of the effectiveness of management/personnel policies, procedures and practices by race, national origin, sex, and disability.

  Input is sought regarding the workforce environment through several means. These include assessment of exit interviews, employee surveys, and the annual OPM Human Capital Survey.

  The Agency includes annual EEO performance goals as part of its performance and budget plan under the President's Management Agenda in the areas of targeted recruitment, EEO training, and diversity initiatives. EEO staff works with managers at all levels in successfully implementing these goals. The goals include conducting recruitment outreach initiatives and developing plans to increase representation of Hispanics and individuals with disabilities in the Agency workforce. The latter have included mentoring programs, awareness training, shadowing assignments, targeted outreach and partnering with a local high school. In FY09, we exceeded all these goals.

  The Agency has an effective Alternative Dispute Resolution (ADR) program with employees encouraged to consider participating in the process. When an employee requests ADR and it is deemed appropriate to offer ADR, supervisors and managers are required to participate.

  The Agency has revised its ADR directive to ensure incorporations of the suggestions made by EEOC in its August 4, 2005 letter to the Agency. That directive was signed by the Chairman in FY06 and distributed again to all employees via email notification. In FY09, the Agency conducted refresher training in Mediation for 100% of personnel via an intranet training presentation.

  Since 2007, CPSC has captured and reviewed applicant flow data through the Quick Hire system. This data captures all race/national origin (RNO) groups including Native Hawaiian/Pacific Islanders and individuals with disabilities. Since August 2005, CPSC has captured RNO data for Native Hawaiian or Other Pacific Islander new employees using the revised SF181. In FY04 we developed a tool that included Native Hawaiian or Other Pacific Islander as well as other RNO groupings and resurveyed our entire workforce.

- **Essential Element E – Efficiency.**

  EEO staff has the necessary training and experience to conduct the MD-715 analysis.

The Agency gets its personnel data base support from Department of Interior (DOI).

The EEO Office conducts periodic assessments of data contained in the Human Resource database against standard forms received and manual reports compiled as a quality control measure for Race, National Origin (RNO) and disability data.

FY09 afforded the Agency the use of Quick Hire for recruitment purposes. Quick Hire has an effective means of capturing or gathering applicant flow data including RNO and disability data on applicants for employment; recruitment trends, and targeted recruitment effort, **which is used by the Agency. FY09 data indications is addressed in the workforce analysis portion of this report.**

The Agency uses a complaint tracking and monitoring system that allows identification of the location, status, length of processing time at each stage, issues, bases, complainant, and involved management officials.

The Agency also monitors trends via the annual EEOC 462 report including the new complaint trend analysis. We also monitor the training of contract investigators and collateral duty counselors via this report. **In FY08, 60% of individuals filing pre-complaints were offered consideration for ADR (3 of 5 individuals). Two of the 5 pre-complainte were deemed not suitable for ADR due to the nature of the complaint issues. Of the three pre-complaints considered for ADR, the Agency rejected one as the complaint was outside the purview of the Agency to resolve. In FY09, of the 8 pre-complaints completed, 7 or 88% were offered consideration for ADR. Four of the seven individuals offered ADR consideration rejected ADR and elected traditional counseling. Out of the 3 ADR attempts, 67% were resolved.**

Our complaint tracking system provides the benchmarks for comparison of the Agency's processing of discrimination complaints with 29 C.F. R. Part 1614.

Given its size and personnel constraints, the Agency does everything within its power to ensure no conflicts exist with regard to legal sufficiency reviews, Agency representation in EEO complaints, and the neutral adjudication of EEO complaints. The Office of General Counsel and Office of EEO and Minority Enterprise have established a working relationship that provides for fair and timely review and consultation.

- **Essential Element F – Responsiveness and Legal Compliance.**

The EEO Director's performance plan contains elements ensuring the timely, accurate, complete and consistent reporting of EEO complaint data to the EEOC. In FY06, EEO began developing new management controls which will include reporting of data and compliance with corrective actions and settlements as required. This process is on-going.

In this reporting period, 100% of EEO counseling's were completed within the applicable timeframes. The average days for investigation were 148 (well below the EEOC required number of days of 180 days). The Agency issued no merit decisions in FY09.

Summary of Analysis of Work Force Profiles

At the end of this reporting period, CPSC's workforce consisted of 439 full-time permanent employees (95% of the total workforce) located at the Headquarters in Bethesda, Maryland, the CPSC laboratory in Gaithersburg, Maryland and those assigned to Field and Import positions.

Of these, 425 were in the General Schedule (GS) and 14** in the Senior Executive Service (SES). The CPSC has no employees in the Wage Grades (WG). The FY08 permanent workforce was 415.

**One of the 14 reflected as a permanent SES is a political appointee and should be reflected under temporary employees. This issue has been reported to the Human Resource Management Office.

Hiring efforts resulted in gains across the workforce with a net change of 5.78% (24 employees) relative to our FY08 level in its permanent workforce. With the exception of African-American males (no change) and American Indian/Alaskan Native males (-66.8% or 2 separations) all other categories had positive net changes in FY09.

We experienced 28 permanent workforce losses.

	White Males	White Females	Black Males	Black Females	His Males	His Females	AA/PI Males	AA/PI Females	AI/AN Males	AI/AN Females
Voluntary Retirement	4 40%	3 30%		2 20%	1 10%					
Disability Retirement		1 100%								
Transfer to New Job	2 17%	2 17%		4 33%	1 8%		2 17%		1 8%	
Resignation	1 33%	1 33%		1 33%						
Death	1 50%	1 50%								
CPSC09 CLF	35.1	30.0	4.8	15.5	2.1	1.8	5.7	3.6	.2	.2

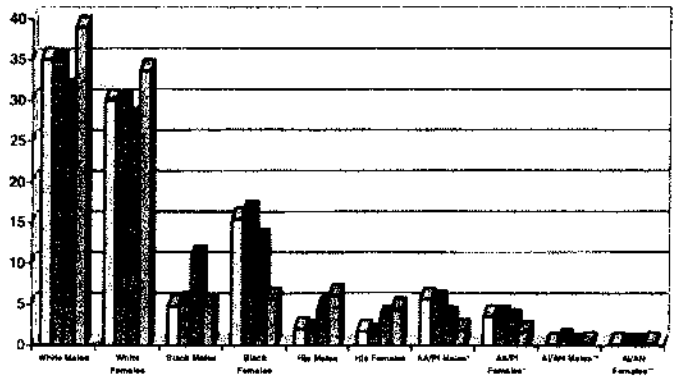
Minority losses due to transfer or resignation were 60% compared to their workforce representation of 35%. Fifty three percent of women were loss due to transfer or resignation compared to their workforce representation of 51%. One voluntary retirement and one death were also individuals with a disability. **A review of exit survey results indicate that 56% of the employees taking the survey would recommend CPSC to a friend as a good place to work. When asked what could be done to prevent the employee from leaving, of those that responded, opportunities for growth (training), promotion, and respect for abilities were the most frequent responses. When asked what CPSC could do better, those that responded said communication, decisiveness, meeting time, empowerment, and telecommuting.**

Permanent employees who have identified themselves as individuals with a disability experienced a net change of 2.8% (1 employee) representing 8.4% of the permanent workforce. Individuals with targeted disabilities remained the same at 7 employees, 1.6% of the permanent workforce which is still below the government high of 2.95%.

The Federal Information Processing Standards (FIPS) code identified in this report is that of Montgomery County, Maryland, as that is where the headquarters is located.

However, many employees and applicants reside in the greater Washington, DC-MD-VA-WV Primary Metropolitan Statistical Area (PMSA). Additionally, approximately 30% of our workforce resides across the US and our applicant pool potentially draws from across the US. Therefore, both the Greater Washington DC-MD-VA-WV PMSA and National Civilian Labor Force (CLF) are used for comparison purposes.

FY08 Percentage of Permanent Workforce Distribution



CPSC FY09	35.1	30.0	4.8	15.5	2.1	1.8	5.7	3.6	.2	.2
CPSC FY08	35.0	29.6	5.1	16.4	1.7	1.7	5.3	3.6	.7	.1
DC-MD-VA CLF	31.2	27.7	10.9	12.9	4.6	3.5	3.4	3.1	.1	.1
NCLF	39.0	33.7	4.8	5.7	6.2	4.5	1.9	1.7	.3	.3

* AA/PI = Asian American/Pacific Islander
** AI/AN = American Indian/Alaskan Native

Native Hawaiian or Other Pacific Islander Males represent .2% of the workforce (increase of 1 employee over FY08 total of 0) and Two or more races males represent .5% of the workforce (increase of one employee over FY08 total of one employee) with females representing .5% as well (staying constant at 2 employees).

In FY09 minorities represented 31% of permanent new hires, a decrease of 11% over permanent new hires in FY08. Black females and Asian males represented the majority of minority new hires at 13% for Black females (7 employees) and 9.1% for Asian males (5 employees). Asian females and Hispanic males represented 3.6% with 2 employees in each category. Women represented 47% of all permanent new hires, a decrease of 2% over FY08. Three FY09 new hires identified him or herself as an individual with a disability. No new individuals with target disabilities were identified. We will continue to try and meet our goal of one new hire of an individual with a targeted disability in FY10.

Of the permanent workforce in FY09, 245 employees or 56% are in the Officials and Managers occupation category compared to 238 employees or 57% in FY08. Of these 245 employees, 173 or 71% are non-supervisory. In FY09, 160 employees or 36% are in the Professional category compared to 142 or 34% in FY08. In FY09, 5 employees or 1.2% are in the Technicians category the same as in FY08. In FY09, 22 employees or 5% are in the Administrative Support Workers category compared to 25 or 6% Administrative Support Workers in FY08. Finally, in FY09, 6 employees or 1.4% are Service Workers compared to 5 employees or 1.2% in FY08. CPSC has no employees in the Sales Workers, Craft Workers, Operatives, or Laborers and Helpers occupational categories.

The percentage representation of employee groups in the **Officials and Managers** occupational category (our largest employment category with 245 employees) reflects the following information. CPSC occupational series in this category include GS-0301, 0340, 0343, 0501, 1102, and 1801.

Officials and Managers Data

	White Males	White Females	Black Males	Black Females	His Males	His Females	AA/PI Males	AA/PI Females	AI/AN Males	AI/AN Females
CPSC FY09	37.1	32.0	4.9	13.5	2.9	2.5	3.6	1.6	.4	.4
CPSC CLF 09	35.1	30.0	4.8	15.5	2.1	1.8	5.7	3.6	.2	.2
CPSC FY08	37.0	32.4	5.0	13.9	2.5	2.1	3.4	1.7	.8	.4
CPSC CLF08	35.0	30.0	5.0	16.4	1.7	1.7	5.3	3.6	.2	.2
DC Metro CLF	42.4	29.5	7.0	9.8	2.3	1.9	2.9	1.9	.1	.2
NCLF	52.1	30.6	2.8	3.5	3.3	2.4	2.1	1.3	.2	.2

Highlighted percentages indicate underrepresentation in that RNO category. In this category, Native Hawaiian or Other Pacific Islander males are .4% and two or more race females are .8%. Also, in this category, individuals with disabilities represented 9.8% of the permanent employees in FY09 compared to 9.7% of the permanent employees in FY08. Individuals with targeted disabilities represented .8% FY09, the same as in FY08. **Note that our Project Safety Investigator positions, which make up a good portion of our mid-level officials and managers group, have bona fide occupational physical requirements that may cause fewer individuals with disabilities to apply.**

Tha percentage representation of employee groups in the **Professionals** occupational category (our next largest employment category with 154 employees) reflects the following. CPSC occupetional series in this category include GS-0110, 0180, 0201, 0405, 0415, 0510, 0801, 0830, 0850, 0905, 1035, 1320, 1629, 1529, 1530, and 2210.

Professionals Data

	White Males	White Females	Black Males	Black Females	His Males	His Females	AA/PI Males	AA/PI Females	AI/AN Males	AI/AN Females
CPSC FY09	36.9	28.8	5.0	9.4	1.3	.6	9.4	7.5	0	0
CPSC CLF09	35.1	30.0	4.8	15.5	2.1	1.8	5.7	3.6	.2	.2
CPSC FY08	38.0	26.8	5.6	10.7	.7	.7	9.2	7.8	0	0
CPSC CLF08	35.0	30.0	5.0	16.4	1.7	1.7	5.3	3.6	.2	.2
DC Metro CLF	35.8	32.9	6.7	10.4	1.8	1.9	4.8	3.5	.1	.1
NCLF	37.1	42.3	2.7	4.9	2.3	2.8	3.2	2.6	.2	.3

Highlighted percentages indicate underrepresentation in that RNO category. In this category, there are no Native Hawaiian or Other Pacific Island employees and 2 (1.3%) employees identified as two or more races (male). Also, in this category, individuals with disabilities represented 5.63% in FY09, the same as FY08 permanent employees. Individuals with targeted disabilities represented 1.25% in FY09, a slight decrease over the FY08 percentage of 1.41.

The majority of the permanent workforce is concentrated in the GS-12 and above grade levels.

Fiscal Year (FY)	GS-12	GS-13	GS-14	GS-15	SES
FY09	102	131	64	54	14
FY08	102	127	51	47	14

Participation rates of Women, Hispanic males and females, Black males and females, American Indian males and females and two or more races male and female in senior grade levels (GS13 – SES) fell below their rates in the CPSC permanent workforce.

	All Women	White Males	White Females	Black Males	Black Females	His Males	His Females	AA/PI Males	AA/PI Females	AI/AN Males	AI/AN Females	2+ races Males	2+ races Females
GS13-SES	44.9	41.4	29.7	3.9	8.8	1.5	.4	7.2	5.3	0	0	0	0
CPSC CLF	51.48	35.0	30.0	4.8	15.5	2.1	1.8	5.7	3.6	.2	.2	.5	.5

Highlighted percentages indicate underrepresentation in that RNO category. There was little improvement in FY09 over FY08 in the representation of individuals in the senior grade levels. Women represented 45.2% in FY08 despite a workforce participation rate of 52.1%, Black females – 8.4% despite a workforce participation rate of 16.4%.

However, in the 1601 series (Officials and Managers), our largest feeder groups to the GS13 and above grade level, 40 individuals are in career ladder positions at grades 7-12 with the target grade of GS13. Of those, 22% are women, 52% minority, and 2% individuals with disabilities. This includes 20% Black females, 10% Black males, 7% Hispanic females, and 5% 2+ race males and females.

CPSC major occupational categories are: GS-343, Management and Program Analyst (30 employees), GS-0905, Attorney (28 employees), GS-1801, General Inspection, Investigation, and Compliance (137 employees) and GS-2210, Information Technology Management (28 employees).

In the GS-0343 series, Hispanic females, White males, Asian males, and American Indian females are underrepresented in comparison to the relevant civilian labor force. No change from FY08. **FY09 applicant pool data shows that women and minorities were well represented and qualified but individuals with disabilities were lacking on referral lists.**

In the GS-0905 series, Hispanic females, White males, Black males, Asian/PI Males, and American Indian males and females are underrepresented compared to the relevant civilian labor force. **Due to a FY09 hire, Hispanic males are no longer underrepresented. FY09 applicant pool data shows the women and minorities are well represented and well qualified, however there were no individuals that identified themselves with a disability on any referral list.**

In the GS-1801 series, Hispanic males, White males, American Indian/Alaskan Native males are underrepresented compared to the relevant civilian labor force. **FY09 applicant data shows well qualified women, minorities and individuals with disabilities in the merit promotion and DEU investigator hiring pools. In the Compliance Officer applicant pools, women and minorities are well represented and well qualified, however there is a lack of candidates with disabilities.**

In the GS-2210 series, Hispanic females, White males and females, and American Indian females are underrepresented compared to the relevant civilian labor force. **FY09 applicant data shows that women, minorities and individuals with disabilities are well qualified and well represented in the applicant pools.**

Individuals with two or more races are underrepresented across the major occupations.

Individuals with disabilities are not represented in GS-0905 labor force. The 2210 series now includes an individual with a disability.

Generally, a review of FY09 applicant pool data indicates that well qualified women and minorities are well represented in hiring pools across series. However, a review of internal processes in selection of applicants may be warranted in some areas where minorities have not been traditionally brought into the workforce. The data does indicate a greater need to focus on outreach to individuals with disabilities across series.

In FY09, 23 competitive promotion actions were finalized. Minority candidates received 34.8% of competitive promotions (1 Black male, 4 Black females, and 1 Asian female). Female candidates received 30.4% of competitive promotions.

In addition to the promotions indicated above, CPSC hired at least 23 employees into permanent positions with career-ladder promotion potential as high as the GS-13 (30% minorities, 60% females). In FY 08, CPSC hired 27 employees into positions with career-ladder promotion potential as high as the GS-13 (59% minorities, 56% females).

CPSC reviewed statistical data that reflected accessions, separations, promotions, major occupations, awards, grade and occupational distribution, and changes in the workforce for this report. We also reviewed Agency employee exit interviews, EEO complaint activity, applicant flow hire data, and the OPM Human Capital Survey.

Summary of EEO Plan Objectives to Eliminate Barriers or Correct Program Deficiencies

The Agency conducted a barrier analysis and assessment. Barriers and objectives to overcome identified barriers are identified below:

- **Recruitment** – Present recruitment sources may not yield the expected rate of qualified applicants of all racial and national origin groups, both sexes, and individuals with disabilities who meet organizational needs. Fiscal constraints have limited CPSC's ebility to pay recruitment/retention bonuses, relocation expenses, interview travel expenses, cost of participation in job fairs or scientific meetings, and costs for job postings in scientific publications, job banks, or professional societies.

Several initiatives have been genereted to increase CPSC visibility and target outreach activities to underrepresented populations. These included the direct-mailing to Hispanic-serving institutions of higher education of a recruitment brochure and materials with an introduction to the Agency and the nature of positions. **(Completed)** CPSC will compile statistical and contact information of the number of underrepresented groups graduating from colleges and universities with degrees in math, statistics, the sciences, engineering, and law so that recruitment efforts can be targeted. **(Continuing)**

CPSC will also generate a list of contacts with professional, trade and alumni associations serving underrepresented groups for targeted recruitment efforts. **(Completed)** CPSC will pursue opportunities to expand the worker-trainee placement program by increasing the use of Hispanic Association of Colleges and Universities (HACU) interns and the workforce recruitment program for college students with disabilities. **(Continuing)**

Report of Accomplishments and Modification to Objective

CPSC hosted no HACU interns at our Laboratory facility in FY09. **Funding exists to fund at least one intern in 2010.** CPSC was able to use the Schedule A student appointments to bring on students in offices throughout the Headquarters.

The Agency engaged in several other efforts to expand its applicent pool and introduce the Agency as an employer of choice:

- Pursued participation in Operation Warfighter. Provided resumes to managers as potential intern candidates. **In FY10, we hope to place at least one disabled veteran at CPSC for training. We will also participate in an Operation Warfighter briefing at Bethesda Naval Hospital and Walter Reed Army Medical Center, and job fair.**
- Participated in job fairs with Department of Agriculture and the Hispanic Association of Colleges and Universities (HACU), the University of Maryland, University College, Partnership for Public Service, and John Hopkins University.
- Participated in career fairs at the Blacks in Government (BIG) and La Raza Conference. Sent a Public Affairs employee to the Urban League conference.

- Worked closely with the National Council of Hispanic Employment Program Managers and the National Association of Hispanic Federal Executives to advertise job vacancies to constituency groups.
- Continued to utilize the Department of Labor EARN program to post job vacancies in the hopes of attracting individuals with disabilities.
- Forwarded Workforce Recruitment Program (WRP) resumes to Laboratory, Engineering, and Compliance.
- Conducted training for managers and supervisors on their EEO responsibilities.
- Utilized the Partnership for Public Service Hot Jobs.
- Joined Call to Serve as a Partner Agency.
- Utilized Craig's List and other non-traditional sources for job postings.
- Provided recruitment brochures at the BIG and FEW conferences.
- Continued our partnership with Bethesda-Chevy Chase (BCC) High School providing tutoring, mentoring and providing students, who receive course credit, working internships in CPSC positions. We participated in the BCC Career Day.
- Participated in the Sligo Creek Elementary School Career Day.
- Partnered with Howard University Law School and recruited student legal interns.
- Direct-mailed all Historical Black Colleges and Universities a recruitment brochure and materiels with an introduction to the Agency and the nature of positions.
- Met with Society of Hispanic Professional Engineers regarding FY10 conference participation.
- Provided recruitment incentive bonuses and superior quelification determinations to new hires including women and minorities for hard to fill positions.
- Presented conference workshops, participated in conferences, and set on subject matter expert panels for a number of science, engineering and statistical groups.

Additionally, CPSC exceeded its three Quality and Management goals under the President's Management Agenda. These are: Target recruitment efforts to organizations serving under-represented pepulations; Conduct training sessions for employees in EEO/AEP responsibilities; and Promote representation of underrepresented groups. We accomplished the following:

- Conducted targeted outreach recruitment efforts focusing on underrepresented groups for Property Management, Product Safety Investigator, Physiologist, Toxicologist, Deputy Hazard Reduction, Mechanical Engineer, Electrical Engineer, Engineering Psychologist, Assistant IG, Chemist, Fire Protection Engineer, Math Stat and Program Analyst vacancies.
- Conducted training in the Conflict Resolution for Field Operation employees.
- Conducted ADA Act of 2008, Ebbing the Tide of Reprisal Complaints, How to Stay Out of Legal Hot water training Supervisors.
- Provided Demystifying EEO training for employees.
- Supported the participation of Agency employees in the Federally Employed Women, Blacks in Government, Urban League, Perspectives, EXCEL, and La Raza conferences.
- Participated in career days and fairs.
- Conducted a CPSC wide Diversity Day.

- **Employee Development and Training** – Training and other developmental opportunities, including management and executive training, are limited. Lack of formalized succession planning inhibits career development planning (including the opportunity to experience executive level decision-making) and mentoring of high potential employees. Fiscal constraints have inhibited available training funds. While CPSC advertises many job positions as career-ladder positions, internal applicants do not always meet the specialized experience to qualify and advance.

As appropriate, CPSC will create opportunities that will allow employees to receive the experience and training necessary to qualify for higher graded positions within the Agency by modifying selected positions for recruitment at the lowest possible grade level, thus ensuring internal applicants meet minimal qualifications and can be considered. CPSC will also establish internal training plans for these positions that will provide the experiences and on-the-job training necessary for successful advancement to the next and subsequent grade levels. CPSC will develop "bridge" positions in selective technical occupations affording administrative or clerical staff the ability to apply and qualify for in-house positions. CPSC will form mentoring circles to assist employees at all grade and experience levels in learning the organization hierarchy and provide opportunities for growth and development. CPSC will also use developmental details and shadowing assignments to provide career enhancing experiences at all levels of the organization. **(Continuing) One management official expressed concerns regarding the process of providing job details to employees and suggested a review of this process in FY10.**

Report of Accomplishments and Modification to Objective

CPSC was successful in developing career ladder professional positions and upward mobility positions for staff. **Over 23 vacancies were announced as career ladder positions. We will continue to seek targets of opportunity to do the same in FY10.**

CPSC continues to recruit both product safety investigators (target Grade GS-12) and compliance officers (target Grade GS-13) at the GS5/7 level in an effort to reach the broadest applicant pool possible and provide the opportunity for career growth and development. Investigator positions have comprehensive training plans for each grade level to ensure the employee achieves the necessary competencies to perform at the next higher grade level.

In FY09, CPSC was able to provide the following developmental and training opportunities to staff either on site or through our partnership with the Small Agency Council:

- Senior level management development training opportunities were made available to individuals in the GS14 and above grade levels and all nominees were selected for attendance at the training of their choice. This group of 10 individuals included 3 women and 2 minorities.
- Leadership Essentials
- Project Management
- Introduction to Financial Management
- Powerpoint 2007
- Intro to Excel 2007
- Word Intro 2007
- Positive Approaches to Difficult People

- Retirement Plans for FERS
- Intermediate Excel
- Introduction to Federal Budgeting
- Coaching Skills for Today's Leaders
- Managing and Measuring Performance
- Intro to Access
- Advanced Word, Excel, Powerpoint
- Fundamentals of Writing
- Leading Change
- Report Writing
- Effective Briefing Techniques
- Interpersonal Effectiveness for Managers
- Managing a Virtual Workforce
- Pre Retirement and Early Retirement for FERS and CSRS
- Behavioral Interview

Every Agency employee has desktop access to the Go LEARN treining. This package includes over 100 on-line course offerings in personnel management, EEO, leadership and supervision, information technology, administrative management, the NO FEAR Act and other topics of interest to help employees develop new and career enhancing skills.

Conclusion

In FY10, CPSC will continue to focus on the two key barriers initially identified in the FY04 plan and affirmed through this report process. **This will include continued expansion of our outreach efforts to reach individuals with disabilities for mid-level positions, review of Agency job details, and a flash mentoring program.**

EEOC FORM 715-01 PART F	*U.S. Equal Employment Opportunity Commission* FEDERAL AGENCY ANNUAL EEO PROGRAM STATUS REPORT

CERTIFICATION of ESTABLISHMENT of CONTINUING EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS

I, Kathleen V. Buttrey, Director, EEO and Minority Enterprise, GS-260-15 am the

(Insert name above) (Insert official title/series/grade above)

Principal EEO Director/Official for The US Consumer Product Safety Commission

(Insert Agency/Component Name above)

The Agency has conducted an annual self-assessment of Section 717 and Section 501 programs against the essential elements as prescribed by EEO MD-715. If an essential element was not fully compliant with the standards of EEO MD-715, a further evaluation was conducted and, as appropriate, EEO Plans for Attaining the Essential Elements of a Model EEO Program, are included with this Federal Agency Annual EEO Program Status Report.

The Agency has also analyzed its work force profiles and conducted barrier analyses aimed at detecting whether any management or personnel policy, procedure or practice is operating to disadvantage any group based on race, national origin, gender or disability. EEO Plans to Eliminate Identified Barriers, as appropriate, are included with this Federal Agency Annual EEO Program Status Report.

I certify that proper documentation of this assessment is in place and is being maintained for EEOC review upon request.

Kathleen V. Buttrey 1/26/10

Signature of Principal EEO Director/Official Date

Certifies that this Federal Agency Annual EEO Program Status Report is in compliance with EEO MD-715.

Inez Tenenbaum, Chairman 1/26/10

Signature of Agency Head or Agency Head Designee Date

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Memorandum

Office of the Chairman

Date: JUL 2 1 2008

TO : All CPSC Employees

FROM : Inez Tenenbaum
Chairman

SUBJECT : CPSC Policy on Non-Discrimination in Employment

The Consumer Product Safety Commission (CPSC) is fully committed to ensuring equal employment opportunities for all employees and applicants. No one will be denied opportunities because of race, color, religion, sex, age, national origin, mental or physical disability, or reprisal or retaliation for opposing discriminatory practices and/or participating in the discrimination complaints process.

Unlawful employment practices, including those prohibited personnel practices based on sexual orientation, status as a parent, marital status, or political affiliation, are detrimental to the accomplishment of CPSC's mission and to the morale of our workforce and will not be tolerated.

As CPSC seeks to position itself to continue to attract, develop, and retain a highly skilled workforce that delivers results, I am committed to ensuring a qualified agency workforce reflective of our nation's diversity and one that includes opportunities for women, minorities, people with disabilities, and disabled veterans. This involves providing a workplace free of discrimination with the necessary tools, training, and support systems that employees need to develop to their fullest potential.

Employees at all levels are free to bring concerns they feel are relevant to the EEO Director or EEO office at any time. No other employee shall attempt to dissuade an employee from making such contacts or take any action against them for having done so. Such actions can have a chilling effect on the EEO process and are prohibited by law. Any employee found to have done so shall be subject to disciplinary action.

We must all work together to demonstrate fairness, cooperation, and respect toward our colleagues and customers. Each of us is responsible for creating an environment in which every employee is treated with respect, dignity and professionalism. This includes a collaborative effort to develop positive approaches in resolving employment problems at the lowest level possible.

Questions and additional information on this policy may be directed to Kathy Buttrey, Director, EEO and Minority Enterprise, (301) 504-7771.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Memorandum

Office of the Chairman

Date: JUL 21 2009

TO : All CPSC Employees

FROM : Inez Tenenbaum
Chairman

SUBJECT : CPSC Policy on the Prevention of Harassment (Sexual and otherwise)

As part of my commitment to the CPSC workforce, I want to emphasize my pledge to providing a work environment for our employees and guests that is free from discrimination, including all forms of harassing behavior.

Harassment in the workplace violates federal law and will not be tolerated whether the discriminatory treatment is based on sex (whether or not of a sexual nature), race, color, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes.

Harassment is defined as unwelcome verbal or physical conduct based on any characteristic protected by law which the conduct has the purpose or effect of (1) unreasonably interfering with work performance and/or (2) creating an intimidating, hostile or offensive work environment. Sexual harassment is more specifically defined by statute and regulation as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which is made a term or condition of a person's job, is used as a basis for employment decisions affecting a person, creates a hostile or abusive environment, or interferes with the performance of a member of CPSC's workforce. Harassing conduct may include, but is not limited to, racial slurs, demeaning or sexual jokes, negative stereotyping, offensive written material or electronic media, or inappropriate unwanted touching.

Offensive conduct constitutes harassment if it alters the conditions of the victim's employment either by culminating in a tangible employment action or by being sufficiently severe or pervasive as to create a hostile work environment. Supervisors have a special responsibility to exercise reasonable care to prevent and promptly correct any harassment in the workplace. All employees have a responsibility to avoid the potential harm of harassment by promptly reporting such behavior to their supervisory chain and the EEO Office.

Each of you is responsible for ensuring that CPSC maintains a professional work environment free of all forms of harassment. Managers and supervisors will take the lead in setting the example of treating all people with mutual respect and dignity, fostering a positive climate, and taking appropriate action when conduct is disruptive, provoking, discriminatory, or otherwise unprofessional.

Incidents of harassment should be reported to the appropriate supervisor and the Equal Employment Opportunity Office promptly. Allegations of harassment will be dealt with swiftly, fairly, and confidentially. If harassment is found to occur, corrective action, including appropriate disciplinary measures, will be taken. In addition, no person shall be subject to reprisal for opposing any practice made unlawful by the antidiscrimination laws, or for filing or taking part in presenting or processing discrimination complaints.

Questions and additional information on this policy may be directed to Kathy Buttrey, Director, EEO and Minority Enterprise, (301) 504-7771.

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 9-30-09

Table A1: TOTAL WORKFORCE - Distribution by Race/Ethnicity and Sex

Employment Tenure		TOTAL WORKFORCE			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
TOTAL WORKFORCE - Permanent and Temporary																		
Prior FY	#	437	211	226	7	7	152	131	23	70	24	15	0	0	4	1	1	2
	%	100%	48.28%	51.72%	1.6	1.6	34.78	29.98	5.26	16.02	5.49	3.43	0	0	0.92	0.23	0.23	0.46
Current FY	#	461	223	238	9	8	162	139	23	72	25	16	1	0	1	1	2	2
	%	100%	48.37%	51.63%	1.95	1.74	35.14	30.15	4.99	15.62	5.42	3.47	0.22	0	0.22	0.22	0.43	0.43
Nat Zk CLF	%	100%	53.23%	46.77%	6.17%	4.52%	39.03%	33.74%	4.84%	5.66%	1.92%	1.71%	0.06%	0.05%	0.34%	0.32%	0.88%	0.76%
Difference	#	24	12	12	2	1	10	8	0	2	1	1	1	0	-3	0	1	0
Ratio Change	%	0.00%	0.09%	-0.09%	0.35%	0.13%	0.36%	0.17%	-0.27%	-0.40%	-0.07%	0.04%	0.22%	0.00%	-0.70%	-0.01%	0.21%	-0.03%
Net Change	%	5.49%	5.69%	5.31%	28.57%	14.29%	6.58%	6.11%	0.00%	2.86%	4.17%	6.67%	0%	0%	-75.00%	0.00%	100.00%	0.00%
PERMANENT WORKFORCE																		
Prior FY	#	415	199	216	7	7	145	123	21	68	22	15	0	0	3	1	1	2
	%	100%	47.95%	52.05%	1.69%	1.69%	34.94%	29.64%	5.06%	16.39%	5.30%	3.61%	0.00%	0.00%	0.72%	0.24%	0.24%	0.48%
Current FY	#	439	213	226	9	8	154	131	21	68	25	16	1	0	1	1	2	2
	%	100%	48.52%	51.48%	2.05%	1.82%	35.08%	29.84%	4.78%	15.49%	5.69%	3.64%	0.23%	0.00%	0.23%	0.23%	0.46%	0.46%
Difference	#	24	14	10	2	1	9	8	0	0	3	1	1	0	-2	0	1	0
Ratio Change	%	0%	0.57%	-0.57%	0.36%	0.14%	0.14%	0.20%	-0.28%	-0.90%	0.39%	0.03%	0.23%	0.00%	-0.50%	-0.01%	0.21%	-0.03%
Net Change	%	5.78%	7.04%	4.63%	28.57%	14.29%	6.21%	6.50%	0.00%	0.00%	13.64%	6.67%	0%	0%	-66.67%	0.00%	100.00%	0.00%
TEMPORARY WORKFORCE																		
Prior FY	#	22	12	10	0	0	7	8	2	2	2	0	0	0	1	0	0	0
	%	100%	54.55%	45.45%	0	0	31.82	36.36	9.09	9.09	9.09	0	0	0	4.55	0	0	0
Current FY	#	22	10	12	0	0	8	6	2	4	0	0	0	0	0	0	0	0
	%	100%	45.45%	54.55%	0	0	36.36	36.36	9.09	18.18	0	0	0	0	0	0	0	0
Difference	#	0	-2	2	0	0	1	0	0	2	-2	0	0	0	-1	0	0	0
Ratio Change	%	0%	-9.09%	9.09%	0.00%	0.00%	4.55%	0.00%	0.00%	9.09%	-9.09%	0.00%	0.00%	0.00%	-4.55%	0.00%	0.00%	0.00%
Net Change	%	0.00%	-16.67%	20.00%	0%	0%	14.29%	0.00%	0.00%	100.00%	-100.00%	0%	0%	0%	-100.00%	0%	0%	0%

Please note one female SES employee was miscoded as permanent rather than temporary in both 08 and 09.

CPSC CONSUMER PRODUCT SAFETY COMMISSION · 9-30-09

Table A2 - Permanent Workforce By Component - Distribution by Race/Ethnicity and Sex

Organizational Component		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
National CLF	%	100%	53.20%	46.80%	6.20%	4.50%	39%	33.70%	4.80%	5.70%	1.90%	1.70%	0.10%	0.10%	0.30%	0.30%	0.90%	0.80%
CONSUMER PRODUCT SAFETY COMMISSION	#	439	213	226	9	8	154	131	21	68	25	16	1	0	1	1	2	2
(D)	%	100%	48.52%	51.48%	2.05%	1.82%	35.08%	29.84%	4.78%	15.49%	5.69%	3.64%	0.23%	0.00%	0.23%	0.23%	0.46%	0.46%
	#	439	213	226	9	8	154	131	21	68	25	16	1	0	1	1	2	2
Total	%	100%	48.52%	51.48%	2.05%	1.82%	35.08%	29.84%	4.78%	15.49%	5.69%	3.64%	0.23%	0.00%	0.23%	0.23%	0.46%	0.46%

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 9-30-09

Table A3-1 - Occupational Categories - Distribution by Race/Ethnicity and Sex

Occupational Categories		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
1. Officials and Managers																		
Executive/Senior Level (Grades 15 and Above)	#	46	27	19	1	0	24	17	0	2	2	0	0	0	0	0	0	0
	%	100%	58.70%	41.30%	2.17%	0.00%	52.17%	36.96%	0.00%	4.35%	4.35%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Mid-Level (Grades 13-14)	#	26	17	9	0	0	14	7	1	2	1	0	0	0	1	0	0	0
	%	100%	65.38%	34.62%	0.00%	0.00%	53.85%	26.92%	3.85%	7.69%	3.85%	0.00%	0.00%	0.00%	3.85%	0.00%	0.00%	0.00%
First-Level (Grades 12 and Below)	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Other	#	173	77	96	6	6	53	54	11	29	6	4	1	0	0	1	0	2
	%	100%	44.51%	55.49%	3.47%	3.47%	30.64%	31.21%	6.36%	16.76%	3.47%	2.31%	0.58%	0.00%	0.00%	0.58%	0.00%	1.16%
Officials And Managers - TOTAL	#	245	121	124	7	6	91	78	12	33	9	4	1	0	1	1	0	2
	%	100%	49.39%	50.61%	2.86%	2.45%	37.14%	31.84%	4.90%	13.47%	3.67%	1.63%	0.41%	0.00%	0.41%	0.41%	0.00%	0.82%
2. Professionals	#	160	86	74	2	1	59	46	8	15	15	12	0	0	0	0	2	0
	%	100%	53.75%	46.25%	1.25%	0.63%	36.88%	28.75%	5.00%	9.38%	9.38%	7.50%	0.00%	0.00%	0.00%	0.00%	1.25%	0.00%
3. Technicians	#	5	5	0	0	0	4	0	1	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	80.00%	0.00%	20.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
4. Sales Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
5. Administrative Support Workers	#	22	1	21	0	0	0	6	0	15	1	0	0	0	0	0	0	0
	%	100%	4.55%	95.45%	0.00%	0.00%	0.00%	27.27%	0.00%	68.18%	4.55%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
6. Craft Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
7. Operatives	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
8. Laborers and Helpers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
9. Service Workers	#	6	0	6	0	1	0	1	0	4	0	0	0	0	0	0	0	0
	%	100%	0.00%	100.00%	0.00%	16.67%	0.00%	16.67%	0.00%	66.67%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 9-30-09

Table A3-2 - Occupational Categories - Distribution by Race/Ethnicity and Sex

Occupational Categories		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
1. Officials and Managers																		
Executive/Senior Level (Grades 15 and Above)	#	66	27	19	1	0	24	17	0	2	2	0	0	0	0	0	0	0
	%	10.50%	12.68%	8.44%	11.11%	0.00%	15.58%	12.98%	0.00%	2.99%	8.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
Mid-Level (Grades 13-14)	#	26	17	9	0	0	14	7	1	2	1	0	0	0	1	0	0	0
	%	5.94%	7.98%	4.00%	0.00%	0.00%	9.09%	5.34%	4.76%	2.99%	4.00%	0.00%	0.00%	0%	100.00%	0.00%	0.00%	0.00%
First-Level (Grades 12 and Below)	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
Other	#	173	77	96	6	6	53	54	11	29	6	4	1	0	0	1	0	1
	%	39.50%	36.15%	42.67%	66.67%	75.00%	34.42%	41.22%	52.38%	43.28%	24.00%	25.00%	100.00%	0%	0.00%	100.00%	0.00%	100.00%
Officials And Managers - TOTAL	#	245	121	124	7	6	91	78	12	33	9	4	1	0	1	1	0	1
	%	55.94%	56.81%	55.11%	1.60%	1.37%	20.78%	17.81%	2.74%	7.53%	2.05%	0.91%	0.23%	0.00%	0.23%	0.23%	0.00%	0.46%
10. Professionals	#	160	86	74	2	1	59	46	8	15	15	12	0	0	0	0	2	0
	%	36.53%	40.38%	32.89%	22.22%	12.50%	38.31%	35.11%	38.10%	22.39%	60.00%	75.00%	0.00%	0%	0.00%	0.00%	100.00%	0.00%
11. Technicians	#	5	5	0	0	0	4	0	1	0	0	0	0	0	0	0	0	0
	%	1.14%	2.35%	0.00%	0.00%	0.00%	2.60%	0.00%	4.76%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
12. Sales Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
13. Administrative Support Workers	#	22	1	21	0	0	6	0	0	15	1	0	0	0	0	0	0	0
	%	5.02%	0.47%	9.33%	0.00%	0.00%	0.00%	4.58%	0.00%	22.39%	4.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
14. Craft Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
15. Operatives	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
16. Laborers and Helpers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
17. Service Workers	#	6	0	6	0	1	0	1	0	4	0	0	0	0	0	0	0	0
	%	1.37%	0.00%	2.67%	0.00%	12.50%	0.00%	0.76%	0.00%	5.97%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
Permanent Workforce	#	438	213	225	9	8	154	131	21	67	25	16	1	0	1	1	2	2
	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09-30-09

Table A4-1: Participation Rates for General Schedule Grades - Distribution by Race/Ethnicity and Sex - Permanent Workforce

GS/GM, SES AND RELATED GRADES		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-01	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	2	0	2	0	0	0	1	0	1	0	0	0	0	0	0	0	0
GS-02	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	50.00%	0.00%	50.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0
GS-03	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-04	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
GS-05	%	100%	100.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-06	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	8	3	5	1	0	1	0	1	5	0	0	0	0	0	0	0	0
GS-07	%	100%	37.50%	62.50%	12.50%	0.00%	12.50%	0.00%	12.50%	62.50%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	6	0	6	0	1	0	1	0	4	0	0	0	0	0	0	0	0
GS-08	%	100%	0.00%	100.00%	0.00%	16.67%	0.00%	16.67%	0.00%	66.67%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	30	9	21	1	3	5	6	1	11	2	1	0	0	0	0	0	0
GS-09	%	100%	30.00%	70.00%	3.33%	10.00%	16.67%	20.00%	3.33%	36.67%	6.67%	3.33%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
GS-10	%	100%	100.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	25	12	13	1	0	7	6	4	7	0	0	0	0	0	0	0	0
GS-11	%	100%	48.00%	52.00%	4.00%	0.00%	28.00%	24.00%	16.00%	28.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	102	42	60	2	3	30	38	5	17	4	1	1	0	0	1	0	0
GS-12	%	100%	41.18%	58.82%	1.96%	2.94%	29.41%	37.25%	4.90%	16.67%	3.92%	0.98%	0.98%	0.00%	0.00%	0.98%	0.00%	0.00%
	#	131	74	57	1	1	50	32	7	12	13	11	0	0	1	0	2	1
GS-13	%	100%	56.49%	43.51%	0.76%	0.76%	38.17%	24.43%	5.34%	9.16%	9.92%	8.40%	0.00%	0.00%	0.76%	0.00%	1.53%	0.76%
	#	64	31	33	2	0	22	21	3	9	4	2	0	0	0	0	0	1
GS-14	%	100%	48.44%	51.56%	3.13%	0.00%	34.38%	32.81%	4.69%	14.06%	6.25%	3.13%	0.00%	0.00%	0.00%	0.00%	0.00%	1.56%
	#	54	30	24	1	0	27	21	0	2	2	1	0	0	0	0	0	0
GS-15	%	100%	55.56%	44.44%	1.85%	0.00%	50.00%	38.89%	0.00%	3.70%	3.70%	1.85%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All other (unspecified)	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive Service	#	14	10	4	0	0	10	4	0	0	0	0	0	0	0	0	0	0
	%	100%	71.43%	28.57%	0.00%	0.00%	71.43%	28.57%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09-30-09

Table A4-2: Participation Rates for General Schedule Grades - Distribution by Race/Ethnicity and Sex - Permanent Workforce

GS/GM, SES AND RELATED GRADES		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-01	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	2	0	2	0	0	0	1	0	1	0	0	0	0	0	0	0	0
GS-02	%	0.46%	0.00%	0.88%	0.00%	0.00%	0.00%	0.76%	0.00%	1.47%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0
GS-03	%	0.23%	0.00%	0.44%	0.00%	0.00%	0.00%	0.76%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-04	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
GS-05	%	0.23%	0.47%	0.00%	0.00%	0.00%	0.65%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-06	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	5	4	5	1	0	1	0	1	5	0	0	0	0	0	0	0	0
GS-07	%	1.82%	1.41%	2.21%	11.11%	0.00%	0.65%	0.00%	4.76%	7.35%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	6	0	6	0	1	0	1	0	4	0	0	0	0	0	0	0	0
GS-08	%	1.37%	0.00%	2.65%	0.00%	12.50%	0.00%	0.76%	0.00%	5.88%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	30	9	21	1	3	5	6	1	11	2	1	0	0	0	0	0	0
GS-09	%	6.83%	4.23%	9.29%	11.11%	37.50%	3.25%	4.58%	4.76%	16.18%	8.00%	6.25%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
GS-10	%	0.23%	0.47%	0.00%	0.00%	0.00%	0.65%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	25	12	13	1	0	7	6	4	7	0	0	0	0	0	0	0	0
GS-11	%	5.69%	5.63%	5.75%	11.11%	0.00%	4.55%	4.58%	19.05%	10.29%	0.00%	0.00%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	102	42	60	2	3	30	38	5	17	4	1	1	0	0	1	0	0
GS-12	%	23.23%	19.72%	26.55%	22.22%	37.50%	19.48%	29.01%	23.81%	25.00%	16.00%	6.25%	100.00%	0%	0.00%	100.00%	0.00%	0.00%
	#	131	74	57	1	1	50	32	7	12	13	11	0	0	1	0	2	1
GS-13	%	29.84%	34.74%	25.22%	11.11%	12.50%	32.47%	24.43%	33.33%	17.65%	52.00%	68.75%	0.00%	0%	100.00%	0.00%	100.00%	50.00%
	#	64	31	33	2	0	22	21	3	9	4	2	0	0	0	0	0	1
GS-14	%	14.58%	14.55%	14.60%	22.22%	0.00%	14.29%	16.03%	14.29%	13.24%	16.00%	12.50%	0.00%	0%	0.00%	0.00%	0.00%	50.00%
	#	54	30	24	1	0	27	21	0	2	2	1	0	0	0	0	0	0
GS-15	%	12.30%	14.08%	10.62%	11.11%	0.00%	17.53%	16.03%	0.00%	2.94%	8.00%	6.25%	0.00%	0%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All other (unspecified)	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive Service	#	14	10	4	0	0	10	4	0	0	0	0	0	0	0	0	0	0
	%	100%	71.43%	28.57%	0.00%	0.00%	71.43%	28.57%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	439	213	226	9	8	154	131	21	68	25	16	1	0	1	1	2	2
TOTAL	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09.

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09-30-09

Table A4-1 Participation Rates for General Schedule Grades - Distribution by Race/Ethnicity and Sex - Temporary Workforce

GS/GM, SES AND RELATED GRADES		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-01	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-02	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-03	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-04	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
GS-05	%	100%	100.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-06	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-07	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-08	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0
GS-09	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-10	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-11	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-12	%	100%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	2	1	1	0	0	1	1	0	0	0	0	0	0	0	0	0	0
GS-13	%	100%	50.00%	50.00%	0.00%	0.00%	50.00%	50.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-14	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	9	6	3	0	0	5	3	1	0	0	0	0	0	0	0	0	0
GS-15	%	100%	66.67%	33.33%	0.00%	0.00%	55.56%	33.33%	11.11%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All other [unspecified]	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive	#	5	2	3	0	0	1	3	1	0	0	0	0	0	0	0	0	0
Service	%	100%	40.00%	60.00%	0.00%	0.00%	20.00%	60.00%	20.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09.

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09-10-09

Table A4-2: Participation Rates for General Schedule Grades - Distribution by Race/Ethnicity and Sex - Temporary Workforce

GS/GM, SES AND RELATED GRADES		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-01	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-02	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-03	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-04	%	4.55%	0.00%	8.33%	0%	0%	0.00%	0.00%	0.00%	25.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
GS-05	%	4.55%	10.00%	0.00%	0%	0%	12.50%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-06	%	4.55%	0.00%	8.33%	0%	0%	0.00%	0.00%	0.00%	25.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-07	%	4.55%	0.00%	8.33%	0%	0%	0.00%	0.00%	0.00%	25.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-08	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0
GS-09	%	4.55%	0.00%	8.33%	0%	0%	0.00%	12.50%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-10	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-11	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	0	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0
GS-12	%	4.55%	0.00%	8.33%	0%	0%	0.00%	0.00%	0.00%	25.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	2	1	1	0	0	1	1	0	0	0	0	0	0	0	0	0	0
GS-13	%	9.09%	10.00%	8.33%	0%	0%	12.50%	12.50%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-14	%	0.00%	0.00%	0.00%	0%	0%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	9	6	3	0	0	5	3	1	0	0	0	0	0	0	0	0	0
GS-15	%	40.91%	60.00%	25.00%	0%	0%	62.50%	37.50%	50.00%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All other (unspecified)	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive Service	#	5	2	3	0	0	1	3	1	0	0	0	0	0	0	0	0	0
	%	100%	40.00%	60.00%	0.00%	0.00%	20.00%	60.00%	20.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
TOTAL	#	22	10	12	0	0	8	8	2	4	0	0	0	0	0	0	0	0
	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09

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Table A5-1 - Participation Rates For Wage Grades by Race/Ethnicity and Sex - Permanent Workforce

WD/WG, WL/WS & Other Wage Grades		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
Grade-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-02	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-03	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-04	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-05	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-06	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-07	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-08	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-09	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-10	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-11	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-12	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-13	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-14	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-15	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
All Other Wage Grades	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

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Table A5-2 - Participation Rates For Wage Grades by Race/Ethnicity and Sex - Permanent Workforce

WD/WG, WL/WS & Other Wage Grades		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other Wage Grades	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

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Table ASNS-1 - Participation Rates for Non-Supervisory Wage Grades - Distribution by Race/Ethnicity and Sex - Permanent Workforce

WD, WG, WL, WD, XL, & XP		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non-Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other Non-Supervisory Wage Grades	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

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Table A5N5-2 - Participation Rates for Non-Supervisory Wage Grades - Distribution by Race/Ethnicity and Sex - Permanent Workforce

WD, WG, WL, XD, XL, & XP		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non-Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other Non Supervisory Wage Grades	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

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Table ASS-1 - Participation Rates for Supervisory Wage Grades - Distribution by Race/Ethnicity and Sex - Permanent Workforce

WS & XS		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non-Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
Grade-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-02	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-03	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-04	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-05	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-06	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-07	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-08	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-09	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-10	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-11	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-12	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-13	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-14	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-15	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
All Other Supervisory Wage Grades	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

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Table A55-2 - Participation Rates for Supervisory Wage Grades - Distribution by Race/Ethnicity and Sex - Permanent Workforce

WS & KS		TOTAL EMPLOYEES			RACE/ETHNICITY													
					Hispanic or Latino		Non- Hispanic or Latino											
							White		Black or African American		Asian		Native Hawaiian or Other Pacific Islander		American Indian or Alaska Native		Two or more races	
		All	male	female	male	female	male	female	male	female	male	female	male	female	male	female	male	female
Grade-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-02	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-03	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-04	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-05	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-06	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-07	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-08	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-09	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-10	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-11	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-12	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-13	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-14	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-15	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
All Other Supervisory Wage Grades	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
TOTAL	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

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Table B1 - Total Workforce - Distribution by Disability

Employment Tenure		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
TOTAL WORKFORCE - Permanent and Temporary															
	#	437	385	13	39	7	1	2	0	0	0	1	0	3	0
Prior FY	%	100%	88.10%	2.97%	8.92%	1.60%	0.23%	0.46%	0.00%	0.00%	0.00%	0.23%	0.00%	0.69%	0.00%
	#	461	407	16	38	7	1	2	0	0	0	1	0	3	0
Current FY	%	100%	88.29%	3.47%	8.24%	1.52%	0.22%	0.43%	0.00%	0.00%	0.00%	0.22%	0.00%	0.65%	0.00%
Federal High (FY08)	#					2.95%									
Difference	#	24	22	3	-1	0	0	0	0	0	0	0	0	0	0
Ratio Change	%	0.00%	0.19%	0.50%	-0.68%	-0.08%	-0.01%	-0.02%	0.00%	0.00%	0.00%	-0.01%	0.00%	-0.04%	0.00%
Net Change	%	5.49%	5.71%	23.08%	-2.56%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
PERMANENT WORKFORCE															
	#	415	366	13	36	7	1	2	0	0	0	1	0	3	0
Prior FY	%	100%	88.19%	3.13%	8.67%	1.69%	0.24%	0.48%	0.00%	0.00%	0.00%	0.24%	0.00%	0.72%	0.00%
	#	439	386	16	37	7	1	2	0	0	0	1	0	3	0
Current FY	%	100%	87.93%	3.64%	8.43%	1.59%	0.23%	0.46%	0.00%	0.00%	0.00%	0.23%	0.00%	0.68%	0.00%
Difference	#	24	20	3	1	0	0	0	0	0	0	0	0	0	0
Ratio Change	%	0.00%	-0.27%	0.51%	-0.25%	-0.09%	-0.01%	-0.03%	0.00%	0.00%	0.00%	0.01%	0.00%	-0.04%	0.00%
Net Change	%	5.78%	5.46%	23.08%	2.78%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
TEMPORARY WORKFORCE															
	#	22	19	0	3	0	0	0	0	0	0	0	0	0	0
Prior FY	%	100%	86.36%	0.00%	13.64%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
	#	22	21	0	1	0	0	0	0	0	0	0	0	0	0
Current FY	%	100%	95.45%	0.00%	4.55%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Difference	#	0	2	0	-2	0	0	0	0	0	0	0	0	0	0
Ratio Change	%	0.00%	9.09%	0.00%	-9.09%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Net Change	%	0.00%	10.53%	0%	-66.67%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09.

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Table B2 - Permanent Workforce By Component - Distribution by Disability

Component		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
Federal High (FY07)	%					2.65%									
CONSUMER PRODUCT SAFETY COMMISSION	#	439	386	16	37	7	1	2	0	0	0	1	0	3	0
(0)	%	100%	87.93%	3.64%	8.43%	1.59%	0.23%	0.46%	0.00%	0.00%	0.00%	0.23%	0.00%	0.68%	0.00%
	#	439	386	16	37	7	1	2	0	0	0	1	0	3	0
Total	%	100%	87.93%	3.64%	8.43%	1.59%	0.23%	0.46%	0.00%	0.00%	0.00%	0.23%	0.00%	0.68%	0.00%

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Table B3-1 - Occupational Categories - Distribution by Disability - Permanent Workforce

Occupational Category		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
1 Officials and Managers															
Executive/Senior Level (Grades 15 and Above)	#	46	38	2	6	1	0	0	0	0	0	0	0	1	0
	%	100%	82.61%	4.35%	13.04%	2.17%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	2.17%	0.00%
Mid-Level (Grades 13-14)	#	26	25	0	1	0	0	0	0	0	0	0	0	0	0
	%	100%	96.15%	0%	3.85%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
First-Level (Grades 12 and Below)	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Other	#	173	153	3	17	1	0	0	0	0	0	1	0	0	0
	%	100%	88.44%	1.73%	9.83%	0.58%	0.00%	0.00%	0.00%	0.00%	0.00%	0.58%	0.00%	0.00%	0.00%
Officials And Managers - TOTAL	#	245	216	5	24	2	0	0	0	0	0	1	0	1	0
	%	100%	88.16%	2.04%	9.80%	0.82%	0.00%	0.00%	0.00%	0.00%	0.00%	0.41%	0.00%	0.41%	0.00%
2 Professionals	#	160	140	11	9	2	1	0	0	0	0	0	0	1	0
	%	100%	87.50%	6.88%	5.63%	1.25%	0.63%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.63%	0.00%
3 Technicians	#	5	5	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100%	0%	0%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
4 Sales Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
5 Administrative Support Workers	#	22	18	0	4	3	0	2	0	0	0	0	0	1	0
	%	100%	81.82%	0%	18.18%	13.64%	0.00%	9.09%	0.00%	0.00%	0.00%	0.00%	0.00%	4.55%	0.00%
6 Craft Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
7 Operatives	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
8 Laborers and Helpers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
9 Service Workers	#	6	6	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100%	0%	0%	0%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

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Table B3 2 - Occupational Categories - Distribution by Disability - Permanent Workforce

Occupational Category		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
1. Officials and Managers															
Executive/Senior Level (Grades 15 and Above)	#	46	38	2	6	1	0	0	0	0	0	0	0	1	0
	%	100%	9.87%	12.50%	16.22%	14.29%	0.00%	0.00%	0%	0%	0%	0.00%	0%	33.33%	0%
Mid-Level (Grades 13-14)	#	26	25	0	1	0	0	0	0	0	0	0	0	0	0
	%	100%	6.49%	0%	2.70%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
First-Level (Grades 12 and Below)	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
Other	#	173	153	3	17	1	0	0	0	0	0	1	0	0	0
	%	100%	35.74%	18.75%	45.95%	14.29%	0.00%	0.00%	0%	0%	0%	100.00%	0%	0.00%	0%
Officials And Managers - TOTAL	#	245	216	5	24	2	0	0	0	0	0	1	0	1	0
	%	55.94%	56.10%	31.25%	64.86%	28.57%	0.00%	0.00%	0%	0%	0%	100.00%	0%	33.33%	0%
2. Professionals	#	160	140	11	9	2	1	0	0	0	0	0	0	1	0
	%	36.53%	36.36%	68.75%	24.32%	28.57%	100.00%	0.00%	0%	0%	0%	0.00%	0%	33.33%	0%
3. Technicians	#	5	5	0	0	0	0	0	0	0	0	0	0	0	0
	%	1.14%	1.30%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
4. Sales Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
5. Administrative Support Workers	#	22	18	0	4	3	0	2	0	0	0	0	0	1	0
	%	5.03%	4.68%	0%	10.81%	42.86%	0.00%	100.00%	0%	0%	0%	0.00%	0%	33.33%	0%
6. Craft Workers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
7. Operatives	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
8. Laborers and Helpers	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
9. Service Workers	#	6	6	0	0	0	0	0	0	0	0	0	0	0	0
	%	1.37%	1.56%	0%	0%	0%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
Permanent Workforce	#	438	385	16	37	7	1	2	0	0	0	1	0	3	0
	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

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Table B4-1: Participation Rates for General Schedule Grades - Distribution by Disability - Permanent Workforce

Occupational Category		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
GS-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-02	#	2	0	0	2	2	0	2	0	0	0	0	0	0	0
	%	100%	0.00%	0.00%	100.00%	100.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-03	#	1	0	0	1	0	0	0	0	0	0	0	0	0	0
	%	100%	0.00%	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-04	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-05	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-06	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-07	#	8	8	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-08	#	6	6	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-09	#	30	28	0	2	1	0	0	0	0	0	0	0	1	0
	%	100%	93.33%	0.00%	6.67%	3.33%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	3.33%	0.00%
GS-10	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-11	#	25	21	0	4	0	0	0	0	0	0	0	0	0	0
	%	100%	84.00%	0.00%	16.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-12	#	102	89	5	8	0	0	0	0	0	0	0	0	0	0
	%	100%	87.25%	4.90%	7.84%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-13	#	131	116	6	9	2	1	0	0	0	0	1	0	0	0
	%	100%	88.55%	4.58%	6.87%	1.53%	0.76%	0.00%	0.00%	0.00%	0.00%	0.76%	0.00%	0.00%	0.00%
GS-14	#	64	58	2	4	1	0	0	0	0	0	0	0	1	0
	%	100%	90.63%	3.13%	6.25%	1.56%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	1.56%	0.00%
GS-15	#	54	48	1	5	1	0	0	0	0	0	0	0	1	0
	%	100%	88.89%	1.85%	9.26%	1.85%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	1.85%	0.00%
Alt other (unspecified)	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive Service	#	14	10	2	2	0	0	0	0	0	0	0	0	0	0
	%	100.00%	71.43%	14.29%	14.29%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09-30-09

Table B4-2: Participation Rates for General Schedule Grades - Distribution by Disability - Permanent Workforce

Occupational Category		Total	Total by Disability Status				Detail for Targeted Disabilities							
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-01	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	2	0	0	2	2	0	2	0	0	0	0	0	0	0
GS-02	%	0.46%	0.00%	0.00%	5.41%	28.57%	0.00%	100.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	1	0	0	1	0	0	0	0	0	0	0	0	0	0
GS-03	%	0.23%	0.00%	0.00%	2.70%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-04	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-05	%	0.23%	0.26%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-06	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	8	8	0	0	0	0	0	0	0	0	0	0	0	0
GS-07	%	1.82%	2.07%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	6	6	0	0	0	0	0	0	0	0	0	0	0	0
GS-08	%	1.37%	1.55%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	30	28	0	2	1	0	0	0	0	0	0	0	1	0
GS-09	%	6.83%	7.25%	0.00%	5.41%	14.29%	0.00%	0.00%	0%	0%	0%	0.00%	0%	33.33%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-10	%	0.23%	0.26%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	25	21	0	4	0	0	0	0	0	0	0	0	0	0
GS-11	%	5.69%	5.44%	0.00%	10.81%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	102	89	5	8	0	0	0	0	0	0	0	0	0	0
GS-12	%	23.23%	23.06%	31.25%	21.62%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
	#	131	116	6	9	2	1	0	0	0	0	1	0	0	0
GS-13	%	29.84%	30.05%	37.50%	24.32%	28.57%	100.00%	0.00%	0%	0%	0%	100.00%	0%	0.00%	0%
	#	64	58	2	4	1	0	0	0	0	0	0	0	1	0
GS-14	%	14.58%	15.03%	12.50%	10.81%	14.29%	0.00%	0.00%	0%	0%	0%	0.00%	0%	33.33%	0%
	#	54	48	1	5	1	0	0	0	0	0	0	0	1	0
GS-15	%	12.30%	12.44%	6.25%	13.51%	14.29%	0.00%	0.00%	0%	0%	0%	0.00%	0%	33.33%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All other (unspecified)	%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
Senior Executive Service	#	14	10	2	2	0	0	0	0	0	0	0	0	0	0
	%	3.19%	2.59%	12.50%	5.41%	0.00%	0.00%	0.00%	0%	0%	0%	0.00%	0%	0.00%	0%
TOTAL	#	439	386	16	37	7	1	2	0	0	0	1	0	3	0
	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09-30-09

Table 84-1 Participation Rates for General Schedule Grades - Distribution by Disability - Temporary Workforce

Occupational Category		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
GS-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-02	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-03	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-04	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-05	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-06	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-07	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-08	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-09	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-10	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-11	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-12	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-13	#	2	2	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
GS-14	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
GS-15	#	9	9	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
All other (unspecified)	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive Service	#	5	4	0	1	0	0	0	0	0	0	0	0	0	0
	%	100.00%	80.00%	0.00%	20.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

Please note: one female SES employee was miscoded as permanent rather than temporary in both 08 and 09

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09 30-09

Table B4-2: Participation Rates for General Schedule Grades - Distribution by Disability - Temporary Workforce

Occupational Category		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-01	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-02	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-03	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-04	%	4.55%	4.76%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-05	%	4.55%	4.76%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-06	%	4.55%	4.76%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-07	%	4.55%	4.76%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-08	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-09	%	4.55%	4.76%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-10	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-11	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	1	1	0	0	0	0	0	0	0	0	0	0	0	0
GS-12	%	4.55%	4.76%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	2	2	0	0	0	0	0	0	0	0	0	0	0	0
GS-13	%	9.09%	9.52%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GS-14	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	9	9	0	0	0	0	0	0	0	0	0	0	0	0
GS-15	%	40.91%	42.86%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All other (unspecified)	%	0.00%	0.00%	0%	0.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Senior Executive Service	#	5	4	0	1	0	0	0	0	0	0	0	0	0	0
	%	22.73%	19.05%	0%	100.00%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	22	21	0	1	0	0	0	0	0	0	0	0	0	0
TOTAL	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Please note - one female SES employee was miscoded as permanent rather than temporary in both 08 and 09.

CPSC CONSUMER PRODUCT SAFETY COMMISSION - 09/30/09

Table BS-1 - Participation Rates For Wage Grades by Disability - Permanent Workforce

WD/WG, WL/WS & Other Wage Grades		Total	Total by Disability Status (04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	Detail for Targeted Disabilities (16,17) Deafness	(23,25) Blindness	(28,32 38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other Wage Grades	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

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Table 85-2 - Participation Rates For Wage Grades by Disability - Permanent Workforce

WD/WG, WL/WS & Other Wage Grades		Total	Total by Disability Status: (04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	Detail for Targeted Disabilities: (16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Wage Grades	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

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Table BSNS-1 - Participation Rates for General Schedule Grades - Distribution by Disability - Permanent Workforce

WD, WG, WL, XD, XL, & XP		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
Grade-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-02	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-03	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-04	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-05	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-06	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-07	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-08	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-09	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-10	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-11	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-12	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-13	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-14	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-15	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
All Other Non-Supervisory Wage Grades	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

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Table B5N5-2 Participation Rates for General Schedule Grades - Distribution by Disability - Permanent Workforce

WD, WG, WL, WD, XL, & XP		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other Non-Supervisory Wage Grades	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

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Table 855-1 - Participation Rates for Supervisory Wage Grades - Distribution by Disability - Permanent Workforce

		Total by Disability Status				Detail for Targeted Disabilities								
WS & KS	Total	(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-01 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-02 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-03 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-04 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-05 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-06 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-07 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-08 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-09 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-10 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-11 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-12 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-13 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-14 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Grade-15 %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other Supervisory Wage Grades %	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%

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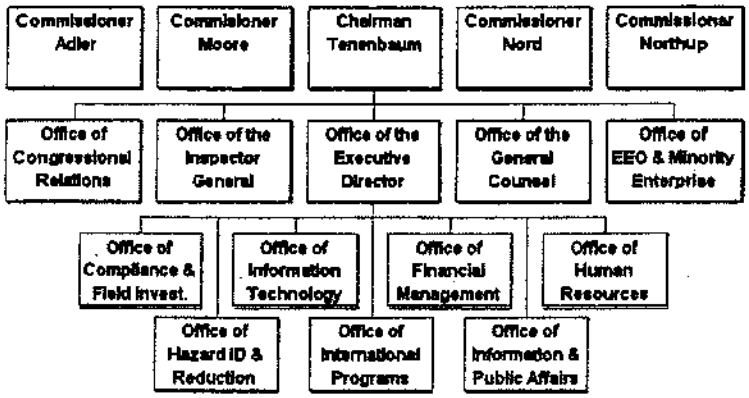
Table B5S-2 - Participation Rates for General Schedule Grades - Distribution by Disability - Permanent Workforce

WS & KS		Total	Total by Disability Status				Detail for Targeted Disabilities								
			(04,05) No Disability	-1 Not Identified	(06-94) Disability	Targeted Disability	(16,17) Deafness	(23,25) Blindness	(28,32-38) Missing Limbs	(64-68) Partial Paralysis	(71-78) Total Paralysis	-82 Convulsive Disorder	-90 Mental Retardation	-91 Mental Illness	-92 Distortion Limb/Spine
Grade-01	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-02	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-03	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-04	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-05	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-06	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-07	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-08	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-09	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-10	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-11	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-12	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-13	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-14	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Grade-15	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
All Other Supervisory Wage Grades	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
TOTAL	#	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%


Commissioner Adler
Commissioner Moore
Chairman Tenenbaum
Commissioner Nord
Commissioner Northup
Office of Congressional Relations
Office of the Inspector General
Office of the Executive Director
Office of the General Counsel
Office of EEO & Minority Enterprise
Office of Compliance & Field Invest.
Office of Information Technology
Office of Financial Management
Office of Human Resources
Office of Hazard ID & Reduction
Office of International Programs
Office of Information & Public Affairs

Questions for the Record Submitted by Congressman Crenshaw

Regarding X-Ray Fluorescence (XRF)

1) **During a recent conference, the CPSC's head of compliance called handheld XRF the "secret to our success." Can you please describe for the committee how exactly the commission is using XRF?**

Response:

CPSC lab and field staff uses XRF in a number of ways. In our Product Testing Laboratory, chemists employ portable XRF as well as a research-grade XRF machine to analyze samples for elemental composition, including lead, cadmium, and many other elements. We screen products for lead, cadmium, and other elements to see if additional testing may be necessary, such as extractions for cadmium or total digestions for lead content.

We are also conducting research together with the National Institute of Standards and Technology (NIST) to determine if XRF can be used, according to the CPSIA, for lead in paint testing. CPSC Field and Import Surveillance staff use portable XRF to screen for lead, cadmium, and other hazards potentially in products entering the country at our ports, or in retail stores or warehouses. This screening allows our staff to cast a wider net and collect the samples most likely to present a hazard to consumers.

2) **Manufacturers, retailers & importers remain unclear about how exactly *they* can use XRF. Can you please describe in detail how companies are currently legally allowed to use XRF in testing their products?**

Response:

XRF can be part of a "reasonable testing program" for General Certificates of Conformity for products that may have lead in the substrate. XRF can be used as part of in-house screening procedures for incoming materials and for spot-checking of products in-process. However, XRF cannot be used by any entity as a basis for official tests of the lead-in-paint limits or lead content in children's jewelry.

3) **Please detail how third party labs are allowed to use XRF to test products in a non-destructive way?**

Response:

Test Method CPSC-CH-E1002-08 was published by CPSC staff in 2008 and provides guidance on the potential use of XRF to test for lead in polymers. Currently, there is no requirement for third-party testing for such products, but where such testing is done, this provides guidance on the proper way to do such testing. There are many laboratories

whose accreditation has already been accepted by CPSC for testing of lead in nonmetal products by CPSC-CH-E1002-08.

4) **Finally, what future regulatory steps do you envision taking to permit broader use of XRF technologies?**

Response:

If the Commission determines that x-ray fluorescence technology or other alternative methods for measuring lead in paint are as effective, precise, and reliable as the methodology used by the Commission for compliance determinations prior to the date of enactment of the CPSIA, the Commission may promulgate regulations governing the use of such methods in determining the compliance of products with part 1303 of Title 16, Code of Federal Regulations, as modified pursuant to this subsection. CPSC is continuing to work with NIST to evaluate XRF and other non-destructive technologies that may lead to more efficient and enhanced methods. Furthermore, the Commission will be issuing regulations for third party testing of lead in products other than paint and children's metal jewelry. Such regulations may include provisions for the use of XRF for determining lead in plastic, such as described in Test Method CPSC-CH-E1002-08.

TUESDAY, APRIL 27, 2010.

FISCAL YEAR 2011 BUDGET REQUEST FOR THE ELECTION ASSISTANCE COMMISSION

WITNESS

HON. DONETTA DAVIDSON, CHAIR, U.S. ELECTION ASSISTANCE COMMISSION

Mr. SERRANO. The subcommittee will come to order.

Mrs. Emerson will be joining us in a second, but she has given us the okay to proceed since that side is in great hands.

Mr. CULBERSON. We are in good hands, yes.

Mr. SERRANO. Today, we will hear from the Election Assistance Commission on its budget request of fiscal year 2011. We welcome back Election Assistance Chair Donetta Davidson, who is making her third appearance before the subcommittee. I think that is a record.

As it is an election year, it is of particular interest for the subcommittee to hear how the EAC has prepared for the upcoming midterm elections, lessons learned from past elections, the main challenges the EAC must address in the lead-up to November, and what additional resources the Commission will need to successfully perform its mission.

As I have said many times, the EAC is a small agency with a significant responsibility. The Commission plays a critical role in giving guidance and information to election officials, providing regulatory authority over the National Voter Registration Act, and directing Federal resources to support the conduct of open, fair, and accessible elections.

More than $3 billion in Federal money has been appropriated over the past 7 years, including $93 million in fiscal year 2010, to help improve election administration and voting systems. Even with this commitment of resources, election officials continue to have critical unmet needs relating to the smooth conduct of elections.

For fiscal year 2011, the President's budget proposes $16.8 million for operating expenses, a decrease of $1.2 million from fiscal year 2010. The President's request does not provide any funding for State election reform agendas, representing a $75 million decrease from fiscal year 2010. I am particularly interested to hear about how this cut in requirement payments will impact States.

The 2008 election had the highest voter turnout in recent years. More than 132 million Americans voted. While perhaps not everything went perfectly, we did not see the same level of controversy that plagued other recent elections, such as the 2000 Presidential election. We hope that this is a sign that the EAC, together with

State and local officials, are learning from experience and are moving in the right direction.

Finally, I strongly believe that the often intense debate over election issues is due to the passion we share when it comes to protecting our democratic process in guaranteeing the right of every individual to cast a ballot in a fair, open, and honest election. Our goals should be to ensure that we count every vote and make every vote count. I hope this hearing will help us to understand better what the EAC needs to help the Nation meet that goal.

Testifying before us today is the chair of the Election Assistance Commission, Donetta Davidson. Ms. Davidson has served as the commissioner at the EAC since 2005 and is now chair of the Commission for the second time. Prior to her service at the EAC, she was Colorado's Secretary of State; and she also has significant experience administering elections in two Colorado counties.

We are pleased to have her here again today, and the timing is so wonderfully well set in place because—and here is Mrs. Emerson.

Mrs. EMERSON. Thank you. I am so sorry.

Mr. SERRANO. No, no. It is okay. And I just finished my statement.

Mrs. EMERSON. Thank you very much for being here today. We are very grateful and look forward to your testimony.

Ms. DAVIDSON. Thank you.

Mrs. EMERSON. May I say something else?

Mr. SERRANO. It is your statement.

Mrs. EMERSON. I want to apologize to you for not being available to meet with you when you were in the office. I had something unexpected come up that I had to deal with. So my apologies.

Ms. DAVIDSON. Not a problem. Not a problem.

Mr. SERRANO. You know how it goes.

We ask you to limit your statement to 5 minutes. The rest of your statement will go in the record, and that will give us hours upon hours to grill you, although Mr. Culberson has agreed to stay within the 5-minute time limit, which is a major accomplishment for this committee. Please proceed.

Ms. DAVIDSON. I will try. Good morning, Chair Serrano and Ranking Member Emerson and committee members and the appropriation committee for inviting me today. I want to thank you for your support.

My name is Donetta Davidson, and I am a lifelong election official. I became chair of the Election Assistance Commission, or the EAC from now on in my testimony, in January this year. I serve alongside my commissioners, Gracia Hillman and Gineen Bresso Beach, who I thank for their hard work and dedication to the success of the EAC.

The EAC is a small Federal agency with a big mission to improve administration of Federal elections. Today, I will discuss our fiscal year 2011 budget and how it will be executed to achieve our mission. The EAC's budget request is 16.8, which will include 3.25 million to the National Institute of Standards and Technology.

As EAC chair, I will focus on the following initiatives: improved service for military and overseas voters, the National Voter Registration Act, and collecting and ensuring creative solutions in elec-

tions like contingency planning in the States and counties and polling place work recruitment.

Let me describe a few budget items that are of great interest to the committee and the public, beginning with our grants and our requirements payments section. Our fiscal year 2011 budget request includes 750,000 of college poll worker grants. Last year, 71 organizations requested 5 times more funding than was available. This program has been very popular because we continue to have a shortage of poll workers throughout the Nation.

Regarding how States are spending their requirement payments, since 2003, I cheated and I brought some charts with me today. The chart on my right is showing section 251 expenditures by year. As you can see, we saw a big spike in the spending in 2006. Then, on my left, the chart shows a comparison of when the funds were received by States versus when the funds were used. The majority of the funds were received in 2004 and 2005, as the orange and yellow show.

Again, we see most of the funds were spent, as you can see by the blue indication, in 2006. A small amount of the funds were spent in 2004, 2005, primarily due to the provisional voting implementation and polling place information for voters. A few States had already purchased new equipment and were eligible for reimbursement of HAVA funds.

With these charts, it shows that it takes about 18 months of time before a State when the appropriation is passed and that the State receives them and spends the money. It takes about 18 months. There is two reasons for this. It is the State's ability to appropriate the 5 percent match and the State procurement process.

In 2007 through 2009, HAVA distribution and expenditure rates slowed down. Most likely, these rates will continue to follow the typical 18-month cycle that we saw in previous years as we know that some States were unable to appropriate the 5 percent match in 2008 and 2009 due to budget constraints.

So let us review some of the basic facts regarding the payments. Appropriated has been 2 billion six; through March of 2010, over 2.4 billion has been distributed. States have reported spending about 80 percent of the funds through September 30, 2009. Twenty-one of our States have certified that they have met the compliance of Title III.

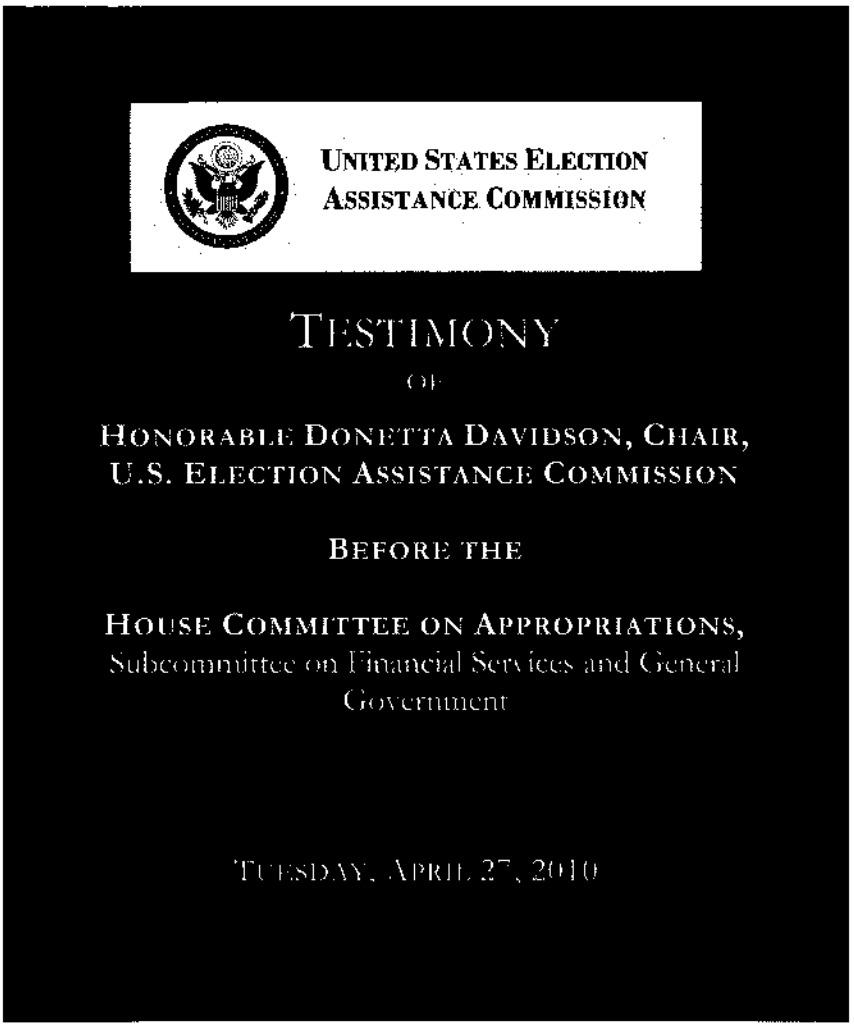
Of course, managing and distributing HAVA funds is not the only main responsibility we have at EAC. We have certified four voting systems, and we are in the last stage of our next iteration of voluntary voting system guidelines. And, as a part of our responsibility under the MOVE Act, we just delivered yesterday a roadmap to Congress which included a draft remote electronic voting system pilot program that we devised.

I also want to make sure that you are aware that EAC has translated the national voter registration form and also other material into five Asian languages, along with the Spanish that is available.

There is not enough time to tell you about all of the work EAC is doing on behalf of the voters and the election officials, but it is always available at www.eac.gov, including the translation of voters registration forms and other material in the six languages.

Before I conclude, I want to thank the EAC staff for their hard work. They are creative, industrious, and dedicated. I also want to thank you for your leadership to the EAC and to the American voters.

I will be happy to answer any of your questions.



U.S. Election Assistance Commission
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Washington, DC 20005
www.eac.gov

Good morning Chairman Serrano, Ranking Member Emerson, and Members of the Subcommittee. I am pleased to be here on behalf of the U.S. Election Assistance Commission (EAC) to discuss our Fiscal Year 2011 budget request and the Commission's goals and activities.

INTRODUCTION

EAC is a bipartisan, independent Commission consisting of four members: Chair Donetta Davidson and Commissioners Gracia Hillman and Gineen Bresso Beach. There is one vacancy on the Commission.

EAC is a small federal agency with a big mission – to improve the federal administration of elections. To achieve its mission, EAC assumes a dual role of providing resources to help states make improvements and assisting election officials throughout the nation empower voters through access, collaboration and engagement. The commission has embraced the concept of collaborative governance and is working to break down communication barriers between the federal government and America's voters.

To ensure success, the Commission has established a solid internal foundation for managing personnel and resources, as well as a structure to ensure accountability. In Fiscal Year 2009, EAC hired a chief financial officer and an accounting director, who achieved immediate results by aggressively finalizing financial management policies and procedures. Consequently, EAC received an "unqualified," or clean, opinion on its financial statements and Annual Financial Report. An "unqualified" or clean opinion indicates that the Commission followed all accounting rules appropriately and that the financial reports are an accurate representation of the Commission's financial condition.

To build upon EAC's actions to effectively manage resources, the Commission is working to foster a culture of accountability among staff by improving staff satisfaction ratings and achieve management excellence through improved internal controls and human resource initiatives.

In addition to establishing a foundation of accountability, EAC has also instilled a spirit of creativity and innovation among staff to meet our mission and maximize the use of available resources. Initiatives include applying technological solutions, establishing strategic partnerships and collaborating among program areas to eliminate duplication of effort, maximizing skill sets and strategically leverage talents and abilities throughout the Commission. For example, the EAC Design Team, consisting of administrative and program area employees, provide management with recommendations and input and to make sure the lines of communication remain open at every level of EAC. The Design Team will ensure that all EAC employees have a voice and a platform to offer solutions and suggestions, but also incorporate strategies to create a healthy working environment and a solid foundation for the future.

EAC believes its efforts to strengthen financial operations, promote synergy among staff and use technology to reach more stakeholders will enable the Commission to better manage and allocate its FY 2011 budget and ultimately serve more voters and develop more tools and resources to improve federal elections.

Below we discuss EAC's FY 2011 budget request and how the Commission plans to allocate resources to achieve its mission.

BACKGROUND, MISSION AND ORGANIZATIONAL STRUCTURE

In October 2002, Congress passed the Help America Vote Act (HAVA). The law recognized the need for states to invest in their election infrastructure and set out a comprehensive program of funding, guidance, and ongoing research. To foster those programs and to promote and enhance voting for United States citizens, HAVA established the EAC.

EAC is an independent, bipartisan agency. Four full-time Commissioners, appointed by the President and confirmed by the U.S. Senate, and three federal advisory committees--the Standards Board, Board of Advisors, and the Technical Guidance Development Committee-- guide the EAC. Its mission is to assist in the effective administration of federal elections. EAC is statutorily required to:

- Create a clearinghouse of information for election officials and the public.
- Distribute HAVA funds to states for election administration improvements.
- Issue, and periodically review and modify, as necessary, Voluntary Voting System Guidelines (VVSG).
- Accredit voting system test labs and certify voting equipment.
- Conduct periodic studies of election administration issues.
- Establish best practices and guidelines on election administration for state and local election officials.
- Maintain the national voter registration form developed in accordance with the National Voter Registration Act (NVRA) of 1993.
- Provide Congress with a bi-annual report to assess the impact of the NVRA.

The Standards Board and the Board of Advisors provide advice and guidance to EAC on Voluntary Voting System Guidelines and other election administration issues. In addition, the Technical Guidelines Development Committee (TGDC) assists EAC in the preparation of the VVSG. The VVSG sets the standards against which voting systems are tested. The Director of the National Institute of Standards and Technology (NIST) serves as the Chair of the TGDC and provides technical support to the Committee.

Additionally, HAVA specifies that NIST provide recommendations to EAC regarding voting system test laboratories. Since Fiscal Year 2004, EAC's annual appropriations have included funds for NIST support.

The Senate confirmed four Commissioners in December 2003 and EAC began operations in January 2004, within ten months of the date mandated by HAVA. Its Fiscal Year 2004 operating budget was $1.7 million. At the close of the fiscal year, EAC had a staff of 18.

EAC's focus in 2004 was to assemble staff, obtain office space, arrange for administrative support from the General Services Administration (GSA), establish a website, start clearinghouse operations, and distribute federal financial assistance to states. In regard to federal financial assistance, Congress appropriated nearly $3 billion in Fiscal Years 2003 and 2004 for payments to states under Titles I and II of HAVA. States received the funds to upgrade their voting systems, establish a statewide voter registration database, train election officials, and educate voters. As EAC did not begin operations until 2004, GSA initially distributed HAVA funds to the fifty states, Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa and the District of Columbia on EAC's behalf in Fiscal Year 2003.

In FY 2004, EAC appointed a statutorily-required General Counsel. During Fiscal Year 2005, EAC appointed its other statutorily-required position, the Executive Director, and an interim Inspector General. EAC focus in subsequent years was on upgrading the VVSG, completing required research to promote effective federal elections and to present key data on election practices and voting, instituting a voting system testing and certification program, auditing state use of HAVA funds, and providing information on improving elections to its stakeholders.

In FY 2007, the full-time equivalent staffing ceiling of 24 was lifted. As of the end of FY 2009, EAC had a full-time staff of 43 employees, including three Commissioners. Since its inception, EAC has received $2.5 billion in requirements payments for the states based on a formula of the number of eligible voters, $14.7 million in discretionary grant funds for Poll Workers, Mock Elections and Election Data Collection, and transferred $17.7 million to NIST. EAC is located in Washington, D.C.

FISCAL YEAR 2011 HIGH PRIORITY GOALS

Voters need easy access to up-to-date information on where, when and how to vote. Leading up to an election year, election officials face an increase in activities to inform voters and recruit and train Election Day poll workers.

Federal elections are locally administered with a wide variety of practices and policies. Election officials work hard to conduct fair, accessible, accurate and secure elections by

informing the electorate and properly training poll workers. EAC assists states and local jurisdictions by providing tools and best practices to improve election administration practices, including pre-election testing and contingency planning materials, which promote a proactive approach to election management.

As states look to new technology and practices in voting (including remote access voting for Uniformed and Overseas Citizens Absentee Voting Act [UOCAVA] voters, vote by phone and accessible technology for disabled voters) and private sector manufacturers expand the number and type of voting systems available, EAC must be in a position to test the new systems against rigorous federal standards in a timely, efficient and high-quality manner.

As part of the process to prioritize tasks, maximize existing resources and focus on mission-specific goals, EAC defined a limited number of high-performance priority goals consistent with the Commission's Fiscal Years 2009-2014 Strategic Plan. The high-performance priority goals will help EAC measure its ability to provide assistance to the public and voters as well as meet the mandates of HAVA. Our focus in FY 2011 will be on the following high-performance priority goals:

1. Serve as a clearinghouse and provide election officials and voters with information regarding the process for casting a vote in the 2012 federal elections, including technical assistance and information, poll worker recruitment and training, and basic information for voters such as links to states' polling place locators and voter guides about how, when and where to vote for the 2012 federal elections.
2. Distribute materials designed to allow citizens who are not proficient in the English language to participate fully in federal elections to any jurisdictions covered by the Voting Rights Act Section 5 languages.
3. Provide voluntary best practices for computerized statewide voter registration list requirements and registration by mail guidance to the states.
4. Ensure that voting systems and modifications of already-certified systems submitted to EAC program are thoroughly and efficiently tested to federal standards.

Implementation of the high-performance priority goals in FY 2011

Goals 1a and 1b

1(a) Serve as a clearinghouse and provide election officials and voters with necessary information regarding the process for casting a vote in the 2012 federal elections.

1(b) Provide election officials with funding, technical assistance and information, as appropriate to support poll worker training, educate the

public, and help provide voters with access to information such as when and where to vote for the 2012 federal elections.

The first of the high-performance priority goals is aimed at assisting voters so that they have the necessary knowledge to cast and have their ballots counted on Election Day. Three EAC program areas will be involved in implementation of the goals—the Research, Policy and Program, Communications, and Grants divisions—in partnership with state and local election officials, voter advocacy groups, voters and all other stakeholders.

EAC will employ the following strategies to implement the goal:

- Increase the use and availability of EAC research products and teaching materials through the EAC clearinghouse and other electronic tools.
- Use the results of the 2010 evaluation of EAC products to revise publications such as the poll worker training manual, poll worker recruitment guide, and voter education materials for 2010 and beyond.
- Implement an annual research plan
- Disseminate voluntary guidance on provisional voting pursuant to Section 311 of HAVA.

Goal 2

Support jurisdictions covered by the Voting Rights Act Section 5 languages so that all jurisdictions have access to and use materials designed to allow citizens who are not proficient in the English language to participate fully in federal elections.

The aim of the goal is to ensure that all voters assigned to jurisdictions covered under Section 5 receive materials and support from EAC. These voters include persons who are Native American, Asian American, Alaskan Natives or of Spanish heritage. It also will help in ensuring that limited and non-English proficiency voters are able to register and vote. The lead EAC offices responsible for implementing the goal are the Language Accessibility Program of Research, Policy and Program Division, and the Grants Division. Partners in the effort include state and local election officials, voter advocacy groups and all other stakeholders.

EAC's strategy to achieve the goal is to update and expand the resources available through the Language Accessibility Program. Recent deliverables include the translation of the National Voter Registration Form into Chinese, Japanese, Korean, Tagalog, Vietnamese and Spanish. The EAC *Voters' Guide to Federal Elections* is also available in these seven languages, but the information needs to be updated. Based upon the 2010

Census results, EAC will provide other materials to jurisdictions determined to be covered under minority language provisions of the Voting Rights Act and any other jurisdiction that may have a need based on their population. Resources needed to achieve the goal include funds for translations, publications and the expenses related to working group and roundtable discussions with experts in these languages. These resources are included in the 2011 Budget request for EAC Salaries and Expenses.

Goal 3

Provide states with best practices for computerized statewide voter registration list requirements and registration by mail based on voluntary guidance provided by EAC pursuant to Section 311 of HAVA.

The aim of Goal 3 is to work with the 50 states, Puerto Rico, the U.S. Virgin Islands, the District of Columbia, Guam and American Samoa to adopt best practices that encourage increased voter participation and more accurate voter registration lists. The lead EAC division for the effort is Research, Policy and Program, in partnership with state and local election officials, and voter advocacy groups, the public and all other stakeholders.

HAVA requires states to "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list...." Congress mandated that EAC issue voluntary guidance to assist the states in implementing the provisions of HAVA relating to statewide voter registration list requirements. EAC issued its first set of voluntary guidance in July 2005.

In accordance with EAC's Fiscal Years 2009-2014 Strategic Plan., EAC contracted with The National Academy of Sciences (NAS) to conduct further research to expand upon the 2005 voluntary guidance. Issued in 2009, the *Improving State Voter Registration Databases* report, included data gathered from the states about their databases and short-term and long-term recommendations for improving and implementing them. EAC will use the NAS report as a basis to update its 2005 voluntary guidance for statewide voter registration databases.

EAC's updated voluntary guidance on statewide voter registration databases may include but is not limited to: matching protocols, maintenance of accurate voter registration lists, data collection and storage, online functionality, identification requirements for first-time voters, and interoperability and intraoperability of databases; and help states promote intergovernmental cooperation between their various agencies and departments.

Goal 4

Ensure that modifications of certified systems submitted to EAC's program are successfully and efficiently tested to federal standards.

The goal is to ensure that modifications of certified systems submitted to EAC's Voting System Testing and Certification Program are thoroughly and efficiently tested to federal standards in a transparent manner.

The lead office for implementation of the goal is the Voting System Testing and Certification with input from partners including the National Institute of Standards and Technology and the TGDC.

EAC has aligned its five Strategic Plan goals—Communicate; Fund and Oversee; Study, Guide, and Assist, Test and Certify; and Manage—with the offices responsible for implementing them.

BUDGETS & PERFORMANCE MEASURES BY STRATEGIC PLAN GOAL

EAC's Fiscal Years 2009-2014 Strategic Plan provides the public with the framework for the Commission's short and long-term goals in accordance with HAVA. The plan lays out an approach to create a receptive and productive Commission fully capable of the unique leadership role it has been given as a national clearinghouse for election information, a manager of federal financial assistance, certifier of voting systems and a resource and hub of credible information for election officials throughout the nation.

The plan provides the structure for EAC's performance-based budget approach. A budget allocation history as well as the FY 2011 request accompanies each of the five strategic plan goals.

EAC's offices have been realigned to address the goals in the Strategic Plan:

- Goal 1: Communicate is administered by the Office of Communications and Clearinghouse.
- Goal 2: Funds and Oversee is administered by the Grants and Inspector General Offices.
- Goal 3: Study, Guide and Assist is aligned with the Research, Program and Policy unit.
- Goal 4: Test and Certify is administered by the Voting Systems and Certifications unit.
- Goal 5: Manage is aligned with the Boards, Commissioners, Executive Director, Chief Operating Officer, Chief Financial Officer and General Counsel.

A cost allocation model distributing administrative costs to the goals was developed and submitted to the financial statement auditors for review. Budgets tie to information in the financial statements.

Strategic Plan Goal 1: Communicate timely and accurate information on the effective administration of elections for federal office and on the operations and services offered by EAC.

Outcome: The Congress, federal agencies, state and local election officials and the public receive reliable, accurate, and non-partisan information about administering, conducting and participating in federal elections and how, where, and when Americans vote.

FY 2009 Enacted	FY 2010 Enacted	FY 2011 President's Budget
$985,017	$848,752	$840,167

The Communications division is responsible for administration of the agency's website, www.eac.gov which contains over 1,000 documents with information about voting system test plans, agency correspondence, and testimony from EAC monthly Public Meetings and hearings; and external and internal communications such as press releases, news articles and speeches, informational videotapes on the programs, a monthly newsletter about EAC activities and events to approximately 1,200 subscribers, and a weekly email on internal operations. The unit coordinates with EAC staff to communicate policies guidance, research, and other agency initiatives to the Public.

The Communications division is instrumental in ensuring all stakeholders receive information about the testing and certification program. EAC's Testing and Certification Voting System Reports Clearinghouse is where Communications staff post and disseminate voting system reports and studies that have been conducted or commissioned by a state or local government.

Using an interagency agreement with the U.S. Department of Agriculture, the division produced poll worker and election official training videos, available on the eac.gov website and on YouTube. As we prepare for the 2010 federal election year, EAC plans on producing four new training videos at approximately $8,000.

In 2009, in order to accelerate establishment of a Clearinghouse of information on federal elections and to ensure a cost-effective contract, EAC recompeted its contract which includes the Clearinghouse and a restructure of the website. With the new contract, EAC will continue to achieve our goal of serving as the trusted source for information about elections and election administration. In 2010, EAC intends to connect its stakeholders to a new, separately identifiable Clearinghouse on the EAC website. The fixed price for the website contract in FY 2011 is $130,000 with optional time and materials task orders.

Goal 1 is administered by a staff of three. The unit spends approximately $26,000 to produce the mandated EAC Annual Report.

Strategic Plan Goal 2: Deliver and manage federal funds effectively.

Outcome: States and other recipients promptly and accurately receive federal funds administered by EAC and use the funds appropriately to improve the administration of elections for federal office.

	FY 2009 Enacted	FY 2010 Enacted	FY 2011 President's Budget
Grants Management	$1,965,889	$1,914,069	$1,406,639
OIG	1,757,730	1,770,259	1,837,836
Total	$3,723,619	$3,684,328	$3,244,475

Goal 2 is administered by the Grants Management unit and the Office of the Inspector General (OIG).

In FY 2009, EAC reorganized, creating a Grants Management division. The division is responsible for distributing, monitoring, providing technical assistance to states and grantees on use of funds, and reporting on requirements payments and discretionary grants that improve administration of elections for federal office. The office negotiates indirect cost rates with grantees and resolves audit findings on use of HAVA funds.

With EAC's reorganization of the financial management functions, a new senior level grants director was hired in FY 2009. The director is emphasizing technical assistance to the states and grantees, offering workshops and training sessions using distance learning tools and services of a grant support contract. EAC will continue to work with the states and grantees to clarify their responsibilities they have in managing the funds they receive or are awarded.

A system to track audits and state completion of corrective actions will be established. Another goal is to achieve the performance targets for timeliness in the Strategic Plan, such as resolving 100 percent of audit findings, awarding grants in established timeframes, and submitting state plans to the Federal Register within 30 days of receipt.

Providing assistance to states about HAVA Section 251 funds, or requirements payments, is the division's highest priority. A total of $2.604 billion in requirements payments has been appropriated to the states. These funds may be used to implement provisional voting; provide information to voters; procure voting systems; implement a statewide voter registration database; implement identification requirements for first-time voters who register to vote by mail; and other activities to improve the administration of elections for federal office.

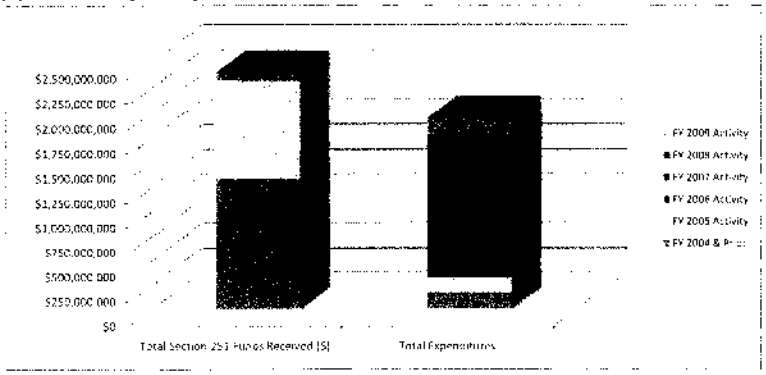
Requirements Payments Appropriations & Disbursements

Requirements Payment Appropriated		Amounts Disbursed	Percentage
Section 251 (2003 & 2004)	2,319,360,617	2,319,360,617	100%
Section 251 (2008)	115,000,000	80,450,626	70%
Section 251 (2009)	100,000,000	51,969,214	52%
Section 251 (2010)	70,000,000	6,608,177	9.4%
Total Appropriations	2,604,360,617	2,458,388,634	94.4%

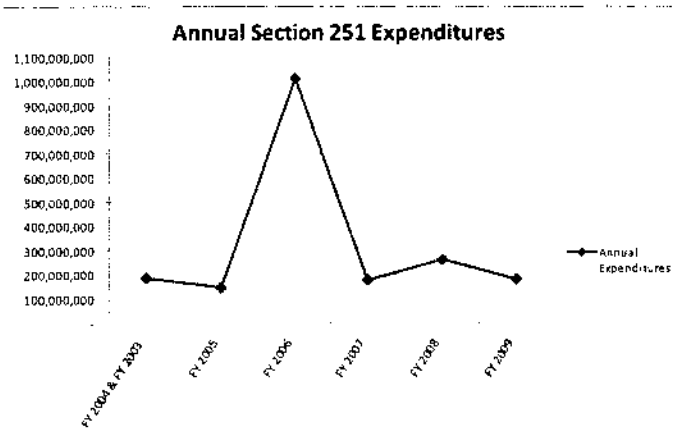
Based on aggregate financial reports from states reporting through September 30, 2009, with 80% of states reporting, and using projections for remaining states based on last year's spending rates, we can make several observations:

1. It takes about 18 months after a major disbursement of funds for states to begin spending funds. The time lag is due to state appropriations processes needed to secure matching funds and procurement processes needed to spend funds.

2. The implications for not disbursing funds in 2011 may be mitigated by the fact states will have received funds for three years in succession prior to 2011, so there are funds in pipeline to keep state processes moving forward.



3. The aggregate HAVA spending (Section 101 and Section 251) increased approximately $90 million from 2007 to 2008. After 2006, states are spending less in non-election years, but they are spending funds at a 2:1 ratio to how much is annually being appropriated. At this expenditure rate, Section 251 funds should be completely expended in 3-5 years. As of September 2009, 23 states have spent 90% or more of their 251 federal funds.



4. Twenty-one out of 55 states (and Territories) have certified as being compliant with Title III of HAVA, which includes meeting HAVA voting system standards (Section 301), provisional voting and information requirements and adopting computerized statewide voter registration systems. Of the 34 states that are not yet certified compliant 19 of those states have expended 90% or more of their federal 251 HAVA funds.

EAC's goal for 2010 is to better understand how much it will cost for each of these 34 states to become Title III compliant and how much it will annually cost to maintain that compliance. This information will be helpful for the 2012 budget process as we examine the continning budget needs associated with helping states maintain compliance with HAVA.

Our work in this area will include analysis of how much it will costs states to become compliant with the MOVE Act, which is relying on Section requirements payments. MOVE Act costs were not contemplated during the time the 2011 bndget was being developed.

The Grants Office is currently staffed by the director and a grants specialist with contractor and temporary staff support. An estimated $303,000 will be needed to print State Plans and grants notices in the Federal Register. In FY 2010, EAC plans on hiring one full-time staff in lieu of FY 2009 contractor support.

For FY 2011, the Office of the Inspector General initial request is $1,893,494. The President's Budget request is $1,837,836. The Inspector General has determined that these amounts will support operations for FY 2011. Of the total requested in the President's Budget, $25,000 is for staff training to meet the continuing education requirements applicable under Generally Accepted Government Auditing Standards, and $4,534 is for support for the Council of Inspectors General on Integrity and Efficiency.

OIG plans on increasing the number of HAVA funds audits from five per year to eight, and the number of reviews and investigations that are conducted. OIG plans on conducting two internal audits/evaluations of EAC programs and operations and an evaluation of its own operations in 2011.

As reported in the *OIG Semi-Annual Report to Congress, April 1, 2009 to September 30, 2009*:

"Since the inception of the audit program, the OIG has completed audits of 22 states – with audits of additional five states under way – and through the completed audits reported findings related to states' expenditures of nearly $25.5 million. In the first several fiscal years, the OIG questioned a greater percentage of HAVA funds based upon their use. However, over the past fiscal year, the OIG has seen a reduction in the monetary findings associated with its HAVA funds audits. This is directly attributable the states' efforts to effectively monitor and document their use of federal funds. In fact, one state audited in the current reporting period received no monetary findings and one state audited during a prior period received a clean audit."

An increase of one junior auditor was requested for FY 2010, in addition to the existing positions of the Inspector General, legal counsel, and senior auditor. OIG requests 3.5 additional staff – a director of audits, a journeyman auditor, an investigator, and a part-time administrative assistant – for 2011 to build two audit teams. The additional staff would be hired in lieu of a portion of the more than $900,000 in audit contracts awarded annually to increase flexibility to react to and further investigate questionable situations and potential audit findings. The staff would help manage contract audits to more efficiently review state and local government use of HAVA funds, expand grant audits to include the discretionary grant programs, and evaluate EAC operations.

Strategic Plan Goal 3: Identify and develop information on areas of pressing concern regarding the administration of elections for federal office and issue guidance, translations, best practices and recommended improvements as required by HAVA, and carry out responsibilities under the National Voter Registration Act.

> Outcome: As a result of this goal: 1) the election community and other key stakeholders improve the administration of elections for federal office on the bases of pertinent, impartial, timely, and high-quality

information, recommendations, guides and other tools on election and voting issues and 2) eligible citizens use the mail voter registration application to register to vote, register with a political party, or report a change of name, address, or other information.

FY 2009 Enacted	FY 2010 Enacted	FY 2011 President's Budget
$1,191,890	$1,544,817	$1,523,184

The Research, Policy and Programs division administers:

1) The Election Management Guidelines Program to provide information on topics such as Ballot Design, Contingency Planning, Managing Change in an Election Office, Media and Public Relations, and Developing an Audit Trail for the verification of votes, to help election officials promote secure, accurate, and accessible elections.

2) The Language Accessibility Program to provide informational materials on the federal election process and election terminology in languages other than English, translate the national voter registration form, and gather information from working groups to address the election needs of voters with limited or no English proficiency.

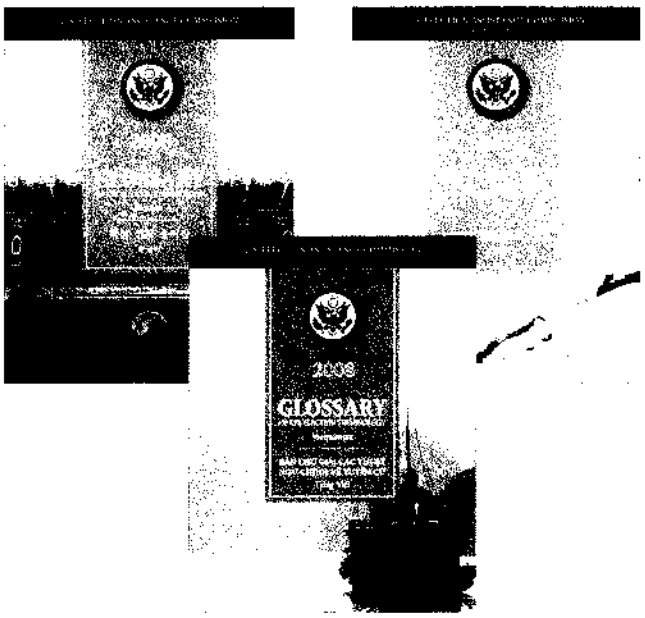
3) Provides materials to voters to facilitate successful participation in federal elections such as registering to vote.

4) Conducts election research on mandated topics.

HAVA mandates that EAC issue studies on the impact of free absentee ballot return postage on voter participation, electronic voting and Uniformed and Overseas Citizens Absentee Voting Act voters, the feasibility of alternative voting methods, the voting experiences of first-time voters who register to vote by mail, and the feasibility and advisability of identifying voters by Social Security Numbers.

Each year, staff presents potential Election Management Guideline (EMG) chapters and Quick Start Management Guide ideas to the Commissioners for their review and consideration. Ideas for new chapters and guides are gathered by program staff from a variety of sources in the elections field. Once reviewed by the Commissioners, staff from the Research, Policy and Programs Department complete preliminary research for each new agreed-upon chapter.

EMG chapters are vetted with the topical working group and made available for comment to the EAC's Board of Advisors and Standards Board through the Virtual Meeting Room.



The final version of each EMG chapter is formally adopted by the Commission. Once this has occurred the chapter is disseminated by mail and the Internet to all local and state election officials.

In 2011, EAC will release a report on data collected in the 2010 elections and a report to Congress assessing the impact of the National Voter Registration Act (NVRA) on the administration of elections for federal office. On August 28, 2009, the NVRA regulations were transferred from the Federal Election Commission to EAC. The project will involve review of the current regulations, any proposed changes to the regulations, and consideration of public comments. The EAC will conduct hearings to ensure broad participation in the rulemaking process. Final regulations must be adopted by a vote of the Commission following the public rulemaking process and published in the Federal Register before taking effect. In addition, EAC will update the Federal Election Commission's implementation manual to reflect any changes in the regulations and the additional requirements added by the passage of HAVA.

EAC's Board of Advisors and Standards Board assist in prioritizing research topics that are important and helpful to election officials. When new research projects are identified as priorities to undertake, a working group is organized. The members of the working

group provide feedback to Research staff about possible topics of study and are subject to final approval by Commissioners as part of the annual research plan.

Strategic Plan Goal 4: Build public confidence in elections by testing and certifying voting systems to improve system security, operation and accessibility.

Outcome: Voting equipment operates more reliably and securely and is more accessible to the disabled. States use EAC testing and certification program to ensure voting systems meet standards.

FY 2009 Enacted	FY 2010 Enacted	FY 2011 President's Budget
$1,672,406	$1,861,008	$1,825,642

Under HAVA, EAC is responsible for assisting states with improvements to voting systems through the distribution of federal funds and by providing a voluntary federal certification program. The federal government's first voluntary Voting System Testing and Certification Program for the states also provides the public the opportunity to review every aspect of certifying voting equipment, such as voting equipment system information, test plans and reports, and reports on irregularities. Comprehensive procedures for the program are detailed in EAC's Voting System Testing and Certification program.

The division works on EAC's full accreditation and certification program. Staff works with the National Institute of Standards and Technology (NIST) to evaluate and accredit voting system test laboratories and the management of the voting system certification process. The program assists states with voluntary certification of their systems, supports local elections officials in the areas of acceptance testing and pre-election system verification, increases quality control in voting system manufacturing, and provides clear procedures to manufacturers for the testing and certification of voting systems to specified federal standards consistent with the requirements of HAVA Section 231(a)(1).

In FY 2009, EAC increased the Testing and Certification staff to expedite the voting system certification process. An EAC certification means that a voting system has met the requirements of the federal standards by passing a series of comprehensive tests conducted by an EAC-accredited test laboratory. Procedural requirements for the Voting System Test Laboratory Program are detailed in EAC's Voting System Test Laboratory Manual. Currently, six voting systems are participating in EAC's Testing and Certification Program.

The additional staff hired in 2009 has improved the process by answering technical questions of the election officials and vendors, helping test lab vendors understand how

to test specialized systems, reviewing test plans, tracking complaints, visiting the testing labs, and keeping the technical review and approval process moving forward. The staff has made a commitment to match the testing time schedules provided by the voting system test laboratories and manufacturers. Staff holds weekly teleconferences with the labs and manufacturers of all testing engagements underway. Staff holds kick-off meetings with the labs and manufacturers to give the technical reviewers an opportunity to meet with the labs and manufacturers and ask them about everything they need to know about the systems for their reviews.

In addition to staffing and staff efforts to streamline the voting system certification process, EAC along with its Standards Board, Board of Advisors, and Technical Guidelines Development Committee (TGDC) (chaired by the director of NIST and comprised of 14 other members) work together to review voluntary testing standards. Efforts are underway to revise the 2005 Voluntary Voting System Guidelines. The revisions are aimed at aiding the creation of test suites that promote uniform, consistent and faster testing by eliminating bottlenecks in the testing process. Revisions will also provide clarification in key areas that may cause confusion and slow the process.

In 2011, EAC plans on transferring $3,250,000 to NIST via interagency agreement for activities required under Sections 221 *Technical Guidelines Development Committee* (TGDC), 231 *Certification and Testing of Voting Systems*, and 245 *Study and Report on Electronic Voting and the Electoral Process* of HAVA.

EAC and NIST seek to produce final reports by the second quarter of 2010 related to UOCAVA initiatives on Best Practices for Transmission of Election Material and Security Considerations for Remote Voting. NIST's interim report, "A Threat Analysis on UOCAVA Voting Systems," discusses the need to balance security and privacy in electronic transmission of voting materials with ensuring UOCAVA voters get to vote in a timely manner.

The Testing and Certification unit consists of six full-time staff, four part-time technical reviewers, and two contractual staff. Total cost of staff, reviewers, and contractors for FY 2011 is $1,254,941. Travel is budgeted at $280,500; printing at $105,200; other services at $180,000; and $5,000 for supplies. Current plans are to begin phasing out one of the contractual staff as new full-time staff are trained and can take over the function.

How does a Voting System Get Certified by the EAC?

Step one: Voting system manufacturers must register with the EAC.

Step two: Manufacturers must submit an application and select a federally accredited test laboratory to begin the testing process.

Step three: Test laboratory submits draft test plan to EAC for approval.

Step four: EAC approves test plan.

Step five: Voting system is tested to the applicable standards.

Step six: Testing concluded; draft test report submitted to EAC for approval.

Step seven: EAC approves test report and issues initial decision on certification.

Step eight: Test laboratory rebuilds voting system in a trusted environment, otherwise known as a "trusted build."

Step nine: Manufacturer provides software identification tools to EAC, which enables election officials to confirm use of EAC-certified systems.

Step ten: Manufacturer provides voting system software to EAC repository, allowing EAC to capture an official record of the voting system it has tested and certified.

Step eleven: Manufacturer agrees in writing to all EAC certification conditions and program requirements.

Step twelve: EAC certifies voting system.

Strategic Plan Goal 5: Achieve organizational and management excellence.

Outcome: EAC Commissioners and staff proficiently carry out EAC's strategic objectives.

Goal 5 consists of one clear-cut objective; to implement a high performance organization. Goal 5 is administered by the Commissioners, the Standards Board, the Board of Advisors, the Technical Guidelines Development Committee, Executive Director, Chief

Operating Officer and Chief Financial Officer with support from the Offices of the General Counsel and Administration.

In FY 2009, in response to the agency's first financial statement audit, EAC reorganized the agency structure and created a financial division. The division consists of a senior level grants director who administers HAVA funds, an accounting director who is a Certified Public Accountant, and a Chief Financial Officer who ensures that EAC is compliant with federal requirements and resources are used efficiently.

The CFO department will continue to focus on resolution of issues identified in audits, setting up sound systems and policies and procedures, working with managers on the relationship between budget and performance, maximizing use of staff and financial resources, and training EAC staff on financial management processes and their responsibilities.

Management is working to foster a culture of accountability among staff. The agency is seeking to improve staff satisfaction ratings and achieve management excellence through improved internal controls and human resource initiatives.

INFORMATION TECHNOLOGY

The Commission's information security program encompasses those measures necessary to protect the Commission's information resources. These measures include providing for each project: the appropriate technical, personnel, physical, administrative, environmental and telecommunications safeguards; and continuity of operations through contingency or disaster recovery plans. The Commission's protective measures cover the following information resources: data, applications, software, hardware, physical facilities and telecommunications. The Commission's information security program assures that each automated information system has a level of security that is commensurate with the risk and magnitude of the harm that could result from the loss, misuse, unauthorized disclosure or improper modification of the information contained in the system.

Currently, EAC depends on GSA for email, internet and information technology (IT) security services, and on a contractor for maintenance of the website, www.eac.gov. Current EAC IT staff maintains personal computers and smartphones, provide software requested by EAC staff, and perform vulnerability scans. The agency has a shared drive but does not have an intranet where policies and procedures can be posted.
EAC is GSA's last IT client agency. EAC's vision is to be responsible for our own infrastructure led by a qualified Chief Information Officer (CIO). EAC expects to replace the acting CIO with a CIO in the second quarter of FY 2010. The CIO will work on integration of EAC systems, upgrade the agency's email to MS Outlook from Lotus Notes, assist the directors with systems to capture performance metric data, and guide

EAC in implementation of an automated Time and Attendance system and an e-Travel system. Currently, EAC submits hard copy exception-based time sheets to GSA, where the Electronic Time and Attendance Management System is used. EAC submits hard copy Travel Authorizations and Vouchers to GSA.

Salaries and Expenses
(Dollars in thousands)

IT Resource Category	Budget Activity	FY 2009 Enacted	FY 2010 Enacted	FY 2011 President's Budget
Total, IT Investments		**1,037.1**	**961.4**	**974.6**

CREATIVE SOLUTIONS & APPROACHES

Thanks to an innovative and creative staff, EAC has implemented several initiatives to use contractors more efficiently, save money, leverage partnerships and increase productivity throughout the Commission.

Procurement Innovations

Beginning in FY 2008, EAC started the process of hiring staff in lieu of contractors for its research and evaluation work. By FY 2009, EAC had phased out 12 contracts awarded by the Department of Interior on EAC's behalf and instead used staff to produce publications and reports.

In accordance with the President's Memorandum on Government Contracting, issued on March 4, 2009, we reviewed EAC's existing contracts and current acquisition practices to target achievable cost savings. The acquisition budget for FY 2010 is budgeted at $4.3 million and FY 2011 is approximately $3.3 million. The following items are proposed to save 3.5 percent of EAC's baseline contract spending in FY 2010 and a further 3.5 percent in FY 2011.

Acquisition Savings Plans Steps to be Taken for FY2010/2011

1) Perform an analysis of organizations within EAC to consider the continued need and cost-effectiveness of out-sourcing expertise that could be staffed in-house.
2) Cost savings are projected by converting current out-sourced resources to current or future in-house staff for ongoing work tied to growth projections of EAC.
3) Re-compete two current contracts to obtain cost reductions:
   - EAC Website Maintenance & Hosting Contract. Savings in 2011: $235,000
   - EAC Election Day Survey Analysis Contract: $130,000 in 2010

Partnerships and Collaboration

The federal government consists of a wealth of valuable resources, including experts in the areas of policy, budget and technology. In recent years, federal agencies have experienced an increase in cross-agency collaboration, which has facilitated the sharing of resources and knowledge. For a small agency like EAC, these federal resource hubs are invaluable. EAC employees have joined federal organizations like the Small Agency Council, which offers ways for agencies to share training costs and ideas. Through the Council, the participants pooled resources to fund training classes through the Gradnate School (formerly the United States Department of Agriculture [USDA] Graduate School). Participants even share physical training space. Due to the cost savings and the small agency perspective provided by the trainings, EAC intends to continue being an active participant in FY 2011.

EAC also participates in events sponsored by the Web Managers' Council, an interagency group of senior federal government web managers who collaborate to improve the online delivery of U.S. Government information and services. The Council offers training courses at reduced prices and hosts a list-serve in which federal employees exchange ideas, ask questions and share solutions. EAC recently participated in training sponsored by the General Services Administration for www.data.gov. Communications Division employees will continue to draw upon the expertise of the group of federal employees managing this new site, which is the designated location for high-value federal data sets.

As part of EAC's effort to develop and share best practices in election administration, EAC contracted with USDA, Office of Communications, Broadcast Media and Technology Center to produce training videos. The collaboration resulted in four very well received videos about polling place set-up, accessibility at the polling place, contingency planning and an overview about how the EAC tests and certifies voting systems. Videos are available at www.eac.gov as well as on EAC's YouTube page, Help America Vote. EAC will again partner with USDA to produce another series of videos, including one featuring a Mock Election Grant recipient's approach to forming a partnership with a local election office.

An invaluable resource for EAC has been the Target Center at USDA. The Target Center's mission is to make sure that USDA employees have "safe and equal access to electronic and information technology by assessing, educating, and advocating for the integration of assistive technology and worksite accommodations." EAC reached out to the Target Center for assistance with making documents accessible. Consequently, the Center hosted a training session for the entire EAC staff and continues to be available to us if we need assistance.

EMPLOYEE SATISFACTION & SUPPORT

Program and financial integrity depends on well-structured human resource policies and practices. Along with the Chief Operating Officer and Chief Financial Officer, EAC's Human Resource (HR) Director in the Office of the Chief Operating Officer is charged with improving program operations and tracking accomplishment of goals. In 2009, HR began the process of implementing policies and procedures to improve staff performance and to establish a human resource accountability system. The system will ensure effective Human Resource management in support of the agency's Strategic Plan and in adherence to the federal merit systems principles, and other federal HR laws and regulations.

EAC is committed to building a diverse, well-trained, high-performing workforce. Managers and supervisors are accountable for efficient and effective human resources management in support of the agency's mission and in accordance with merit system principles. Supervisors will undergo a human resources management training program with the aim of enhancing managers' and supervisors' ability to accurately evaluate performance, recognize good performance, and take corrective action as needed to address identified performance deficiencies. They will be trained on effective performance management: the importance of providing feedback to employees frequently throughout the year, and of conducting regular formal performance appraisals with appropriate detailed feedback to help staff grow and succeed. The supervisory training program also includes modules on EEOC and sexual harassment, No Fear Act, teambuilding, ergonomics, and work/life balance.

EAC has expanded the services provided under the Employee Assistance Program via a Memorandum of Understanding with Federal Occupational Health to include clinic services such as first aid and blood pressure checks and the WorkLife4You Program. The Work/Life Program includes consultations for staff on such topics as child and elder care, adoption, career development, retirement planning, and services for adults with disabilities and illnesses

Staff and supervisors will also be responsible for annual Performance Plans and Individual Development Plans (IDPs) to help employees identify strengths and weaknesses, reach their potential and attain their career goals. The Performance Plans will address not only accomplishment of strategic plan goals and how each employee contributes to achievement of the agency's mission and goals, but will also address core competencies and performance elements for each position. Development activities in the IDPs include in addition to formal training, mentoring, coaching, computer-assisted training, brown bag lunch-time learning groups, and formal feedback.

In September 2007, EAC produced a Succession Management Framework to mitigate the impact of employee attrition. The plan outlines recruitment, selection criteria,

identification of agency-wide core competencies required, development of staff, and retention of staff by providing challenges and rewards. The acquisition budget for FY 2010 is planned at $4.3 million and FY 2011 is approximately $3.3 million.

INVESTING IN EMPLOYEE SATISFACTION & WELLNESS

EAC plans on using employee survey findings to improve recruitment, retention and future ratings. We are developing an action plan to address the specific areas that employees have identified as needing improvement. One area identified as needing improvement is leadership and supervisory skills. As mentioned in the Internal Control section of this document, a Supervisory Development Program will be offered with courses in project cost management; EEO, sexual harassment and diversity; financial management, human resources management, and performance appraisal. Further, the agency arranges team building exercises to improve internal communication over and above the activities described in Goal 1 Communicate.

The acquisition budget for FY 2010 is planned at $4.3 million and FY 2011 is approximately $3.3 million. In an effort to promote health and wellness initiatives, EAC provides staff with an Employee Assistance Program via a Memorandum of Understanding with Federal Occupational Health. EAC has expanded the services provided under the MOU to include clinic services such as first aid and blood pressure checks and the WorkLife4You Program. The Work/Life Program includes consultations for staff on such topics as child and elder care, adoption, career development, retirement planning, and services for adults with disabilities and illnesses. In addition, EAC does not have to expend funds on offering a fitness facility as one is provided to staff in the building to use free of charge. EAC participates in the Flexible Spending Account program, and provides flexible work schedules, telecommuting, and transit benefits. In FY 2009, EAC purchased automated external defibrillators for each of its three locations and provided cardio-pulmonary resuscitation training to approximately 12 staff on use of the machines through the Red Cross.

LOOKING FORWARD

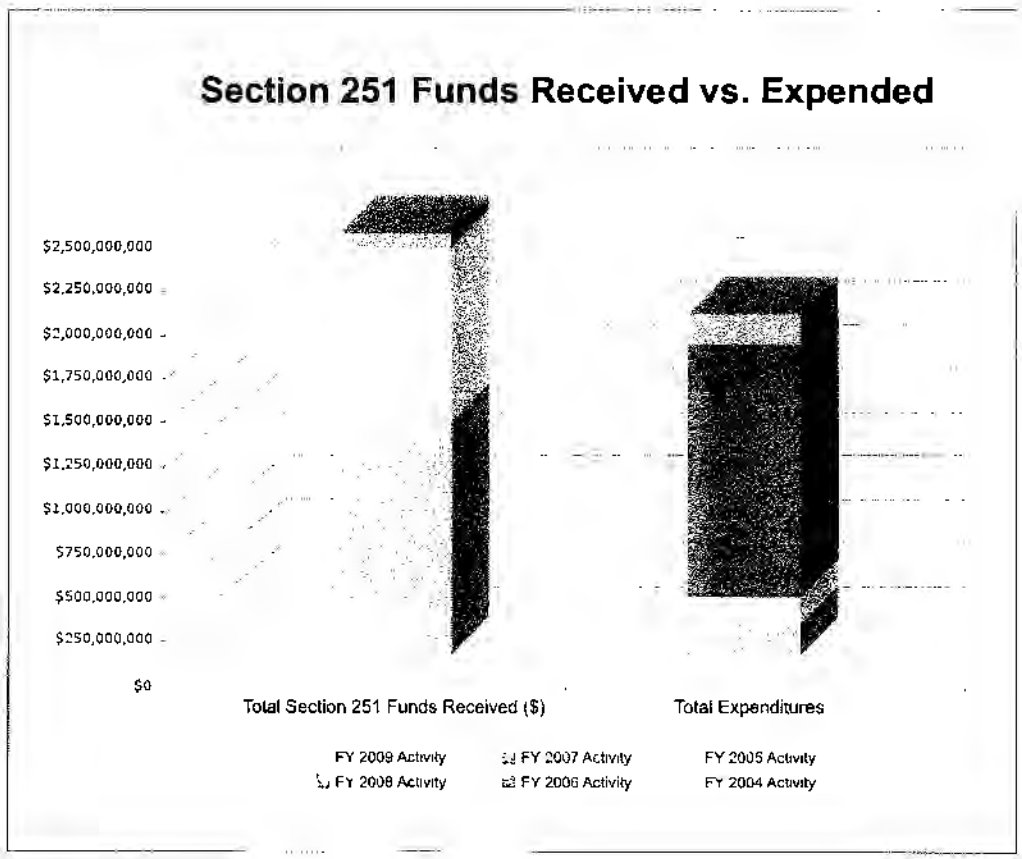
FY 2011 will be a busy year for EAC as we prepare for a presidential election year. We anticipate that the technology investments and Web site enhancements will help us deliver and provide information to a larger audience, enabling more voters to have a successful experience casting their ballot. We will expand the online resources provided to election officials, including an effort to collect best practices about contingency planning, poll worker training, pre-election testing and audits.

EAC's Voting System Testing and Certification Division will be working towards the final adoption of the next iteration of the VVSG, as well as manage the responsibilities that will come from the EAC-certified voting systems operating in the field, many of them for the first time. Manufacturers are obligated under the terms of the program to report problems that occur in the field, and we must make sure we have the resources to thoroughly follow up. Efforts to work with the Federal Voting Assistance Program and NIST to develop a remote electronic voting system for overseas citizens and the military will continue.

Staff will collect information from the 2010 election for EAC's Election Administration and Voting Survey, including data about the rate of participation for overseas citizens and military voters. Almost simultaneously, they will begin developing the survey instrument for the 2012 election.

To support staff as they embark upon the many responsibilities ahead, EAC will continue to provide training, support services and make sure that the work environment is healthy and will promote productivity. Therefore, EAC will continue to focus inward to improve internal operations. The Design Team will continue to serve as a liaison between staff and management, making sure the lines of communication stay open.

EAC will continue to form strategic partnerships within the federal government, employ the use of technology to broaden our reach and deliver information to more people, and be responsible stewards of federal resources.


Section 251 Funds Received vs. Expended
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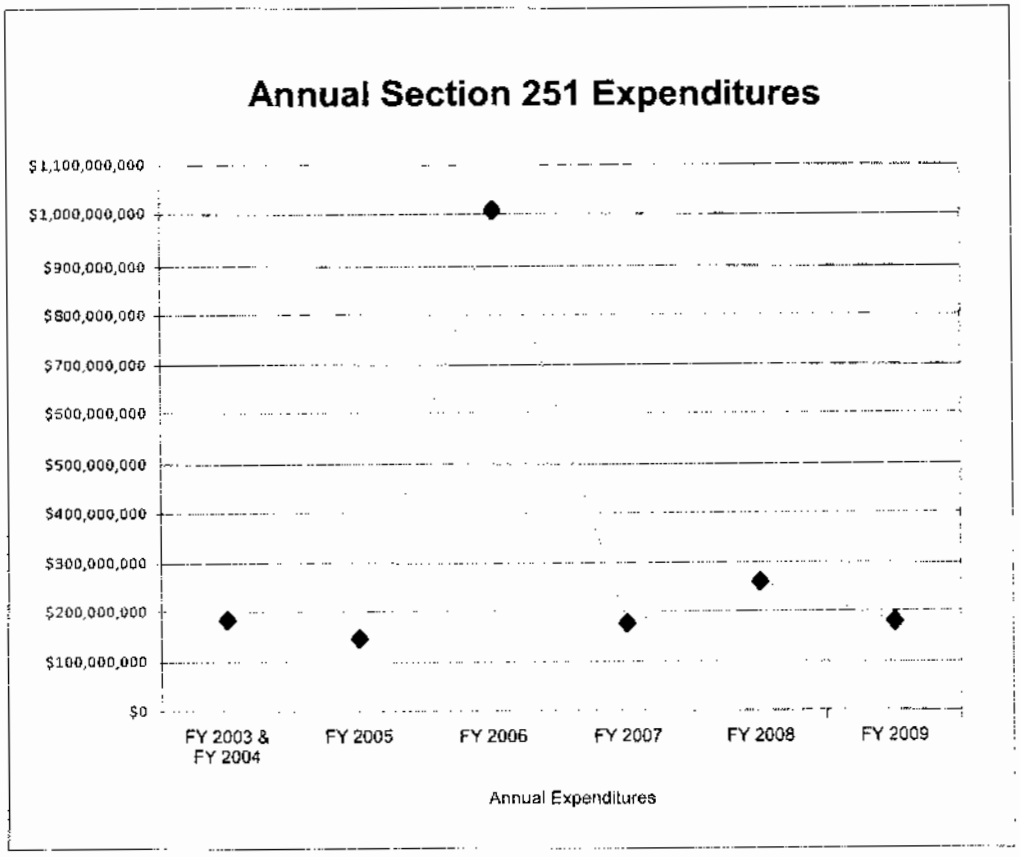
FY 2009 Activity
FY 2008 Activity
FY 2007 Activity
FY 2006 Activity
FY 2005 Activity
FY 2004 Activity


Annual Section 251 Expenditures
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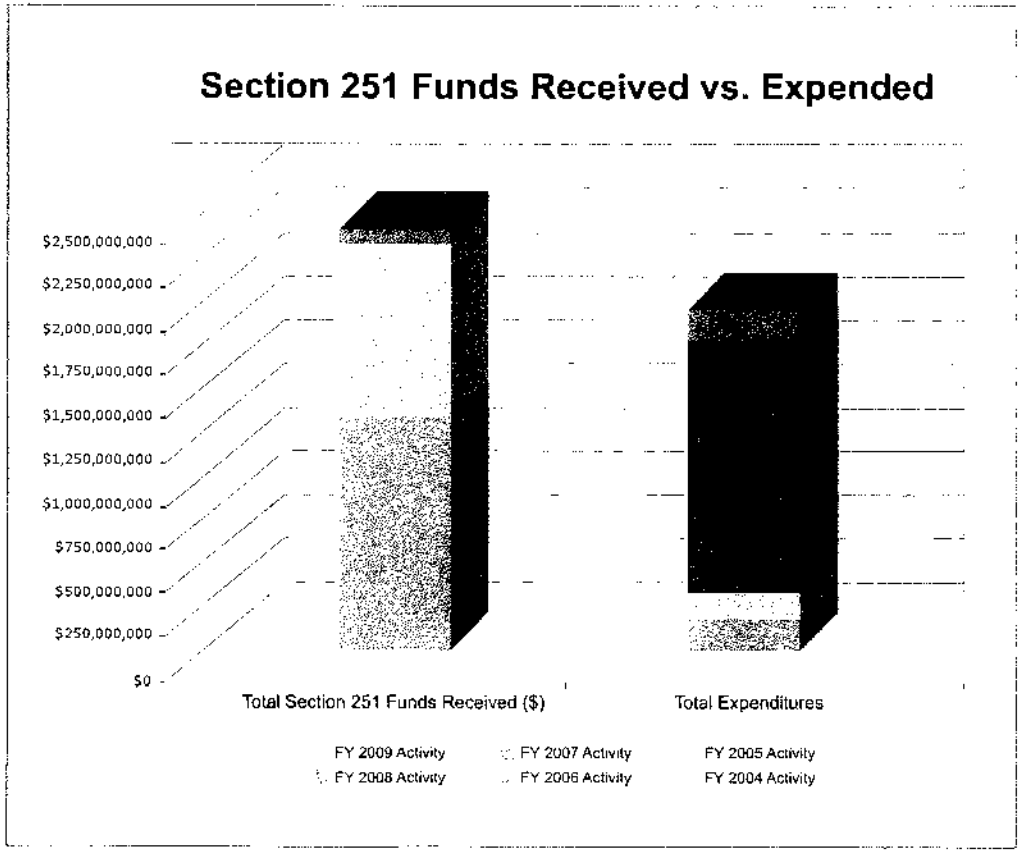
Annual Expenditures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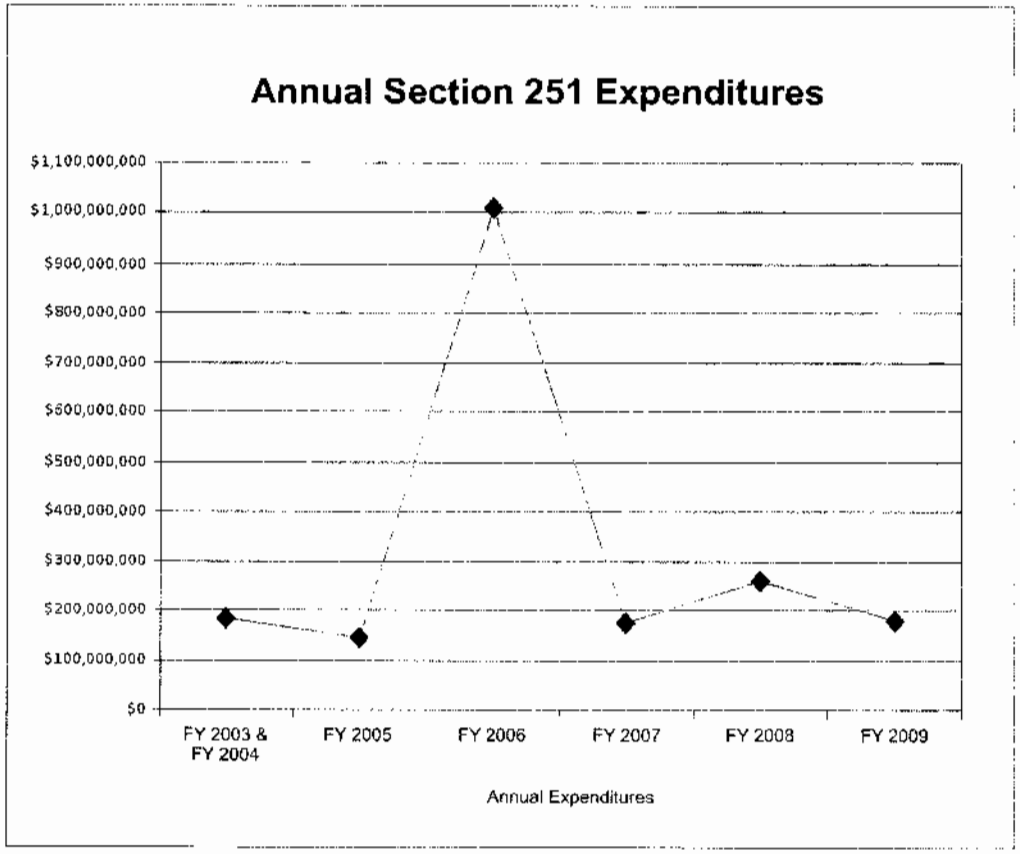
Annual Section 251 Expenditures
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$200,000,000
$100,000,000
$0
FY 2003 & FY 2004
FY 2005
FY 2006
FY 2007
FY 2008
FY 2009
Annual Expenditures

Mr. SERRANO. Thank you so much. Thank you for your testimony.

Two quick things come to mind that I didn't have prepared to ask. Refresh my memory. The five languages, the six languages, is that by law or is that—that is by law, right?

Ms. DAVIDSON. That is correct. The National Voter Registration Act requires that the languages be available in certain areas within the United States underneath Title—I want to say Title V requirements, but I am not sure that is right, and then there is that section of the National Voter Registration Act.

Mr. SERRANO. Okay. And, secondly, just on a personal level, when we say you were a local election official, you did it all at the local level, right?

Ms. DAVIDSON. I was a local election official in a very small county, very rural county. And then also I was the election official—elected county clerk in both of them—in a very large county. So I had the rural and the metro experience, and they are very different.

Mr. SERRANO. I just think that every so often we should mention people in this society who don't get much credit. Having been in elected office for 36 years now, some of the folks that work at the local level never get any credit; and I am not talking just about the officials but the folks that get up at 4:30 in the morning, for instance, in New York to be at the poll site by 5:00 to have those machines ready by 6:00, and then they are there until 9:00, and then they have to count. And years like last year, the count went on, just the lines of people outside and the whole thing; and they do it for very little money and with no fanfare. And so every so often in public we should give them a special thanks because, without them, it doesn't happen.

Ms. DAVIDSON. Absolutely. You are absolutely correct. They are really the vital source of our Election Day process. Without them, we couldn't conduct the elections.

Mr. SERRANO. Right. Congress provided $115 million in fiscal year 2008 and $100 million in 2009 and $75 million for fiscal year 2011 for grants to States for the purpose of helping them meet the requirements of the Help America Vote Act. What percentage of this funding has been distributed to States? What are the reasons for funding not yet being disbursed or used by the States? And, lastly, how fast are States spending HAVA funds relative to the rate at which this subcommittee has provided funds to them?

Ms. DAVIDSON. The States in some areas—it is State by State. Every State is different. I need to make that statement, first of all.

But we have appropriated all the funds except about $200 million of the funds, and that has been the later funds that have been given for us to appropriate to the county and—to the States, I should say, to the States—And the reason why they haven't been able to meet that 5 percent. We have been trying to work with the States to give them the flexibility. If they can meet part of that, we will give them the money that they—a portion of that 5 percent that they have met to give them that capability at drawing down some of their funds. But we do have some States that are really under dire stress.

Mr. SERRANO. And this stress is caused by what, their own inability to absorb the funds, their inaction, resistance? Is there any resistance?

Ms. DAVIDSON. Mr. Chairman, there is no resistance. If the States had the 5 percent match, they have to go through their own legislative process to get the 5 percent and their budget or their budget process, and it usually is legislative. Some States, as you notice, it took them 2 years to be able to get their money. Some of our States only—their legislators only meet every 2 years. So that is one of the things that holds up them getting them money.

And then the other thing is we have found that there is just as much problem out there with the States currently—the ability of meeting the financial needs, they just haven't been able to get the 5 percent. States have asked us for special ability—like Florida asked us if they could use their interest money to meet that 5 percent. We don't have that authority, obviously. So right now, no, we can't do that.

Mr. SERRANO. This was the interest money on——

Ms. DAVIDSON. That they had made on HAVA and haven't spent today.

Mr. SERRANO. I see.

Now, on a personal note, I know that my State of New York had some problems catching up to date, I would say. From your point of view, are we ready to go in New York? I know what they tell me, but are they ready to go?

Ms. DAVIDSON. New York, we are aware, has been spending money and buying equipment this last year. I think New York City was one of the last counties that actually purchased—or the city and county that actually purchased the equipment. So it is probably being manufactured and delivered as we are speaking, and it should be utilized in this next election.

Mr. SERRANO. Okay. That makes me a little nervous with September primaries and November elections. Not that I have a special interest, but——

Ms. DAVIDSON. Well, I can tell you, Mr. Chair, that we found—as you stated in your opening statement, it takes time for election officials to write new manuals when they get new voting systems, train their poll workers, train, obviously, their office staff and even training the voters to vote on new systems. So we had more problems. When we put all of the systems in at one time nearly throughout the United States, there were more problems. And, as you have said, the problems seem to have ceased this last election, be a lot less. We are always going to be training new election officials, but definitely we hope—and I know that they are working very hard at training everybody to make sure it is a smooth election for everyone.

Mr. SERRANO. Thank you.

Now, as you know, there are proposed budget cuts, a decrease of $75 million. We also know there are States that have the leftover dollars. So will all States be eventually impacted by the proposed budget cut in the elections reform program in 2011? How will States continue to be compliant in the future? In other words, what do States need in the mid to long term to keep up with the HAVA requirements?

Ms. DAVIDSON. You know, as I said in my opening portion, every State is different. I really think that you need to talk to the individual States. Some States have spent all of their money. Others have spent a percentage of it. But, really, it is up to the State, every State. How they have run their elections and how they run them, because of their State laws, is much different throughout the Nation. So it is by an individual State-to-State need.

Mr. SERRANO. Thank you. I can't believe that the chairman stuck to the 5-minute rule.

Mrs. Emerson.

Mrs. EMERSON. Wow, I guess I better be—don't start the clock yet. How did the Yanks do last night?

Mr. SERRANO. The Yankees were at the White House yesterday.

Mrs. EMERSON. Did you have fun?

Mr. SERRANO. It was fabulous. I yelled out, 28, Joe. Not meaning his number, but 28th World Series, the next one. Arrogant on my part.

Mrs. EMERSON. Did you have your picture made with everybody?

Mr. SERRANO. No, they wouldn't let us near them. It was terrible.

Mrs. EMERSON. When the Cardinals came from having won the World Series we got our pictures.

Mr. SERRANO. And I am a Cardinal, right?

The greatest time was when the President complained that the White Sox would probably never win a World Series again; and Joe Girardi, the manager, says, Mr. President, hold onto the Yankee trophy. He said, you better hold onto it because it will be the last time you touch a World Series trophy.

Mrs. EMERSON. Sorry. We have this little baseball competition going here. My Cardinals won last night, too.

Okay. Ms. Davidson, you said that the States are not allowed to use the interest money that they earn on the monies that they have received for purposes of their 5 percent match, correct? So what do they do with this interest money? What can they use it on?

Ms. DAVIDSON. That is correct. If a State has not met the requirements of Title III, they can purchase more voting equipment. They can use it on a voting registration system or improving it. A lot of States are having to improve their voter registration because of the MOVE Act. They can also use it on the procedures on doing the—let me stop and think. There are four reasons: provisional ballots, and then educating voters, and putting the information up in the polling place, also.

Mrs. EMERSON. Well, it seems to me, though, just looking at these numbers—for example, Missouri, which is my home State, received $44,914,650. They have spent 88.9 percent of their funds, which is—excuse me, no, that is plus interest—95.7 percent of their funds. So that is good. They are still sitting on $3,878,000 plus. And it seems to me that it is somewhat advantageous for the States to just be sitting on this money and not spending it because they are earning all this interest. So it multiples and they have got more money to spend, correct?

Ms. DAVIDSON. Of course, they make a lot less on the interest now than what they used to.

Mrs. EMERSON. But New York is sitting on $22 million interest. Missouri is on almost $3.9 million. They make less on interest, but it is still sitting there, and it is growing a little bit.

Ms. DAVIDSON. You are correct. That report is as of September 30, 2009, So there could be more expenditures made since that time.

Mrs. EMERSON. Since that time. Okay.

Now, given the fact that for every other government program known to mankind, practically, the State or the local match is 25 percent, 30 percent, even up to 40 percent, so 5 percent just doesn't seem a lot to me, given—and I am very sympathetic and understanding of the financial positions States find themselves in, but I am still looking at this list of how much money all the States are sitting on and I am wondering why we are sending the States—they are sitting on nearly a billion dollars worth of unspent HAVA grant money; and, given that our deficit is projected to be $1.6 trillion this year, why would we be giving these States more money? Please tell me why.

Ms. DAVIDSON. Well, what I can tell you is every State is different. Some of States have spent all of their money, including their interest money. There have been a few of those that have spent 110 percent. So that includes their interest money. Other States have spent an average of probably 80 percent. Some States are still holding on to probably about 50 percent of their money, and I imagine New York is in that category is shown there because they have just started spending the money this last year. So with the report being due in September of 2009, there is quite a bit of money to spend in that area since that time. But every State is so different. So it is hard for me to tell you why.

I can tell you from history that States know this money is not going to continue, and they are afraid they are not going to be able to continue meeting the needs of the contracting, supporting their voting systems. They know that voting systems only last about 8 to 10 years, and they know they are going to be up for a new allocation of money that has to be spent, and they are afraid where they are going to get that because they know the Federal money has not been appropriated for anything like that.

Mrs. EMERSON. We keep giving them money, though, so it seems to me—I don't know. Do you think it would be better for us to take back the money that we have got and wait for them to apply for grants and you all just hold it in D.C., as opposed to leaving it there for them since they are not applying for the grants in the first place?

Ms. DAVIDSON. I really don't have an opinion on that. The States being able to have it in their funds and spend it at the time—I do know that when we have money that has been allocated to give to the States it takes them a great deal of time to first meet the HAVA requirements, have a State plan, how they are going to spend it and have that put in the Federal register and then also do any type of expenditures they have to go through their appropriation that is required by State law. So it does take them about 18 months to be able to, from the time it has been appropriated, to be able to receive it and spend it is what we are finding.

Mrs. EMERSON. Could you provide us with some updated figures? Do you have any beyond September 30, 2009?

Ms. DAVIDSON. I don't—the laws require them to report on that time. Now——

Mrs. EMERSON. Do you mean like quarterly?

Ms. DAVIDSON. The reports are due September. So that is——

Mrs. EMERSON. Each year?

Ms. DAVIDSON. Each year. So I am trying to think if I could ask them to give us an additional report right away without going through the Paperwork Reduction Act. We do have to do that; and, as you know, that takes 3 to 4 months to get it through.

Mrs. EMERSON. Could you just send them an e-mail maybe?

Ms. DAVIDSON. I am sorry to say if I ask more than nine people, I fall underneath that. Even with an e-mail. But I will see if we have anything. I will report back to you.

Mrs. EMERSON. That would be awesome. Thank you so much.

Ms. DAVIDSON. I definitely will do that.

Mrs. EMERSON. Thank you.

Mr. SERRANO. Just as an aside, I am told that part of what is happening in the States is that the States are unsure what commitment the Federal Government will make to them as they move along. For instance, all the ones who are already on board now in 10 years will have to replace the machines. In the meantime, machines break down and so on.

Then there is the other point, I am told, where funds sitting there may have already been obligated in some way. So it is not that they are not spent.

Mrs. EMERSON. That is why I asked if we could get a midterm report by e-mail so we could keep the paper at a low level.

Mr. SERRANO. I am for paper, but—yes.

Ms. DAVIDSON. There is one thing that comes to light that has happened this last year, the MOVE Act. The MOVE Act has required several elements for the States to meet that will be additional funding that they will be spending of their HAVA dollars. And one of those is to make their system where they can send out electronically to the overseas and the military any blank ballots and election material. They also have to be able to track that ballot, the absentee ballot when it goes out and when it comes in and put that up on a Web site to make it available to the individuals.

So their systems will need work; and every time that we even ask for a change of our report, that costs the States money. So I can tell you that much. When laws are changed, obviously, that costs money for them; and they can utilize the HAVA dollars in meeting those needs.

Mr. SERRANO. Since I am lobbying my Republican colleagues for a bill that is on the floor on Thursday——

Mrs. EMERSON. He is being nice to us.

Mr. SERRANO. Mrs. Emerson is one of the greatest ranking members in history; and now I yield to one of the greatest members in the history of the world, Mr. Culberson, under the 5–minute rule.

Mr. CULBERSON. Thank you very much, Mr. Chairman.

We really do appreciate your service, Ms. Davidson. Thank you very much.

When a State election voting system is certified as accredited, you are looking not only at the actual machinery and mechanism the State uses for people to vote but their entire voting system, correct? You are looking at the way they conduct the election, the way that the State ensures it that people with disabilities or other language barriers have access to vote, that sort of thing. You are looking at the whole comprehensive system or just the machine?

Ms. DAVIDSON. I am sorry to tell you that I cannot meet your dream. It is just the equipment that we look at. We test it by the standards that have been set by the TGDC, NIST, and the EAC. So it is tested just to those standards.

Mr. CULBERSON. As I recall—and I know all of us were here after the—I think this law was initially passed in 2003, 2002—2002—in response to the problem with the Florida election and hanging chads and the punch card system. We are trying to find a way in Federal elections to make sure the votes are counted accurately and honestly, and I know that the money that the States are given as a part of the funding is to help them replace their old punch card system, correct? And we ideally want States to be able to move to an electronic system that has been certified as accurate by the Election Assistance Commission, correct?

Ms. DAVIDSON. That is correct.

Mr. CULBERSON. You also, I notice in your report, have as a part of your responsibility, in addition to making—there is a national voter registration form, some standards that if it is a Federal election—obviously, if it is a State election that is there, we, as the Federal Government, can't necessarily dictate to the States what sort of standards they are going to set in a State election. But if it is a Federal election, this national voter registration form, just a standard that was adopted apparently in 1993, that is also a part of your charge, is to make sure that States are registering and allowing people to vote that are qualified, correct?

Ms. DAVIDSON. That form is utilized by anybody throughout the Nation, along with the State form. They are not required to only accept that form. I mean, they have to accept that form, but they also can utilize their own State form. They also utilize the Federal form that FVAP hands out. That is the overseas and military form. So they utilize all those forms, but it is not mandated that is the only form they can use.

Mr. CULBERSON. What I am driving at is—and, also, I noticed you also help States with this funding they can also use to help keep their voter registration lists purged from people who pass away or are disqualified because of a felony conviction, et cetera; is that correct?

Ms. DAVIDSON. That is correct.

Mr. CULBERSON. What I am driving at is, how do we help ensure that States are registering people who are qualified, that are able to vote, and that we are not voting people that are either felons or otherwise disqualified because they are not a citizen, for example?

Ms. DAVIDSON. Everything that the Election Assistance Commission does is voluntary except provide the form and the rules that we have to go through to develop that form.

Mr. CULBERSON. But the States, by accepting the money, they are locked in to comply with the requirements of the Act.

Ms. DAVIDSON. Remember, we are an assistance commission. We can give them all kinds of assistance. They are not required to accept that. Even our testing that we do on equipment, that is a voluntary process. The States can utilize equipment that has been tested and certified by the EAC or they can go out and buy equipment on their own and it does not meet our qualifications.

Mr. CULBERSON. But once the State accepts the funding, they are not required to comply with any of the——

Ms. DAVIDSON. It is still an assistance commission.

Mr. CULBERSON. Have any of the States rejected the funding?

Ms. DAVIDSON. No, no States have rejected the funding. There was a couple of States that rejected the initial up-front funding to replace the—I believe that is the 102 money. The 102 money, they rejected that; and I think it was only one or two States that rejected it, wanted to keep their same system that they had.

Mr. CULBERSON. Who was that? What States?

Ms. DAVIDSON. Through the 102 money was to buy one piece of equipment for every precinct that met the needs of the disability community to be able to vote openly and fairly and confidentially. That it had to meet those standards, also.

Mr. CULBERSON. What, if anything, does the Commission do to ensure that the voter registration rolls are purged of people that have passed away, become convicted of a felony, or that the voter registration rolls do not contain the names of people who are not eligible to vote because they are not citizens?

Ms. DAVIDSON. We do not have any authority. We are not a regulatory agency at all in that area. The only ones that really review that is the Justice Department.

Mr. CULBERSON. Or the Secretary of the individual States—

Ms. DAVIDSON. The Secretaries of States and also the Attorneys General within their own States, obviously. Yes. But I meant at the Federal level.

Mr. CULBERSON. Thank you.

Thank you very much, Mr. Chairman.

Mr. SERRANO. Just an editorial comment. If there is something I know about undocumented folks is that they really don't want to be found out. The idea of going to a register to vote is like in your face, here I am, and it is just the opposite.

Ms. Lee, before you came in, I made a comment that I was being extra nice to all colleagues because I need your votes on Thursday. But you have been with me for a few years on that. I am still going to introduce you as the greatest Member of Congress in the history of the world.

Ms. LEE. Thank you very much, Mr. Chairman. And that vote on Thursday, I think it is extremely important in terms of democracy building.

Let me thank you for being here. I apologize for being late. I hope my questions are not redundant.

Let me just say, Ms. Davidson, I, of course, come—my congressional district is in Oakland, California, northern California. But I was born in El Paso, Texas. So I come from a State where there was a poll tax and I went through the civil rights struggles and finally got the right to vote, my family and friends. And so the protection of the rights of voters in the election process is very, very

dear to not only myself but members of the Congressional Black Caucus, to all of us.

After the Bush versus Gore decision, I once again became very concerned about the protection of the rights of our voters and the election process, from ballot issues in Florida to voting machine dysfunctions. There were real issues that needed to be resolved.

And since the right to vote is really at the core of our Constitution and at heart of the civil rights movement, I guess I am very concerned about how the Help America Vote Act of 2002 is being implemented, especially as it relates to, one, the commissioners.

Now, you can correct me if I am wrong. It is my understanding right now there are three commissioners and there is one Democrat on the Commission and the vacancy. I want to know how that affects the deliberations and the operations of the Commission in terms of the real imbalance in terms of political party affiliation and the important work that needs to be done. So that is my first question.

Secondly, of course, you know, the lack of diversity among the 37-member Board of Advisors and the 110-member Standards Board and the hundreds of election officers around the country, do you have a breakdown on the demographics of the Board of Advisors and the Standards Board?

Of course, we have 50 percent women in our country, 65 percent white, 15 percent Hispanic or Latino, 12 percent African American, 4.5 percent Asian American, 1 percent American Indian, point 2 percent native Hawaiian and other Pacific islanders, and 1.7 percent persons who claim two or more races. So I think it is very important to get it right because of the history of what we have been through in our country to make sure that diversity is there in a very clear way. So I would like to find out if you have that information. If not, could you submit to the committee?

Ms. DAVIDSON. The first question on the three members of the EAC commissioners, we are a nonpartisan board. We act as a nonpartisan board. There have been times when it has been one Republican and two Democrats with vacancy, is how it seems to work. But I have not seen that be a problem in any way, shape, or form.

The other question, the Standards Board is two members from each State; and one is appointed by the Secretary of State for the State and then the local individual is appointed by the locality. I do not have a breakdown of that board at all, and I am not sure I would be accurate in trying to guess the diversity of the nationality of individuals.

And, second, the Advisory Board is appointed by other people than the EAC, so we have never, ever had a breakdown there, either. I can tell you that the Standards Board is half and half Democrat and Republican. That is the only thing that the law made sure, that there wasn't a lopsidedness on that Board.

Ms. LEE. Well, I guess, Mr. Chairman, I don't know if we could ask the Commission for the breakdown in terms of gender and race on these boards. Because, again, it may be fine. It may reflect the diversity of our Nation, and it may not. And I think it is important that we know the background and the race, ethnicity, and gender of people on the 37-member Board and the 110-member Standard Board. Because if they didn't take diversity into consideration, then

we may not have a Board that is diverse. Or if they did, we are fine.

Ms. DAVIDSON. I will be more than happy to try to collect that information, but, again, I will have to go through the Paperwork Reduction Act to be able to collect that information for you.

Ms. LEE. That is fine. Whatever it takes.

Ms. DAVIDSON. It may take a while. But I would be happy to put that issue into action and be able to work on it.

Ms. LEE. I really appreciate it and just let us know what you think in terms of time frame, however long it takes. But we need to know sort of the time frame it would take to get this.

Ms. DAVIDSON. I will try my best in as short of time as possible.

Ms. LEE. Thank you.

Ms. LEE. Finally, let me ask you about the needs of Americans with disabilities and access to voting machines, written ballot, and other ways to verify that the vote that they believe they are casting is actually the one cast. How are we moving in terms of Americans with disabilities? My sister has a disability, and I am very in tune with the needs of the disabled in terms of the voting machine issues and all the barriers that have been there for the disabled community.

Ms. DAVIDSON. You are absolutely right. And with the Help America Vote, that was one of the main issues that was in that main legislation.

We have done several things. The equipment that is out there, we have pushed very hard to make sure that we are meeting more and more disabilities. You have got to remember somebody could have more than one disability as they go to the polling place, and it is very important by law they be able to vote independently and privately. And so we are working very hard on that.

We also received an $8 million grant to move forward on a study for the disability community on equipment, and that grant is getting ready to go out. Part of that grant we are doing with the injured military voters, that we have about a $500,000 grant that will go for a tally vote either later today or tomorrow, for the commissioners to vote on. And that is to study what the needs are of our individuals returning back from the military with some type of—being injured and meeting that need. So that is part of that $8 million grant.

The rest of it will go out very shortly for study of disability issues and needs that we can improve upon in the future. So we are hoping that that grant is very popular and we get a lot of information.

Ms. LEE. Great. That is very important. But it is hard to believe that we are just going to begin to study it. Don't we have the data already that show what the needs of the disabled are and how to effectively ensure that they vote—have access to voting?

Ms. DAVIDSON. We did a roundtable in the last of 2009 with the community that was really all the community from the diverse community of disability. And what we found was that education was one of the things that we need to be doing more on as well as the equipment. The equipment that we have, the DREs, met more the needs of the disability, but that was the equipment that came up where the public felt—or some of the public felt that it was not as secure as it should be.

Ms. LEE. What happened to Diebold, parenthetically?

Ms. DAVIDSON. Diebold has been purchased by ES&S, and that is being reviewed by the Department of Justice, whether they can purchase that. It is an issue that is being—it is clearly not a complete decision that has been made on that, whether that purchase may go forward.

Ms. LEE. Good. I am glad of that.

Ms. DAVIDSON. But the direct record machines, there are still several States and localities that have that. They have in a lot of areas put paper with it to make it where the public feels it is more secure.

Ms. LEE. Thank you.

Mr. SERRANO. Thank you.

Chair Davidson, what are the top priorities that need to be accomplished before the 2010 midterm elections to ensure that the election is fair, open, and accurate? I said in my statement that you are not seen as a big agency, but you have a major responsibility. And these elections don't get boring in this country. They get more exciting all the time. And I expect these midterm elections are going to be heated, and you are going to see reports on TV saying that people are registered who shouldn't have registered and machines are not ready and States are not ready. So what needs to be in place, in your opinion, to make sure that the right election is conducted in terms of having every vote counted properly and what steps are the States taking to prepare for the midterm elections? What role are you playing with the States?

Ms. DAVIDSON. First of all, the role we play is to try to provide as much as we can throughout the Nation of educating our election officials. When you stop to think about it, three-fourths of our election community, whether they are county or municipalities that are running the elections, are small. They are small to medium size. We only have a few large. So being able to get the information out to them, even if it is on the Web site, we find not always do our municipalities and counties get this information and utilize it.

Being able to share our information that we have developed is one of the biggest things I think that we need to try to improve upon. We send it out, but it seems like it doesn't get into the hands of the people that really need it.

It is on the Web site. We go to conferences. We will go to any State conference and talk about the information that is out there.

I will say that I think that is being spread far more than what it had been in the past. I was just at an election conference that was held in Seattle, and part of the presentations were even on our work that we do at the EAC, the type of information that we have to go out to those localities. And even in the audience they were talking about other portions of our program that we have done, whether it is laying out your ballot properly to make sure that it is not confusing to the voters, as well as information at the polling locations, hiring poll workers, recruiting, maintaining the poll workers.

We have got to distribute about 22 different documents that have been placed upon our Website quick starts that will be really easy for the counties and localities to read and to be able to improve upon their elections. Security, testing equipment before an election

and also doing audits after elections, information there, how valuable that is for them to know the process and to do it right. So getting the information out is very important to the Election Assistance Commission because that is information that would help every locality.

The other thing is States are very dedicated, as you said, in your opening remarks. States and localities, they are very proud of their election officials and maintaining and running that election fair; and making sure that all of their citizens are able to register and to vote and to have their vote counted is very important to all of our election officials. And they are learning more and more about pre-testing, L&A testing, and testing after the election to make sure the election was run accurately and without any problems.

Mr. SERRANO. So, with that in mind, how reliable would you say were the voting systems that were used in the 2008 election?

And, also, I understand that the Election Commission always conducts a survey after an election, but since 2004 this survey has not collected information on voting system performance or malfunctions. So in the absence of a formal survey in 2008, did you receive reports of voting machines not working or possibly recording a vote inaccurately and what, if anything, how extensive was this and what role have you played? How do you feel about the equipment that will be used this November? And, secondly, what kind of reports have you been getting about the past?

Ms. DAVIDSON. First of all, I feel good about the equipment that is out there. 2008, the equipment ran very well.

I will tell you we do have one open-ended question on our survey, because we thought they would fill that out and we would get more information on any type of anomalies they found within their election during the process. We never received any answers whether we had questions on there before or not. But we are finding States are reporting to us when they do any type of testing themselves, reports that they have conducted within their States. Those are up on our Web site. They have presented those, and they are up on the Web site.

Now that we have certified equipment, it is also part of our procedures and our manual; and a manufacturer has to do this just to keep his manufacturing capability, is he has to report if he has been certified by EAC any anomaly that takes place in the election process to the EAC immediately. So, in the future, that is how we will get it; and it will be more accurate and up to date than if we wait until a report after the election. We will get that immediately so we can notify our localities of any issue that they need to be aware of before Election Day, possibly, rather than after the election and not notifying them.

Mr. SERRANO. Did you get many reports in 2008 or were things much smoother than—I was going to say in 2000, but that is unfair. Everything is smoother than in 2000. Well, it was——

Mrs. EMERSON. That is true.

Mr. SERRANO. I think we all agree, right? They are still counting votes in some places.

Mrs. EMERSON. They counted them twice in my place.

Ms. DAVIDSON. We did not get any anomaly reports from the States.

Mr. SERRANO. You what?

Ms. DAVIDSON. We did not get any reports from the States that there were problems in the 2008——

Mr. SERRANO. Okay. One of the areas that I am very excited about—and it is a small area—is mock elections. I really believe that education and civic engagement begins in a person's youth. The Mock Election Program is a grant program under the EAC that allows students to participate in simulated elections with actual voting equipment, ballots, and poll workers. And I tell you, I wish there was one in every community in the Nation, because I think it is a great idea.

Can you give us an example of one or two programs that have been implemented under the Mock Election Program and what kind of impact are you seeing, how are the grant recipients engaging the students?

Ms. DAVIDSON. I can. In 2008 and in 2009, we gave out each year $300,000 worth of grants. That was each year. Excuse me. Two of those that were so successful, one was in Miami which they are even this year having two schools a day teaching the students about election process and even allowing them to vote on voting equipment, and this will last for 3 months. So this should include educating students on election——

Mr. SERRANO. Is that the whole city of Miami, the school district, or what?

Ms. DAVIDSON. Miami-Dade County I believe is what it is called, a county.

Mr. SERRANO. It is two schools a day?

Ms. DAVIDSON. For 3 months. So that will contact many students. I cannot tell you exactly how many it will. They have to report that after they get through with that grant, so we will have a report on that when it is finished.

Mr. SERRANO. We would like to see that.

Do you know offhand what the actual work with the students consists of? I mean, I remember about 25 years ago I set up a program in my district where I had the local—I found out that the local middle school, one of the many local middle schools in my district—at that time, my State assembly district was having a student election. I said, why don't I provide a couple of voting machines and you will have inspectors and have a table and you will have to register ahead of time and register with a party and then you can vote for any candidate. And we took them through the whole thing.

And we found out a few years later, according to the principal, that that graduating class eventually in high school had a very high participation rate in the local election because we had used those machines.

So do you know what it entails, what it actually entails?

Ms. DAVIDSON. I do. I do have that in front of me.

The election department will run a Mock Election Program to introduce to the high school students a new optical scan voting system. The mock election will be conducted as if the school were an actual precinct. The school students will serve as poll workers and as judges. And that is what they do on each one of them.

We think this will be utilized by over a thousand students, and we are also going to do a video of this so that we can put this up on the Web site to educate other people that come into our EAC Web site to learn from that.

Mr. SERRANO. I commend you for that, and I would hope that continues to grow. I think that is very, very, very key. And at these mock elections, Mr. Culberson, maybe you allow everyone to vote, just in case they become citizens later.

Mr. CULBERSON. Don't ask, don't tell.

Mr. SERRANO. Mrs. Emerson.

Mrs. EMERSON. At least we have fun, right? That is a good thing. And I thank you.

I actually chaired my college mock election probably back in—I didn't run for anything. I didn't want to run for anything. I am an accidental Member of Congress. It was a wonderful experience, particularly for those of my fellow students who were not at all politically involved; and they learned a lot. And one of my daughters did the same thing when she was in college, too. So I commend you all for that. I think it is great.

Let me ask you a little bit about staffing, if I might, please. You all are authorized for 50 full-time employees, and your budget is $17 million. How many staff people do you have on board right now?

Ms. DAVIDSON. I would say it is possibly 40, is what I am guessing. Forty-two is what I was just told.

Mrs. EMERSON. Can you give me a sense or give all of us a sense of what percentage of your staff are involved directly in such activities such as grant management, election studies, writing guidance, and what percentage play a strictly administrative role?

Ms. DAVIDSON. The administrative role is 21 out of the 42.

Mrs. EMERSON. So then the other 21 are involved in the other sections. I am curious, because you are a small agency; and I know you have a big mission. But with 50 full-time employees, or the ability to have 50, and a $17 million budget, I think I am confused as to why you have an executive director, a chief operating officer, a chief financial officer, and an acting director. I mean, do you really need all of those people at the top end of the administrative, as opposed to actually working in a liaison function with the State, et cetera? That is a tiny agency to be so top-heavy in management.

Ms. DAVIDSON. You know, when I came to the agency, I believed the same way you did. But we went through our first audit over a year ago and failed it miserably.

Mrs. EMERSON. That was because?

Ms. DAVIDSON. That was because we were even told in our audit that we needed to hire these positions, get people that had expertise in there to be able to handle the job. We hired not only the CIO, but we hired the auditor. We came out this last year with a clean audit. In one year, we changed the way we were working. We had relied on other agencies,

In our audit, also, it showed that we had not met anywhere near the needs of the requirement of developing procedures and guidelines to meet the Federal requirements. We walked in there and started doing what HAVA told us to do; and, being a new agency, we didn't think about that we had to meet all of the requirements

and all of the rules and regulations that the Federal Government had set out. There wasn't a handbook on how to form an agency, and we weren't doing a very good job of it.

Mrs. EMERSON. Who all gave you an audit, the GAO or who it was?

Ms. DAVIDSON. No. We had to be audited because of the amount of money that we get in. We had to be audited by our Inspector General, and he had to go out to a special—it was a special audit because of the amount of money. So it was a higher audit.

Mrs. EMERSON. Was it an outside contracted audit?

Ms. DAVIDSON. Yes, it was an outside contract that our IG went through to audit our agency. And the first one we did fail. But the second one we worked very hard at meeting all of the requirements of the Federal Government, and we passed that audit this last time, and we were very proud that we passed it.

What we found and what I have found to be personally—you know, to open up really with you, is, yes, we are a small agency, but we have to meet every requirement that the Federal Government sets out, no matter what size the agency is. There is no different requirements for us than there are for others.

Mrs. EMERSON. I understand. No, I understand that. It just seems to me, when there are only 50 people, to be top heavy that way, I mean, you wouldn't run a business that way. But you know that as well as I do, if you, in fact asked the same question.

Now that you have gotten a clean audit and everything is squared away—I know that, over a year ago, the Commission interviewed and made an offer to an individual to backfill the general counsel position and then subsequently withdrew the offer; and I know that that person then took the issue to the Office of Special Counsel and claimed he was denied the position due to his political leanings. The Office of Special Counsel ruled in favor of this individual's claims that you all had wrongly denied him the position, and I am told that you all have now reposted the position. So have you identified anyone to backfill the general counsel's position and what will you do to make sure that the next candidate is handled in a fair and unbiased manner?

Ms. DAVIDSON. EAC takes this situation very seriously, and we are working now to make changes to improve our hiring process, and we are committed to a fair and rigorous process in doing so.

Currently, the applications process has been closed. They are being reviewed to make sure that every candidate meets the minimum requirements.

Mrs. EMERSON. So do you know when you might be hiring this person?

Ms. DAVIDSON. Hopefully very shortly. We are all excited, and we are ready to hire. We have been without a counsel too long.

Mrs. EMERSON. So then you are going to have an executive director, a CFO, a COO, an acting director, and a general counsel. You couldn't combine those position, huh? I am having issues with this many for a 50-person—and I understand, but I am not satisfied with the answer: That is the way the government tells me to do it. It is not personal towards you. It is just stupid, in my opinion. But I appreciate your commitment to trying to make this Commission work properly.

Ms. DAVIDSON. And if I haven't answered it properly and the staff didn't feel like I have, we will make sure that you get additional information.

Mrs. EMERSON. Thanks. Thank you.

Mr. SERRANO. My dear, dear friend, Mr. Culberson.

Mrs. EMERSON. You didn't say my dear, dear friend, Mrs. Emerson.

Mr. SERRANO. I said the greatest ranking member——

Mrs. EMERSON. You then called her the greatest. You called Barbara the greatest.

Mr. SERRANO. She has been with me on that bill for 6 years now.

Mrs. EMERSON. I see. If we go with you on the bill, that means we rise up in your esteem?

Mr. SERRANO. You would be like the greatest of all time.

Mr. CULBERSON. Thank you. Thank you, Mr. Chairman.

It does look like the Attorney General—I was going back through the statute trying to refresh my memory, and the uniform and nondiscriminatory election requirements in the Act, do you enforce those at all or is that entirely up to the Attorney General?

Ms. DAVIDSON. Would you repeat your question?

Mr. CULBERSON. This is your enabling Act, Title 42 of the U.S. Code, looks like it is section 15.401 in the following sections. Title III looks like the requirements for uniform and nondiscriminatory election technology, that the States have to have an accurate voting list, et cetera. The question I was asking you earlier, a State does have to certify it looks like to the Commission that they are in compliance with the requirements of the Help America Vote Act and they file that certification with you, correct?

Ms. DAVIDSON. That is correct. And we have 21 States that have filed that and met those requirements. And it is not only that they have to meet it. They have to continue to meet that yearly. That is even their precinct, whether they are accessible to the disability. It falls down to that level, as well as equipment and the voter registration. But it is a self-certification.

Mr. CULBERSON. Right. You don't confirm the accuracy of the certification?

Ms. DAVIDSON. No, we don't. That is for the Department of Justice. We have no authority underneath the law to do so.

Mr. CULBERSON. You have no authority to confirm the accuracy of the certification given to you by the States?

Ms. DAVIDSON. What really happens is——

Mr. CULBERSON. That is implicit. I would think.

Ms. DAVIDSON. If there is any indication that something is not right, we can ask our Inspector General to go out and audit the State and to see, and then his audit—he will review that audit to see if they are meeting what he feels. That is the only thing we can do, is really turn it over when we feel that somebody hasn't quite met it or we ask for more information when they send in their certification. It is a pretty simple process for them to say they have certified, that they are compliant.

Mr. CULBERSON. I notice there is also a section in the enabling act that allows State election officials in Texas, the Secretary of State, to enter into an agreement with the Social Security Administration to cross-check the voter registration rolls, for example, in

Texas against the Social Security list and to try to ensure the accuracy of the voting list. Do you have that information about which States have entered into an agreement with the Social Security Administration to cross-check their voter accuracy, the voter registration list? Could you provide that to me?

Ms. DAVIDSON. I don't think I have that.

Mr. CULBERSON. That has to be a part of your jurisdiction. It is in your enabling act.

Ms. DAVIDSON. Well, one of the things that they do is some States have an agreement with the Motor Vehicle Department because they collect it, and they check it every time with them. So they get it through the Motor Vehicle—they don't get it just directly through the Social Security. We have got——

Mr. CULBERSON. From the Federal Government, who makes sure that those—other than if you get a complaint, for example, and you perform an audit and in this case with the Social Security Administration cross-checking the accuracy, a list with the States, wouldn't that be within your jurisdiction, if there is such an agreement, that it is being carried out in a way that is accurate and fair and keeps the Social Security records confidential?

Ms. DAVIDSON. I will double-check. But we don't have any authority, I don't believe, at all in that area. But I will double-check and get back with you. Because if I am wrong, I don't want to give the wrong information.

Mr. CULBERSON. I would like to know which States have that agreement and particularly in Texas. Do we have it in Texas?

The problem is, in some jurisdictions, there has been a recurring problem with people who are deceased or felons or not eligible voting. Now the computer technology has gotten so good it is possible to cross-check those lists, and the statute does authorize the State to enter into an agreement with the Social Security Administration to cross-check those lists. That is a really important way to confirm the accuracy of the voter registration rolls, and I would be grateful if you could tell me which States are doing so.

Mr. CULBERSON. All of Title III then, what authority do you have to ensure that States are in compliance with the requirements of the Title III, the uniform and nondiscriminatory election administration requirements?

Ms. DAVIDSON. We don't have any authority.

Mr. CULBERSON. Any authority at all?

Ms. DAVIDSON. No. We are just an assistance commission, and we don't have any authority. It is only the Department of Justice that has the authority to go out. If we see clips, we turn those clips over sometimes to our IG to go out——

Mr. CULBERSON. Clips?

Ms. DAVIDSON. Newspaper clips that there is a problem in some States how they are spending their money that possibly we don't think meets the requirements of HAVA. So we turn that over to our Inspector General.

Mr. CULBERSON. Do they take it to the Department of Justice?

Ms. DAVIDSON. And then if there is something in our report that we feel that States are not giving us, our full report goes to the Department of Justice, and they review it.

Mr. CULBERSON. Do you do anything or could you provide me with information on what enforcement actions the Department of Justice is taking?

I notice at the end of Title III it does say that the Attorney General—excuse me—in Title IV, Section 401 of the Act, the Attorney General may bring a civil action against any State or jurisdiction for declaratory or injunctive relief, a restraining order or a permanent injunction to enforce the provisions of the Act. Is that something you monitor or work with them? And could you provide us with a list of what civil action the Attorney General has taken, where and when?

I am still trying to figure out—I have to tell you, I tend to agree with Mrs. Emerson's comments about overloaded bureaucracy. You all have a lot of noble purposes, but it really just seems to me from first blush you generate a lot of paperwork, a lot of reports, a lot of paperwork and a lot of busywork. And it just doesn't seem like there is a whole lot of beef here, a whole lot of substance to what you do because you say you don't have any enforcement authority.

What can you tell me about what the Attorney General has done under Title IV? Could you provide my with information on what civil actions the Attorney General has taken to enforce the Act?

Ms. DAVIDSON. I can ask the Attorney General to give us a report.

Mr. CULBERSON. You don't monitor that?

Ms. DAVIDSON. They do not give us information. They don't keep us up to date when they are going out to even look into a State or a county. They don't keep us in their—we have asked to be acknowledged and know more information.

Mr. CULBERSON. The chairman has been very generous with his time. And you all have a noble purpose. Mr. Chairman, there is clearly a need for Federal funds for some States to update the voting machines to go from the punch cards. I don't know what purpose this agency has got. This might be a good place to look to save some money.

Thank you very much. I appreciate it.

Mr. SERRANO. It is interesting that you are bringing up the issue of possible voter fraud. I recall we had an issue here a few years ago where the agency had hired a contractor to look at the issue of voter fraud and some very serious newspapers reported that indeed the issue was not that there was voter—that voter fraud was not a problem, but voter intimidation was, and that some folks allegedly at the Justice Department got involved in what the final report should look like, and the final report said voter fraud was the problem when the initial draft report said voter intimidation was the problem, not voter fraud.

Mr. CULBERSON. If I may recall, also, the Black Panther suit that was dropped by this Justice Department was a real concern because there was videos of these big thugs running people off from the polls. And the previous Justice Department pursued those guys, and then this Justice Department dropped them. That is a problem on both sides.

And if I may share with you a story. It illustrates the problem with elections. My grandfather was actually a Federal election poll watcher in South Texas in Duval County, the famous Box 13 in

Lyndon Johnson's election. This in the 1940s. And my grandfather noticed that a lot of the migrant voters were coming in that had a piece of string with knots in it. And they would come in to—this is why I am so interested in this. My grandfather—I grew up with this, the problem in South Texas and particularly——

You will love this story, Mr. Chairman. It is relevant to the Commission.

But my grandfather noticed that these people would come in to vote, and they had a string with knots tied in it. And they would lay the string down next to the ballot; and wherever there was a knot, they would check off the ballot. And then they would take the string, and they would hand it to the next guy, and he would come in and lay it down.

My grandfather as the Federal election watcher studied that for a minute, and he finally instructed the poll workers to hand them the ballot upside down. And because these poor folks were illiterate and they were using the string, they would lay it down there and it screwed up their whole system. This is Duval County, Box 13.

Mr. SERRANO. And you thought this was bad? From strings—that is before it became a palm card. Now you have got a palm card outside the polling site telling you put a check next to Serrano, put a check next to Serrano, put a check next to—and don't vote—yeah, but——

Mr. CULBERSON. These guys can't enforce it. That is what worries us. We want you to be able to——

Mr. SERRANO. I am just telling you that that might have been just the way to tell people how to vote. That happens all the time. They are called ads, too.

But, anyway, I am not making light of it. I understand what you are saying.

Let us move on for a second to Military and Overseas Voting Empowerment, MOVE. What is the status of States implementing MOVE and can States use HAVA dollars currently distributed to address the new requirements of the MOVE Act?

Ms. DAVIDSON. The States have been asked by our department to send us a letter if they are not able to get a plan in to how they are going to spend it under the MOVE Act. And we are supposed to be receiving those by May of this year.

I would tell you probably we will receive every different way that you can think of meeting the MOVE Act because our States are all different. Can they use HAVA money? If they are Title III compliant, they can spend HAVA money as much as they need to. If they are not Title III compliant, it depends on how they are going to spend the money. If it is a voter registration system, improving that, they probably could spend it under Title III and not be compliant. But there is about $350,000 that each State can spend on it without being compliant. So they can spend some, but they may not be able to meet all their needs.

Mr. SERRANO. I am just concerned that as we get closer to these elections and then to the 2012 elections, or any other, actually, for that matter, that we are not where we need to be with the military and the overseas voters. And that is key. I mean, we spend a lot of time in this country making great comments, as we should, about our troops. And then not to give them all the help they need

in making sure that they get to vote is just a shame. So I would hope that we continue to stay on top of that and make it possible.

Ms. DAVIDSON. We also have a pilot program that the EAC has been working on for several months. Even before MOVE, we started working with NIST and the Federal Voting Assistance Program to develop a pilot program that would be put into an area outside of the country that voters could vote on. It would be a kiosk-type system and would have a backup of a paper. But it allows people to vote right there at their locality.

Plus, the MOVE Act has added more time to the ballots to be out. Hopefully, that will help our overseas voters.

We are continually trying to get information and putting information out to the States on how they can help their overseas and military voters. Many of the States have moved forward, putting a lot of the information up on their Web site and providing blank ballots to voters so they can vote early and get those ballots back in time. It cuts away that time of mailing a ballot out and getting it back in so they can get the ballot to the voter.

Mr. SERRANO. Well, I hope we really stay on top of that. That is of interest to all of us. I know Mrs. Emerson and I share the same thoughts on this.

The impact of the census and redistricting. As a result of the census, 2012 elections will be the first year the States will face redistricting since the passage of HAVA. How will the 2010 census impact State spending of HAVA funds?

Ms. DAVIDSON. For the States, the census could affect them in several ways. If there is a locality that has growth in the community, they will have to have more precincts, more equipment. If they are bilingual, they will have to create their ballots and their voting information in the languages that are required. We have a lot of that information that we have already done, but if there is also more languages added, obviously we will have to start working on that and getting it provided for them. There are also more judges that could be utilized and things like that. So it depends on how the census creates or breaks up a county or a municipality in their voting. It could make more precincts. Definitely, the census is something that the States are considering and knowing that they have got to work through.

Mr. SERRANO. Now, I suspect that the census will show that we have become yet even more a diverse Nation, which will require special needs. Will States be able to use HAVA funds to address an increase in alternative language communities for ballots, polling, and place signage?

Ms. DAVIDSON. Yes, Mr. Chair, they will. They will be able to use HAVA funds to make sure that the signages are in all languages and the ballots and everything like that so they can use HAVA funds.

Mr. SERRANO. Thank you.

Mrs. Emerson, my dear, dear, dear friend, Mrs. EMERSON.

Mrs. EMERSON. Thank you, Mr. Chairman.

MS. DAVIDSON, you may remember that Congressman Lungren and I recently raised concerns about some of the Commission's contracting practices; and we specifically raised questions concerning EAC's practice of awarding contracts noncompetitively or in in-

stances where you all only received one bid. We additionally asked to what degree you contract out positions at EAC that include inherently governmental roles. So I have a few little questions about that.

First of all, can you explain what you all are doing to make sure that this practice of awarding contracts on a noncompetitive basis remains limited?

Ms. DAVIDSON. When EAC was formed, there was a lot more contracts. Because we didn't have the employees to do the jobs, a lot of contractors were hired. Since that time, the contracts have come down. We are bringing the contracts down constantly in our agency, and that is one of the reasons why people were hired to do some of the work.

Mrs. EMERSON. So how many contracts do you all have outstanding right now?

Ms. DAVIDSON. I am sorry. I don't have that right in front of me, but I will get it for you. I remember the letter that I sent and listed all the contracts, but they went back for 3 years. So I cannot tell you——

Mrs. EMERSON. If you can just get that information to me some time—you probably have it readily available. Someone in the staff does.

Ms. DAVIDSON. I think that we do. So I can get that to you right away.

Mrs. EMERSON. Right. Normally, I am not a big fan of contracting out inherently governmental functions. However, in some cases, if there is something temporary to be done, it makes less sense to hire someone permanently than it does to make the contract. So it is concerning. And if you could get that information from obviously how many contracts you all started, where you are today and whether or not some of these are inherently governmental roles and some are not.

Let me ask you a little bit about grants. Your budget request shows an amount of $740,000 for grant funding in 2011. This is a reduction of $300,000 from 2010. What is the amount requested for each grant program for 2011 and what changes were made for each program from 2010?

Ms. DAVIDSON. What we have in that section is just the poll worker grant, over $700,000. The mock election, because we made those a 3-year grant in 2008 and a 2-year grant in 2009 knowing that money was tight, those are ongoing grants right now. We didn't ask for the $300,000 until the mock election.

Mrs. EMERSON. I see. Can you tell me how much of your grant money went to ACORN or any of its affiliates?

Ms. DAVIDSON. We had two contracts underneath, that we had Project Vote that got money—I think it was 2007, maybe 2008. I am unsure of that. But there were two grants in 2006, it looks like. So it amounted to around $16,000 each. There were two of them, and they were given to Project Vote. We have asked our Inspector General to investigate that and to get a full report on if it was allocated to ACORN and how it was spent. So we have asked for an investigation.

Mrs. EMERSON. Do you have measures in place now to assure that no grant moneys will go to ACORN or any of its affiliates? I

realize that a lot of ACORN has closed down, but they have also renamed themselves. So——

Ms. DAVIDSON. If we know the affiliates and we know—that would be something we would look at when grants come in.

Mrs. EMERSON. But you don't have any specific measures in place right now with regard to that; is that correct?

Ms. DAVIDSON. Well, we ask for affiliates; and so that will help us in that way. But I don't know what kind of measures you are talking about.

Mrs. EMERSON. Just a policy that says no money is going to go. We put it in law, but——

Ms. DAVIDSON. We are following the law. So that is where we are at.

Mrs. EMERSON. Just because knowing or doing the research necessary to be able to recognize some of the new names of this organization, I mean, that hopefully is ongoing among your staff.

Let me ask you——

Mr. SERRANO. Excuse me a second. I am just confused, and I am not trying to be difficult. Didn't the court just rule that we couldn't have done that to ACORN?

Mrs. EMERSON. I don't know the answer.

Mr. CULBERSON. A district court did. It is on appeal. The statute still stands until——

Mr. SERRANO. Okay. All right.

Mrs. EMERSON. Let me ask you, have you all ever considered conducting a study to determine the unique requirements of meeting the needs of voters in both urban and rural settings? I have a very, very, very rural, very rural district with 28 counties. I just want to make sure that all of my voters have the ability to vote, and I just am curious if you all have ever considered doing something. And then there are equal challenges in urban settings. One of my big issues would be transportation to get to a poll, if you will. And you might not have that in the city where there is public transportation, but we don't have that. I am just curious if you all have ever thought about it.

Ms. DAVIDSON. We are doing a study currently. We are just getting ready to start it. We are selecting people from localities that would be willing to serve on that. So if you have somebody in mind that is from your district, we would be more than happy to put them on that.

You are absolutely right. It is very different for an urban county. And with money being tight, they close precincts. So it means further for them to drive. That also means, then, there needs to be consideration for those voters, how can they vote. Maybe early voting where they could go to the poll when they go shop for groceries before the Election Day. Or absentee ballots given to individuals that live so far away from a polling place. It is a real problem.

I understand where you are coming from and we do at the agency. The cities have their issues and how they are meeting them. They can meet it in some ways with technology, but that doesn't work for a small county. So we are very aware that there are some real needs for a study there, and that is beginning to start. So I welcome if you would like to have somebody put on that committee.

Mrs. EMERSON. That would be wonderful. I appreciate that offer, and we will definitely get back to you sooner rather than later. I am thrilled you are doing that study because—I mean, people who live in cities can't imagine the issues that folks out in the rural area have and vice versa. So I am grateful that you all are doing that. Thank you.

Ms. DAVIDSON. Not a problem. I understand that well, because I have served different sizes of counties, and my job was completely different.

Mrs. EMERSON. Thanks.

Mr. CULBERSON. Thank you, Mr. Chairman.

Mr. SERRANO. I am going to introduce to everyone the immigrant's greatest friend, Mr. John Culberson.

Mr. CULBERSON. The legal immigrant's greatest friend.

Mr. SERRANO. Try to ask a set of questions without immigrants in it.

Mr. CULBERSON. Actually, this is about military personnel and following up on——

Mr. SERRANO. You don't have to be a citizen to serve in war in the military, right?

Mr. CULBERSON. In fact, it entitles you to go to the front of the line to become a citizen, God bless them, if they serve in the military, which is really a wonderful provision of the law.

I wanted to ask about military people, service members voting. I know in Texas, for example, if you mail in a ballot to vote, as long as the postmark is on or before Election Day, the clerk will count it. That is pretty standard, I think, nationwide, right?

Ms. DAVIDSON. That is——

Mr. CULBERSON. In your experience in Colorado as well, if you received a ballot from someone voting by mail, if the postmark was on or before Election Day, you counted it?

Ms. DAVIDSON. And the laws are changing throughout the Nation. A lot of the States have said that if the ballot was received up to 10 days after the election, it would be counted, if that was postmarked on Election Day.

Mr. CULBERSON. Sure. A reasonable period after the election, right. But as long as the postmark is on or before Election Day.

Ms. DAVIDSON. That is correct.

Mr. CULBERSON. What surprises me actually in here, Mr. Chairman, this is something we really ought to look at because this I think will disenfranchise a lot of military people. I didn't realize this was in the Act. But in Title VII of the statute in voting assistance programs for overseas voting materials, the Secretary of Defense has to ensure that the measures implemented, da, da, da, do not result in the delivery of absentee ballots by service members to the financial destination after the date on which the election for Federal office is held.

So that Federal law is inconsistent with, really, the standard rule across the country. I am sure it is true in New York and Missouri, that if you vote by mail and again the postmark is on or before the date of the election, it is counted if it is received within 10 days.

We probably ought to fix that, because I bet that results in disenfranchising a lot of military people that are serving overseas. I didn't realize that was in there. Would you agree?

Ms. DAVIDSON. I didn't realize it was in there, either. I would agree. Because I will tell you right now that——

Mr. CULBERSON. It says, if the ballot is not received—the Secretary of Defense has to ensure that the ballots are received by the clerk—for example, you were a clerk in a county in Colorado, in Bent County, that the Bent County election clerk has to receive the ballots on or before Election Day or they are not counted.

Mr. SERRANO. Right. Well, that is true for everybody else.

Mr. CULBERSON. No, no. Actually, the rule for everybody else is, if the ballot is received up to 10 days after the election, as long as the postmark is marked before—but he can't—even if he is delivering ballots postmarked on or before the Election Day, they are no good.

VOICE. Delivered to the soldier to cast the ballot by election.

Mr. CULBERSON. No. The statute says, the Secretary shall ensure that the measures implemented—his measures implemented under the statute result in the delivery of absentee ballots to the final destination of such ballots. The final destination is the clerk.

So we have really got to fix that, Mr. Chairman and Mrs. Emerson, because we are disenfranchising a lot of military people.

Now, the 10-day rule is reasonable. Obviously, if the guy's ballot comes in 6 months later, you don't want to count that. But 10 days, don't you think we probably ought to fix that? Because I guarantee that is probably disenfranchising——

Mr. SERRANO. If that is the way it reads, I would agree with that. If that is the way they are implementing.

Mr. CULBERSON. Yeah. The way the statute reads on its face and as the commissioner says, the chairman says, it is—and it is your opinion as well as an election clerk, that would disenfranchise members of the military whose ballots were received 10 days or less after the election as long as the mail-in ballot were postmarked on before the election date, correct? That is an accurate statement?

Ms. DAVIDSON. Yeah. Congressman, you are absolutely right. If that is the way the law reads—I mean, I think that everybody has been reading it to say that a ballot that is unvoted should not be sent to a voter after the election.

Mr. CULBERSON. Sure. But that says the final destination, And the final destination has to be the county clerk.

Ms. DAVIDSON. If that is the way it is, that definitely needs to be fixed, because we don't want to disenfranchise any more of our military members.

Mr. CULBERSON. Right. That is a bad problem.

You also, I understand from reading the statute, have the authority, as Mrs. Emerson said, to issue grants to nonprofit entities that are engaged in helping to organize voters or register voters, correct? Do you only issue grants to government entities or can you also issue grants to nonprofits or nongovernment entities?

Ms. DAVIDSON. We can issue to nongovernment entities, but we cannot issue a grant on voter registration.

Mr. CULBERSON. I understand. Therefore, the question——

Ms. DAVIDSON. It was through the mock election that this happened, so that you are aware, a college poll worker.

Mr. CULBERSON. If I could just follow up with some precision to get a really clear answer on Mrs. Emerson's question about ACORN. Because we did pass in an appropriations bill last year I think, after all this monkey business came out about ACORN, flat prohibition against any Federal money going to ACORN or to any of their affiliates. It is the law. It has not been overturned by a final judgment of an appellate court. So, therefore, it is the law of the land. What are you doing to ensure the enforcement of that law?

Ms. DAVIDSON. We are making sure——

Mr. CULBERSON. That you are not issuing grants to ACORN. It is prohibited.

Ms. DAVIDSON. To ACORN or anybody that affiliates with ACORN.

Mr. CULBERSON. It is prohibited?

Ms. DAVIDSON. Yes.

Mr. CULBERSON. Have you issued any grants to ACORN or any of their affiliates?

Ms. DAVIDSON. Not since the law was passed. That was in 2006 that we did that.

Mr. CULBERSON. You are sure of that? Because your answer to Mrs. Emerson was a little foggy.

Ms. DAVIDSON. I am sure of it.

Mr. CULBERSON. Okay. And we really do appreciate your service, and I thank you for your answer to our questions, and I appreciate the chairman's indulgence for the time. Thank you.

Mr. SERRANO. We have your papers over here. We are looking at it. We are as concerned as you are, and we will look at it and make recommendations.

I have one last question, and then we will let you go. How is that?

I have heard that the job of—well, I know the job of an elected official is often challenging, ensuring that elections are fair, accurate, and carried out officially with small staffs and limited resources. So in a tough budget year, I can imagine the job of an election official is particularly challenging.

I understand that you have personal experience, as we said, working as an election official when you were county clerk and later as Colorado's Secretary of State. Can you relate some of your experiences to the challenges that election officials will face this coming year throughout the Nation? Every State has less money than they had before. How will this affect the running of these elections? And how can we assure that local and State election officials have the resources they need to successfully oversee the elections?

Think back to those days when you were sitting there wondering if you would ever get to testify in front of Mr. Culberson.

Ms. DAVIDSON. I think probably my knees would have been shaking a little bit more than today.

Mr. SERRANO. My knees are shaking right now.

Ms. DAVIDSON. Oh, good. I am in good company then.

Elections are difficult. They are not the same throughout the United States, as I have said before. Every State has their own

issues. Every county has their issues. Polling place workers are a tremendous—a scarceness. And our college poll worker program has been a big success because it brings in individuals with the experience of technology, the energy to be able to carry those 8 hours—not 8 hours but almost 18 hours sometimes of Election Day, but making sure that they have the resources that they need.

I would tell you in a county budget, as I was a county clerk, I found that I was the last one on the list of receiving money. It was always the potholes that needed to be filled, the police department that needed the money. We weren't thought about.

But I will say since HAVA came on the forefront and the heightened public interest in elections, it has been good because it has brought a lot of good ideas and a lot of things forward. And with the passage of HAVA and the Federal funds, it has helped the States to become more up to date, the voter registration lists and being able to have that throughout the States, to be able to control people being registered more than once. It is also hooked up with the deceased files and the motor vehicle files. It has improved the election process. So the money that has been spent definitely has improved that process of Election Day.

Also, the disability people being able to vote for the first time independently and privately has been an asset to all of those people. It is very hard to answer your question, how can we make sure that they have everything that they need, because we hear from the States when we go to their meetings that there are issues that they have that we haven't even begun to think about. So it seems like it is constant that there is always a new issue that they need to be considering.

Our contingency planning is one of my pet ones, because when we think about what can go wrong on Election Day—somebody said, why is the election so hard? It is not rocket science. You know what? It is worse. Because we can't say 3 minutes or 2 seconds before it is supposed to go up in the air that the rocket—that we are going to stop the process. We have to have Election Day.

So training our election officials to be ready for that pre-certification and everything that goes on is very important. Every State has their own issues and their own needs.

So for me to answer that, I am really not able to answer I know to what you really want. And I am sorry about that. Because it changes it seems daily even within the States and the counties. So I am not doing a good job for you, and I apologize.

Mr. SERRANO. That is okay. I know it can become difficult at times. Always feel free after this hearing to supply us with any further information on any of the questions that were asked.

Mrs. Emerson and I have some questions for the record.

I want to thank you for your testimony today. We want to thank you for your service. We want to remind you again that, regardless of differences you may see within the two parties on many issues, there is one issue where we don't disagree on and that is having fair and accurate elections. There will different interpretations as to what that means to some people in some areas, but certainly we understand on this subcommittee the importance to our democracy and to our system to have fair elections with full or as close to full participation as possible.

I am always amazed at how much you hear people say how much they love this country and how much they love our system and to the point—and this is only my comment—where sometimes we try to force our system down other country's throats, where they should be like us. And yet when it comes to election, we are not outraged when only half of the people vote or we are not outraged in the past when we elected the President from both sides with 43 percent of the people voting.

So anything we can do to make elections better, to have more people participate, and to make sure that when that person voted for a certain candidate that that is pretty much—or should be actually the actual result of that vote with no hanging anything in the future. So that is what we ask you to continue to look at; and, in the meantime, you will continue to have our support.

I am sure if people were to do an analysis of this subcommittee they would find out that Mrs. Emerson and I treat everybody who comes here with respect. That is because we understand that everybody who sits before us has a major role to carry out, and we want you to be successful. Our patience is running thin on the Security Exchange Commission. Other than that, we want to be supportive.

Other people say his subcommittee meetings are like a love fest. Well, because we want to be supportive, especially you. You have a major, major role to play; and your agency has a major task to accomplish. So thank you for your work. Thank you for what will be your work, and keep us informed on anything that is going on that we should know.

Ms. DAVIDSON. I would be more than happy to. Thank you.

Mrs. EMERSON. Thank you.

Mr. SERRANO. The meeting is adjourned.

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

HEARING

ON

THE FY 2011 BUDGET REQUEST OF THE ELECTION ASSISTANCE COMMISSSION

Questions for the Record

for

The Election Assistance Commission

April 27, 2010

Questions for the Record
Submitted by Chairman Serrano

HAVA Requirements Payments

In the past three years, Congress has provided $290 million for grants to states for the purpose of helping them meet the requirements of the Help America Vote Act. In regards to the requirements payments, please indicate:

- What percentage of this funding has been distributed to states? What the reasons are for funding not yet being disbursed or used by states?

Requirements Payment Appropriated		Amounts Disbursed	Percentage
Section 251 (2003 & 2004)	2,319,360,617	2,319,360,617	100%
Section 251 (2008)	115,000,000	81,206,590	72%
Section 251 (2009)	100,000,000	52,626,574	53%
Section 251 (2010)	70,000,000	9,274,223	13%
Totals	2,604,360,617	2,462,468,004	95 %

Between May and November of 2009, EAC distributed over $85 million in Requirements Payments. We anticipate a similar amount of disbursements for 2010 as states receive the 5% match from their legislatures and complete the HAVA Section 253(b) certification needed to receive funding. The 33 states (as of June, 2010) that have not certified to EAC that they are Title III compliant may be limited in the ways they can spend HAVA Section 251 funds; as such, they may not have any use for additional funds until they can complete their Title III certification.

Challenges with becoming Title III compliant are often not tied directly to availability of funds, but have to do with challenges in meeting all the requirements outlined in HAVA (for example, implementation of the state-wide voter registration system that meets HAVA specifications). Once these challenges have been met, states should be able to spend Requirements Payments to improve administration of federal elections at a faster rate.

Two additional factors that affect whether states request remaining funds are: 1) state appropriation cycle and ability to appropriate the 5% match; and 2) the

complex and lengthy state planning process required by HAVA for revising the HAVA-mandated state plan, which can take up to two years to complete.

- How fast states are spending HAVA funds relative to the rate at which this subcommittee has provided funds to them?

Beginning in FY 2007 through FY 2009, states are spending on average $203m per year in Requirements Payments funds. The average appropriation over fiscal years 2008-2010 has been $95m, which means states are spending funds on average over two times faster than funds are being appropriated.

- Will all states be evenly impacted by the proposed budget cut to the election reform programs in FY 2011?

States will not be evenly affected by the proposed cut. The 23 states listed below have spent over 85 percent of their Requirement Payments funds and accrued interest. These states could experience a negative impact in the very near future by reduction of Requirements Payments.

STATE	Funds & Interest Expended
NEBRASKSA SECRETARY OF STATE	100%
RHODE ISLAND SECRETARY OF STATE	100%
NEW MEXICO SECRETARY OF STATE	99%
NC STATE BOARD OF ELECTIONS	99%
INDIANA SECRETARY OF STATE	98%
IDAHO SECRETARY OF STATE OFFICE	98%
OHIO SECRETARY OF STATE	95%
WYOMING SECRETARY OF STATE	92%
IOWA SECRETARY OF STATE OFFICE	92%
UTAH STATE ELECTIONS OFFICE	92%
LOUISIANA DEPARTMENT OF STATE	92%
GEORGIA SECRETARY OF STATE	91%
TEXAS SECRETARY OF STATE	90%
SOUTH CAROLINA SECRETARY OF STATE	90%
WEST VIRGINIA SECRETARY OF STATE	89%
MONTANA SECRETARY OF STATE	88%
CONNECTICUT SECRETARY OF STATE	88%

MISSOURI SECRETARY OF STATE	88%
MISSISSIPPI SECRETARY OF STATE	88%
PENNSYLVANIA DEPT OF STATE	88%
COLORADO SECRETARY OF STATE	86%
MINNESOTA SECRETARY OF STATE	86%
KANSAS SECRETARY OF STATE	85%

- How will states continue to be compliant in the future?

Presently, states have several strategies for maintaining compliance with Title III as it relates to spending. The first is to carefully manage existing HAVA funds; ensuring that they will last well into the future.

A second strategy is to rely on future HAVA support up to the level of funding authorized in HAVA. States in this category may have operational challenges in 2012 if 2011 Requirements Payments are not provided or alternative sources of funds are not identified.

Two states have taken a third approach by setting-up revolving funds so that counties can borrow funds to purchase new equipment, paying back the state's HAVA election funds over time.

Despite differences in short term strategies for maintaining Title III compliance, all states will eventually need to confront how to purchase the next generation of voting equipment they will need when current equipment becomes obsolete or needs to be replaced.

- What do states need in the mid to long-term to keep up with HAVA requirements?

The level of funding states will require to maintain the reforms instituted under HAVA is an open question. Currently, states are spending on average $203.m per year in Requirements Payments to support the election infrastructure including statewide voter registration databases, voting systems and education and training associated with being compliant with Title III of HAVA.

I understand that in order to receive the Section 251 requirements payments states are required to provide a 5% match in funds. As you know, some states are facing severe budget shortfalls for FY 2011.

- Have you heard from any states whether they are having difficulty in providing the 5% match?

  EAC has heard informally from several states that match for 2010 and 2011 will be a challenge to identify. While the percentage of funds required by the match is low (5%), states describe a budget climate where every other state department is seeing large cuts to their budget, making it difficult to request additional funds for election purposes.

- What will the consequence be for these states if they are unable to make the 5% match?

  EAC will continue to hold funds until states can identify and deposit the 5% match into their state election account. If match cannot be identified, states will not have access to Requirements Payments to support implementation of their state HAVA plan in that year. EAC is not in a position to predict whether or not lack of funds would actually disrupt elections.

The Help America Vote College Program

The EAC administers a grant program to recruit and train college students to become poll workers.

- What have the results of this program been?

  Through FY 2010 EAC has awarded 89 grants totaling $3.1 million to recruit, train and place college poll workers since the program was established in 2004. The program has received appropriated funds in 2004, 2006, and 2008-2010.

  According to EAC's Election Administration and Voting Survey, 46% of our nation's voting jurisdictions reported having difficulty recruiting poll workers during the 2008 election cycle.

  Approximately 8,000 college poll workers have been recruited, trained and served as election workers through this grants program. Student poll workers conduct a variety of crucial election administration tasks, such as setting up polling places, checking off names on the registry (the most common activity), checking voters' identification, staffing information

booths, demonstrating how to use the machines, answering voters' questions, serving as election observers, acting as translators, assisting voters with disabilities, securing the machines at the end of the day, counting votes, and transmitting unofficial results.

All grantees use the EAC College Poll Worker Handbook, which has won praise from election officials for being comprehensive and easy to use.

In addition to successfully placing college poll workers, the grants have facilitated:

1) *Institutionalization of the program on college campuses, including incorporation of poll worker service into college courses, which generates college poll workers after EAC grant support has stopped;*

2) *Enduring partnerships between local election offices and colleges and universities which have created pipelines for new election workers and led to the creation of innovative, university-sponsored training material and pedagogies for training all poll workers in a given jurisdiction;*

3) *Development of specialized curriculum to better equip poll workers for supporting voters that have disabilities and to recruit and train election workers that have disabilities; and*

4) *Outreach to traditionally underrepresented groups through grants to historically black colleges and universities, Native American groups and an emphasis on serving both urban and rural populations.*

EAC is also working to make the program more cost effective by encouraging development and use of:

- *Web sites to inform students about the program and allow students to submit their contact information;*
- *Social-networking Web sites to create supportive communities for promoting the program;*
- *Automated, web-based training using avatars and virtual reality software to create contextualized, online training environments;*
- *Videos to document training and post the awarding of certificates to attract future student poll workers;*

- *Use of email and text messaging to recruit students and campus organizations to take part in the program; and*
- *Local television and radio advertisements to allow program directors and students to reach a broader audience.*

Accessible Voting Technology & Pre-Election Logic & Accuracy Testing Initiatives

The FY 2010 bill included $3 million for grants authorized by HAVA to carry out research on voting technology improvements directed at improving accessibility for voters with disabilities. The bill also included $2 million for a pilot grant program for States and local governments for pre-election logic and accuracy testing, and post-election verification, of voting systems.

- What is the status of the implementation of these programs?

  The FY 2009 funds for the Accessible Voting Technology research were combined with the $5 million appropriated in FY 2010 for the same purpose. EAC has conducted extensive outreach, including hosting a day long roundtable with top researchers and policy specialists in the area of technology research and disability policy, to support development of this important initiative.

  The first grant competition with these funds, the Voting Technology and Accessibility Research—Military Heroes Initiative will be awarded by the end of 2010. This $500,000 initiative will support research to better understand the needs of injured military personnel related to election processes, including: 1) documentation of current practices associated with voting activities at these faculties; 2) identification of barriers that may prevent this population from voting privately and independently; and 3) reviews and assessments of new and innovative technologies for assisting military personnel's ability to participate in the electoral process.

  The grant solicitation for the remaining funds is under development and will be submitted to EAC Commissioners for an initial review in July 2010. After an additional round of EAC Commissioner and public input on the draft funding solicitation, EAC will publish the notice by September 30, 2010.

  The FY 2009 funds for pre-election logic ond accuracy testing, and post-election verification grants were combined with the FY 2010 funds

appropriated for the same purpose. The draft grant solicitation is currently posted for public input. EAC anticipates publishing the notice this summer with the goal of having grants in place prior to the 2010 general election.

Military and Overseas Voter Empowerment (MOVE) Act

The Military and Overseas Voter Empowerment (MOVE) Act was signed into law last October as part of the FY 2010 National Defense Authorization Act. MOVE allows for electronic and mail transmission of voting materials and requires that states send out absentee ballots at least 45 days before an election, in addition to other improvements to make voting more accessible for Americans stationed and living abroad.

- What challenges will the states face in implementing MOVE?

One of the most difficult challenges states face when trying to implement MOVE or improve services in general for UOCAVA voters are related to security concerns. EAC and its partners, FVAP and NIST, have made significant progress toward assisting election officials with providing services to UOCAVA voters, but these security concerns have delayed the implementation of general purpose personal computers for transmitting electronic ballots via the Internet. Therefore, solutions will require input and support from a wide variety of stakeholders as well as frequent public updates. The following stakeholders must work together on behalf of UOCAVA voters: state and local election officials, computer science researchers, experts in fields such as usability and accessibility, industry representatives, and other federal agencies charged with improving the remote UOCAVA voting process.

- What role is the EAC playing in assisting states in the implementation of MOVE?

EAC is developing intermediate testable guidelines that leverage the successes achieved to date by jurisdictions with electronic absentee voting systems. These guidelines will be used to pilot remote electronic absentee voting systems implemented as a manned kiosk with printable paper ballots for audit capability. Election jurisdictions and FVAP will be able to use these guidelines to run pilot programs for UOCAVA voters should they choose to do so. The information gained from the pilot projects will be used to help inform the final guidelines development process by providing valuable information regarding the security and logistical challenges of a remote electronic voting system.

EAC is working to facilitate an inclusive approach and will continue to solicit input from its statutory boards and the public, and will work with NIST and FVAP to ensure that the remote electronic absentee voting guidelines will provide the structure to successfully develop and test systems for UOCAVA voters.

States will also be able to use EAC's electronic absentee voting guidelines when evaluating electronic voting systems that facilitate the return of marked, or voted ballots.

For more information about EAC's work to lead the effort to help states comply with the MOVE Act and improve services for UOCAVA voters, please see the attached Report to Congress on EAC's Efforts to Establish Guidelines for Remote Electronic Absentee Voting Systems.

Questions for the Record
Submitted by Ranking Member Emerson

Paper vs. Electronic Voting Systems

Some individuals in Congress and elsewhere continue to claim that electronic voting machines can readily be manipulated and insist that States Nation should create a paper trail of recorded votes. But I'd have to question whether a paper trail would be more secure than an electronic record. In fact, a 2004 study by Carnegie Mellon University concluded that paper records do not address those risks. While a paper trail may be able to show voters that their choices were properly recorded, it offers no guarantee that their ballot was counted or that it will be when a recount or audit is conducted

- Are you aware of any documented cases of voter fraud related to the use of electronic voting machines? Has there ever been a documented case of electronic voting equipmeut being hacked into during an election and votes being changed?

EAC is not aware of any documented cases of fraud related to the use of electronic voting machines and we are not aware of a documented case of electronic voting equipment being hacked into during an election and votes being changed. There have been hacking experiments on voting systems in

controlled environments such as laboratories, but we are not aware of a successful hacking attempt during an actual election.

However, regardless of the voting system – electronic, paper, or hybrid – every system is vulnerable if the appropriate procedures are not in place. That is why EAC developed the Election Management Guidelines program, a collection of best practices on everything from logic and accuracy testing to chain of custody procedures to ballot design. These materials were created with input from election officials to ensure they would be applicable in the real world of elections, regardless of what kind of voting system the state or local entity has in place. EAC continues to receive positive feedback from election officials about the Election Management Guidelines materials.

Focusing on only one kind of voting system risk ignores large, known vulnerabilities in our election process. To successfully compromise a voting system – any voting system -- during an election, you must have two things –

- *knowledge OF, and*
- *access TO a system.*

- Are paper trails for electronic voting machines necessary? Can't paper ballots readily be manipulated, thrown away or forged?

It is important to remember that whether we are discussing a ballot box, an optical scan machine or a touch screen – people (poll workers, election officials and voters) control whether an election is fair and accurate. The bottom line is that real security for any voting system comes from systematic preparation:

- *Prepore systems to PREVENT tampering;*
- *Prepare people to DETECT tampering;*
- *Prepare poll workers and law enforcement officers to REACT to tampering; and*
- *Prepare election officials to RECOVER by auditing and investigating.*

- And more importantly, shouldn't we let the States decide which form of voting systems they would prefer to use as opposed to dictating that from Washington, D.C.?

  EAC recognizes that one-size-fits-all does not apply to elections. For example, some rural areas prefer to use mail and other regions prefer optical scan systems. Electronic voting machines bring advantages to large

cities with diverse populations because they can make it easier and cheaper to meet language and accessibility requirements. States already choose voting systems that best meet the needs of their voters.

Appropriate Role of the Federal Government in Election Administration

The administration of elections is largely a State and local function. There have been calls over the last few years for Congress to legislate new election requirements and standards and to provide additional Federal funding to subsidize the cost of elections.

- Can you discuss the role that Congress should play in assisting States?

EAC has observed that in recent years, the interest Congress has shown in election administration through not only legislation but also hearings has provided the public with valuable information about how elections are administered. Issues such as pre-election testing, audits and voting system certification have been the subject of many Congressional hearings and have resulted in election administration improvements among election officials and voters. The dialogue facilitated by Congress has brought awareness to the need to professionalize the election administration field.

- Should Congress be legislating how the States administer elections?

The Commission does not have an opinion regarding the role Congress should or should not assume in state elections.

- Should Federal tax dollars be used to fund the cost of elections that have traditionally been funded at the State and local level?

Appropriations available through the Help America Vote Act of 2002 were the first funds ever provided by the federal government to the states for election administration. As the entity responsible for administering these funds, EAC can report that states have used these resources to replace outdated voting equipment, implement statewide voter registration databases, provide accessible voting systems for people with disabilities and make other key improvements to improve the election administration process on behalf of voters. EAC tracks and reports annually how states are using

HAVA funds, and while the Commission does not have an opinion regarding the role Congress should play in election administration, EAC provides this information to assist Congress as it considers future election administration funding and other election administration-related legislation.

Contracting

Please provide the number of contracts and contractors that EAC funded in its first year and the current levels for each. How many of the current contractor positions fall into the inherently government category?

During FY04, the EAC had a few small dollar purchase orders and GSA delivery orders primarily for Commission start-up support such as office equipment and miscellaneous supplies. There was one GSA Schedule Delivery Order service contract to Glynn Interactive, Inc for $54,559 (EAC Web site). This contract was completed in FY05. Additionally, there was one GSA Schedule Delivery Order supply contract to Kimball Office Furniture, Inc for $28,781 (EAC Office Furniture). This contract was completed in FY04.

A report the EAC provided on contracts shows a contract for nearly 250 thousand dollars with a company called Practical Strategies. That is a large contract for an agency with your budget, and I have a few questions about it.

- What exactly is Practical Strategies doing for the EAC?

Practical Strategy is providing technical support to EAC grantees, grant policy support services, and developing core competencies for HAVA funds management. This includes state audit and resolution reviews, contact and assessment of needs with audit targets, review of IG audit plan for 2010; review EAC and federal grant requirements, draft new grant policies, provide grant handbook reviews, and draft recommendations; attend EAC meetings and two (2) national grantee meetings and workshops; develop self-assessment tools, templates, and processes; and codify competencies and tools.

- Looking at the company's web site, the only place I see the word "elections" is where they list the EAC as a client. What qualifications does Practical Strategies have for its work for you?

Practical Strategy is a small woman-owned business and a GSA Schedule Contract holder who has a GSA Mission Oriented Business Integrated Services

(MOBIS) contract (GS-10F-0111V). Under this GSA Schedule Contract Practical Strategy provides specialized services to include Federal Grants Management and Consulting. (www.practicalstrategy.org)

Employee Issues

A recent report from the EAC Inspector General suggested some serious concerns about the EAC's performance evaluations of its employees. For example, the report said management claimed three employees had performance issues but there was no evidence management attempted to take corrective action. The report also cited an individual's performance evaluation being reduced based on failure to return two phone calls, another whose work was praised but who was denied travel after being told three individuals felt the person "did not know their place."

- What, specifically, is the EAC doing to improve its employee performance management systems?

EAC recognizes the importance of appropriately managing performance and discipline issues. As such, staff has been provided with ongoing troining opportunities. Training has been provided to senior management, supervisors, mid-level and junior-level staff. Further, management supervisory training has been provided to EAC managers. Most recently EAC provided mandatory staff training addressing Equal Employment Opportunity (EEO) requirements.

With respect to the specifics of EAC's performance management system, the system was approved in 2006 by the Office of Personnel Management (OPM). The system was implemented with the hiring of a Human Resource Director in 2007. OPM evaluated the results of the system after it was implemented using the Performance Appraisal Assessment Tool (PAAT). Based on the results of the PAAT, EAC revised the performance management system in 2009. Each Division was briefed on the revisions, trained on how to develop critical elements and standards, and provided resource materials. The opproved personnel management system is currently in place and the performance period is January through December.

A report the EAC provided on contracts shows significant expenditures for temporary staff – $329K in 2008, $459K in 2009, and $359K in 2010.

- What tasks have these temporary staff performed? Are they included in the total staff figures you provided?

The chart below provides a detailed description of the tasks temporary staff performed and the associated costs.

FY 2010 - $359,000

% of Expenditure	EAC Division	Scope of Work
91%	Voting Systems Testing & Certification	Retired annuitant brought through temporary employment services because of prior work with EAC as a NIST employee. Performs technical reviewer services for testing and certification unit. Retired annuitant (DOD) brought through temporary employment services because of elections experience with military and overseas voters.
9%	Research	Continued data entry of contract information and the training of newly hired program staffer to take over task.

FY 2009 - $459,000

% of Expenditure	EAC Division	Scope of Work
34%	Election Administration & Support	Retired annuitant (former DOI IG detailed to EAC in 2007) brought through temporary employment services because of expertise with HAVA funding and government auditing standards.
25%	Voting Systems Testing & Certification	Retired annuitant brought through temporary employment services because of prior work with EAC as a NIST employee. Performs technical review services for testing and certification unit.
16%	Administration and Grants Division	Administration: to fill absences for Receptionists and Administrative Assistant. From 12/08 – 5/09, Financial Management Specialist position was temporarily filled during recruitment process. Grants Division: Data entry operator to assist with grants award process.
16%	Voting Systems Testing & Certification	Retired annuitant (DOD) brought through temporary employment services because of elections experience with military and overseas voters.
9%	Research	Data entry and status reporting on contracts.

FY 2008 - $329,000

% of Expenditure	EAC Division	Scope of Work
43%	Administration, Office of General Counsel & Communications	Administration: temporary fill for 2 vacant positions during recruitment. Office of General Counsel: Information request for Congresswoman Lofgren (generated 40,000 pgs) Communications: FOIA requests
37%	Election Administration & Support	Retired annuitant (former DOI IG detailed to EAC in 2007) brought through temporary employment services because of expertise with HAVA funding and government auditing standards.
17%	Voting Systems Testing & Certification	Retired annuitant (DOD) brought through temporary employment services because of elections experience with military and overseas voters.
3%	Research	Development of Contract Tracking System

WEDNESDAY, JUNE 9, 2010.

FEDERAL COMMUNICATIONS COMMISSION FY 2011 BUDGET REQUEST

WITNESSES

JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. SERRANO. The subcommittee will come to order. Before we begin are there any numbers from the FCC as to the ratings last night for the Nationals game?

Mr. GENACHOWSKI. I did some firsthand research, Mr. Chairman, and took my son to the game, and I can give a full report at a later time.

Mr. SERRANO. Great. That is wonderful. The ratings must have gone through the roof.

We are pleased to have Chairman Genachowski before us today to discuss the FCC's proposed budget for next year—and the Nationals game from last night—on the Commission's Broadband Plan also.

Rapid changes in communications technologies are giving consumers more options, even as it gives some providers more leverage for high prices. The FCC must run faster and faster to keep pace with these changes. We count on the FCC to regulate communications so as to protect consumers without stifling innovation.

Last March, the FCC issued its Broadband Plan that lays out the current Commission's perspectives on the future of communications. As the Broadband Plan made clear, Americans increasingly rely on broadband Internet connections for delivery of fast, rich and reliable transmission of voice, text, Internet browsing, medical images, entertainment or almost any other form of communication.

Now, as you know, this hearing is on-line live as we speak, and I sent out a Twitter message, I put it on two Facebook pages and an e-mail. So we should get at least 10 people to watch.

Mrs. EMERSON. Do you have your BlackBerry out so you can answer or Twitter as we are going along.

Mr. SERRANO. Yes. And we are being recorded.

Mrs. EMERSON. Good.

Mr. SERRANO. Just to make the point that we are up to date on some of the technology, although it is all very confusing to us still.

As the Broadband Plan explains, wireless spectrum is becoming increasingly in demand as more communications go wireless and require more bandwidth. We face a crisis if we do not act soon to free up more spectrum for broadband. I applaud the FCC's efforts to identify under-used spectrum for possible conversion to broadband applications.

I am also pleased that the Plan recognizes the benefit to our society when almost everyone has access to broadband. More and more, access to broadband opens opportunities in education, job hunting, becoming an informed voter, and so forth, and lack of access to broadband closes opportunities. We must work to close the digital divide in access to broadband.

Not long after the ink dried on the FCC's Broadband Plan, a ruling by the Court of Appeals for the District of Columbia Circuit

raised questions about the FCC's authority to regulate Internet service providers. As a recent New York Times editorial pointed out, it is essential for the FCC to have authority over the Internet, the dominant 21st century mode of communications. We are looking forward to better understanding your decision to launch proceedings to bring ISPs under Title II.

This subcommittee has also been concerned that almost 9 years after 9/11 and 6 years after the 9/11 Commission report our first responders still lack the robust interoperable communication system needed in the case of major emergencies. Your plan recommends one approach that has been endorsed by both co-chairs and two members of the 9/11 Commission, but that approach has been opposed by some organizations representing first responders. We look forward to learning how you propose to resolve this situation so that we can move ahead.

PEG channels that provide public, educational, and governmental information to cable TV viewers make a vital contribution to our civic society. As technology has evolved some of those PEG channels have become more difficult to access. Despite many petitions and comments for the record, the FCC has failed to fix this problem. I was disappointed that your 360-page Broadband Plan made no mention of the future of PEG, much less proposed a solution.

Finally, as you know, I have been concerned that Americans living in the Territories often lack communication services comparable to those available in the States. Your report on communication services available in the Territories shows dismal rates of Internet use in the Territories. I was pleased to see that your Commission recently gave the go-ahead for XM-Sirius to make the investments necessary to operate effectively in Puerto Rico. I remain concerned about the availability of universal service funds there.

I want you to be assured, Mr. Chairman, that it is in the best interest of this committee and this Congress for you folks to succeed, but to succeed on behalf of the consumer, to succeed on behalf of strong technology for our future, to succeed on behalf of bringing us to where we should be as a nation, but never at the expense of leaving behind any community, including those folks who live in the Territories.

And with that I turn to my colleague, my sister and the ranking member, Mrs. Emerson.

Mrs. EMERSON. Thank you, Mr. Chairman. Chairman Genachowski, welcome and thanks so much for being here today.

The FCC has an important regulatory role in the county's communications, television, radio, Internet and cable industries, and we all know these services touch nearly every American citizen and business daily. Ultimately you all have to find a balance between enabling technological progress and providing enough regulation and oversight to ensure that the American people have available communication services. It is a very challenging job, with many business technology and consumer groups watching your every move.

I want to congratulate you on the development of the national Broadband Plan. Developing a strategic plan to provide every American with affordable access to broadband services is a worthy

goal. And I am very pleased because it has the potential to assist those Americans without Internet access to improve health care, education, public safety, access to government and the economy. I am still a little confused why we used—we were going to deploy rural Internet opportunities, or at least broadband opportunities, after which you were then going to do a new map, if you will. So perhaps the cart got before the horse, in spite of the fact that I do think that that is a good use of stimulus funds is the deployment of broadband, particularly since I have a hugely rural district. So it will end up helping my constituents a good deal.

I will say, though, that I, like many others, have some concerns with your plan. As the chairman said, many in the first responder community are concerned with your strategy to implement a nationwide wireless first responder network, or at least the means by which you want to do it. And I am also concerned with your announced plan to reclassify broadband as a phone service instead of as an information service. Many have questioned whether this reclassification will stand the scrutiny of the courts.

In addition, my constituents, my very small providers, really believe this action will reduce private sector investment and broadband expansion, which will obviously then hinder your goal of expanding affordable broadband access.

Thanks for being here. I look forward to your testimony, and we will have lots of questions, I presume. Thanks, Mr. Chairman.

Mr. SERRANO. Thank you. You know the drill, Mr. Chairman. You give us 5 minutes, we will put your whole statement in the record, and then we will drill you to the point of exhaustion on our part, I am sure.

Please proceed.

Mr. GENACHOWSKI. Thank you. Good morning, Chairman Serrano, Ranking Member Emerson, Congressman Crenshaw. Thank you for being here. I am pleased to be making my first appearance, so I am learning the drill. But I welcome this subcommittee's oversight and input and look forward to working with you to ensure that the Commission is able to perform its mission and that we get good input into all of the issues in front of us.

I also want to take a minute to thank your staff, Lee Price and John Martens, who have taken considerable time and effort, a very healthy working relationship at the staff level, and I appreciate their work.

The FCC's mission is to promote opportunity and prosperity for all Americans through communications, technologies, and networks. To advance this mission we are focused on these goals: Promoting universal broadband that is robust and affordable for all Americans regardless of where they live; pursuing policies that promote job creation, investment, competition, and innovation; protecting and empowering consumers and families; helping deliver interoperable public safety communications networks with the best technology to serve our firefighters, police officers, and other first responders, and ultimately to save lives; advancing a vibrant media landscape that serves the public interest in the 21st century; and seizing the opportunity for the United States to lead the world in mobile.

The budget we have submitted will considerably enhance the FCC's ability to achieve these goals. It will help ensure that we have the staff we need with the technical skills we need to support our work to promote investment, competition, job creation, public safety, our global competitiveness in this complex communications landscape.

The budget request also includes investments in technology that will enhance agency operations, particularly in the area of public safety. My written statement contains more details on this. I ask that it be included in the record.

Let me briefly touch upon some key items before the Commission, and I am sure we will have an opportunity for a good exchange on these.

First, as I am glad both of you mentioned, Congress directed the FCC to produce a national Broadband Plan, and we have now done so and submitted it to Congress and the President. It includes key recommendations to transform the Universal Service Fund from supporting yesterday's technologies to tomorrow's, recovering and unleashing licensed and unlicensed spectrum so that we can lead the world in mobile. It proposes ways to promote investment by cutting red tape, lowering the cost of deployment and accelerating broad deployment everywhere of wired and wireless networks. It proposes initiatives to foster vibrant competition and empower consumers who are often confused about this landscape. It includes a roadmap to tackle vital inclusion challenges so that everyone everywhere, individuals and small businesses, can enjoy the benefits and opportunities of broadband, and it proposes concrete ways in which broadband can be deployed to help solve many of our Nation's major challenges, including education, health care, energy, and public safety.

In April, the Commission released a detailed, extensive timetable for taking action on the Plan's recommendations. The Commission has since unanimously approved eight action items already, including a notice kicking off broad-based universal reform. In May we continued driving on this agenda by approving three more items from the Plan's recommendations, a notice to cut red tape in the E-Rate program and increase flexibility for schools to better serve their communities with the funds and the technology, and order a notice to foster competition in broadband deployment by improving access to pole attachments, part of the blood and guts of this area where if we get it right we can seek faster deployment of infrastructure, and an order enabling the use of 25 megahertz more spectrum for mobile broadband.

Although many of the action items from the national Broadband Plan can be further reviewed and acted upon by the Commission, a few major recommendations require review and action by both Congress and the Commission, one of the most urgent being the creation of a nationwide interoperable public safety broadband wireless network. For far too long, as you said, Mr. Chairman, our Nation's first responders have lacked such a network. As part of the national Broadband Plan I tasked our FCC team, led by a brilliant retired admiral with great experience in this area, with starting anew and developing a comprehensive plan for an interoperable broadband public safety network. The Commission staff has pro-

posed a multi-part plan that will support the greatest benefits for public safety's day-to-day needs and provide essential redundancy and resiliency during the worst emergencies. The Plan confirms that the current 24 megahertz of spectrum identified by Congress and allocated to public safety is sufficient for public safety needs for the foreseeable future, and that if necessary in dire emergencies public safety will be able to access and roam on adjacent commercial networks in the 700-megahertz band, including the D-block, which Congress has required the FCC to auction.

It includes specific recommendations to get our mobile broadband public safety network built during a window that is closing of the rollout of commercial 4G networks. If we can get this done now, taking advantage of efficiencies that can happen by building out at the same time, we can both get it done and save a tremendous amount of money than if we wait.

Second, with respect to our goal of ensuring that the U.S. leads the world in mobile, there is little debate that our Nation's spectrum needs are rapidly increasing, with demand for spectrum very significantly exceeding the supply. If the U.S. is to lead the world in mobile services and technologies, we must address this looming spectrum crunch. I understand and share the concern that in pursuing this objective that we take full account of viewers of free over-the-air TV as we pursue what we strongly believe is a win-win-win plan to benefit free over-the-air viewers, the broadcast industry, our broadband future and American consumers.

I look forward to working closely with this committee and Congress on a mechanism for a win-win-win auction to address our mobile spectrum needs and make sure that we take full accounts of existing services like free over-the-air TV.

Finally, I remain focused on the importance of broadband to our Nation's economic growth, competitiveness, investment and innovation, huge opportunities here for the country. But as we heard, we face legal uncertainty now as a result of a recent court decision in the Comcast case.

Comcast, although we argued to sustain the framework that had existed, the court disagreed and that decision cast real doubt on whether the legal framework the Commission chose for broadband Internet services nearly a decade ago is adequate to achieve core broadband policies such as universal service, public safety, and promoting investment and innovation related to broadband and extending it to all Americans.

In addressing this issue, I reject both extremes, the extreme of overregulation and the extreme of doing nothing. I believe that a light touch approach continues to be the correct one, and look forward to ongoing dialogue with Congress as the Commission seeks public comment on how best to ensure that our broadband policies rest on a solid legal foundation and that we foster a climate for robust private investment in communications that benefits all Americans.

As you may know, the chairman of our authorizing full and subcommittees have announced they will start a process to develop proposals for updating the Communications Act. I welcome their process and the opportunity to serve as a resource to them and Congress in their work, and of course I look forward to working

with the members of this subcommittee on these issues and all issues the FCC faces.

Thank you again for this opportunity to discuss the FCC's 2011 budget request and our work under the Historic Recovery Act. I respectfully request that the subcommittee consider granting the FCC's fiscal 2011 funding request, and I would be happy to hear comments and of course take any questions.

Mr. SERRANO. Thank you so much. Thank you. Around here we always use the phrase "win-win." You say "win-win-win." Does that extra "win" mean you know something is going to happen?

Mrs. EMERSON. It means the Cardinals and the Yankees and the Nationals are all going to get a win.

Mr. SERRANO. It used to be a situation where everyone asked how long before Serrano brings in Cuba and Puerto Rico into any kind of a hearing and now it is how soon the Yankees and the Cardinals come into it. So we will see you in September.

The court decision, the D.C. Decision, now, first of all, when you come before this committee or any committee in Congress, and I am sure some of my colleagues are going to be upset with this, not in this committee, don't ever assume that Members of Congress know this issue through and through, because this is one of the more complicated issues that we deal with, and I am sure it is for you folks too. Now, the court decision kind of threw everybody for a loop. And the issue was, as we saw it, do you have the authority, existing authority, to move in the direction that many of us want you to move in. So what's your sense?

Now, just as a little aside, if one looks at your biography, you have done enough in the past to have dealt with many issues on many levels, from the Supreme Court to Congress to the administration to the FCC. So you certainly have an understanding of how these things move. Did that court decision cripple you? Does it allow leeway? Does it give you leeway to do what you need to do? Where are we at now? How can you explain that to us?

Mr. GENACHOWSKI. There is no question that the decision raised serious questions, created a problem that we have to solve. There had been a consensus that the FCC could adopt sensible rules around broadband for universal service, for public safety, for consumers, under a particular Title I approach. We defended that in court, we thought it was fine. We want to focus on what the American people want us to focus on, which is extending broadband to all Americans, leading the world in innovation, driving tremendous investment, having this be a platform for job creation, and extending the wonders of broadband and health care and education to all.

Unfortunately, we didn't win the case. And in its opinion the court raised real questions about the consensus framework that had been used. We now have to solve that problem. As I looked at it, we had two extremes in the debate. We had an extreme of oh, well, this is fine, the FCC doesn't need to do anything here at all, and we had what I believe is an extreme of oh, this is an opportunity for massive regulation of this infrastructure. And I reject both those extremes. And I directed our staff to identify a strategy that would restore the status quo, that would restore the light touch framework that would allow the Commission to do what is necessary to promote investment, to promote public safety, to ex-

tend broadband, not to do more than what is necessary. And the staff developed what we have called the third way approach that is modeled on the existing approach for how mobile voice is regulated and that we will continue to take public comment on and discussion on, with our central goal being the litigation. The court decision created a problem, let's solve it so that we can tackle our country's broadband needs.

Mr. SERRANO. And how do other members, I mean they are not here, but is there support on the Commission for that approach?

Mr. GENACHOWSKI. Well, I wouldn't want to speak for other members. I think we have healthy debate at the Commission, which is a good thing. I think each of the members of the Commission has expressed their initial views. This is an issue of sufficient importance that we should have public comment, public discussion, and encourage everyone involved to roll up their sleeves with the Commission with an approach of problem solving. I don't think anyone disputes that there is a problem. And I am going to do everything I can to work with all stakeholders, my colleagues at the Commission, the great staff at the Commission, to tackle this and solve it so that we can focus on the core goals that I think are widely shared of promoting broadband for our economy and for solving major national challenges.

Mr. SERRANO. And if I was to put you on the spot and say looking forward, at what point date wise can you say we have put this part aside and we are moving on now? I mean, I know you are moving on different fronts at the same time, but we have put this issue behind us, this has been resolved, what do you see?

Mr. GENACHOWSKI. Well, the first step is to start the proceeding, which we haven't done yet. It takes time to get it going. We will start the proceeding, we will encourage broad public comment and input, and we will do everything we can to solve this problem while we continue to move forward simultaneously on key elements of the Broadband Plan. We can't slow down, it is too important for extending opportunity to all Americans. And we have continued to move forward in the ways that I mentioned, we will keep on moving forward, and we need to tackle this issue for many reasons, including the fact that the rest of the world is not standing still.

Mr. SERRANO. Let me, I am going to be asking members after Mrs. Emerson speaks to stick to the 5-minute rule, so I will abuse it now and say the following. On your last comment, I don't know how briefly you can do this, but what happened to us, why did we fall behind, why are we in so many ways the greatest country on Earth and in this particular one we are trying to catch up, what happened to us?

Mr. GENACHOWSKI. It is obviously a very good question. A lot of people disagree on why we are where we are, but I think there is broad agreement that we are behind where we should be. Perhaps one of the drawbacks to having the infrastructure that we do is that we have to deal in this country with legacy infrastructure that in some cases slows us down. We have to reform the Universal Service Fund so that it applies to broadband, not just all telephone service. But I think what we focused on in the Broadband Plan was assessing what the current obstacles are and what we need to do to tackle them.

Mr. SERRANO. Mrs. Emerson.

Mrs. EMERSON. Thanks, Chairman. So Commissioners McDowell and Baker have stated that no evidence exists of systemic failure in the broadband market that would justify a new onerous regulatory regime. So perhaps you can tell us, because we are the Financial Services Subcommittee and generally we deal mostly with something dealing with financial services, and I will admit to not having a lot of expertise in this issue, but other than the Comcast case, which I actually kind of understand, what problem would be solved by increasing Internet regulation and is there evidence that Internet service providers are discriminating against certain customers?

Mr. GENACHOWSKI. A couple of points if I may. One is I don't support a new onerous regulatory regime. I oppose it. I support the restoration of the light touch regulatory regime that we have. There are a couple of different issues that get talked about together here. With respect to the basic authority issue, there is a broad list of problems we have to solve and they are detailed in the national Broadband Plan; broadband for all of America, tackling public safety, tackling privacy, promoting investment. All of these require the FCC to have basic authority with respect to broadband access.

Another issue that gets discussed in this is the issue of preserving a free and open Internet. I do believe that we have something very special in this country: An Internet built on an open architecture that allows free speech, that allows innovators to reach a broad audience. It has led to the development and growth of small businesses across the country, huge benefits in terms of investment. My view on this is that we need to preserve what we have and make sure that this platform remain open as we drive more and more investment in it so that the infrastructure can lead the world.

Mrs. EMERSON. Well, are you concerned that a majority of Members of Congress in both parties oppose your plan? I think there were 171 Republicans and 74 Democrats who wrote you a letter basically saying not to move forward with your plan, quite frankly because it is our responsibility to give you direction as opposed to you giving us direction. But you know we all are trying to work together to help the American people. But does that bother you that the majority of Members aren't, on the House side anyway, aren't in favor of your plan?

Mr. GENACHOWSKI. Well, the concerns that Congress have of course I take very seriously. And I share many, if not all, of the concerns that are in the letters. We need to find a way to make sure that we restore the status quo that exists, protect consumers, promote competition, promote investment, promote universal broadband to all Americans in a way that is a healthy framework that is consistent with the framework that we had. So I am looking forward to ongoing discussions with Members of Congress to developing broader understanding of the options, of the approach that I have suggested, and I believe that this is an area where I hope and I think we should be able to achieve better understanding and enable us to move forward in a way that allows us to have a solid legal foundation that promotes investment so that we have a basis for making sure we can take care of universal service, take care of

public safety, take care of small businesses and broadband, and I look forward to this process and I think our proceeding will help be a resource as we move forward.

Mrs. EMERSON. Well, since your Broadband Plan assumes significant contributions or investments by the private sector, and if, I mean you just mentioned investment, but if investors are fearful of government's involvement in regulating the Internet, and you may not call it regulation but others do so, it is all a question of semantics, so how is that going to impact the expansion of broadband to all Americans if in fact you have investors who say, well, wait a minute here, this is overreach-overreach. And I realize that you say it is not, but some others would think it is.

Have you studied the question and the impact that that might have on how we do achieve at least the large goals in your plan.

Mr. GENACHOWSKI. I am committed to making sure that we have a framework that promotes investment. As Congressman Serrano mentioned, I spent many years in the private sector, including work as an investor. This is essential. In this country private investment will fuel our broadband networks, and we have to make sure that we achieve that. We are just at the beginning of tackling this issue. I would note just one thing, which is that the third way approach replicates the framework for mobile, which has been very consistent with investment, it has been widely praised. And I look forward to discussing this with you and other members to make sure that we have a framework to achieve our common goals with respect to broadband.

Mrs. EMERSON. Are you having trouble with the authorizing committee? This is something that everybody believes will somehow solve a problem that exists out here, at least, you know, according to you. Have you not talked to the authorizing committees to determine whether or not a narrow bill could simply be written and that would preclude you from having to do it by regulation? People are very nervous about any regulatory body doing things by regulation in place of us legislating it because it is a little heavy, at least the perception is it is very heavy handed.

Mr. GENACHOWSKI. The chairmen of the authorizing committee on the House side and the Senate side have announced that they are looking at proposals to update the Communications Act and we will of course be a resource to that. So they are looking.

Mrs. EMERSON. So in other words, you would not hold back and perhaps let Congress do what it is supposed to do as opposed to you all doing it instead?

Mr. GENACHOWSKI. I am looking for a solution that allows us to work together to promote our common broadband goals. And I put on the table a solution that I believe rejects both extremes that is modeled on regulatory frameworks that work, but I am focused on a solution and if Congress were to provide a solution that would be welcome.

Mrs. EMERSON. Thanks.

Mr. SERRANO. Thank you. And now under the 5-minute rule, with a very nice gavel in my hand, I am honored to introduce the newest member of our committee attending his first hearing, the legendary gentleman from New York, a legend in his own time, Congressman Steve Israel.

Mr. ISRAEL. Thank you, Mr. Chairman. Mr. Chairman, thank you for your hospitality. I have heard references to the Yankees and the Cardinals, but nothing about my beloved New York Mets, by the way, and I hope that changes.

Mr. SERRANO. The chairman is a Yankee fan.

Mr. ISRAEL. Mr. Chairman, although I am new to the subcommittee, back in December I sent you several letters expressing concern for the deterioration of negotiations on retransmission agreements between broadcast companies and Comcast providers. Both parties have intended to do brinkmanship, but it is the American people who hang in the balance. In Chairman Serrano's community and my community about 3 million subscribers in New York, New Jersey, and Connecticut lost access to their ABC affiliate 15 minutes into the presentation of the Oscars when it went dark until the switches were turned on. And in the letter I asked you to consider ordering carriage on an interim basis when this happens, ordering arbitration, other alternative dispute resolutions so that the American people don't hang in the balance.

Two questions. One, what can the FCC do to ensure that there is not a repeat of this kind of brinkmanship and protect consumers? And second, I believe that this is just a tip of iceberg and as we move forward there are going to be more and more cases where the American people suddenly find themselves literally in the dark with respect to their access to programming. And so what are you planning to do in order to keep pace? The regulations that were promulgated in the early 1990s clearly are not keeping pace with the intensity of failed negotiations, and so what can we do moving forward to provide those consumer protections?

Mr. GENACHOWSKI. I share your concerns, particularly with respect to viewers, consumers who don't have a seat at the negotiating table and can wake up and find out that what is expected of them doesn't make any sense. You mentioned the February/March issue. I remember back to December/January when there was a possibility that viewers might find out on the Friday before a holiday weekend that they would lose their signal over the weekend for when there were high interest, in that case football programming on that they would want to watch. And at one level making sure if consumers have a real ability with sufficient time and notice to change providers that is debatable, that is something we can debate and think about. But the idea that a viewer would find out on a Friday that, oh, you can't watch some programming that is very important to you on a Monday unless you go to a store that is closed and order a product that you can't get in time, that doesn't make any sense at all. So we have announced that we are looking at the retransmission framework, and it is largely a statutory framework that has been the same framework in place for a very long time. And we are running a process to see whether it can and should be updated. I do think that the private parties in this should have the ability to negotiate their own deals, but I think something—the consumers and viewers who are not at the table, their interests have to be taken into account as we analyze the framework and make sure that it fully serves the whole ecosystem.

Mr. ISRAEL. And what is your timeframe for the review of the retransmission process?

Mr. GENACHOWSKI. It is ongoing now. I believe we are in the public comment process, and our staff is having discussions with the various players to see what recommendations we can come up with to improve and update the process.

Mr. ISRAEL. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you. The distinguished Mr. Crenshaw.

Mr. CRENSHAW. Is that all you have to say, Mr. Chairman?

Mr. CULBERSON. That is all you get.

Mr. CRENSHAW. Is that all I get?

Mr. SERRANO. I spent the last year and 6 months praising you.

Mr. CRENSHAW. Thank you, Mr. Chairman. And thank you for being here, Mr. Chairman.

One of the things that when I talk to my folks back home what drives them crazy is every time there is a problem Washington says we will either spend more money, we will pass more laws, we will implement more rules, more regulations. And I guess I am trying to understand what the problem is that you are trying to solve, trying to understand why if Congress, if you have the chairmen of the authorizing committees saying they are trying to identify the problem, they want to solve the problem, that is kind of Congress' role. So when I look at the telecommunications industry it seems to be fairly innovative, it seems to be growing, there is a lot of private investment. And it would seem that I hear you saying you want to have a light touch, but it sounds like there is going to be more regulation and more regulation is going to bring more uncertainty. And I would like you to maybe just touch on a couple of things. One is kind of succinctly tell me what the biggest problem that you are going to solve, or maybe Congress is going to try to solve as well, tell me why it is important that you solve it through rules and regulations before Congress has a chance to solve it through input from their constituents, et cetera, more accountability. And then the third thing, maybe can you tell us, because this committee is interested in the money that we are going to spend, what kind of expenditures are going to be necessary if you put in place whatever rules and regulations you think you are going to put in place. It would seem to me you are going to need more people which would cost more money. So you know, and I guess you are also going to face a bunch of lawsuits and things like that. So can you highlight that as quickly as you can? I know that is probably not that easy to do quickly, but help me understand those three things.

Mr. GENACHOWSKI. Sure. First of all, I have been and the Commission has been very transparent over the last year on what policy objectives we believe need to be pursued to advance our broadband goals as a country, I think a greater level of transparency and openness about that than anyone remembers.

Mr. CRENSHAW. Now is that the problem, there is not enough transparency?

Mr. GENACHOWSKI. Transparency at the Commission? No, no, I don't think that is the problem at all. What the court decision did and our reaction to it doesn't change at all, not one bit, the policy goals that we have articulated in terms of getting broadband to rural America and all Americans, dealing with public safety issues, addressing basic consumer protections, nothing changes with re-

spect to our goals. What this uninvited, undesired court decision does is it forces us to look at the legal foundation underneath it, to go into the basement and say, all right, we need to do these things for the country, they really matter. Even though we liked the structure that existed, the court told us you got to go into the basement and fix the foundation so that what you are doing for all these other things stands up. That is what we are trying to do.

Mr. CRENSHAW. So that is the problem.

Mr. GENACHOWSKI. That is the issue.

Mr. CRENSHAW. Okay. And is that not being done now?

Mr. GENACHOWSKI. Well, that is the process. We believe we have an obligation at the Commission to say, look, this court decision came down, it raises questions, we need to have a public, open, transparent process to identify what to do going forward. A lot of other people are looking at it, and I encourage that. This is an area where it is in our national interest to have all stakeholders come together, roll up their sleeves, get into the basement, get their tools out and fix this.

Mr. CRENSHAW. What needs to get fixed? What is the big, big, big problem? You got goals, you got objectives and some of them I guess are being accomplished. But is there one big thing that is not, that you got to fix?

Mr. GENACHOWSKI. Well, in terms of the legal foundation the court said, hey, your foundation is broken, we need to go fix it. With respect to the broadband policies and objectives, transforming the Universal Service Fund so that we can extend broadband to all Americans, a vital thing we have to fix.

Mr. CRENSHAW. Is that not being done now?

Mr. GENACHOWSKI. It is something we are working on very, very hard. The court decision raises questions about the legal basis on which it can rest. None of us want to spend a long time working together to build consensus for universal service reform and then have the court say, oh, you weren't listening, we told you that you can't rest it on this part of the Communications Act.

Mr. CRENSHAW. That is the big problem. All right. Now so you are working on that. Why are you working on that and not Congress working on that?

Mr. GENACHOWSKI. Well, I think we have an obligation as the agency that administers the Universal Service Fund to work on it and improve it. We have obligations with respect to public safety, obligations with respect to basic consumer protections. And as I said, all of these policy goals have been very transparent and open. And nothing about the litigation or this process that we are dealing with now to deal with it affects our policy goals, affects our desire to have light touch regulation, to promote investment, to cut red tape, to focus on consumers' real needs, to focus on broadband and education.

Mr. CRENSHAW. Won't you end up with more regulation?

Mr. GENACHOWSKI. No.

Mr. CRENSHAW. So you might actually reduce regulation, your new rules might be less restrictive than the rules you have now?

Mr. GENACHOWSKI. Our goal is to go into the basement, fix the foundation so we can continue to work on exactly the same house that we have been working on and do that in a spirit of bipartisan-

ship and consensus and global competitiveness in the United States.

Mr. CRENSHAW. And what do you think the Congress' goal is?

Mr. GENACHOWSKI. I am not sure that I would—I am not sure——

Mr. CRENSHAW. Would they be working on—I assume that Congress is going to—I don't sit on the Energy and Commerce Committee, but I assume somebody there is. As you say, the authorizing committee chairmen are talking about fixing the telecommunications industry or rewriting laws or whatever. Is that a mutually shared goal they have with you?

Mr. GENACHOWSKI. Yes. And I wouldn't want to speak for other Members of Congress, but we work closely with our authorizing committees and have great respect for the chairmen of those committees.

Mr. CRENSHAW. So why don't you wait and let them do it? It is that urgent?

Mr. GENACHOWSKI. I think success in broadband is urgent for the country, I do believe that.

Mr. CRENSHAW. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you. Ms. Wasserman Schultz, the gentlewoman from the great State of Florida.

Ms. WASSERMAN SCHULTZ. Thank you very much, Mr. Chairman. And a lifelong Yankee fan I might add, having been born in your home State.

I am going to be the fly in the ointment among the members here and tell you, and not be afraid to say out loud, that I don't really have a problem with your move towards light touch regulation and am very interested in seeing what benefits to the consumer we might have. I mean, we have been struggling with issues related to the Internet like net neutrality, like how to make sure that we decide how much a company should be able to restrict access to a piece of network or control a piece of the network and package that and sell it. I would like to hear from you, to the degree you haven't already touched on it, what consumer benefits you think would come from light touch regulation.

I also, though, would like you to touch on the whole issue of child pornography trafficking across the Internet. That is something that I have been very focused on since passing the Protect Our Children Act in 2008. I mean just to give you an example, last year a major ISP in the world tried to determine the magnitude of child pornography trafficking across their network in just one country, and it was a small country, fewer than 10 million people, something like the size of New Jersey, they used known child pornography identifiers, hash values from a registry provided for them by Interval. They determined that 120,000 transactions for receipt, distribution and possession of child pornography had occurred in one day in one country. If we were to extrapolate a similar demand on the United States it would mean that there could be as many as 3 million hits for child pornography in our own country.

I would like to know what the intended policy is toward anonymity on the Internet. Does the agency see a need to mandate that broadband providers keep and manage information like that? And I have a couple other questions related to that as well. But I know

the easiest thing in the world to do politically is to just stay away from the Internet, stay away from Internet taxation, stay away from Internet regulation. The Internet has been off limits to any suggestion of anything governmentally related in touching it since its explosion. And I think as far as the answer to the question why not leave this to Congress, I mean sometimes Congress leads and sometimes we are pushed. And to be honest with you, I am not sure, as much respect as I have for the chairmen working on the issue now, I am not sure that they would have taken the issue up quite as soon if the FCC had not begun exploring the avenues that you are exploring. So I would love to hear from you.

Mr. GENACHOWSKI. Thank you very much. Consumer benefits, the FCC has always promoted consumer benefits with respect to the main access to communications that goes into people's homes. And a lot of this issue is about preserving the ability to do, to take necessary steps for consumers. I will give you an example. We have been working recently on the issue of bill shock. There are consumers who get their bill in the mail for their mobile service and where they thought they were going to have a bill of $70, $80, $90 they get one for $2,000 because they exceeded their limits and they just didn't know. Our survey found that as many as 30 million Americans are affected by this at some level. And there are some basic things that we are exploring that might be able to fix this; making sure that consumers get text messages when they exceed their limits, for example, number one. Number two, I believe that information technologies actually provide a whole new range of opportunities to address consumer confusion, deal with basic consumer issues in a way that is lighter touch and more beneficial than in the past, because it is easier now to put in front of consumers of broadband access services information that will help them understand their speeds, their services. You know we found an international Broadband Plan that the speeds that consumers actually get for broadband are about half of what is advertised. Well, there are things that we ought to look at with respect to transparency rules that make it clearer to consumers. All of these issues are tied up in do we have basic authority to adopt sensible rules with respect to broadband access.

With respect to preserving a free and open Internet, I believe that is a huge consumer issue. The ability of consumers to have choice, to access services that they would like, I think about consumers too as small businesses who want to have the opportunity to put a business on line and know that they can reach an audience, I think it is a very, very big consumer issue.

To your child pornography point I would say that that focus is about lawful content and services. And I feel very strongly that we need to preserve the freedom and the openness of the Internet for lawful communications, lawful business relations, but unlawful content and services are in a different category. And in fact I think for the success of our Internet in the future we need to recognize both the need for openness and the need for safety, being very cognizant of the First Amendment and its vital importance.

Ms. WASSERMAN SCHULTZ. Can I just ask you, because you just described reasonable network management practices. Mr. Chair-

man, if I can just finish this sentence and get an answer that would be great. Thank you.

Does the FCC intend to allow ISPs to block, thwart and encourage identification of legal content? I mean, during this light touch regulatory process I would think that that is something that you could take up that would really protect children and address the explosion of illegal content that is being transmitted across the Internet.

Mr. GENACHOWSKI. Yes. Preserving a free and open Internet and making sure that reasonable steps can be taken to deal with unlawful content or unlawful activities, we need to get that balance right, and I think we can.

Ms. WASSERMAN SCHULTZ. Thank you very much.

Mr. SERRANO. Let me just say that that is, and that was a great line of questioning, that is my biggest concern, that you allow the freedom that we Americans always love to enjoy and at the same time not allow the Internet to be used to destroy people or to commit unlawful acts. And that is a challenge and a half, because it has to be done carefully. And we can't do it every time there is a crisis. Because when we respond to a crisis we tend to go too far to one side. And so it is a balance. I don't envy the job you have to do, but we do remind you on both sides that this is a huge challenge you have.

Mr. Culberson.

Mr. CULBERSON. Thank you, Mr. Chairman. Following up on Ms. Wasserman Schultz's question, and she is absolutely right, all of us are deeply concerned about the proliferation of child pornography, exploitation of children on the Internet, but the District Court of Appeals for the D.C. Circuit, the Supreme Court in this most recent decision from the D.C. Circuit, you don't have ancillary jurisdiction to regulate in areas that are not specifically authorized by the statute. I saw you were the general counsel of the FCC from 1994 to 1997. And when you tell us blithely and broadly that you are going to go work on the foundation, you don't have the statutory authority to do what you are attempting to do. You have a unanimous decision from the D.C. Court of Appeals, you have 10 years of precedent from the FCC in decisions and from the U.S. Supreme Court that you do not have the authority or jurisdiction to do what you are attempting to do. And all that is necessary if you are, if you are passionate about this and concerned about it is to go to the authorizing committees and ask them to amend the Communications Act to give you authority to regulate information services. And I would suggest that what you need to ask for specifically is the authority to prohibit illegal content and in particular the abomination of child pornography. And anybody that traffics in it, promotes it, allows it to be transmitted ought to be boiled in oil. And you guys ought to be able to have authority to regulate that. And I am confident the authorizers would do so. But you do encounter strenuous opposition from all of us in any broader effort to regulate lawful content on the Internet. You don't have the authority to do what you are attempting to do, do you?

Mr. GENACHOWSKI. Well——

Mr. CULBERSON. Where in any court decision and where in the statute—you were the general counsel from 1994 to 1997—tell me

specifically in what court decision and where in the statute does it explicitly give you the jurisdiction to do what you are attempting to do? It is not there, is it?

Mr. GENACHOWSKI. Well——

Mr. CULBERSON. Where?

Mr. GENACHOWSKI. With respect, I believe that the proposals that have been laid out—actually, by the different stakeholders in this there are many who agree that there are different ways under the statute to pursue broadband, and a lot of the debate is which is the best way. So we would be happy to provide a fuller legal—go on, please.

Mr. CULBERSON. You can do it I am sure off the top of your head. You were the general counsel for the FCC, you are an attorney, I am an attorney. Tell me specifically, show me, just tell me where in the statute, what court decision is it that gives you the authority to attempt to regulate the Internet in the way that you are attempting to do? I don't see it, it is not there. Can you tell me as the former general counsel and the Chairman, where in the statute and what court case gives you that authority.

Mr. GENACHOWSKI. Just one correction, I wasn't the general counsel. I was chief counsel to the Chairman.

Mr. CULBERSON. Same thing.

Mr. GENACHOWSKI. Yes. But nevertheless, the third way proposal would go back to the definition that the FCC had of broadband access providers as telecommunication service providers, the people who provide the pipe into your home for broadband access.

Mr. CULBERSON. You would just issue a regulation that says they are telecommunication?

Mr. GENACHOWSKI. The Commission had that in place in the past and then it adjusted that, and I think lawyers would agree we have the discretion to adjust it back.

Mr. CULBERSON. Ancillary jurisdiction is what you are talking about and the D.C. Circuit said you don't have ancillary jurisdiction, and you would also be reversing 10 years of explicit decisions from the FCC classifying the Internet as information services, not telecommunication, right?

Mr. GENACHOWSKI. Well, if I could, there are people who believe we continue to have ancillary jurisdiction.

Mr. CULBERSON. Despite the court decision?

Mr. GENACHOWSKI. Yes. But by the way, those are some of the carriers who would urge us to continue moving under Title I. With respect to whether the classification of broadband access can be changed there are many, many lawyers, our general counsel currently at the agency believes that it is well within Supreme Court decisions and D.C. Circuit decisions to adjust that clarification.

Mr. CULBERSON. Forgive me. My chairman is correct on the 5–minute rule and I will have follow-up. Harry Truman used to say he always wanted to meet a one-armed economist so they couldn't say on the one hand and then on the other hand. There are always lawyers that can tell you that no matter despite this mountain of Supreme Court decisions, and this most recent explicit Court of Appeals decision, that you do not have ancillary jurisdiction, and despite all these decisions from the FCC over the last 10 years that

you don't have the jurisdiction or authority to regulate the Internet, we are just going to do it anyway is what you are telling me.

Mr. GENACHOWSKI. No, sir, that is not what I am telling you.

Mr. CULBERSON. Sure.

Mr. GENACHOWSKI. We are not going to regulate the Internet.

Mr. CULBERSON. Let me just ask you again. Where in the law, what statute specifically gives you this authority and what court case gives you this authority explicitly when you have got a unanimous opinion from the D.C. Circuit that says you do not have, quote, untrammeled freedom to regulate activities over which the statute fails to confer you that authority?

If you don't have the authority, all you need to do is go to the authorizing committee, go to Mr. Waxman. As Ms. Wasserman Schultz suggests, child pornography is vile. I mean you ought to go in and just ask for authority to regulate illegal activity. You would get it. Ask for the authority. You don't have it in statute, you don't have it under court cases, do you? Tell me the case.

Mr. GENACHOWSKI. With respect, I believe we have authority.

Mr. CULBERSON. Where?

Mr. GENACHOWSKI. Under Title II. Many believe authority under Title I.

Mr. CULBERSON. Where? I have got it right here. Where?

Mr. GENACHOWSKI. Section 201, Section 202.

Mr. CULBERSON. 201 and 202. Hold on. I will do my follow up. Where else?

Mr. GENACHOWSKI. In general Title II applies to telecommunications providers.

Mr. CULBERSON. But telecommunication is not information services, that is my point. The D.C. Circuit said the Internet is information services. You are given authority to regulate telecommunications, right? You are an attorney, come on.

Mr. GENACHOWSKI. Yes. I would be happy to continue this discussion.

Mr. CULBERSON. Don't dodge.

Mr. GENACHOWSKI. No, sir. I am trying to answer your questions directly. The question is whether the provision of broadband access to consumers is——

Mr. CULBERSON. Is information or telecommunications. The chairman has been very generous. But Ms. Wasserman Schultz is exactly right, we need to absolutely shut down child pornography. Go to the authorizers. You don't have the authority to do what you are attempting to do. Why don't you go to the authorizers, will you?

Mr. GENACHOWSKI. I understand your point. We are in discussion with our authorizers.

Mr. CULBERSON. Thank you, Mr. Chairman. You have been very gracious. Thanks for the indulgence.

Mr. SERRANO. Were you a prosecutor?

Mr. CULBERSON. I just feel as strongly as we all do. And my good friend Debbie Wasserman Schultz is right about this. I mean these people ought to be boiled in oil and it is inexcusable that this vile material is allowed to be broadcast. And we can find them and roast them. She is right, toast them up.

Mr. SERRANO. We all agree.

Mr. Fattah.

Mr. FATTAH. Mr. Chairman, just let it be for the record I would rather you go deal with the child pornographers and if someone wants to say you don't have the authority let them defend on the other side. But I want to pass this round to Congressman Ryan, and then I will catch him on the next round because he wants to do something to facilitate us continuing in this particular vein.

Mr. SERRANO. Well, in that case——

Mr. RYAN. Mr. Chairman, I feel like this is a basketball game because I am going to pass to Ms. Wasserman Schultz so that she can follow up on her line of questioning.

Mr. SERRANO. Right. Who is in charge here?

Mr. RYAN. I don't know. This is my first meeting.

Mr. SERRANO. I was going to welcome the newest member of our committee, Mr. Ryan, who already has broken three other rules.

Mr. FATTAH. I think the gentlelady from Florida is in charge.

Mr. SERRANO. Of the time now I guess. Okay. Ms. Wasserman Schultz.

Ms. WASSERMAN SCHULTZ. I will only take a couple of the very generous 5 minutes that my colleagues have tossed me. I actually agree with Congressman Fattah that to the degree that you have authority, whatever authority you possess today to restrict the transmission of child pornography and to be able to go after pornographers who are transmitting content on the Internet and to be able to expose them and deal with a telecommunications policy that prohibits them from being anonymous, then you should use all that authority and you should seek more. So if we can split the difference and say that you may not have all the authority you need, but whatever authority you have you should pursue that.

Mr. GENACHOWSKI. If I could say done, like many of us, I have three kids, including two young ones, and it is a huge, huge terrible issue that needs to be tackled very fully, and so I completely agree.

Ms. WASSERMAN SCHULTZ. Good. And then the other quick question I had is just about the life line service, because life line has not, has traditionally been for land line services. Obviously it is very important now given how many people use cell phones. In September, Congresswoman Matsui, our colleague, introduced legislation that would require the FCC to establish a broadband assistance program for low-income people by expanding the life line program. Have you had a chance to review that legislation and are you supportive of it?

Mr. GENACHOWSKI. Yes and yes. And our national Broadband Plan recommends that we move forward on it, and we have actually begun the process in May looking at doing exactly that.

Ms. WASSERMAN SCHULTZ. Does your fiscal year 2011 budget request reflect it?

Mr. GENACHOWSKI. It would be part of our overall Universal Service Fund reforms, it would be inside the Universal Service Fund.

Ms. WASSERMAN SCHULTZ. Which I guess if you had some light touch regulation you would be able to advance even further?

Mr. GENACHOWSKI. Yes.

Ms. WASSERMAN SCHULTZ. Thank you very much for my colleague's indulgence.

Mr. RYAN. Thank you. I just have—it is me, right? I just have one question. The national Broadband Plan recognizes that we have this huge gap in funding, $24 billion. And we have similar issues with our transportation budget. We have a $1.4 trillion transportation infrastructure gap. And we are trying to come up with some creative ways through transportation banks and leveraging private financing and those kind of things, creative ways to try to address this issue.

Are you exploring some creative ways that we can address this issue, because we have got a lot of work ahead of us? And I think economic development and a lot of communities, not just rural but urban centers as well, who are trying to regenerate and restore their local economies, for example, in the industrial Midwest where a lot of this stuff was steel, rubber, manufacturing that is now trying to move into some higher technology, biofuels, whatever the case may be, software, this is very important for us. And so the only question is, and if we can help you in any way figure out creative ways to finance this and then to maintain it over the long term.

Mr. GENACHOWSKI. And I agree with the premise of your question completely, and there is always the opportunity for new ideas, and I welcome that.

Transforming the Universal Service Fund, it is approximately an $8 billion a year fund that needs to be focused in a smart way on new technologies to benefit people all over the country. There are opportunities in thinking creatively about spectrum options, and so the kinds of policies that we have proposed, some of which require legislation, to recover and auction off new spectrum, it has this win-win-win effect, because it can free up more spectrum, and spectrum is a form of infrastructure when it comes to wireless technologies for mobile broadband in urban and rural areas, which can make a big difference. It can generate substantial funds for the Treasury, which can help funding across the board, and there are ways to do it that work and are wins from the perspective of entities that hold spectrum licenses now.

And so there are some creative ideas there around two-sided auctions, incentive auctions that we would be happy to follow up with you on because it is an important area where we do need to work with Congress to make sure that we have the spectrum infrastructure that will allow us to lead the word.

And to your earlier question, Chairman, about what the U.S. hasn't done right in the past, this is an opportunity in the future for us to focus on our mobile infrastructure, on our wireless infrastructure to make sure we get it right for the next 10, 20 years.

Mr. RYAN. Thank you.

Mr. SERRANO. Thank you, Mr. Ryan.

Let me go into an area that is of great interest to me and I know to members on both sides, and that is the treatment of the PEG channels. In 2008, this subcommittee held a hearing on Public, Educational, and Governmental, or PEG, access television subscribers. At that time, several companies were denying PEG channels treatment equal to basic commercial channels. PEG supporters have filed petitions at the FCC to ensure fair treatment of PEG channels.

When I urged prompt resolution of those petitions at our FCC hearing last year, Acting Chairman Cox said, it is my hope—this is a quote—that the Commission will take whatever steps are necessary to ensure that PEG channels remain a vibrant and valuable service.

One year later, the FCC has apparently still not resolved the situation.

Now, some of us have been around long enough to remember that when this great bonus, cable television, went out, it was with an understanding that the local community would have access through these channels, and everything from the local Little League football team being able to present their awards live, or taped on a local channel, to the local church having a Sunday service to whatever cultural and ethnic groups wanted to go on the air; they could do it.

And what has happened is that more and more, the people are making them—making it hard for them to function. And in some cases, we hear stories out in the West Coast and other places where the channels now have moved from the first 15, 20, 30, 50 channels to channel 800, and it is a dropdown menu, and making it almost impossible for you to get.

Now, I think eventually, as we begin to trade off support, as we always do, where you have some issues that you want Congress to support you and Congress needs for you to do something, this little issue of PEG channels may become a very difficult issue, because on both sides, people support the fact that there is this public access, and it is important.

So, before I ask you what is happening, I am telling you that this has to be dealt with fairly and strongly; otherwise, we are going to have some very difficult times between this subcommittee and the FCC, because we will not sit by and allow the FCC to allow commercial carriers to just push these folks aside.

Mr. GENACHOWSKI. I appreciate the question. There has been some good news with respect to PEG, and there is also a lot more work that needs to be done. So one of the major disputes that existed was one involving Comcast, and that now has been, there has been a satisfactory solution there. We would be happy to review it with your staff and make sure it is satisfactory to you and your staff. But it is our understanding that the PEG community is satisfied with how that was resolved, and that obviously involves many communities across the country. There is at least one other major provider where there is an ongoing dispute that has not been resolved, and I can assure you that we will go back and make sure that it is on a track toward resolution.

Mr. SERRANO. Now, do you feel that there is a concentrated effort to move them off the bands, if you will? Is there indifference by the major carriers, or is there a plan here?

Mr. GENACHOWSKI. Well, I don't know that I would be comfortable characterizing their points of view. The issues tend to come up, as you know, in convergence to digital. And sometimes the conversions are done to digital transmission of video services in a way that leaves PEG behind. That is what creates the issue.

Mr. SERRANO. When you buy a house or get a car, you don't leave some of the members of the family behind. Right? You move them

all to the new place and you all celebrate. And I think that what has happened is that the FCC has not regulated these folks. And you do have the authority to do so on this particular issue, to say, this is part of the deal. And we remember the deal. I remember, in the Bronx, which took longer than most places, as you know, to get cable, that those were the agreements. Now, they have done pretty well there, but in some places, they are totally forgotten.

Mr. GENACHOWSKI. The issue remains, and we will work with you closely on this. My hope is that the successful resolution in one case can be a model for successfully resolving it in others. But there is no question that the rights of PEG channels to have access to systems and access to the audience have to be honored and enforced.

Mr. SERRANO. Okay. Now, taking Mr. Culberson's approach of being more direct. You do have the authority. Do you intend to use it to make sure that they are not left behind?

Mr. GENACHOWSKI. We intend to honor the statute here and take this very seriously and make sure that PEG channels are not left behind.

Mr. SERRANO. Okay. I understand your desire to honor it. I am going to take it a step further. I hope you get angry. Because I think as we deal with bigger issues, or what some people perceive as bigger issues, these will be left off the table again. And we can't do that.

Which brings me to my next question, which is another favorite subject of mine. And that is, why can't the FCC do what some of us would want to do with all Federal agencies, but since you have a broader understanding of a lot of issues, why do you find it so difficult to understand that we have 50 States and territories? Why do the territories always drag behind, lag behind in everything the FCC does? Why do we have American citizens who have the least access to the Internet in places like Puerto Rico and the Virgin Islands and Samoan and so on, why when we put forth a plan we always seem to say, for the States and the territories?

And understand, this is a mantra of mine with every Federal agency. But I don't have oversight over all Federal agencies, and we do over the FCC. So why is it that at every turn the territories are always left behind?

Mr. GENACHOWSKI. Well, we take this very seriously. And in fact, in the universal service proposal that we put out last month, there is a specific discussion of territories and looking at a proposal to modernize Lifeline and Link-Up to take into account the unique situations of Puerto Rico and other territories. So it is something that we take seriously, that we are looking at. And I do believe the FCC has made progress over the last few years in thinking about the Universal Service Fund applying to everywhere, including the territories.

Mr. SERRANO. But there are disparities, and you acknowledge that.

Mr. GENACHOWSKI. Yes.

Mr. SERRANO. Well, despite these disparities, you recently declined to set up an insular specific Universal Service Fund mechanism to provide wireline voice service in Puerto Rico, citing recent improvements in overall voice service.

In light of this, what can the FCC do to narrow this wide gap in Internet and especially broadband use in the territories versus the States, and make sure that a similar gap does not develop in the future?

Because what is happening is you have got this gap that exists already. Then every time you move into a new area, you leave them behind again. And so they are not only catching up to what we have now, but they are already in line to have to catch up to what we will have a year or 10 years from now or 5 years from now.

What is so difficult for the members of the Commission to understand that these folks are American citizens living under the American Flag?

Mr. GENACHOWSKI. I believe that we do understand that. And in fact, this is why specifically in our proposals to modernize the Universal Service Fund, we are focused on this issue. The biggest gap that we see and look forward to ongoing discussions with you on this is on the adoption gap. The adoption levels in Puerto Rico, for example, are well, well beneath national averages. There is no question that there is serious lagging behind, and of course, that affects people's ability to look for jobs, to get access to health care information, to be entrepreneurial and start businesses. And it is why this reform that we have proposed with respect to Lifeline and Link-Up to make significant progress on broadband adoption is so important.

On the deployment side, we are looking at both wireline deployment and wireless deployment, and we would like to see progress on both because they are both essential to participating in our economy, connecting with family and friends.

And so we hear you on this. It is very important. I think the Commission is paying very close attention to this.

Mr. SERRANO. In closing, before I turn to Mrs. Emerson, let me do a combination of Mr. Fattah and Mr. Culberson.

Assume you had the authority, if you think you don't have the authority, go and make believe we have 55 States and not 50, and let Congress get upset at you later for treating all Americans equally.

Mrs. Emerson.

Mrs. EMERSON. I am not going there.

Thank you, Mr. Chairman.

Let me ask you a question. Do other countries in the world have interoperable first-responder networks?

Mr. GENACHOWSKI. It varies from country to country. I would be happy to get you detail.

Our military has better interoperability than our first responders. And one of the things that we have been trying to do is increase the best practices, the information, the knowledge that go from our military being able to solve some of the interoperability issues to our first responders. And I think that is an area where we can make progress.

Mrs. EMERSON. But I am asking you, is there another country? Are you aware of any other country in the world that has an interoperable network for public safety folks?

Mr. GENACHOWSKI. Countries that are comparable to ours in the sense that they have so many different local authorities, it is hard to find that level of comparability. It may be that countries that have one single communications force don't have the issues that we have. So the locally-based system that we have is very important to our country. It does create interoperability issues that I think are somewhat unique to the United States.

Mrs. EMERSON. Well, that may be well true. And it is pretty embarrassing that it is this long after 9/11 and we still don't have a network.

And, as a matter of fact, even after Hurricane Katrina within the military, the military itself, active-duty folks had a pretty darn good interoperable system, which has been much improved even since then. But the Guard and—the National Guard and the Reserves couldn't talk to the active duty folks. And I don't know if that has been fixed since then, but it was very apparent during Katrina that they couldn't even do that.

I know that—I mean, I am all for building out and securing a first-responder network, and I know that you all have worked really hard on getting that plan done. I guess I am a little bit confused, because on the one hand, your plan proposes to provide $6.5 billion in assistance to first responders to build out a network, but then the National Governors Association wrote and asked that your plan be amended to allow the D block to be allocated to public safety. And then first responders say that they actually want to control the spectrum, and that priority access on—on a commercial network is insufficient in a crisis. And then we are told that all these different people are coming at it from different approaches.

I guess I want some clarification from you, if you would, because I don't know, why would it be preferable to auction the spectrum commercially and give first responders $6.5 billion, while hoping the industry will work with them? Why wouldn't you just allocate the D block to first responders without giving them the $6.5 billion, and then they can control the spectrum and establish their own relationship with industry to build out a reliable and a resilient network?

It is all a little bit too many different competing interests here. And, you know, the bottom line is, we want a system that works, and I don't know why we would pay $6.5 billion for it if they could get it for free and then do it themselves. So I want to hear your reasoning behind it, if you wouldn't mind.

Mr. GENACHOWSKI. A couple points. One is the goal of finally delivering on the recommendation of the 9/11 Commission that we have interoperable communications, number one. And, two, that we have a mobile broadband first responders is absolutely vital. Two, we don't have the authority to do anything other than auction the spectrum. This was the allocation that Congress made, and for that to change, we couldn't do that on our own.

In connection with the National Broadband Plan, we put together a team led by a retired admiral who is just completely dedicated to tackling these issues. And the team developed a multi-part plan, that there is no single thing that can solve this. But their biggest concern was that the record of the last number of years suggests that if spectrum is allocated for public safety, and there isn't a plan

to build the network, it doesn't get built. And there is spectrum out there that has been allocated. This isn't like other areas that the FCC deals with where private investors will come and invest in networks and they would get them built.

And the conclusion of our staff on this was that if the funding issue isn't tackled directly, the towers and the equipment and everything else that needs to get done won't get done. And that is a suggestion and a request that we have made to Congress, making the point that if this is done now while the commercial four G networks are getting built out, the cost will be much, much less than if it is done in the future.

There are a series of things that are part of the plan that need to be done to make sure that the network not only gets built but that it gets built in a way that is interoperable. And so we have set up an office for interoperability coordinating with Homeland Security Department and the Justice Department to make sure that we don't repeat the errors of the past, and that there are people looking at standards for interoperability, so that as the new network is built out, that can happen.

And the team of course looked at the sufficiency of the spectrum as Congress had allocated it and came to the conclusion, dispassionate staff just looking at the facts, that the issue wasn't quantity of spectrum; the issue was funding to get the network built.

Mrs. EMERSON. Have the first responders even presented a plan? I don't know. I am really asking you, have you seen any kind of plan on the part of first-responder community?

Mr. GENACHOWSKI. There have been many, many discussions between the first-responder community and the agency. And I know from my own conversations with them that many parts of the plan they feel strongly represent real progress, as I think Chairman Serrano mentioned, on a bipartisan basis. The four members, two Democrats, two Republicans on the 9/11 Commission supported the ideas and the plan as the best thing that they have seen to really make progress on this. We will continue to work with the public safety community.

Our goals are the same, and we look forward to working with the public safety community, with this committee, with other committees to get this done for our country. It has not been a proud history. We have made much less progress over the last 10 years. Different people have different views on why that has occurred. But what is important to me was to set up the kind of team that had the right level of experience and could dispassionately look at it and make recommendations to Congress and for our own actions that we believe would accelerate interoperability and accelerate a mobile broadband public safety.

Mrs. EMERSON. So let's just say we all agree with you. Hypothetically, we all agree with you, and you have the go ahead and you are going to get this done, and you will get your $6.5 billion to give out, hypothetically. How long will it take from start to finish to put in place a nationwide public safety network that is going to resolve all the communications issues we faced during both 9/11 and Katrina?

Mr. GENACHOWSKI. Two answers. Several years. And I would be happy to get back to you with something more specific. But I can tell you, it would be roughly built out on the same pace as the buildout of commercial networks. Because part of the idea is, as the commercial carriers are building up four G networks, let's take advantage of that buildout; let's do one truck roll, not two. Let's have equipment go out at the same time. Let's take advantage of the same towers. So the pace would be the pace that is driven by the commercial buildout, and the cost would be much less than if we didn't move forward on this, allow the commercial networks to be built out, and then came back and said, okay, now let's do another set of truck rolls to put in the equipment for public safety.

So I wish we could do it in 6 months. We can't. It will take several years. But it will be much faster than any other approach that we have seen.

Mrs. EMERSON. So several years. Is that under 10?

Mr. GENACHOWSKI. Yes.

Mrs. EMERSON. Is it more than 5? I am not—and I am not going to hold you to it. But just to give us a sense of—because we already have this other broadband deployment in place. I mean, I am happy to get EDGE in my district. You know? I mean, I am happy to get EDGE in some places. So what can I tell you, but nonetheless, it is worrisome in deploying a system like that. I mean, I just watched the nightmares that all of these little companies are going through trying to get approval from either RUS/NTIA just to do the broadband deployment from the stimulus bill, let alone some major national network. So I appreciate your answer. Thanks.

Mr. SERRANO. Mr. Fattah.

Mr. FATTAH. Thank you, Mr. Chairman. And I wish the Yankees well this year.

Mrs. EMERSON. What about the Cardinals?

Mr. FATTAH. But the Phillies are going to be the number one.

Mr. SERRANO. I suspect it will be the Yankees and the Phillies again.

Mr. FATTAH. I am with you.

Welcome to the committee. And you have a recommendation for an increase of $19 million over your base from last year. Now, in part, you got some technology initiatives. There is also an additional 900,000 you are asking in terms of the, I guess the replacement of the vehicles you use now to protect public safety networks from interference. Would those dollars over the long term be backed out in future year budgets, assuming we do the Nationwide D block plan?

Mr. GENACHOWSKI. I am not sure they would. The public safety work that we do, and I am very proud of this, we have developed technologies over the years that have the ability to identify spectrum uses in different markets that has been of tremendous value to our sister agencies in government in dealing with disasters, and we would be happy to follow up with you and give you more examples. Some of them can't be discussed in a public setting. But they have been very valuable throughout the United States, especially with respect to disasters, and I think it is a program that has earned its presence.

Mr. FATTAH. Another part of this increase request is to recruit and hire talent on it, on cybersecurity issues and some other issues. Right? So, now, I assume you do have authority to be concerned about cybersecurity.

Mr. GENACHOWSKI. We are very concerned about——

Mr. FATTAH. This is on the Internet. Right?

Mr. GENACHOWSKI. Yeah.

Mr. FATTAH. There was some debate about whether you had any authority to have interactions around the Internet.

Mr. GENACHOWSKI. It is a very significant challenge for the country. As the FCC, as the expert agency responsible for communications, we have an important role to play here. It is vital that we have the expertise, the engineers and others, who can play a role in our system with respect to cybersecurity.

Mr. FATTAH. Now, in regards to one of your major goals of the agency, as you have identified, is to advancing a vibrant media landscape. In this regard, one of the big concerns has been about making sure that we continue to advance the interests of ownership, both in the media for African Americans, Hispanics, Native Americans, women. And I am, wondering whether it would be, as your role as chair, you see any major initiatives in this regard given the dearth of interest over the last decade in this issue.

Mr. GENACHOWSKI. It is a very important issue. And it becomes even more important as technologies change, as the next generation is looking at new media channels instead of old media channels. So we are both, with respect to older media, getting our arms around the data and pursuing initiatives to continue to encourage those goals with respect to older media. And I also think it is vitally important that we look at a broad opportunity with respect to new media and new technologies. And in some ways there is an even greater opportunity to make a difference there because there are new entrepreneurs starting every day. And so it is one of the reasons, if I may, that I think preserving a free and open Internet is so important, because it gives the opportunity from anyone from any background to start a media company, start a business, reach an audience and have a realistic chance to succeed.

Mr. FATTAH. Well, I concur. And I want to thank you for your work. And I know there is a libertarian streak that we should—that free and open might mean unfettered. I mean, we have a Federal highway system that is free and open, but you do have to be moving on the right direction. You can't be coming up the opposite way. So I want to concur with my colleagues' interest in this child pornography issue, that we need to be clear that, even though we are very interested in a free and open Internet, we don't mean that in that context that people should be able to abuse children and feel as though they can be anonymous and out of the reach or touch of the society in terms of addressing what is a, I think my Republican colleague said, an abomination. But we should be passionate about addressing at every turn people who are involved in that type of activity. So thank you very much.

Mr. GENACHOWSKI. I totally agree.

Mr. SERRANO. Thank you, Mr. Fattah.

I want to echo his words. I think it has to be said again that, on behalf of all members of this committee, we do believe in a free

and open Internet, but not one that then has the ability to bring harm to people. And that is, again, that is your challenge. That is the challenge for all of us. But it is clear that, as he says, you can't use the highway going in the wrong direction. You shouldn't use the Internet to bring harm to people.

Mr. GENACHOWSKI. Absolutely. We have free and open commercial markets in our regular business, and we enforce the hell out of our child pornography laws. And that should be the same approach with respect to these new technologies. It is vital.

Mr. SERRANO. Mr. Culberson.

Mr. CULBERSON. Thank you, Mr. Chairman.

If I could throw out an idea that would allow you to very rapidly permit interoperability of our first responders and law enforcement, and I don't think it would cost much money, if any, and that would be to authorize the television broadcasters to use the currently unused part of their digital spectrum, and let them become Internet providers. If you authorize television broadcasters to function as Internet service providers, they can use the digital spectrum they currently broadcast on, large portions of which are unused, to sell that spectrum to the public, number one.

And then, number two, you can then also simply require them as they do, they have to carry public service messages and broadcast the—PBS, for example, it would be probably within your authority under the statute to authorize the television stations to provide a certain piece of that spectrum to law enforcement community. And then you would have instant interoperability. The whole country has got television service and the towers are there; the digital broadcast is there. That would work. And it is there, and you don't have to do anything other than change the rules and the marketplace to take care of it. Right?

Mr. GENACHOWSKI. Those are issues that we look at. There are some challenges. Broadcasting is a one-way medium; big towers transmitting in one way. And converting that infrastructure into something that works for two-way communications on a nationwide basis is—I wish it were easy.

Mr. CULBERSON. Sure. But the marketplace would solve it. If you authorize it—I guarantee you, I have talked to the television people about it because it occurred to me when I was looking at what they were doing, they have got big gaps. They have got big areas of the digital spectrum they are not using. I throw that out as an idea.

Number two, I know that Puerto Rico and others have cellular phone service, have television service. The cellular service alone, Mr. Chairman, I know provides people with iPhone or BlackBerry access to the Internet. And the purpose of what you are attempting to do you say is to provide the country with greater access to the Internet, but the broadband plan, the National Broadband Plan acknowledges that 95 percent of the country already has access to broadband at 4 megabits per second, and that, by 2013, 90 percent of the country is going to have access at 50 megahertz per second. So the marketplace is already taking care of this.

And, number two, I want to go back to your statement a minute ago. You said you are going to honor the statute. Now, if you are going to honor the statute, as we were just discussing, the statute does not give you the authority to regulate the Internet. You ac-

knowledged that—and I am reading from the District Court of Appeals opinion—in this case, the FCC does not claim that Congress has given it express authority to regulate the Internet. You acknowledge that. It was stipulated. And you are an attorney; you know what that means. You don't even contest it. By the way, you did not even appeal this decision to the U.S. Supreme Court.

So, Mr. Chairman, Chairman Serrano, the FCC stipulated in Federal court that they do not have the authority to regulate the Internet. And when the District Court of Appeals said you don't have the authority to regulate the Internet, they didn't even appeal that to the Supreme Court. They didn't even appeal it. So what they need to do is go to the authorizers and ask for statutory authority to do what you are attempting to do.

The Commission, Mr. Chairman, Chairman Serrano, and I know you know this, Chairman Genachowski, the FCC has ruled that the Internet is not a telecommunications service. You have ruled that it is an information service.

They simply don't have the authority, Chairman Serrano, to do what they are attempting to do. And it is not within the jurisdiction of this committee to fund unauthorized and, in this case, specifically prohibited activity.

So, therefore, Mr. Chairman, I don't think—we need to have—a hard part of our bill needs to say that none of the funds appropriated by this act may be used by the FCC to regulate the Internet, because it is not authorized by law.

I would repeat my question. Tell me, show me where in the statute you have the authority to.

Mr. FATTAH. Mr. Chairman, you have asked this question several times.

Mr. CULBERSON. But he can't answer it.

Mr. FATTAH. But yeah, but that is fine. But we don't badger witnesses.

Mr. CULBERSON. No, sir, I am not attempting to badger.

I mean to make the point to the committee, Mr. Fattah and Chairman Serrano, and this is really important, that the FCC stipulated in court they don't have this authority. They didn't appeal it. When the District Court of Appeals said, you don't have this authority, they didn't even appeal it. So they acknowledged, you don't have statutory authority to regulate the Internet.

Mr. SERRANO. Well, I understand that. But I know what you are trying to get at. But why don't you let him answer the question.

Mr. CULBERSON. And the question would be, where in the statute do you have the authority to regulate the Internet, when you stipulated to the D.C. Court you don't have this authority? And I just looked at title 2, section 201. That talks about communication services. These are the duty of every common carrier to furnish communication services and to hook up other carriers. And then section 202 of title 47, USC, again deals with communications services. That does not give you the authority to regulate the Internet, and you stipulated in Court of Appeals that you do not have the authority to regulate the Internet, and the standing rules of the FCC say you do not have the authority to regulate the Internet.

So my question is, where explicitly in statute or rule do you have the authority to regulate the Internet?

Mr. GENACHOWSKI. So, if I may. It has been a long time since I have been a practicing lawyer, so I would say a couple of things. One is, we have a great experienced legal staff at the FCC, and I would refer you to a long explanation of the legal issues that our general counsel has written.

If I could attempt to summarize some of it. The question of, does the FCC have the authority to determine, not that the Internet, but that providers of broadband communication services are providers of communications services under the provisions you mentioned. I believe one that they do, and that the Supreme Court in the Brand X decision and other decisions confirms that we have the authority to do so.

But we would be happy to provide a legal briefing for the committee. I have excellent lawyers that I rely on for this, institutional lawyers of the FCC, who are committed to making sure that consumer interest, competition interest, promoting innovation and investment are protected with respect to broadband communications.

Mr. SERRANO. Your time is up.

Mr. CULBERSON. He can't answer the question. It is not authorized.

Mr. SERRANO. No, no, he gave you an answer; but that you don't accept the answer. I understand that.

Mr. CULBERSON. May I ask him one follow-up? I will do another round.

Mr. SERRANO. One follow up. But let me preface your follow up by telling you that some members of this committee feel he has the authority to do so and the Commission does, and we are hopeful that they move ahead and do what they have to do, and then run into trouble with Congress if that is going to happen on behalf of the American people and the consumers. That is a good confrontation that I am willing to be supportive of on the Commission side. I don't want them to sit around waiting to see if they have when they feel they have it, and many of us feel that they have it and should use it.

Mr. CULBERSON. You are very gracious with the time, Mr. Chairman, and I do appreciate it. You are a gentleman and a scholar. It is fun working with you. I really mean it. I appreciate the extra time.

But I want to make sure Chairman Serrano and the committee members understand that the FCC stipulated, you would agree, Chairman Genachowski—I am quoting from the District Court of Appeals' opinion: In this case, the FCC does not claim Congress has given it express authority to regulate the Internet.

That is your position in court. You did not appeal it to the Supreme Court. And you do not have and have never claimed in court that you have the authority to regulate the Internet. Isn't that correct?

Mr. GENACHOWSKI. It is not, sir.

Mr. CULBERSON. I am quoting from the opinion.

Mr. GENACHOWSKI. I understand. We will provide you and the other members of the committee a full legal analysis. I will be happy to discuss it on an ongoing basis. But as I tried to indicate, I think we disagree on these legal points. And I do have excellent counsel at the FCC that is focused on these issues.

Mr. SERRANO. They did not claim it.

Mrs. EMERSON. Let me just say something, because one, we are talking about the Internet. Otherwise, we are talking about reclassifying the transmission component of broadband. And so it is not necessarily the same thing. So I just raise that as a question as a point of refereeing.

Mr. GENACHOWSKI. Thank you.

Mr. SERRANO. We don't always claim what we think we are. You are the greatest Member of Congress. You don't claim that all the time.

Mr. Fattah.

Mr. FATTAH. Just to clarify. I agree with the ranking member.

What the chairman has said is that they have the authority to regulate the providers of broadband. And it is different from the question regulating the Internet, even though the broadband providers are operating on the Internet.

So we can play games here, but the reality is that I think the question has been asked and answered. There has been an offering of a legal briefing. And none of us can assert what the law is. That is what we have the courts to determine, and that is why we have lawyers on all various sides of this. But let's proceed.

Thank you, Mr. Chairman.

Mr. SERRANO. Thank you.

And let's do this officially. Why don't we invite your legal staff to come and speak to our staffs and to discuss this at length. Because this chairman would rather you upset some Members of Congress when you defend the rights of the American people as consumers than to wait around to interpret totally whether you have one right or not.

Mr. GENACHOWSKI. Thank you. We will provide that briefing.

Mr. SERRANO. Ms. Lee.

Ms. LEE. Thank you very much. I apologize if this question is redundant due to my being late. I had things off the Hill I had to do. But good morning. Good to see you.

Mr. GENACHOWSKI. Good morning.

Ms. LEE. I know that you are concerned that the National Broadband Plan meets the digital future and is accessible to every American.

We talked with the Congressional Black Caucus when you came in. So it is very important I think to continue this discussion as it relates to diversity in media ownership, management, access, how it is integrated into the National Broadband Plan. Also, the fair and equitable contracting opportunities for minority- and women-owned contractors and subcontractors and the fulfillment of this national effort. So I just want to get a sense of how you are doing in terms of this, in terms of the diversity question and the inclusion question.

And also, it is really important, and I wanted to ask you this before, in terms of businesses and organizations that require people to submit their resume or information only through the computer, only through the Internet, they won't accept any other way of submission, how is that fair to people who don't have access? I mean, the digital divide is alive and well, unfortunately. And so when people—and I know, in my district, say, look, they won't accept my

resume unless I put it online. My God, can we stop that, at least until everyone has access to broadband and to the Internet and has enough money to buy a computer?

Mr. GENACHOWSKI. It is such a powerful point and such an important issue. The costs of digital exclusion today are so much higher than they were 10 years ago. Ten years ago, if you were looking for a job, you could get the newspaper and find a job and apply for it. Today, as you mentioned, more and more job postings are online only and job applications require online submissions.

Ms. LEE. But how can we stop that?

Mr. GENACHOWSKI. Well, I am not sure that our authority extends to address the hiring practices of companies.

Ms. LEE. Not hiring practices.

Mr. GENACHOWSKI. In the way they take applications. But we are very focused on tackling these digital divide issues as fast as we can. It is part of the urgency for moving forward on broadband, on the adoption issues, the inclusion issues, where there are clear gaps, low-income Americans, minority Americans, rural Americans, seniors are behind a level that is already too low. Students and others. So it is vital that we do this.

We suggested a series of things in our plan. Reforming the Universal Service Fund in a way that efficiently tackles this is vital. We suggested the creation of a digital literacy corps that would focus on the communities that are most behind and tackle that with a kind of energy that we are capable of as a country. And on the ownership entrepreneur side, we are doing a series of things working closely with the Small Business Administration to make sure that the programs that exist, the mentoring programs and others, are modernized to help small businesses, entrepreneurs from all communities take advantage of new technologies.

There is no silver bullet here, as you know, but there are a series of things we can pursue with energy. Some of them are within our jurisdiction. We will pursue them. Some of them are suggestions we have made to other agencies and to Congress. But it is very important, and I think the urgency is increased by the fact that the costs for jobs, for health care, for education, of not being online are much higher than they used to be, and they are getting higher every day.

Ms. LEE. But can't the FCC send out an, I won't say directive, but a suggestion that organizations and businesses not require resumes and information to be submitted online only? That that could be discriminatory, and until everyone, every household is wired, that they have to or they should have other means of being able to receive submissions that are critical to people in terms of their lives? Because I think if the FCC just said that, you know, the country would listen. And I know, oftentimes, I talk to companies and nonprofits even. I say, you guys are shutting out a whole population of people because you require online-only submissions. And they say, oh, yeah, we hadn't even thought about that.

So if the FCC would think it through and talk about it a little bit and send out a suggestion that this stop until every household is wired, you know, we may see a bit more fairness in terms of this whole system now.

Mr. GENACHOWSKI. We will work with you on this. And I think we also would need to work together on the other half of it. More and more companies tell me that they need their employees to have basic digital skills and tools.

Ms. LEE. Why sure. That is a given. You know, especially for many of our districts that are not wired and where the digital divide is huge. That is what we intend to do.

Mr. GENACHOWSKI. I agree. So working on the front end, as you said; this back end, we set goals in the plan with respect to schools and libraries in every community that are open to people to make sure that even as we try to get broadband into every home, that there is meaningful access in every local community to the ability to both have access to the Internet, and also to the digital skills and tools that one needs in order to have meaningful access and to be eligible for a lot of the jobs that more and more require digital skills and tools.

Ms. LEE. I look forward to working with you on that, because we have to send out that message that people can't be discriminated against because they don't have access to the Web and to the Internet and to broadband and to a computer. Okay. That is basic. Thanks a million.

Mr. SERRANO. Thank you, Ms. Lee.

I am going to try to wind this down. So I am going to submit most of the rest of my questions for the record. I have two quick ones, and then I will turn it over to the rest and wrap it up.

On wireless contract termination, something we all deal with, I went in recently just to reduce my minutes and ended up with a new phone and a new contract. Don't ask me why. And they told me if I reduce my minutes, then I couldn't get my five friends and relatives on it or whatever. And if I did that—it was like a scene from Mad, Mad, Mad, Mad World where they are all trying to figure out how to get the loot, and Sid Cesar says, well, you were in the car, so you get one share for having a car and one share for being you. You were on foot, but you had two people, so you get three shares. And Jonathan Winters says, It doesn't matter, I still get less than everybody else because I was alone. So it is every man for himself.

Have you ever tried going to redo your contract? It is where you reduce your minutes, you get less options. You get more options, then you are going to fall under this plan. You walk out of there and you say, I speak English, I speak Spanish, I don't speak this language. Very embarrassing.

So what happens when a new generation of iPhones or a new version of an android becomes available? Providers increase their cancellation fees to prevent customers from changing service providers. The FCC survey shows 43 percent of consumers have remained with their current service provider because of high early termination fees. What can the FCC do to restrict anti-competitive behavior so that consumers are not prevented from swapping service providers as technology improves and options increase?

And for the record, my explanation of my own personal account is not a statement about what I want done either for me or for the industry. It is just that I pride myself on the fact that I do a lot

of these things myself and therefore I know what consumers go through. But I am not asking for any special favors from anyone.

Mr. GENACHOWSKI. Our surveys and our complaints show a tremendous amount of consumer confusion over many different aspects of wired and wireless communications. It is a thing that we are very concerned about, because the more confused consumers are, the less they can make the market work and drive competition. So whether it is speed of broadband, whether it is how early termination fees work, we believe that there are real opportunities using information technology to provide greater disclosure, greater transparency to consumers in a form that ordinary people would understand so that consumers can help make the market work better. And we are pursuing that around bill shock. We are pursuing that around early termination fees. We are pursuing that around broadband speeds. And I think this is a promising approach that should empower consumers to help make the market work. With respect to—and one of the things consumers are confused about what choices they have with respect to different services and alternatives to signing up for long-term contracts.

We are also looking at the issue in general with respect to ETFs. We pay close to this. We are in active discussion with companies. On various occasions, we have seen things that have caused us to write letters to companies to ask them to explain some of what they have done, and in some cases, those letters have caused some of the companies to say, Oh, we didn't really mean that, and to adjust behaviors in ways that were more consumer friendly. But there is no question, there is tremendous confusion here, and I think we can play a helpful role in increasing transparency and disclosure and lessening consumer confusion.

Mr. SERRANO. I hope you do. And I know that I speak for all members of the committee when I say that. I hope you move in that direction to make life a little easier for folks. And not only that, to give them a real chance to be able to make wise decisions, because sometimes you are lost.

My last question. As you know, we are big-time baseball fans and believe that all American households should have regular access to baseball games from both leagues. Currently, Time Warner and the Mid-Atlantic Sports Network, MASN, are engaged in a dispute over Time Warner's cable carriage in Eastern North Carolina. In the past, that cable franchise carried the MASN which shows games of both the Nationals and the Orioles, the closest teams to the area. I understand that there have been two arbitration decisions in favor of MASN and that, in October of 2008, the media bureau of the FCC also ruled in MASN's favor. Time Warner has since appealed the decision. In the meantime, baseball fans there are missing out on these two teams.

So I asked you the question last year, but—I asked this question last year, but I understand there has still not been a ruling. Is there a reason that it has taken so long? And do you have any sense of how long it will take the commission to make a final decision so that folks in that part of the country will know where they stand?

Mr. GENACHOWSKI. The Bureau is actively working on it, and we need to bring it to conclusion. The issue of sports programing and

consumers and video carriage is one that occupies a good deal of our time. We adopted rules a couple of months ago that will make it easier for competitors to cable companies to get access to local regional sports networks. It had been both a real barrier to competition and also unfair to consumers who were signing up to the other networks. The retransmission consent issue that we talked about before, one of the areas where it tends historically has had some real impact on consumers is that that becomes a leverage point for negotiations between cable companies and broadcasters and consumers who want to watch the programming they want to watch end up getting hurt. And then there are issues like the one that you mentioned. So these are all activity on the plate of the FCC. On some, we have moved on, and I think we have made really good progress. On this particular one, we still need to act, and I will make sure we do soon.

Mr. SERRANO. Well, with that statement that you will move on it so that the folks know what is going on, especially with this kid in Washington who is going to keep striking people out. Okay.

Mrs. Emerson.

Mrs. EMERSON. Thanks. I have some questions I would like to submit to the record, Mr. Chairman. And just on that—one little quick question again on that retransmission thing, because my smaller carriers who cannot necessarily afford it pay much, much higher rates than my larger carriers for retransmission rights. And it is problematic because they just can't compete; but yet, quite frankly, the larger cable companies don't come in there, anyway, into these communities because they are very rural anyhow. So it is really—and those are also the communities where folks aren't allowed, don't have the means necessarily to be paying outrageously high cable bills. And so, quite frankly, if you can figure out how to make that work. I realize you believe in negotiation between the parties, and I think that is grand. But for some reason, the little guys, because they don't have as many people over whom to spread their higher costs, it makes it really problematic. And I am just making that statement. You don't have to really respond, but just because Joe brought it up.

Let me ask you a really quick question about Universal Service Fund, and you will have to forgive me, because I am actually late to be somewhere. How will this proposal—is it possible this proposal could increase the cost of phone service to customers living in high-cost areas? Number one. That is the first question. And how are you going to allocate the new funding? Is it going to be based on populations that are the most underserved or unserved? And is every State going to receive money? All sorts of things like that.

I just—you know, I know these are questions that I have, and of course, where I live, people still have land-line telephones. So I don't know if that, how regular, old-fashioned phone service is going to be impacted as well.

Mr. GENACHOWSKI. The Universal Service Fund is one of our most complex, challenging issues, but it also affects so many Americans, and it is so important to get it right for our broadband future, especially when it comes to rural America.

In putting together the broadband plan, we made the following recommendations. One is we need to transform the fund to apply to broadband, as we have discussed, particularly for rural areas. Our recommendation was that we do this not in a flash cut because we are concerned about ongoing provision of telephone service as broadband is coming in, but also not in a way that goes on indefinitely. So we put out a multiyear plan. It is a 10-year plan to gradually move the system from telephone service to broadband in a way that doesn't increase the rate of growth of the fund, because someone has to pay for it; in these times, it is very important for us to be fiscally prudent.

We have also suggested that there is a way to accelerate the transition. This is not something that we will do on our own, but we have suggested that Congress has the ability to authorize, appropriate essentially a bridge fund that would be sort of a one-time capital infusion into the Universal Service Fund that would allow the transition to happen more quickly in rural areas. And I would encourage the committee to look at that. We encourage Congress to look at it. We understand that it is a challenging time fiscally, but we wanted that option to be available because it would accelerate the transition.

And then, with respect to your question about unserved and underserved, the priority is unserved. It is getting broadband to the parts of the country that don't have it. So we are looking at all the various ways we can cut and cap the existing fund to free up money as quickly as possible for the Americans who are most in need and who don't have service wherever they live. And it applies both to high cost and the Lifeline and Link-Up as well as the rate program and the rural health care program.

Mrs. EMERSON. So where you have unserved, that means, unfortunately, in my district, a lot of white, you know, on the red and white maps on TV in a lot of the white area. And I have so much National Forest and so therein lies part of the issue, so that parts of my district are totally unserved as far as any kind of broadband. On the other hand, I have underserved areas, too, whereby like one half of—for example, you have got a little town, and on one side of Main Street, it is dial-up; other side, it is not 3G, but it may be EDGE or something like that. So would that be considered underserved, and would only be in the main part of the town, but if you lived anywhere on the outlying areas, you are out of luck?

Mr. GENACHOWSKI. I would say the principle is every American, wherever they live, should have access to broadband infrastructure. And one of the issues that comes up, including in the 95 percent figure that we heard earlier, is that it often looks at things on a zip code basis, on a county basis, and it obscures some of the real issues inside, where a county might be counted or a zip code might be counted as having broadband infrastructure, even though 20, 30, 40, 50 percent of the people inside don't have it. So we are going to be very practical about making sure that the Universal Service Fund goes to actually get people service where they need it. If you are part of the 20 percent that lives in a county or a zip code that doesn't have it, you shouldn't be penalized because you are in that zip code. We also have to figure out a way not to overfund areas that don't need it so we can target the money where it is really nec-

essary. It is not easy, but we are committed to taking it on. And not to reintroduce the authority issue, but this is part of what is at stake.

Mrs. EMERSON. I don't have as much of an issue with this part of it. And it is critically important, and it helps for lots of reasons, not the least of which is when you go to a little clinic and we can do telemedicine—you don't need it in your district. You can do telemedicine with MD Anderson, for example. That is pretty significant. And I would like for all of my constituents to have those same opportunities.

So, anyway, best of luck as you get that whole system deployed.

Mr. GENACHOWSKI. Thank you.

Mr. SERRANO. The last question goes to Mr. Culberson. However, the singular ruling does not allow him to ask anything about authority.

Mr. CULBERSON. If I could just ask Mrs. Emerson if you have got television service in all parts of your district, broadcast, where they can put rabbit ears.

Mrs. EMERSON. No, I do not. There are parts of my district where you have to use satellite in order to get television. And it is not necessarily local.

Mr. CULBERSON. But it is all digital now.

Mrs. EMERSON. Yes, it is.

Mr. CULBERSON. The way to do this, I am serious, if you would consider just granting television stations the ability to be Internet service providers, the marketplace will take care of this. And they can install the equipment, let them charge a fee for it, and through the satellites or through the transmission towers, they could provide Internet service on that unused portion of their digital spectrum to the country. Just consider it. Try to think outside the box, you know?

And a couple of follow ups, Mr. Chairman, because it is truly not a matter—and I am really not—this is not a matter of interpretation on my part. The D.C. Circuit Court of Appeals in the first week of April just handed down this decision in the Comcast case.

And if I could, Chairman Serrano, during the last part of my 5 minutes here, the remainder, just a couple of sentences. Let me quote for the record that the D.C. Court of Appeals says: In this case, we must decide whether the FCC has authority to regulate an Internet service provider's network management practices. The FCC acknowledges, Mr. Chairman, that it has no express statutory authority over such practices. And the commission relies on section 4(1) of the Communications Act which authorizes the commission to, quote, perform any and all acts and make such rules and regulations and issue such orders that are not inconsistent with this chapter as may be necessary in the execution of its functions.

Sort of like the necessary and proper clause, Chairman Serrano, of the Constitution, which has been interpreted very broadly to give Congress authority in areas that the Founders did not intend.

But here, the D.C. Court ruled explicitly you do not have authority to regulate the Internet service providers, regulate the Internet, not only because the statute doesn't allow you to do it, and you acknowledge that the FCC stipulated in court that you don't have this authority expressly in statute, but you are relying on this nec-

essary and proper clause. And the FCC has repeatedly ruled that the Internet is information services, not telecommunications services. Everything I have just said is accurate.

Mr. GENACHOWSKI. I disagree with you, sir. We will provide a full legal briefing.

Mr. CULBERSON. I just quoted from the D.C. Court. Did I misquote the D.C. Court of Appeals? I just read it to you.

Mr. GENACHOWSKI. I don't have it in front of me. I don't think you misquoted it. But the issue of whether transmission services by broadband providers is inside the Communications Act under its various titles is one in which many lawyers, including the career staff at the FCC and our excellent general counsel, believes that, under Brand X and other decisions, there is clearly the authority to move on it.

Mr. CULBERSON. Therefore, let me just quote you. This is the D.C. Court of Appeals: The FCC acknowledges that you have no express statutory authority over the regulation of the Internet. I am quoting from the D.C. Court of Appeals' opinion. That was your decision in court. Are you telling this committee that your position today on June 10 is different from the position you had in the D.C. Court of Appeals in April?

Mr. GENACHOWSKI. You are raising issues around definitions of information services, transmission services, telecommunication services that are very complex. We would be happy to——

Mr. CULBERSON. I am quoting from the Court of Appeals' opinion. You told the Court of Appeals you don't have authority. Have you changed that position?

Mr. GENACHOWSKI. The Court invalidated the approach that the Commission had taken. It did not invalidate other approaches that are now on the table for consideration. I would have preferred the other approach.

Mr. CULBERSON. Well, of course. You are an attorney.

Mr. GENACHOWSKI. But because the court disagreed with the mechanism that the FCC had used to protect consumers, promote competition, particular form, and the reasoning.

Mr. CULBERSON. I understand. My time is very limited. And forgive me for interrupting, and the chairman is very gracious with the time.

But, Mr. Chairman, it is a fact, and Chairman Genachowski cannot disagree that the FCC has standing rules that the Internet is information services, and he has not disagreed that the FCC stipulated, told the Federal Court of Appeals that the FCC has no—and I am quoting from the opinion—has no express statutory authority to regulate the Internet.

He can't quote me the statute. You haven't changed your position that you had in court. So, therefore, you, the FCC, has no express statutory authority to regulate the Internet.

So what my point is, Mr. Chairman, is that we need to have an amendment—and I will be offering an amendment—that none of the funds appropriated by this committee can be used to regulate the Internet. Because that is the ruling of the Court of Appeals; that is the ruling of the FCC.

And you have not appealed this to the Supreme Court. Have you?

Mr. GENACHOWSKI. Well, I look forward to working with you and others making sure that we can pursue investment on a broadband future for all Americans, because that is what is at stake in this debate.

Mr. CULBERSON. Leave that to the marketplace.

Mr. GENACHOWSKI. I disagree with you on the legal interpretations, but we will provide a full legal briefing, and I look forward to ongoing discussions about it.

Mr. CULBERSON. Mr. Chairman, you have been very gracious, and I appreciate the time.

Mr. SERRANO. I shouldn't alert you to what my comeback would be in committee when you propose that amendment. But my comeback will be, for the record, that what you are proposing also will not allow him to do anything about pornography if that is the case. And I am not a lawyer, but that is the way I would read it; that he could not move on anything, including something that we all agree he should be moving on this afternoon.

Mr. CULBERSON. Could we work together on an amendment to let him have that on the pornography?

Mr. SERRANO. See, I am not chairman of this committee to take power away from this committee only in the case of Washington, D.C., which I have stated I don't want to supervise Washington, D.C. So I am not going to be sending him to the authorizers to get powers I think the Commission has to carry out their duty. It is a matter of interpretation: Does he have all the total powers? Maybe not. Does he have enough powers to move on some very specific issues? Absolutely. And so as long as they are fighting on behalf of the American consumer and allowing the digital divide to be narrowed and done away with, I take—and maybe it is because I am not a lawyer and I take irresponsible stances—that some people say, stop, you can't do that much on behalf of the consumer. That would be a great day in America when people tell them to stop and tell the commission to stop. That is what I want to see happening. Thank you.

Mr. CULBERSON. Could I offer a suggestion? I would love to work with you on the amendment with Ms. Wasserman Schultz.

Mr. SERRANO. I always work with you. But we are not going to work on an amendment that says they cannot move ahead and do. That is something you will have to do on your own, because I think they should move ahead and do as much as they can.

Mr. CULBERSON. I was going to suggest a very narrow one to give them the authority to regulate child pornography and keep it off the Internet. We could work one up together with Ms. Wasserman Schultz and target that rifle shot authority in that one area, and otherwise——

Mr. SERRANO. Well, this is not the time.

Mr. CULBERSON. I would love to help you with that.

Mr. SERRANO. I think they should move on everything.

Mr. Chairman, thank you so much. I think it is clear to you that, notwithstanding the fact that the average American may not know what FCC stands for, that certainly this committee understands the major role you play. And from the unemployed person carrying a cell phone to the folks who sit at the major corporations, you can affect them all. And I think at the end of the day, just my personal

position, the ones who need the most protection are the ones at the bottom of the totem pole who get ripped off a lot of times. We are not here asking you to do a number, if you will, and not support major corporations in their desire to make the industries grow. You know, it is all for the country. But this whole issue of consumerism is very important to us.

But I think you have noticed that while we all agree on most of the issues and the approaches to them, we have certain interests. So Ms. Lee reminded you of diversity and how important it is, and it is something we all subscribe to. I would be very happy if I saw communications coming out of your office saying the territories are treated equally and that an American citizen with a need for the Internet in the Virgin Islands has the same right as one in L.A. and in Chicago and in D.C.

You have agreed to—and you are going to hate me for this. You have agreed to bring the legal team here, and I invite the gentleman to join the staff. That is the part you are just going to hate me for. Every member is always allowed to join the staff.

Mrs. Emerson spoke about the rural areas. With all the problems we have in the inner city, and God knows we have a lot of problems, it is hard for me to understand how you can be in a place where you can't get a telephone signal at all. And I don't mean an apartment in the Bronx or a television signal. So those are issues.

And, lastly, we all want you not to wait for any court ruling, but to move on the pornography issue.

We commend you for your work. We will support you in your challenge. And understand that, notwithstanding at times the tone of this committee, it wants to be a partner with you in moving ahead and resolving all of these issues. And thank you so much for your testimony today.

Mr. GENACHOWSKI. Thank you very much.

Mr. SERRANO. And this hearing is adjourned.

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

HEARING

ON

THE FY 2011 BUDGET REQUEST OF THE FEDERAL COMMUNICATIONS COMMISSION

Questions for the Record

for

The Federal Communications Commission

June 9, 2010

Questions for the Record
Submitted by Chairman Serrano

Auctioning of Spectrum now Held by Broadcasters
The Broadband Plan proposes that broadcasters be allowed to give up some of their spectrum in return for some of the auction proceeds. The broadcasters strongly objected to the possibility that some of their valuable and underutilized spectrum might be taken away involuntarily.

1. **Could you describe the extent to which this spectrum is underutilized and why it is valuable?**

RESPONSE:
The spectrum currently used by television broadcasters, particularly in the UHF band between 470 MHz and 698 MHz, is ideally suited for mobile broadband uses for a number of reasons. First, the propagation characteristics of this band allows for wide coverage areas, which reduces the need for dense network builds that require many towers, and therefore reduces the cost of deployment. Second, this band allows for better in-building penetration, which also simplifies the network build and provides a better consumer experience. Third, the UHF band is wide enough to configure into nationwide blocks, which is the optimal configuration as data traffic increases dramatically in the coming years.

I believe that some of the UHF spectrum can be put to a higher and better use for wireless broadband for a number of reasons. Use of the mobile Internet and other mobile applications continues to increase at a rapid rate, while television viewing over the television spectrum has been declining since the late 1980s. Indeed, nearly 90% of Americans do not rely solely on over-the-air as the means for receiving television programming. In addition many broadcasters have not yet taken advantage of the additional capacity afforded to them by the digital transition – either through multicasting, high definition television or mobile DTV – and thus some portion of this valuable spectrum remains unused. My aim is to find ways to ensure the vitality of broadcasting while improving the efficient use of this precious resource. One possible solution to this is channel-sharing. Channel-sharing takes advantage of the benefits of the DTV transition while also making most efficient use of television spectrum by enabling two television stations to operate on one 6-megahertz channel, while preserving their ability to broadcast in HD or broadcast multiple streams, including mobile streams. Another efficiency enhancement resulting from our incentive auction proposal is the planned post-

auction repacking, which will result in a much more efficient allocation of television spectrum, and correct some of the legacy inefficiencies that have historically plagued the band for the past many decades.

2. What are the prospects and timeframe for implementing this proposal in the Broadband Plan?

RESPONSE:
We have proposed and are seeking Congressional Authority to implement a voluntary program by which only those broadcasters that want to contribute spectrum to the auction would do so, and would be able to exchange their spectrum for a portion of the auction proceeds. If granted by Congress we can move expeditiously to implement a completely voluntary program in the next few years.

Small Business
There is a huge digital divide in this country. Even small business owners, especially those in disadvantaged areas, may not be as technology savvy as they need to be in order to promote their goods and services and transact business online. The Broadband Plan includes a digital literacy initiative that promotes partnership between SBA's SCORE program and private sector partners to provide education and training to small businesses.

3. What are the major impediments to faster implementation of IT among small businesses?

RESPONSE:
The challenges that small businesses, located in disadvantaged areas, face in utilizing broadband to grow their businesses certainly include, but are not limited to, insufficient digital literacy. Many of the areas where such small businesses are located lack access to high-speed internet. Where infrastructure is lacking digital literacy becomes a moot point. It is not uncommon for at-risk communities to be the last on the list to receive advanced cable, fiber optics or enhanced telephone services. In most rural counties, nearly 50% of businesses lack assess to broadband at speeds of 4 Mbps or higher.

In areas with high-speed connectivity, many small businesses find their broadband communications services to be too slow and they lack choices to select alternative hardwire or wireless service providers. Finally, small businesses pay an average of

three times more per employee than large businesses for comparable broadband services.

Broadband Service in the Territories

During the hearing I asked about your decision to decline to institute an insular wireline program. I understand that part of the reason for this decision was the recent increase in telephone subscribers in Puerto Rico, which has presumably been largely driven by new wireless service. This is wonderful news for telephone service.

4. **As we move forward with implementing broadband for all Americans, including equal service for those in the territories, do you think that broadband will require wireline service? If so, how do you plan to address the ongoing lack of sufficient wired infrastructure in Puerto Rico?**

RESPONSE:

I am committed to ensuring that all Americans, including those in the territories, have access to high-quality broadband and voice service. To achieve this goal, the National Broadband Plan recommended that the Commission create a Connect America Fund (CAF) to directly support broadband and voice service in areas that are unserved, as well as areas that are currently served with the assistance of high-cost universal service support. Consistent with the principles of competitive and technological neutrality, the Plan further recommended that any broadband provider that can meet or exceed the specifications set by the FCC for the provision of broadband and voice service should be eligible to receive support under the CAF. This could include wireline, wireless, and satellite broadband providers.

I have committed to initiate a rulemaking in the near term that would seek comment on these issues, among other things. I also anticipate that we would seek comment on whether unique circumstances exist in insular areas and how any unique circumstances should be taken into account, as we did in the April 21, 2010 rulemaking that initiated reform of the high-cost universal service program.

Questions for the Record
Submitted by Ranking Member Emerson

Emergency Response Interoperability Center

Your budget request proposes a $1.5 million increase to establish an Emergency Response Interoperability Center to ensure the operability and interoperability public safety wireless broadband communications. Several other Federal agencies work with public safety agencies on interoperable communications including the National Institute of Standards and Technologies, the Department of Justice and the Department of Homeland Security.

- What work will this Center perform that is unique to the FCC's mission?
- How will you ensure that the Center's efforts are well coordinated with Justice, Homeland and NIST?

RESPONSE:

The Commission established the Emergency Response Interoperability Center (ERIC) in connection with its ongoing rulemaking proceeding to establish a nationwide, interoperable public safety broadband network in the 700 MHz band. The mission of ERIC is to ensure that the public safety broadband network will be fully operable and interoperable on a nationwide basis, both day-to-day as well as during times of emergency. To accomplish this mission, ERIC is tasked by the Commission with implementing national interoperability standards and developing technical and operational procedures for the network. The Commission has jurisdiction to implement these requirements and procedures under Sections 1, 4(i), 4(j), 5(b), 5(c), 201(b) and 303(r) of the Communications Act of 1934, as amended.

In terms of coordination, ERIC is already actively working with the Department of Justice, the Department of Homeland Security, and the Department of Commerce, including the National Institute of Standards and Technology and the National Telecommunications and Information Administration. ERIC has established a weekly meeting with these Federal partners to ensure that work to further the development of the interoperability framework for the public safety broadband network is well-coordinated. In addition, ERIC is performing regular outreach with each of these Departments. The Commission is also in the process of finalizing Memorandums of Understanding relating to ERIC with several of these federal partners to further the coordination effort.

On April 23rd, the Commission announced the establishment of the Center.

- If the Center is being established this year instead of in fiscal year 2011, do you still need a $1.5 million increase for fiscal year 2011?

RESPONSE:
Yes. The FCC established ERIC in 2010 because it was critical that ERIC begin its work as soon as possible. The Commission has recently granted authority to 21 state and local jurisdictions to begin broadband network deployment. In order to ensure that these deployments are interoperable from the outset, and will support nationwide interoperability in the long run, ERIC must establish initial interoperability requirements starting in the next few months. To date, however, ERIC has been staffed with existing resources, and current staffing levels will not provide sufficient resources for ERIC to fully perform its important role after this fiscal year. Further, the current FCC budget does not account for the necessary travel and other expenses that will be required for ERIC to work with the public safety community, equipment vendors, and Federal partners to perform its mission. Therefore, increased fiscal year 2011 funding is critical if ERIC is to have an impact on the recently authorized state and local efforts.

Consolidated Out-Dated IT Licensing Systems

Your budget request proposes a $1.4 million increase to continue work begun in fiscal year 2009 to consolidate and upgrade your licensing systems. I understand that many of these systems are more than 10 years old.

- How many years will this consolidation take and how much total funding do you estimate will be needed?
- Do you have experienced IT program and contract management staff in place to successfully implement a multi-year and multi-million IT project?

RESPONSE:
Full consolidation of the licensing systems is anticipated to take approximately five years. The implementation of the new system is being pursued in phases so that existing legacy systems are replaced on a rolling basis beginning in Fiscal Year 2011. The full acquisition cost for the system is approximately $22 million; however, most of the funds will be provided through offsets from deferred system and lifecycle maintenance on the existing legacy systems. As such, the Commission has only sought a net increase in $4.5 million over the fiscal years 2009 through 2011 - $1.5 million in this year's budget submission. As legacy systems are retired in FY 2011, future year acquisition funds will be supported by the cost savings derived from the new, more efficient licensing platform.

The FCC has several experienced IT Program Management and Contract Management staff in place to successfully implement a multi-year and multi-million IT project. Many of the IT Managers currently employed by the Commission have previously developed and deployed large information management systems comparable to that being pursued in this consolidation effort.

Staffing Increase

Your budget request proposes 75 additional staff. I am interested in learning more about the work that these additional staff would perform.

- Can you tell us how many staff would be engineers or technology experts that would provide assistance to first responders, local governments and service providers?
- How many additional staff would be attorneys working to implement controversial new regulations?

RESPONSE:

The additional staff will be devoted primarily to implementing the National Broadband Plan, increasing our openness and transparency, and strengthening our role in government and industry cyber-security preparedness. The specific allocations by occupation have not been finalized, but will include engineers, attorneys, economist/econometricians, statisticians, business and market analysts and data analysts and architects. One example of how we propose to allocate these additional staffing resources includes a projected increase of more than 30 positions in the areas of public safety and homeland security. To support our expanded public safety and homeland security goals, we will need attorneys with expertise in privacy law and homeland security compliance requirements as well as engineers and data analysts able to understand the technical needs of the public safety communities nationwide.

Cyber Security Certification Program

Recently, the Commission issued a Notice of Inquiry seeking input on the establishment of voluntary cyber security certification program to encourage communications service providers to implement a full range of cyber security best practices. I am pleased that the Federal government is increasing its efforts to address cyber security. As our use of broadband and mobile technologies increase, more and more of our personal information is vulnerable to criminals and espionage. However, the Department of Homeland Security is the lead Federal agency addressing cyber security in the United States.

- What unique role does the FCC play in the area of cyber security?

RESPONSE:
The FCC's role is to promote "a rapid, efficient, Nation-wide, and world-wide wire and radio communications service" to the American public. Among the Commission's statutory purposes for carrying out this role is doing so "for the purpose of national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communication." In times of emergency, the Commission's primary mission becomes more focused on these purposes, i.e., ensuring that essential communications networks and services are operable, reliable, and quickly restored. Given its statutory role, the FCC has a unique role to play in adopting rules and policies to strengthen the critical communications infrastructure, and in maintaining the reliability and security of communications networks.

Most cyber attacks are not an attack *on* the communications infrastructure but an attack *through* it. Targets are more often the information systems that lie across the communications infrastructure from attackers, and the communications infrastructure is merely an unwilling enabler. The communications infrastructure is not immune to cyber attacks, though, and a successful attack on this critical infrastructure could be crippling to our nation's way of life. The FCC, in concert with other Federal agencies and in cooperation and partnership with the private sector, has a role to play in preventing cyber attacks and mitigating their effects when they do occur. The Commission's unique role in this team effort is on the protection of the critical communications infrastructure against cyber attacks. We do, of course, stand ready to support our Federal partners in efforts to respond to a cyber attack.

The Commission is considering several measures to strengthen the security of the nation's critical communications infrastructure to prevent and withstand cyber attacks. The National Broadband Plan, which the Commission released in March after gathering and considering a substantial record, includes recommendations to strengthen the cyber security of the critical communications infrastructure. Following up on these recommendations, the Commission is actively considering:

- Establishing a voluntary cyber security certification program to create additional incentives for industry implementation of important security methods and procedures.

- Creating cyber security information reporting systems to help us monitor the

health of the network and provide us with data with which to work with communications providers on preventative measures.

- Taking steps to improve the communications infrastructure resiliency, thereby mitigating the effect of cyber attacks.

- Discussing cyber security issues with international organizations and the regulatory authorities of other nations.

- Finally, the Commission is formulating a roadmap, in coordination with the Executive Branch, that will identify the five most critical cybersecurity threats to the communications infrastructure and its end users, including a two-year plan for the FCC to address these threats.

Moreover, the FCC chartered a new federal advisory committee, the Communications Security, Reliability and Interoperability Council (CSRIC), which held its first meeting Dec. 7, 2009. The Council is expected to recommend actions to enhance the security, reliability and resiliency of America's communications systems.

- How are you coordinating your efforts with the Department of Homeland Security?

RESPONSE:
To ensure that our cybersecurity efforts are effective, the FCC is building successful policies and programs, while coordinating with the White House Cyber-Security Coordinator, Howard Schmidt, and with the Department of Homeland Security (DHS). The FCC staff has met not only with Mr. Schmidt but also with several members of his staff. We have also met with Rand Beers, DHS Under Secretary, National Protection & Programs Directorate; Philip Reitinger, DHS Deputy Undersecretary of National Protection and Programs Directorate; and Greg Schaffer, Assistant DHS Secretary for Cybersecurity and Communications. We have discussed with them what the FCC is doing at sector-specific coordinating councils hosted by DHS. Moreover, the FCC staff participates in interagency groups, such as the DHS National Communications System (NCS), to coordinate government cyber security and other communications network security policy, and the Joint Telecommunication Resources Board (JTRB), which provides expert counsel and recommendations on communications issues to the Director of the White House Office of Science and Technology Policy (OSTP). Further, our staff

monitors daily appropriate sources of information (e.g., trade journals, professional newsletters, the Federal Register, etc.) for any developments within our sister agencies that may have an impact on the FCC cybersecurity efforts.

- Will your efforts create confusion among service providers and consumers if multiple agencies are working on similar programs to address the same problem?

RESPONSE:
Currently DHS does not have an effort that is similar to the voluntary cyber security certification program or other programs that the FCC is considering. Also, as mentioned above, the FCC's focus has been on cybersecuring the critical communications infrastructure, which has not been the primary focus of other agencies. In this respect the Commission has not been working directly with consumers, but rather with their communications service providers. Typically, these service providers have a very sophisticated understanding of the FCC's role in promoting safety of life and property through the use of wire and radio communications. Virtually all of these providers are acutely aware of the major cybersecurity problems that confront the nation, and their efforts are to be commended as many are making security software available to their customers, frequently free, in their efforts to protect their customers' computers from malware. Recognizing this difficult challenge, many providers welcome the Commission's efforts to secure cyberspace.

Retransmission Consent

This spring I met with several small cable providers who expressed concern regarding existing retransmission consent regulations. Many of these operators are paying significantly higher rates for the same content then larger operators, and I share their concerns that small companies and their customers (my constituents) in rural American are being overcharged for service. I understand the FCC is reviewing the retransmission consent issue.

- Could you update Committee regarding the status of this review?

RESPONSE:
Given recent concerns raised that the Commission's current retransmission consent policies need a fresh look, I directed the Media Bureau to begin a review of our retransmission consent regulations to determine whether the existing framework

continues to be effective or whether reforms may be necessary to protect consumers and ensure fairness to all parties.

Subsequent to the commencement of the Bureau's review, a coalition representing a number of MVPDs and public interest groups submitted a *Petition for Rulemaking* seeking to reform the retransmission consent rules. Among other things, the *Petition* proposes that the Commission establish new mechanisms that provide for mandatory arbitration when a MVPD and the broadcaster are not able to reach a retransmission consent agreement, continued carriage of broadcast signals during the negotiation or dispute resolution process, and the adoption of rules to address the practice of tying broadcast programming to the carriage of non-broadcast services. The Media Bureau issued a *Public Notice* inviting public comment on the proposals and issues discussed in the *Petition*. The comment period recently closed and we received comments from a broad range of interested parties, including consumers, programmers, broadcasters and MVPDs that serve small and rural areas. The Media Bureau currently is reviewing the record compiled in the proceeding and will draft recommendations regarding how the Commission should proceed.

Questions for the Record
Submitted by Congressman Culberson

You have asked for a significant increase in your FY'11 budget for personnel—75 FTE's which would represent a 10% increase (185 FTE's) over five years. While I understand the needs that are represented by the implementation of the broadband plan, as stewards of the taxpayer's dollars, I think we should be wary about adding employees to the federal payroll.

- As yon yourself have noted, we are transitioning to a broadband world, so rather than hiring additional staff, could you examine re-tasking current employees?

RESPONSE:
Not since the enactment of the Telecommnnications Act of 1996 has the FCC been charged with such an ambitious new set of requirements. At the time of the 1996 Act, the FCC had increased its staffing level from a low of 1753 FTEs in 1993 to 2112 FTEs in 1995. This influx of new talent and expertise allowed the FCC to implement the complex requirements of the 1996 Act fully and on time. Today, the FCC is charged with an equally ambitious agenda but with a much smaller workforce lacking the needed skills. Our current workforce of 1830 FTEs at the end of FY 2010 is fully engaged with our ongoing commitments, and therefore not available for retasking. The additional positions are essential to the completion of our additional requirements such as implementing the National Broadband Plan, examining the future of media, increasing our openness and transparency, and strengthening our role in government and industry cyber-security preparedness. Even with these new positions, our staffing will still remain well below historical levels.

I am concerned about how much resources the FCC will use up as it attempts to regulate broadband instead of trying to eucourage broadband adoption and deployment.

- How long was it between the time that the FCC decided the *Comcast-Bit Torrent* case and the time it was reversed by the Court of Appeals?

RESPONSE:

The FCC issued the Memorandum Opinion and Order at issue in *Comcast Corp. v. FCC* on August 20, 2008. The D.C. Circuit issued its decision in *Comcast Corp. v. FCC* approximately a year and a half later, on April 6, 2010.

No one doubts that if the FCC decides to regulate broadband, those new rules will be challenged in court.

- Assuming this challenge goes to the Supreme Court, how long would that take?

RESPONSE:
Historically, when the Supreme Court has reviewed a Commission order, its decision has been issued approximately two to three years after the FCC order. For example:

- On November 6, 2006, the Commission released an order finding that utterances in two awards shows broadcast on television were indecent. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299 (2006). The United States Court of Appeals for the Second Circuit vacated the Commission's order. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2007). The Supreme Court reversed the judgment of the Second Circuit and remanded the case on April 28, 2009, roughly two years and six months after the Commission released its order.

- The Commission released a declaratory ruling classifying cable modem service as an information service on March 15, 2002. *See Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002). The Supreme Court upheld the Commission's ruling three years and three months later, on June 27, 2005. *See NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).

- The Commission released its Local Competition Order, which implemented provisions of the Telecommunications Act of 1996, on August 8, 1996. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996). The Supreme Court upheld the Commission's order in part two years and five months later, on January 25, 1999. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

It should be noted that if the Commission were to alter its legal framework for broadband Internet services, the ensuing court challenge to that change might well be completed years earlier than the alternative path of litigating the Commission's jurisdiction to issue various substantive orders on a case-by-case basis under the current legal framework and the recent *Comcast* decision.

- How much taxpayer money will be spent defending the FCC's new rules?

RESPONSE:
Any defense would be performed by existing FCC staff which is funded by regulatory fees. Regulated companies and other interested persons routinely file lawsuits challenging final FCC actions (as well as non-final actions, which are not properly reviewable by the courts). Lawsuits are filed regardless of whether the Commission comes out one way or the other, and it is impossible to quantify the incremental cost of adopting one particular legal or policy approach, as opposed to an alternative path. As noted above, if the Commission were to alter its legal framework for broadband Internet services, the ensuing court challenge to that change might well be faster and less expensive than the alternative path of litigating the Commission's jurisdiction to issue various substantive orders on a case-by-case basis under the current legal framework and the recent *Comcast* decision.

- Can you please explain the specific problem you are trying to address with your proposal to dramatically increase the level of regulation on Internet Service Providers?

RESPONSE:
The recent decision of the United States Court of Appeals for the D.C. Circuit in *Comcast v. FCC* casts doubt on whether the legal framework the Commission chose for broadband Internet services nearly a decade ago is adequate to achieve widely supported broadband policies, which prior Commissions thought they had legal authority to implement. To evaluate its options, the Commission adopted a *Notice of Inquiry* at its June 17 Open Meeting to initiate a public discussion on how the Commission should proceed in light of *Comcast*. The *Notice* does not propose to increase regulation on Internet Service Providers. Rather, the *Notice* seeks comment on all options, and invites any ideas for how the Commission

should proceed, including: maintaining the current "information service" classification of services such as cable modem and DSL Internet access; classifying broadband Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply; and a "third way" – similar to the highly successful approach that has been used for cell phone services since 1993 – under which the Commission would identify the Internet connectivity service that is offered as part of wired broadband Internet service as a telecommunications service and forbear from applying all provisions of Title II other than the small number that are needed to implement fundamental universal service, competition and market entry, and consumer protection policies. I am enclosing a copy of the *Notice* for your information. The reply comment period closed on August 12 and the Commission staff is currently reviewing the large volume of responses in the record.

- What industry wide problem exists today among Internet service providers that warrants the government having unfettered ability to regulate Internet rates and micromanage network engineers?

RESPONSE:
Neither the *Open Internet Notice of Proposed Rulemaking* nor the recently adopted *Notice of Inquiry* propose regulating Internet rates or micromanaging network engineers. The *Notice of Inquiry* is not about unbundling and price regulation. Rather, it is about fixing the basic legal foundation for broadband policy, which will enable us to accomplish widely supported goals, including reforming universal service to ensure all Americans can enjoy the benefits of broadband. The *Open Internet Notice of Proposed Rulemaking* proposes high-level rules of the road to provide greater clarity regarding network management practices and preserve Internet openness, while protecting broadband providers' ability to reasonably manage their networks.

- Will you consider the concerns of churches and other wireless microphone users as you continue to deliberate interference protections for wireless microphones?

RESPONSE:
In a pending Further Notice of Proposed Rulemaking the Commission is considering how to revise rules concerning the use of wireless microphones. The Commission will review all of the information in the record in deciding how to

best address the concerns of the many wireless microphones users, including houses of worship, schools, libraries, museums, theaters, and concert halls. In many of the bands in which these wireless microphones operate, there also are other important uses of the bands, and wireless microphone users are required to share spectrum with such users, including television broadcasters and unlicensed TV band white spaces devices. The Commission must carefully balance the important interests among all of these users before it adopts final rules for wireless microphones.

- Will you consider the language in H.R. 4353, which provides for geolocation database protections for 13 specific classes of professional wireless microphone users, including Houses of Worship, arenas, theaters, restaurants, stadiums, and museums?

RESPONSE:
The Commission recently adopted a Second Memorandum Opinion and Order that revised the rules unlicensed devices operating in the TV White Spaces. The rules included several provisions to minimize the risk of harmful interference wireless microphones. Two TV channels will be reserved in every market that can be used by wireless microphones and are available for used by TV White Space devices. These two channels can accommodate at least 12 to 16 wireless microphones at any given location, which should be sufficient for most uses. In addition, many other TV channels will not be available for TV White Space devices at any given location. These channels will be identified in a publicly accessible data base and can be used for additional wireless microphones without concern of interference from TV White Space devices.

The Commission also recognized that certain venues and events, such as the kinds you describe, use many wireless microphones and cannot be accommodated in the reserve channels and other channels that are not being used by TV White Space devices. The Commission established a process where these venues and events can be included in the data base of locations and channels where TV White Space devices may not operate. The TV White Space fixed transmitters and portable transmitters must be located at least 1000 meters and 400 meters away from these sites.

We believe that these measures strike an appropriate balance in accommodating existing users of wireless microphones while creating opportunities for innovation

and investment in new devices and services and making more efficient use of the TV spectrum.

The National Broadband plan recommends that "States should reduce impediments and financial disincentives to using commercial service providers for Smart Grid communications."

- What more can be done to ensure/motivate utilities to leverage commercial technologies for their Smart Grid applications?

RESPONSE:
A beginning point towards the goal of encouraging utilities to leverage commercial technologies for Smart Grid applications is to ensure a thorough understanding of the evolving communications requirements of electric utilities. As an input to the NBP plan, the FCC solicited public comment on Smart Grid technologies, and a number of utilities filed detailed responses. Many utilities declined to comment, however, and others understandably declined to reveal confidential or sensitive information in public filings. Thus, the NBP recommends that DOE, in collaboration with the FCC, conduct a thorough study of the communications requirements of electric utilities, including, but not limited to, the requirements of the Smart Grid. Building upon the FCC's research and development in the NBP proceeding, DOE should collect data about utilities' current and projected communications requirements, as well as the types of networks and communications services they use. Such an analysis will bring to light barriers to utilities' adoption or deployment of commercial technologies for their Smart Grid applications. The DOE has already begun to implement this recommendation, by issuing a RFI on utility Smart Grid communications.

- What activities are specifically recommended for removing financial disincentives and who is undertaking them?

RESPONSE:
The NBP recommends that state public utility commissions (PUCs) review regulatory requirements applicable to electric utilities to ensure that utilities' financial interests do not lead them to reject the use of commercial networks, thereby making suboptimal communications and technology decisions. Specifically, as rate-of return regulated utilities, large utilities typically earn guaranteed profits on the assets they deploy—including private communications

networks—but only receive cost recovery if they use commercial networks. The NBP recommends that state regulators carefully evaluate a utility's network requirements and commercial network alternatives before authorizing a rate of return on private communications systems. Consistent with the Energy Independence and Security Act of 2007 (EISA), the plan recommends that PUCs also consider letting recurring network operating costs qualify for a rate of return similar to capitalized utility-built networks. California is currently considering this question.

Moreover, in many states, electric utility incentives are still oriented toward deploying assets and selling more power, not selling less or cleaner power. While this structural problem is outside the scope of the National Broadband Plan, despite its explicit Congressional mandate to address energy efficiency, a national strategy to support the growth of the Smart Grid must recognize that many large electric utilities have inherent financial incentives to deploy regulator-approved communications systems but have mixed-to-poor incentives to use these systems to deliver energy more efficiently.

- Why should utilities be allocated or re-allocated spectrum (as they have requested) if there is existing infrastructure via commercial technologies that will be utilized for other critical applications like public safety?

RESPONSE:
Utilities will need greater communications across the grid, and many are increasingly using wireless technologies, which are often more cost-effective that wired facilities in reaching wide areas or distributed assets. These wireless networks include licensed commercial networks, licensed private networks, and private networks operating at power levels where FCC licenses are not required.

Developing a Smart Grid is national policy set forth by EISA 2007, and the NBP recommends that the federal government continue to explore the issue of providing spectrum, recommending that "NTIA and the FCC should specifically explore possibilities for coordination of Smart Grid use in appropriate federal bands. Any new broadband network built in the identified spectrum should be required to meet standards of interoperability, customer data accessibility, privacy and security. Use of this spectrum should not be mandated, so that legacy systems are not stranded and that commercial, other shared networks and unlicensed wireless networks can be used where appropriate."

Dedicating spectrum for the Smart Grid could have advantages and disadvantages. Potential advantages include: 1) providing another mechanism for the federal government to drive national interoperability standards and best practices of cyber-security, privacy, and consumer data access; 2) vendor standardization and competition, which could lead to lower equipment prices or more functionality; and 3) a possible acceleration of smart grid deployments. Risks/disadvantages to dedicating spectrum include: 1) possible sub-optimal use of spectrum; 2) fewer applications and users on commercial networks to drive down the cost for all users; 3) the opportunity cost to the U.S. Treasury of not auctioning off the spectrum to commercial broadband users; and 4) a near-term effect of "freezing the market" while companies re-evaluated their Smart Grid technology road maps.

It should be noted that the NBP has a number of general spectrum recommendations that will also benefit the Smart Grid. Increasing spectrum transparency, promoting incentives to improve the secondary market, and providing more opportunities for unlicensed uses – all of these have the potential to be beneficial to Smart Grid networks, including both commercial and private networks. Recent FCC rulings to unlock spectrum – such as the clarification of WCS rules – can also benefit the Smart Grid. Specifically, WCS licensees can now satisfy their build-out requirements by serving utility customers in fixed applications; i.e. Smart Grid applications.

- Will this encourage the build out of duplicative networks that stick the American energy consumers with the bill?

RESPONSE:
A variety of possible models could be employed to provide spectrum to the industry and avoid the possible build out of duplicative networks that impose further energy costs on American consumers. For example, utilities could share spectrum with federal users or with public safety networks (also recommended in the NBP). Other models might result in a private network for electric utilities, by dedicating spectrum to utilities with specific build-out requirements or auctioning spectrum for critical infrastructure uses (which includes the Smart Grid, but could also include natural gas and water management, among others), thereby supporting applications with a high level of reliability, such as those for grid control and protection. The costs and benefits to American consumers – in financial, public safety, and homeland security terms – must be weighed, whatever the model.

Ultimately state regulators and utilities will need to choose the networking strategy that is the most appropriate and cost-effective for their ratepayers.

The National Broadband plan recommends "The Federal Communications Commission (FCC) should start a proceeding to explore the reliability and resiliency of commercial broadband communications networks."

- Will these reliability standards be applied to the private technologies that Utilities are currently deploying and considering for their CIP Smart Grid Applications?

RESPONSE:
There are over 3,000 utilities in the U.S. that serve customers across very different topologies and regulatory regimes. There is not a single solution or a "representative" network for the Smart Grid. Many utilities use a mix of commercial and private networks in the Smart Grid and will continue to do so.

Although, electric utilities traditionally prefer to build and maintain private networks for mission critical communications, some utilities do use commercial networks for mission critical communications today. Commercial networks can be made secure and resilient, as demonstrated by their use in the federal government (DoD, DHS, etc.). For some smaller utilities, the lack of internal networking expertise and personnel might have driven the decision to use commercial facilities.

The NBP recommends that the FCC start a proceeding to explore the reliability and resiliency of commercial broadband networks (Rec. 12.1). As noted in the NBP, commercial broadband networks, and wireless broadband networks in particular, can serve more mission-critical and wide-area utility communications needs as service providers adopt measures to improve the reliability and resiliency of these networks during emergency scenarios. Because 97.8% of Americans are already covered by at least one 3G network, a hardened commercial wireless data network could serve as a core part of the Smart Grid. The benefits of a more reliable commercial broadband network are much broader than enabling the Smart Grid alone. A more reliable network would also benefit homeland security, public safety, businesses and consumers, who are increasingly dependent on their broadband communications, including their mobile phones. Today, more than 22% of households in America do not subscribe to fixed-line telephone service.

The North American Electric Reliability Corporation, an organization under the U.S. Federal Energy Regulatory Commission's (FERC) authority, has been responsible since 1968 for the reliability of the bulk power system. NERC develops and enforces reliability standards. As of June 18, 2007, FERC granted NERC the legal authority to enforce reliability standards with all users, owners, and operators of the bulk power system in the United States, and made compliance with those standards mandatory and enforceable.

- Does having a double –standard for reliability and resiliency testing indirectly support the adoption of "sub-optimal choices" (see section 12.2 page 270) that are being made due to financial incentives (guaranteed profits/rate of return for proprietary buildouts of duplicative network technology)?

RESPONSE:
Reliability and resiliency standards should be consistently applied, regardless of the nature of the network – private or commercial. Thus, for example, the NBP recommends that the North American Electric Reliability Corporation (NERC), the organization under FERC's authority responsible for the reliability of the bulk power system, should revise its security requirements to provide utilities more explicit guidance about the use of commercial and other shared networks for critical communications. In future versions of the Critical Infrastructure protection (CIP) standard, NERC should clarify whether such networks are suitable for grid control communications. NERC should also clarify how its CIP requirements will coexist with the cybersecurity standards of the National Institute of Standards and Technology (NIST). The perceived ambiguity on CIP requirements appears to be slowing utility decision-making and stifling the deployment of some Smart Grid applications on commercial networks.

- What is the FCC doing to ensure that ALL technologies being considered for Critical infrastructure meet the same high standards for reliability and resiliency?

RESPONSE:
The FCC will work closely with FERC, DOE and other applicable organizations to ensure that all technologies being considered for critical infrastructure meet the same high standards for reliability and resiliency, thereby removing incentives –

financial or regulatory – to the deployment or use of suboptimal technologies or networks.

WITNESSES

H.R. 1796, THE RESIDENTIAL CARBON MONOXIDE POISONING PREVENTION ACT, AND H.R. 4805, THE FORMALDEHYDE STANDARDS FOR COMPOSITE WOOD PRODUCTS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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H.R. 1796, THE RESIDENTIAL CARBON MONOXIDE POISONING PREVENTION ACT, AND H.R. 4805, THE FORMALDEHYDE STANDARDS FOR COMPOSITE WOOD PRODUCTS ACT

THURSDAY, MARCH 18, 2010

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

The Subcommittee met, pursuant to call, at 10:07 a.m., in Room 2322 of the Rayburn House Office Building, Hon. Bobby L. Rush [Chairman of the Subcommittee] presiding.

Members present: Representatives Rush, Schakowsky, Sutton, Matheson, Barrow, Matsui, Castor, DeGette, Radanovich, Whitfield, Terry, Gingrey and Scalise.

Staff present: Michelle Ash, Chief Counsel; Robin Appleberry, Counsel; Timothy Robinson, Counsel; David Kohn, Press Secretary; Will Cusey, Special Assistant; Daniel Hekier, Intern; Brian McCullough, Minority Senior Professional Staff; Jerry Couri, Minority Professional Staff; Shannon Weinberg, Minority Counsel; Robert Frisby, FTC Detailee; and Samuel Costello, Minority Legislative Analyst.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The subcommittee will come to order.

The Chair wants to thank all the members and the witnesses on both panels for your participation in this hearing this morning. This subcommittee is here on H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act, and also H.R. 4805, the Formaldehyde Standards of Composite Wood Products Act. The Chair recognizes himself for 5 minutes for the purposes of an opening statement.

The subcommittee is holding today's hearing on two introduced bills that would protect scores of consumers from highly dangerous and lethal carbon monoxide and formaldehyde emissions. The first bill we will take up, H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act, was introduced by Mr. Matheson of Utah. The Consumer Product Safety Commission reports that carbon monoxide poisoning is the leading cause of poisoning deaths in the United States. Carbon monoxide poisoning claims the lives of over 400 people each year, hospitalizing another 4,000 individuals

and it causes 20,000 individuals to seek emergency medical treatment. H.R. 1796 would amend the Consumer Product Safety Act to require that residential carbon monoxide detectors meet current voluntary safety standards. Warning labels would have to be placed on portable generators advising consumers that they should not be used inside residential and dwelling units. And H.R. 1796 would authorize the Consumer Product Safety Commission to establish a grant program to assist the States in training fire code enforcement officials and educating the public about carbon monoxide risks and the proper use of carbon monoxide detectors.

Through these simple actions, H.R. 1796 will enable consumers to better protect themselves against carbon monoxide exposure and poisoning, and I want to take this time to commend Mr. Matheson for his tireless work to prevent these outcomes, many of which are avoidable, and I look forward to hearing from our first panel of witnesses and our ensuing discussion on this important bill and this important matter.

The second bill before us is H.R. 4805, the Formaldehyde Standards of Composite Wood Products Act. This legislation will achieve two very important goals: protecting American consumers and protecting American jobs. H.R. 4805 will amend the Toxic Substances Control Act by establishing a federal standard based on requirements already set by the State of California to limit the amount of formaldehyde that can be emitted from composite wood products. Because this standard will apply nationally, the legislation will result in greater protection for all Americans. It will also ensure that we do not have a repeat of the disaster with FEMA trailers that were used for emergency housing following Hurricane Katrina, which I might remind all of us, the thousands sick unnecessarily, and it would make all of our consumers much safer.

Mrs. Matsui's proposed legislation will level the playing field for American manufacturers. Currently, importers do not have to meet these standards except to the extent that they conduct business in California. As a result, badly needed manufacturing jobs are going overseas and American consumers are less safe. And I want to again take this moment to applaud my colleague from the State of California, Mrs. Matsui, for championing this legislation and working hard on this legislation and ensuring that we are doing everything that we can for both consumers and businesses.

With that, I yield back the balance of my time and recognize the ranking member, Mr. Whitfield, for 5 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. Well, thank you, Chairman, and I certainly want to welcome all the witnesses today. We do look forward to your testimony, your expert testimony on both of these bills, and I certainly want to thank Mrs. Matsui for her bringing to our attention the formaldehyde issue with her legislation, H.R. 4805, which is the Formaldehyde Standards for Composite Wood Products Act.

I don't think there is any question that all of us recognize the concerns with formaldehyde, and the purpose of these hearings of

course is to bring out issues that are of concern to us, and one of the concerns that I have about this particular bill, which does not mean I am opposed to it in any way, but it does not write an actual standard into law and it does not direct the scientists at EPA to investigate this matter. Instead, it explicitly cites a State regulation that was adopted in California and it refers to the California provision. The California regulation has not been fully phased in yet. We cannot get a complete picture of any incremental improvements in public health or how smoothly businesses subjected to it have transitioned and whether consumers, particularly low-income Americans, have been able to have access to affordable products. On top of those concerns but no less importantly, I do always have a concern when we set a federal standard that there is not federal preemption, and I know that one of the witnesses, I believe maybe it was Mr. Tom Julia, although I am not 100 percent certain, expressed concern about their only concern about trying to push for federal preemption was that it might slow down this process. So I think that is a couple of issues that we can explore today in this hearing.

And then I certainly want to thank Mr. Matheson for H.R. 1796, the Carbon Monoxide Poisoning Prevention Act, which we also recognize is a real problem. I suppose that one issue that we will want to explore in this hearing as well relates to right now I guess about 25 States have voluntary standards on this issue and I believe this legislation makes it mandatory, and it is my understanding the Consumer Product Safety Act that the Commission can invoke a mandatory standard but it has to be under certain conditions and whether or not those are met in this situation, I am not sure.

One other concern that I have, particularly with our current financial situation in America with a $14 trillion debt is starting a new grant program, and I don't remember precisely how much money is authorized for this per year but my recollection was maybe it is a couple of million a year, but those are issues that you all are going to help us address and so I want to thank you for being here, Mr. Chairman, and we look forward to their testimony today.

Mr. RUSH. The Chair recognizes the gentleman from Utah, the author of the bill that is currently under consideration, Mr. Matheson, for 2 minutes for the purpose of opening statements.

OPENING STATEMENT OF HON. JIM MATHESON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. MATHESON. Thank you, Mr. Chairman, and thank you for holding this hearing. I do look forward to hearing from the witnesses and look forward to hearing from my colleagues because that is the purpose of these legislative hearings. We try to look to work together to build more consensus, and I am certainly not wedding to the specific text of the initial draft of the bill. I think that is why we are here today is to learn and improve on that to deal with what I think is a really important issue. We have roughly 500 deaths a year in the United States from carbon monoxide poisoning. An additional 15,000 people are hospitalized due to this. If there are efforts we can make that are prudent to create greater awareness of prevention, I think that is a worthy cause to take up,

so I am glad that this subcommittee has scheduled this hearing on this legislation.

Just real quickly, there are three basic components to the bill. It codifies current voluntary standards for carbon monoxide detectors into law. It mandates labeling standards for portable generators and establishes a grant program for States that want to raise awareness and provide carbon monoxide detectors.

Again, Mr. Chairman, I do appreciate you calling this hearing. I hope it is a productive hearing for all of us and we look to improve on this legislation as we move forward. I yield back my time.

Mr. RUSH. The Chair thanks the gentleman. The Chair now recognizes Dr. Gingrey for 2 minutes for the purposes of opening statement.

Mr. GINGREY. Mr. Chairman, I thank you and I would like to ask unanimous consent to submit my prepared remarks for the record.

Mr. RUSH. So ordered.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. GINGREY. I want to spend my 2 minutes, Mr. Chairman, relating something anecdotally, and I hope you will bear with me. It was 53 years ago that I was a 14-year-old kid and my mom and dad owned a small mop and pop motel at the state line between South Carolina and Georgia, and in Georgia, it was permitted to drink at age 21 but in South Carolina it was permitted to drink at age 18. So a lot of the soldiers at Fort Gordon would come across the river on the weekends and stay at our motel for a couple of nights for relaxation and yes, of course, to go across the street and drink a little beer. On a cold March night on a Saturday night, we had three soldiers in one of the motel rooms. Sunday morning my mom and my two brothers and I, all Catholic, went to Mass, and when we came back to the motel, we were shocked to see Army hearses in the parking lot from Fort Gordon, Georgia. And what had happened is, those three soldiers in that motel room died from carbon monoxide poisoning that night because of a faulty heater. My dad has been dead for a long time. I wish he were alive today so he could know about Mr. Matheson's bill and be here and listen to what we discuss today because he never got over that emotionally. It wasn't his fault but of course as I say, he felt to blame for the deaths of these 18-year-old and I believe one 19-year-old soldier from carbon monoxide poisoning. Their bodies were found right next to the door trying to get out of that motel room. They almost made it but not quite. So I have very strong feelings about this and I told my staff that instead of reading the great written remarks he had prepared that this really means a lot to me and it all comes back. It is like it happened yesterday.

So this is serious business and I really commend Mr. Matheson and I commend my good friend, Mrs. Matsui, as well. I look forward to the testimony from the witnesses and discussion from my colleagues, and Mr. Chairman, with that I will yield back.

[The prepared statement of Dr. Gingrey follows:]

Rep. Phil Gingrey
Opening Statement for HR 1796 & HR 4805 Hearing
Commerce, Trade, and Consumer Protection Subcommittee
March 18, 2010

Mr. Chairman, I want to thank you for calling today's hearing on two pieces of legislation – H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act and H.R. 4805, the Formaldehyde Standards for Composite Wood Products Act. I also want to commend you for moving these bills through regular order. I believe that both pieces of legislation fall into important areas of the jurisdiction of the Subcommittee.

Mr. Chairman, I am pleased that we are going to be able to hear from both panels of witnesses on each bill so we can get a closer look at the need for federal action in this arena. On both bills, there are already mechanisms in place with the Consumer Product Safety Commission to potentially address these matters, but the question that I hope these witnesses will address is whether or not there is the need for further federal regulation.

Let me be clear, both carbon monoxide and formaldehyde present problems to consumers that have led to disease and in a number of cases – particularly with carbon monoxide – death. H.R. 1796, introduced by our Subcommittee colleague, Mr. Matheson of Utah. will mandate the current voluntary standard for carbon monoxide detectors and require warning labels on portable generators. One concern that this poses is that it may not have an impact on reducing the unfortunate fatalities that have resulted from carbon monoxide.

Mr. Chairman, H.R. 4805 – introduced by our Subcommittee colleague from California, Ms. Matsui – seeks to codify that the California standard on formaldehyde standards in composite wood products be applied at the federal level. As will be discussed throughout this hearing, this standard was only recently adopted in California, and I would like to get more information from the panel as to the impact it will have on both safety and the economy before we move forward on this legislation.

Mr. Chairman, I believe that we can all agree that there are a number of important issues that will affect consumer safety that will be discussed today. Again, I applaud you for allowing us the opportunity to fully discuss these issues in this hearing. I look forward to hearing from our panels, and I yield back the balance of my time.

Mr. RUSH. The Chair now recognizes the gentlelady from California, Mrs. Matsui, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. MATSUI. Thank you, Mr. Chairman, and thank you very much for calling today's hearing. I would also like to thank the panelists for appearing before us today and I look forward to hearing your views.

The legislative proposals being discussed will help industry achieve consistent standards of compliance, create jobs, protect public health, boost consumer confidence and reduce harmful emissions. It is for these reasons that Congressman Matheson is to be applauded for sponsoring H.R. 1796, which will require the United States Consumer Product Safety Commission to enforce stronger standards to protect people nationwide against the deadly dangers of carbon monoxide. As we continue to discuss ways in which certain products impact American consumers, it is critical that the federal government adopt approaches that are stimulative, effective, innovative and efficient. It is equally important, however, that we ensure that our Nation follows best practices and adheres to the toughest production standards in the world.

Toward that end, I have partnered with Congressman Ehlers to introduce H.R. 4805, which would establish national standards for formaldehyde in domestic and imported composite wood products. The emissions of formaldehyde, which is a chemical widely used in a variety of composite wood product applications, are known to have adverse effects on human health and resulted in cases of toxicity for those storms victims provided FEMA trailers following Hurricane Katrina.

H.R. 4805 would apply the rule recently adopted by the California Air Resources Board, otherwise known as CARB, in collaboration with industry, regulatory authorities and public interest groups to lower limits for formaldehyde emissions in those composite wood products. In doing so, the bill would direct the EPA to accept the standard that is already being practiced by our domestic industries and ensure that ongoing economic recovery efforts continue. I urge my colleagues to favorably consider this bipartisan, bicameral legislation which is publicly endorsed by industry, environmentalists, labor and health care advocates, and I commend Senators Klobuchar and Crapo for offering the Senate counterpart and for their leadership on jobs and consumer health issues.

Mr. Chairman, I thank you again for calling today's hearing and I yield back the balance of my time.

Mr. RUSH. The Chair recognizes the gentleman from Louisiana, Mr. Scalise, for 2 minutes.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Chairman Rush and Ranking Member Whitfield for having this hearing today.

I believe it is important that our subcommittee continue to examine chemicals and substances that are used in our everyday lives as well as the laws governing their use in commerce. It is our obligation to ensure that consumers are properly protected. As I have said before, we must also find the appropriate balance between protecting our health and the environment and protecting jobs in this economy and the manufacturers who make the products that we enjoy.

Of particular interest to me and my constituents for this hearing is formaldehyde. It is a chemical that is widely used but one that unfortunately my constituents are all too familiar with. In 2005, Hurricanes Katrina and Rita destroyed more than 300,000 homes and displaced approximately 700,000 people. As a result, FEMA and its contractors shipped over 200,000 mobiles home, travel trailers and other temporary housing units to our region. These temporary units helped meet the critical housing need following the 2005 hurricanes. Only later did we find out that some of these trailers contained formaldehyde and had exposed people to health risks associated with this chemical. According to the Department of Homeland Security's Inspector General, approximately one-third of the units had "significant potential formaldehyde problems." This led to many people experiencing health and respiratory issues and some even had to move out of the trailers.

Given the challenges we have faced, formaldehyde is an issue that we take very seriously in south Louisiana. That is why I am pleased to see some of my colleagues focusing on this issue and introducing legislation aimed at setting standards for formaldehyde in composite wood products. However, I do have concerns with the legislation and would like to see changes made. My office has discussed this legislation with a number of organizations and businesses involved in the composite wood industry and they have all echoed support for these changes. Chief among these is preemption. As many members have already said, I am afraid that without preemption, businesses will face a myriad of different state regulations that will only make it more difficult for them to conduct business. If California is essentially setting the national standard, what is to prevent them from changing the standard again, thereby creating different requirements and compromising the national standard?

I am also concerned about the timing requirements and restrictions that could be placed on businesses. It is my understanding that implementation was delayed in California because of the challenges business faced in meeting the requirements. I hope that we would look at these issues and the potential unintended consequences that could result from this bill.

Again, Mr. Chairman, formaldehyde is a serious issue that has impacted many of my constituents and I am pleased that we are having this hearing. I do hope that we will fully examine the legislation and proceed carefully when debating the possibility of implementing the prescriptive requirements of one State across the Nation. I look forward to hearing from our panelists on their views on H.R. 4805, particularly on whether preemption would improve the bill. I yield back.

Mr. RUSH. The gentlelady from Ohio, Ms. Sutton, is recognized for 2 minutes.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. Thank you, Chairman Rush, and thank you for holding this hearing on these two bills that are critically important moving through the subcommittee. I am proud to be a cosponsor of these initiatives and I commend Mr. Matheson and Mrs. Matsui for their leadership on these very important safety issues.

The Residential Carbon Monoxide Poisoning Prevention Act will require all manufacturers to meet widely accepted standards for carbon monoxide detectors, and the Formaldehyde Standards for Composite Wood Products Act will protect the health of American families from high uses of formaldehyde in common household products like flooring, paneling, cabinets and doors, both important objectives.

Carbon monoxide poisoning is the leading cause of poisoning death in the United States and formaldehyde has been recognized as a carcinogen. National standards will certainly enhance safety for consumers and will level the playing field between foreign and domestic manufacturers. Currently, foreign manufacturers who use unsafe levels of harmful toxins like formaldehyde are able to undercut domestic manufacturers who put safety above profit. Every year, countless Americans are injured, sometimes fatally, by harmful products that have been manufactured abroad and imported into the United States.

I recently introduced the Foreign Manufacturers Legal Accountability Act of 2010 to protect American consumers and businesses from defective products manufactured abroad. It is our job to protect American consumers. The American people expect and demand that the products that they are sold are safe for themselves and their families. When they install a carbon monoxide detector, they expect that it will warn of dangerous levels of carbon monoxide, and when they install a new countertop or paneling, they expect that the wood products are harmless, and we must ensure that that is the case regardless of where products are made. Dangerous products are dangerous products, and those who would profit over the safety of the American people must not escape accountability simply because they manufacture unsafe products abroad and ship them to the United States for our use, and I yield back.

Mr. RUSH. The Chair now recognizes the vice chairman of the subcommittee, the gentlelady from Illinois, Ms. Schakowsky, for 2 minutes.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. I am proud to be a cosponsor of the Residential Carbon Monoxide Prevention Act, which would establish a mandatory safety standard for all carbon monoxide detectors and requires warning labels on portable generators, a major source of carbon monoxide poisoning. I can't think of more dramatic and compelling testimony than we heard from Representative Gingrey about how important this legislation is, and I am not going to try and elaborate on that.

We do know, according to the Illinois Department of Public Health, however, that infants are even more susceptible to carbon monoxide poisoning because their hemoglobin binds with carbon monoxide better than adults do, so this is a special problem for children. The highest rates are among seniors because they are most likely to mistake the symptoms of carbon monoxide poisoning for the flu or general fatigue. So I am very happy to join my colleagues in H.R. 1796.

The Formaldehyde Standards for Composite Wood Products Act is another very important bill, and I would ask my colleague, Representative Matsui, to add me as a cosponsor of the bill to establish a strong standard for emissions of formaldehyde from the covered products, which are very common in usage and in most of our homes and backyards. But I think it is important to emphasize that Congress is being forced to act on this measure because the Environmental Protection Agency hasn't been able to do so under the existing Toxic Substances Control Act. This is another reason why we will turn our attention to reforming TSCA later this year. Thank you, Mr. Chairman.

Mr. RUSH. The Chair recognizes the gentleman from Nebraska, Mr. Terry, for 2 minutes.

Mr. TERRY. Waive opening statement.

Mr. RUSH. The Chair thanks the gentleman. The Chair now recognizes the gentlelady from Colorado, Ms. DeGette, for 2 minutes.

Ms. DEGETTE. I will put my opening statement in the record.

[The information was unavailable at the time of printing.]

Mr. RUSH. The Chair thanks the gentlelady. The chair now recognizes the gentlelady from Florida, Ms. Castor, for 2 minutes.

OPENING STATEMENT OF HON. KATHY CASTOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Ms. CASTOR. Thank you, Chairman Rush, and good morning, everyone.

It is a good day when we can come to a hearing and discuss bipartisan legislation that will put more Americans back to work and make families and communities safer. I am supportive of both of these bills because there is no doubt they will save lives and jobs. When industry and public health can agree that new laws are in the best interest of all involved, that is very positive. However, I want to stress that these bills should be viewed as just steps in the path to where we really need to go. They don't really bring us across the finish line.

Now, H.R. 1796, the carbon monoxide bill, requires that the voluntary standard for carbon monoxide alarms be made mandatory, as many of you know, carbon monoxide, it is the leading cause of poisoning death in the United States each year so the urgency to pass this bill is particularly acute for Floridians because we are beginning to plan for hurricane season, and besides bottled water and batteries, Floridians are going out to buy generators, and when the big storms roll up through the Gulf or the Atlantic, they lose power and start their generators, and these generators, they will put them in the garages and the gas is colorless, odorless, and this poison can kill them while they sleep and we have had some very sad occasions there. So we need to pass this uniform standard. This is

going to protect all of us. It is a good start but what we really need to do is pass comprehensive TSCA reform so that we don't create more loopholes with piecemeal chemicals legislation. We need to give EPA the authority to regulate harmful chemicals in many of the products that are being dumped on us from overseas.

So in closing, I strongly support both of these bills and encourage my colleagues to vote for them as well.

Mr. RUSH. The Chair thanks the gentlelady and the Chair thanks all the members for their opening statements.

It is now my privilege to welcome our panel of witnesses before this subcommittee. It is indeed an esteemed panel, and I will introduce each panelist beginning on my left where we find Mr. Robert J. Howell, Jr., who is the assistant executive director of the Office of Hazard Identification and Reduction for the U.S. Consumer Product Safety Commission. Seated next to Mr. Howell is Dr. Eric Lavonas, who is the associate director of the Rocky Mountain Poison and Drug Center, and he is an emergency physician at the Denver health Medical Center in Denver, Colorado. And seated next to Dr. Lavonas is Mr. John Andres, who is the director of engineering for the Kidde Corporation. And seated next to Mr. Andres is Mr. Mark Devine, who is the vice president of marketing for First Alert, which is an outstanding and illustrious company from my home State of Illinois located south of Chicago in Aurora, Illinois, where I visited many times, and First Alert is indeed an excellent Illinois corporate citizen.

I want to welcome all of the witnesses today, and I want you to know that it is the practice of this committee that each witness must be sworn in, so would you stand and raise your right hand?

[Witnesses sworn.]

Mr. RUSH. Let the record reflect that the witnesses have all answered in the affirmative.

And now we will invite Mr. Howell to present his opening statement. Mr. Howell, you are recognized for 5 minutes.

TESTIMONY OF ROBERT J. HOWELL, JR., ASSISTANT EXECUTIVE DIRECTOR, OFFICE OF HAZARD IDENTIFICATION AND REDUCTION, U.S. CONSUMER PRODUCT SAFETY COMMISSION; ERIC LAVONAS, M.D., ASSOCIATE DIRECTOR, ROCKY MOUNTAIN POISON AND DRUG CENTER, EMERGENCY PHYSICIAN, DENVER HEALTH MEDICAL CENTER; JOHN ANDRES, DIRECTOR OF ENGINEERING, KIDDE RESIDENTIAL AND COMMERCIAL DIVISION; AND MARK DEVINE, VICE PRESIDENT OF MARKETING, FIRST ALERT

TESTIMONY OF ROBERT J. HOWELL, JR.

Mr. HOWELL. Good morning, Chairman Rush, Ranking Member Whitfield and members of the Subcommittee on Commerce, Trade, and Consumer Protection. My name is Robert Howell and I am the assistant executive director for the Office of Hazard Identification and Reduction at the U.S. Consumer Product Safety Commission. I appreciate the opportunity to testify before you this morning regarding H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act and the overall dangerous of carbon monoxide poisoning.

Before I begin, I would like to note for the record that the testimony that I will give this morning is mine and reflects the views of my technical staff. The testimony has not been reviewed or approved by the Commission and may not necessarily reflect the views of the Commission.

Carbon monoxide is a colorless, odorless and poisonous gas that results from the incomplete combustion of fuels such as natural gas, gasoline, oil, coal and other fuels. The health effects related to carbon monoxide depend upon its concentration in the blood, which in turn depends upon its concentration in air, the duration of exposure and each individual's general health.

Some symptoms of CO poisoning may mimic common illnesses, such as influenza or colds, opening up the opportunity for an initial misdiagnosis. Patients are frequently unaware of exposures to carbon monoxide, and health care providers may not always consider carbon monoxide poisoning as a cause of such nonspecific symptoms.

CPSC staff estimates that there were 180 unintentional, non-fire carbon monoxide poisoning deaths in 2006 associated with consumer products with 71 percent of these deaths occurring in homes. Gas furnaces and boilers have historically been a leading cause of carbon monoxide deaths associated with consumer products. However, portable generator-related have increased more than 350 percent in recent years from an average of about 16 deaths per year from 1999 through 2001 to about 75 deaths per year from 2004 through 2006. But regardless of the type of appliance involved in the incident, CPSC data show that carbon monoxide poisoning and death are much more likely to occur in homes with no functioning carbon monoxide alarms.

CPSC recommends that every home have a carbon monoxide alarm in the hallway near the bedrooms in each separate sleeping area. These alarms should be battery operated or plug-in with a battery backup. CPSC publishes annual press releases on the importance of maintaining home heating systems using carbon monoxide alarms, meeting the requirements of the UL 2034 standard and installing carbon monoxide alarms outside every sleeping area in the home. We also issue our rapid response media alerts when an oncoming storm is likely to spur power outages, as happened in this winter's historic snowfalls. The Commission has also taken action to warn consumers of the specific danger posed by the improper operation of portable generators. In January 2007, the Commission issued a final rule making a portable generator labeling requirement mandatory on units manufactured after May 13, 2007.

The Commission has also directed staff to investigate methods to address the carbon monoxide hazard associated with portable generators. CPSC staff is working expeditiously and making excellent progress to develop and demonstrate a proof of concept for technology that would lower the risk of carbon monoxide poisoning associated with portable generators. To date, the work has yielded promising preliminary results such as prototype generators which would significantly lower emissions rates than found in today's marketplace. However, it likely will take another 2 years of additional testing and modeling before the Commission is ready to con-

sider a proposed rule to regulate carbon monoxide emissions from portable generators.

CPSC staff supports the goals of H.R. 1796. Carbon monoxide alarms save lives by warning consumers of the presence of carbon monoxide before the onset of its debilitating effects. CPSC staff believes that the current edition of UL 2034 is an effective standard and that products meeting those requirements provide adequate protection against carbon monoxide poisoning. Making conformance to UL 2034 mandatory will establish a minimum acceptable performance standard for carbon monoxide alarms and will give CPSC greater authority to keep non-complying carbon monoxide alarms out of the U.S. marketplace.

CPSC staff also supports the provisions in H.R. 1796 for a state grant program for carbon monoxide alarms. Reportedly, only 35 to 50 percent of U.S. households have carbon monoxide alarms. Working with state and local authorities is critical to amplifying our message on the dangers of carbon monoxide poisoning. Getting carbon monoxide alarms into more American homes, both existing and new construction, will save lives. We believe the passage of H.R. 1796 along with our work to reduce or eliminate carbon monoxide emissions at the source, alerting consumers to the presence of hazardous carbon monoxide levels if they occur, and educating consumers to the hazards posed by carbon monoxide will provide a comprehensive approach to addressing the risk to the American consumer from carbon monoxide.

Mr. Chairman, thank you again for the opportunity to testify on H.R. 1796 and the overall issue of carbon monnxide dangers.

[The prepared statement of Mr. Howell follows:]

Statement of
Robert J. Howell
Assistant Executive Director
Office of Hazard Identification and Reduction
U.S. Consumer Product Safety Commission

Before the

House Energy and Commerce Committee

Subcommittee on Commerce, Trade and Consumer Protection

March 18, 2010

Good morning, Chairman Rush, Ranking Member Whitfield, and Members of the Subcommittee on Commerce, Trade and Consumer Protection. My name is Robert J. Howell, and I am the Assistant Executive Director for the Office of Hazard Identification and Reduction at the U.S. Consumer Product Safety Commission ("CPSC"). I appreciate the opportunity to testify before you this morning regarding H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act, and the overall dangers of carbon monoxide poisoning. The testimony that I will give this morning is mine and reflects the views of my technical staff. The testimony has not been reviewed or approved by the Commission and may not necessarily reflect the views of the Commission.

In my role at CPSC, I oversee the technical work of the agency within the directorates for Engineering Sciences, Epidemiology, Economic Analysis, Health Sciences and Laboratory Sciences. My office is responsible for the collection and analysis of death and injury data associated with consumer products, which include fuel-burning products such as heating systems, engine driven tools, gas appliances, and portable generators and related products, including carbon monoxide alarms. My office also is responsible for analyzing product safety performance, developing technological solutions to address product safety concerns, and working with those stakeholders involved in developing voluntary standards designed to improve consumer product performance.

I. Carbon Monoxide: The Silent Killer

Carbon monoxide (CO) is a colorless, odorless, and poisonous gas that results from the incomplete combustion of fuels such as natural or liquefied petroleum (LP) gas, gasoline, oil, wood, coal, and other fuels. The health effects related to CO depend upon its concentration in blood, which in turn depends on its concentration in air, the duration of exposure, and each individual's general health.[1]

Some symptoms of CO poisoning may mimic common illnesses, such as influenza or colds; thus, there likely is a high incidence of initial misdiagnosis by physicians and victims. Patients are frequently unaware of exposures to CO, and health care providers may not always consider CO poisoning as a cause of such non-specific symptoms.

For example, picture an apartment complex with a faulty furnace. As CO seeps inside of that apartment or home, the residents will begin to feel sick. At first, maybe they will just believe they are coming down with the flu, as they experience mild nausea and headaches. The symptoms then worsen as the CO continues to concentrate and dizziness and disorientation set in. This is the critical moment. If the residents do not exit their dwellings and get to fresh air, then unconsciousness is the next stage. If the furnace does

[1] Carbon monoxide combines with hemoglobin (Hb) with an affinity about 250 times that of oxygen, forming carboxyhemoglobin (COHb) and interfering with oxygen transport, delivery and utilization. Generally, there are no perceptible health effects or symptoms in healthy individuals at COHb levels below 10 percent. Symptoms associated with blood levels at or above 10 percent COHb include headache, fatigue, nausea, and cognitive impairment. Loss of consciousness, coma, and death can occur at COHb levels greater than 20 percent, although for healthy adults CO fatalities typically require levels above 50 percent.

not shut down, or a carbon monoxide alarm fails to warn the occupants, serious injury or death is likely to occur. That is why properly operating CO alarms should be installed in all residences.

II. CO Poisoning Incidents: Recent Trends

CPSC staff estimates that there were 180 unintentional non-fire CO poisoning deaths in 2006 associated with consumer products with 71 percent of these deaths occurring in homes. Consumer products often associated with CO fatalities include fuel-burning appliances such as furnaces, portable generators, portable propane heaters, gas ranges, gas water heaters, and charcoal and gas grills.

Gas furnaces and boilers have historically been a leading cause of CO deaths associated with consumer products. From 2004 to 2006, they accounted for almost half (43%) of the estimated 69 CO deaths associated with the gas fueled appliances.

However, a significant increasing trend in consumer product-related, non-fire CO fatalities from 1999 to 2006 is attributable to generators. Portable generator-related deaths have increased more than 350 percent in recent years, from an average of about 16 deaths per year, from 1999-2001, to about 75 deaths per year in the period 2004-2006. During the three-year period 2004-2006, 41 percent of consumer product-related CO poisoning deaths (an average of about 75 deaths annually) were generator-related and 35 percent (an average of 63 deaths per year) were heating system-related.

Regardless of the type of appliance involved in the incident, CPSC data also show that CO poisoning and death are much more likely to occur in homes with no functioning CO alarms.

III. CPSC Response to CO Poisoning from Consumer Products

To address the non-generator related CO hazard, CPSC staff has employed a three-fold approach: (1) reducing or eliminating CO production at the source, (2) alerting consumers to the presences of hazardous CO levels if they occur; and (3) educating consumer to the hazards posed by CO.

In its efforts to reduce CO deaths, CPSC staff has taken the approach of limiting CO levels in the home to the lowest possible level achievable taking into account the limitations of combustion appliance technology and the detection capabilities of low-cost CO alarms. Avoidance of nuisance appliance shutdowns and alarm activations has been a primary concern. Historically, we have had good success, but more needs to be done.

When cooking or heating appliances are kept in good working order, they produce little CO. Improperly operating appliances can produce fatal CO concentrations in the home. Proper installation, operation, and maintenance of fuel-burning appliances in the home are the most important factors in reducing the risk of CO poisoning. In addition to the

proper use and upkeep of appliances that are potential CO sources, CO alarms provide a valuable second line of protection.

CPSC recommends that every home have a CO alarm in the hallway near the bedrooms in each separate sleeping area. The CO alarms should be battery-operated or plug-in with battery back-up. The CO alarms should be certified to the requirements of the most recent Underwriters Laboratories (UL) standard for CO alarms. Consumers should test CO alarms frequently and replace batteries annually. CPSC reaches out to the media and consumers about the dangers of carbon monoxide through many venues. Twice a year CPSC reminds consumers to check their CO alarms when they adjust their clocks for daylight saving time and to change the alarm batteries annually.

We also publish annual press releases on the importance of maintaining home heating systems, using CO alarms meeting the requirements of the UL 2034 standard, and installing CO alarms outside every sleeping area in the home. Our "rapid response" media alerts are issued when an oncoming storm is likely to spur power outages, as happened in the recent historic snowfalls here in the Northeast. We also have several publications on our Web site aimed at warning consumers about carbon monoxide poisoning. Consumers may download these publications or order free copies.

In addition, this year we are developing a poster contest for middle school students - the collection of contest submissions is anticipated in 2011. The goal is to educate students and families and generate awareness across the country about poisonous carbon monoxide.

The Commission has also taken action to warn consumers of the specific danger posed by the improper operation of portable generators. In January 2007, the Commission issued a final rule making a portable generator labeling requirement mandatory on units manufactured on or after May 14, 2007. The mandatory warning label informs purchasers that "Using a generator indoors CAN KILL YOU IN MINUTES; "Generator exhaust contains carbon monoxide. This is a poison you cannot see or smell;" "NEVER use inside a home or garage, EVEN IF doors and windows are open;" "Only use OUTSIDE and far away from windows, doors and vents." The warning label also includes pictograms indicating the danger of CO emissions from portable generators for consumers who may not understand the written warnings. However, labels are only part of the answer; vigorous action is needed to limit the amount of carbon monoxide produced by portable generators.

To lower the CO poisoning risk associated with portable generators, the approach the agency is taking is similar to the approach CPSC takes with many other products, which is to reduce the risk at its source. In December 2006, the Commission directed staff to investigate methods to address the CO hazard associated with portable generators and published an Advance Notice of Proposed Rulemaking (ANPR).

CPSC staff is working expeditiously and making excellent progress to develop and demonstrate a "proof of concept" for technology that would lower the risk of CO

poisoning associated with portable generators. Under a contract with the University of Alabama (UA), CPSC and UA staff have worked to develop two prototype portable generators. The first prototype is designed to operate with significantly reduced CO emissions in the exhaust. The prototype design incorporates electronic fuel injection (EFI), which is a proven, well-understood technology. The prototype generator was subjected to a durability test program to ensure it would perform while achieving the desired emission rates throughout the entire advertised useful life of the generator and not adversely affect generator performance.

A second prototype was developed that uses the same CO-emission reduction strategy as the durability-tested unit but incorporates programmed logic that can distinguish when engine performance is affected by operation in an enclosed space and shuts the engine off. This is a tamper-proof safety feature intended to further limit consumers' exposure to CO when the product is used in an enclosed area.

In tandem with the University of Alabama contract, we are also working with our federal partner – the National Institute of Standards and Technology (NIST) – to develop the requirements for a potential proposed rule limiting CO emissions from portable generators, the criteria for which will be based on health effects. To do this, NIST is testing the two University of Alabama prototype generators in a garage attached to a house set up to measure how CO moves from the garage into the rest of the house. This set-up, with the generator operating in an attached garage, is a common fatal consumer incident scenario. The results from these and other tests, conducted by NIST, will be used by CPSC staff to evaluate the efficacy of the prototypes, and compared to tests run with off-the-shelf commercially available generators, in creating survivable conditions for occupants in the house.

To date, the work on prototype generators that can reduce the risk of CO poisoning has been very promising. However, it likely will take another two years of additional testing and modeling before the Commission is ready to consider a proposed rule to regulate CO emissions from portable generators.

IV. H.R. 1796

CPSC staff supports the goals of H.R. 1796. CO alarms save lives. They do that by warning consumers of the presence of CO before the onset of its debilitating effects. CPSC staff believes that the current edition of UL 2034 is an effective standard, and that products meeting those requirements provide adequate protection against CO poisoning. CPSC staff worked closely with UL on the development and subsequent revisions to UL 2034. Making conformance to UL 2034 mandatory will provide a level playing field for CO alarm manufacturers and will give CPSC greater authority to keep non-complying CO alarms out of the U.S. market.

CPSC staff also supports the provisions in H.R. 1796 for a state grant program for carbon monoxide alarms. Reportedly, only 35 percent to 50 percent of U.S. households have CO alarms. CPSC is a small agency with a big mission. Working with state and local

authorities is critical to amplifying our message on the dangers of carbon monoxide poisoning. Getting CO alarms into more American homes – both existing and new construction – will save lives.

However, I should stress that our support of H.R. 1796 does not diminish the need for manufacturers of generators and gas appliances to design and build products in a manner that provides the greatest level of protection to consumers from CO exposure. We will continue to pursue our current initiatives to ensure that this is accomplished. We believe these initiatives, along with passage of H.R. 1796, will provide a comprehensive approach to addressing the risks to the American consumer from carbon monoxide.

* * * * *

Mr. Chairman, thank you again for the opportunity to testify on H.R. 1796 and the overall issue of CO dangers. CPSC continues to work aggressively to reduce deaths and injuries associated with carbon monoxide poisoning from consumer products under our jurisdiction, and we appreciate the Subcommittee's awareness of this critical issue. I would be happy to answer any questions at this time.

Mr. RUSH. The Chair now recognizes Dr. Lavonas for 5 minutes for the purposes of opening statement.

TESTIMONY OF ERIC LAVONAS

Dr. LAVONAS. Good morning, and thank you. I would like to thank the committee and particularly Mr. Rush and Mr. Matheson for inviting me to be here today. As Mr. Rush said, I am an emergency physician and a medical toxicologist from Denver. I am one of Ms. DeGette's constituents. Thank you. I am the associate director of the Rocky Mountain Poison and Drug Center, which is the State-designated poison control center for five States, and also a faculty member at the University of Colorado.

As Mr. Gingrey said, this is serious business, and I am passionate about this, probably for the same reason that Mr. Gingrey is. Carbon monoxide poisoning is the leading cause of unintentional poisoning death. That is after you subtract out deaths related to complications from drug abuse. The most recent data from CDC reports 562 unintentional deaths caused by carbon monoxide poisoning. That was in 2004. That is not counting fire-related deaths nor is it counting another 1,200 deaths due to suicide. There are approximately 20,000 people treated in America's emergency departments each year because of unintentional carbon monoxide poisoning. Again, that is not counting suicide attempts. As Ms. Schakowsky pointed out, infants and the elderly are at increased risk, as are women. Surprisingly, there is not much variation around the country. North, south, east or west, this is still a big problem. Of those 20,000 or so people treated in emergency departments every year, about a quarter will have lasting brain damage, and that is even with the best available medical treatment. This is a major public health problem in the United States.

So Mr. Gingrey stole my thunder. Statistics are important but sometimes it helps to understand two or three deaths instead of 562. In November 2008, we had an incident in the Colorado mountains in which the Lofgren family from Denver won use of a ski house in their kids' Presbyterian school charity auction. Unfortunately, a vent pipe in the heating system of that home had come unglued, apparently well installed but some glue failed. A pipe was disconnected. Parker and Caroline Lofgren, their 10-year-old son, Owen, and their 8-year-old daughter, Sophie, never woke up the next morning.

In January of 2009, we had a winter storm blow through Denver, as it is wont to do, and it loosened the chimney cap on an apartment building near the University of Denver. So the building super went up on the roof, tightened the cap down as you should do, and accidentally killed a 23-year-old graduate student named Lauren Johnson, who was found dead in her apartment the next morning.

But let me tell you a success story, and these kinds of success stories are why I am here. So when I was in Charlotte, North Carolina, we helped to pass and then strengthen a residential carbon monoxide alarm ordinance. The Charlotte ordinance requires a carbon monoxide alarm in every dwelling unit in the county. So this January, about 2 months ago, a woman, presumably a single mom, for reasons that I don't understand decided to use a charcoal grill inside the house to cook a meal for herself and her three small chil-

dren. Now, the landlord is a good landlord and he complied with the law so there was a carbon monoxide alarm and a smoke alarm in every dwelling unit in the building. Her carbon monoxide and smoke alarms went off but she knew the building wasn't on fire. She didn't understand about carbon monoxide and presumably she pulled the batteries. A few hours later, the carbon monoxide alarm in the upstairs apartment went off. The upstairs neighbor recognized the problem, went downstairs to check on his neighbor. He could hear people moving inside the apartment but nobody could answer the door, so he called Charlotte Fire Department. They gained entry to the apartment, found the mother semicomatose on the floor and the children severely ill. Happy ending. So if you want to know why am I here today, there are five very good reasons why I am here today. We had a good landlord spurred by a good law.

The impact on the survivors is meaningful. For example, I took care of an international—this is a patient I treated, so I can't use his name but an international building business consultant who flew back from wherever he flew back from, got home to his apartment, dropped his bag on the couch, went to bed. In the middle of the night his carbon monoxide alarm went off. He had to crawl down the steps to get help but we were able to treat him. He initially made what looked like a good recovery and then subsequently developed some problems with concentration. I lost track of him after we had referred him to brain injury rehab but he was unable to work, unable to perform his job.

So as you have heard, carbon monoxide poisoning is called the silent killer. This poison has no warning properties. You can't see it, you can't smell it. It mixes freely with air. The first signs that you are being poisoned feel like the flu: vomiting, diarrhea, achiness, fatigue, headaches. Doctors miss this diagnosis a lot, sometimes with tragic results.

If we are going to do something about this, we need three things: source reduction, early detection and public education. Now, I am sitting next to an expert from the Consumer Product Safety Commission so it is silly for me to talk about source reduction. I am not an engineer. Public education is important and both CDC and CPSC are doing aggressive messaging for public education. We can always do more. But we are here today to talk about early detection, carbon monoxide alarms. Even if you could control the behavior of 303 million Americans, there are 127 million households in this country and things break. I have had a carbon monoxide leak in my own home, and my home is 2 years old. Carbon monoxide alarms are inexpensive. They are about 20 bucks, and the price keeps going down. The sensor reliability for modern alarms is very good. We tracked our false alarm rate in Charlotte and found that about 60 percent of the time when Charlotte Fire Department got called for CO alarm activation, they found CO in the home.

As Ms. Castor said, this bill is a small step towards an important goal and I support the goals of this bill, and would look forward to an opportunity to come back with something even more effective and impactful in the future. Thank you.

[The prepared statement of Dr. Lavonas follows:]

Written statement of:

Eric Lavonas, MD
Associate Director, Rocky Mountain Poison and Drug Center
Denver Health and Hospital Authority
Denver, Colorado

Appearing before the:

Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce, United States House of Representatives
March 18, 2010

Regarding:

H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act

Good morning. I'd like to thank the Committee, and particularly Representatives Rush and Matheson, for inviting me to speak with you today. By means of introduction, I am an emergency physician and medical toxicologist from Denver, Colorado. I work for the Rocky Mountain Poison and Drug Center, the nation's busiest poison control center, serving the states of Colorado, Nevada, Montana, Idaho, and Hawaii. We are part of the Denver Health and Hospital Authority. I'm also on the faculty of the University of Colorado School of Medicine. I have worked actively in the prevention and treatment of carbon monoxide poisoning for ten years. I have worked with state and local government to design and enact carbon monoxide alarm laws, performed research with the Centers for Disease Control and Prevention to study the effectiveness of these laws, and serve on the Underwriters Laboratories / American National Standards Institute Standards Technical Panel 2034, which sets the voluntary standards for carbon monoxide alarms. Before coming to Denver, I worked in Charlotte, North Carolina, where I ran the hyperbaric oxygen unit that took care of most of the serious carbon monoxide poisoning cases in western North Carolina.

I am passionate about this issue because, despite all our efforts, carbon monoxide poisoning remains the third leading cause of unintentional poisoning death in the United States. Poisoning is second only to motor vehicle crashes as a cause of death due to injury in the United States.[1] Excluding deaths due to drug abuse, more than half of all unintentional poisoning deaths in the United States are due to carbon monoxide poisoning.[2] The most recent data from CDC reported 562 unintentional deaths caused by carbon monoxide poisoning in 2004. That does not count deaths that were fire-related, nor does it count another 1,200 deaths due to suicide. More than 20,000 people are treated in America's emergency departments each year because of unintentional carbon monoxide poisoning.[3] Rates are slightly higher for women and small children. It's surprising, but there isn't much variation between regions of the country. Even with the best possible treatment, about a quarter of these survivors develop brain injuries, many of which are permanent.[4] There is no question that carbon monoxide poisoning is a major public health problem in the United States.

Statistics are important, but they don't do enough to convey the importance of this problem. Let me give you three recent examples. I should stress that, although I have some connection to each of these stories, all the information I'm sharing comes from public sources:

- In November, 2008, the Lofgren family of Denver, Colorado, won the use of a ski home in Aspen in their children's school charity auction. Unfortunately, a vent pipe in the heating system had become disconnected. Carbon monoxide poisoning killed Parker and Caroline Lofgren, their 10-year-old son, Owen, and their 8-year-old daughter, Sophie.[5]

- In January of 2009, a winter storm loosened the chimney cap on an apartment building near the University of Denver. A repairman tightened the cap down. The following morning, a 23-year-old graduate student, Lauren Johnson, was found dead in her apartment from carbon monoxide poisoning.[6]

- Just this January, we had a success story in Charlotte, North Carolina. A family in a downstairs apartment used a charcoal grill to cook dinner and warm the home. Charlotte has a carbon monoxide alarm law, and the landlord had installed a carbon monoxide alarm in every apartment in the building. It appears that, when the alarm went off in the downstairs apartment, the mom pulled out the battery. A few hours later, the occupant of the upstairs apartment was awakened when his carbon monoxide alarm went off. He heard people inside the downstairs apartment, knocked on the door, and then called 911. The Charlotte Fire Department forced entry, and found the mother and three small children semi-comatose and vomiting on the floor. Potentially lethal levels of carbon monoxide were present in both apartments. If it wasn't for a good landlord who followed Mecklenburg County's carbon monoxide alarm law, at least five people would have died.[7]

To give you a better idea of the impact of carbon monoxide poisoning on survivors, let me tell you about a few of the patient's I've personally treated:

- An international business consultant flew home from Europe, dropped his bag on the couch, and went to sleep. Several hours later, he woke up with a horrible headache, vomiting, and trouble walking. He had to crawl down his stairs to get help. Even after treatment with hyperbaric oxygen, he had difficulty with concentration and complex thinking, and was unable to work. The last I heard, he was applying for permanent disability.

- A general contractor just happened to have a generator in his truck when an ice storm took out the power to his neighborhood. He's a pretty smart guy, so he set up the generator in his unfinished basement, opened all the windows and doors, and went to bed. Being a contractor, he had a carbon monoxide alarm in his home. The alarm woke him up, and he stumbled around the house to shut off the generator. The next morning, the paperboy found him passed out on his front lawn. Like the previous patient, he looked good after treatment, but then developed trouble concentrating. The last time I spoke with him, he was still unable to work, and his business was falling apart.

Carbon monoxide poisoning is often called "the silent killer," because it gives little warning. Carbon monoxide is colorless, odorless, and mixes freely with air. Carbon monoxide is present in nearly every home. Everything that burns fuel, including automobiles, gas appliances, fireplaces, grills, and electrical generators, produces some carbon monoxide. The reason more people don't get sick is a combination of good design, such as furnaces that vent to the outside, and good behavior, such as not running a generator inside the house or garage.

Three pillars of carbon monoxide poisoning prevention are source reduction, early detection, and public education.

Source reduction is basically good engineering: Designing, installing, and maintaining equipment to minimize the amount of carbon monoxide that is produced and to safely route the gas out and away from people. The CPSC and EPA have good people working on that. Other than to say that they need more resources, I'm not going to talk about that any further today.

Public education is crucial as well, for obvious reasons. The CDC and CPSC have put a lot of energy and focus into this area, and HR 1796 addresses this a bit with generator warning labels. However, people often don't follow written warnings. Changing behavior requires a message that is timely, relevant, and repeated often. We can do much more to train the public not to accidentally poison themselves, but that's a conversation for another day.

We are not going to make much headway in the fight against carbon monoxide poisoning without early detection, and that means carbon monoxide alarms. In our nation of 127 million households, things break! This can happen to anyone; I've even had a carbon monoxide leak in my own home. Unfortunately, it's easy to mistake the early signs of carbon monoxide poisoning for food poisoning, a headache, or "the flu." Doctors miss the diagnosis, too. When carbon monoxide leaks into a home, the best way to prevent serious carbon monoxide poisoning is a carbon monoxide alarm.

Carbon monoxide alarms are inexpensive. They currently cost about $20, and the price continues to drop. Although sensor reliability was a problem in the past, modern sensors are quite good. The Charlotte Fire Department tracks its false alarm rate. About 60% of the time, when they respond to a carbon monoxide alarm activation, the alarm is right. Both the National Fire Protective Association and the International Code Council have placed carbon monoxide alarm requirements into their residential building codes.[8,9] Because building code requirements generally only kick in when a home is build or undergoes substantial renovations, it will take 30 years or more to solve this public health problem through building codes. Currently, 24 states have some form of residential carbon monoxide alarm law.[10] This is a growing national standard, and the states are leading the federal government.

To my knowledge, HR 1796 and its companion, Senate Bill 1216, are the first pieces of national legislation to directly address the problem of carbon monoxide poisoning. HR 1796 is a small step in the right direction. Its goals are modest: To ensure that generators have appropriate warning labels, as currently required by the CPSC, to ensure that all carbon monoxide alarms sold in this country meet widely agreed-upon industry standards, and to authorize block grants to help the states that choose to do so implement carbon monoxide alarm programs.

In addition to the provisions in HR 1796, I would encourage the Committee to consider these "next steps" for future legislation.

First, require that carbon monoxide alarms be installed in any housing subsidized by the federal government, including HUD housing, VA-subsidized housing, and government-controlled housing such as military and diplomatic housing. The cost would be about 50 cents per dwelling unit per month, including batteries. That's money well invested in terms of lives saved, and would be largely offset by health care costs avoided.

Second, fund positions within the CDC dedicated to addressing the problem of carbon monoxide poisoning. Currently, the Air Pollution and Respiratory Health Branch of the CDC's National Center for Environmental Health has no positions funded for carbon monoxide poisoning work. The agency has done excellent work in recent years, but each CDC official has to do this work in between other projects. The EPA, which regulates carbon monoxide in automobile exhaust, and the Consumer Products Safety Commission are also trying to do this work on a shoestring. I can't think of another problem that kills 1,700 Americans each year and has so little federal support.

Thank you for taking the time to meet with me today. I will do my best to answer any questions.

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[1] Centers for Disease Control. Unintentional Poisoning Deaths – United States, 1999 – 2004. *MMWR* 2007; 56(5):93-6. http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5605a1.htm, accessed March 14, 2010.

[2] Same.

[3] Centers for Disease Control. Nonfatal, Unintentional, Non-Fire-Related Carbon Monoxide Exposures - United States, 2004 – 2006. *MMWR* 2008; 57(33):896-9. http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5733a2.htm?s_cid=mm5732a2_e, accessed March 14, 2010.

[4] Weaver LK, Hopkins RO, Chan KJ, *et. al.*. Hyperbaric Oxygen for Acute Carbon Monoxide Poisoning. *N Engl J Med* 2002; 347(14):1057-67.

[5] http://www.thedenverchannel.com/news/18166634/detail.html, accessed March 14, 2010.

[6] http://www.thedenverchannel.com/news/18417675/detail.html, accessed March 14, 2010.

[7] http://www.charlotteobserver.com/2010/01/04/1159583/family-rushed-to-hospital-for.html, accessed March 14, 2010.

[8] National Fire Protective Association, Standard 720, 2009 edition. Quincy, MA: NFPA, 2009.

[9] International Residential Code, 2009 edition, section R313. Washington, DC: International Code Council, 2009.

[10] http://www.kidde.com, accessed March 15, 2010.

Mr. RUSH. Thank you. The Chair recognizes Mr. Andres for 5 minutes.

TESTIMONY OF JOHN ANDRES

Mr. ANDRES. Good morning. I am John Andres, director of engineering for Kidde Residential and Commercial Division located in Mebane, North Carolina. Thank you, Chairman Rush and members of the committee, for the opportunity to contribute to the discussion on the prevention of carbon monoxide poisoning in the United States.

Kidde Residential and Commercial Division is part of UTC Fire and Security, a subsidiary of United Technologies Corporation. We are a proud leader in designing and manufacturing lifesaving residential carbon monoxide alarms and other fire safety devices and are committed to strict compliance to industry standards.

Kidde supports enactment of H.R. 1796, the Residential Carbon Monoxide Safety Act. The Centers for Disease Control and Prevention report each year unintentional CO poisoning kills more than 400 Americans, requires 20,000 more to seek emergency medical attention and causes more than 4,000 hospitalizations. H.R. 1796 is a strong first step toward preventing these tragedies. I commend Congressman Matheson for his leadership in elevating this public health and safety issue.

H.R. 1796 would focus much-needed federal attention and resources toward ending accidental carbon monoxide poisoning, The bill's provisions to create a grant program supporting residential CO alarm laws are especially important. However, for the purposes of today's hearing, my comments will focus on describing the carbon monoxide hazard and how CO alarms operate to provide warning and on explaining why it is necessary to establish mandatory federal product safety standards as laid out in H.R. 1796.

Known as the silent killer, carbon monoxide is a byproduct of incomplete combustion. Potential sources are gas-burning appliances such as a furnace, water heater, stove and grill as well as other fuel-burning devices like fireplaces and engines. If such devices are improperly installed or malfunction, carbon monoxide can build up inside a home. Carbon monoxide easily mixes with the air and can quickly reach dangerous levels. Because one cannot see, taste or small carbon monoxide, the only safe way to detect the gas is to install working carbon monoxide alarms. Kidde and fire safety experts such as the National Fire Protection Association recommend placing carbon monoxide alarms outside each bedroom and on every level of an occupied dwelling.

When inhaled, carbon monoxide bonds with the blood's hemoglobin to form carboxyhemoglobin, which then deprives cells of oxygen. The CO alarm works by measuring CO concentrations over time to ensure that an alarm will sound before a person's blood level reaches 10 percent carboxyhemoglobin. Below this level, a normally healthy adult will not experience symptoms of CO poisoning.

Two key attributes of carbon monoxide alarms are accuracy and reliability. These form the cornerstone of Underwriters Laboratories UL standard 2034, an independent third-party standard for which carbon monoxide alarms are voluntarily tested and listed.

UL 2034 is an American National Standards Institute, or ANSI, accredited standard that combines input from medical experts, approval bodies like UL, government agencies such as the Consumer Product Safety Improvement Act, the National Fire Protection Association, users and manufacturers in order to create a robust standard of performance. First published in 1992, UL 2034 has gone through several revisions, each of which is based on years of field test data intended to progressively strengthen the standard. Kidde supports this standard because it specifically tests the product design for electrical safety, mechanical robustness and the accuracy of CO detection over time and in different environmental conditions. UL 2034 is continually reviewed by a standards technical panel in order to keep pace with technological advances and past lessons learned. This revision process has led to the creation of CO-sensing technology that is more advanced, stable and reliable than past generations.

To date, 24 States have enacted laws requiring CO alarms in residential dwellings, and while most mandate that CO alarms meet UL 2034, there is no uniform requirement. More States will likely adopt similar legislation in order to avoid confusion among regulators, consumers and the industry. State lawmakers need a consistent standard to define what constitutes an approved alarm. Without such a reference, conflicting regulations arise that counter one of the CPSC's objectives, which is to develop uniform safety regulations for consumer products and to minimize conflicting State and local regulations.

In closing, each week we hear families whose lives have been saved through the use of carbon monoxide alarms. Having a CO alarm can make the difference between life and death. A federal standard would provide an umbrella of protection for all consumers in the United States as well as increased awareness and save lives.

Again, I thank the committee members for their consideration of H.R. 1796 and for raising awareness about CO dangers. Congressman Matheson, we look forward to working with you to pass this important legislation expeditiously. Thank you for the opportunity to contribute to the discussion.

[The prepared statement of Mr. Andres follows:]

WRITTEN STATEMENT OF

JOHN ANDRES,

DIRECTOR OF ENGINEERING,

KIDDE RESIDENTIAL AND COMMERCIAL

ON

CARBON MONOXIDE POISONING PREVENTION

March 18, 2010

Subcommittee Hearing

Subcommittee on Commerce, Trade and Protection

House Energy and Commerce Committee

Good afternoon, I am John Andres, Director of Engineering for Kidde's Residential and Commercial Division located in Mebane, North Carolina. Thank you, Chairman Rush and members of the Committee, for the opportunity to contribute to the discussion on the prevention of carbon monoxide (CO) poisoning in the United States. Kidde Residential and Commercial Division is part of UTC Fire & Security, a subsidiary of United Technologies Corporation. We are a proud leader in manufacturing life-saving residential carbon monoxide alarms and other fire safety devices. We are committed to leading the industry in product safety and strict compliance to industry standards.

Kidde supports enactment of H. 1796, "The Residential Carbon Monoxide Safety Act." The Centers for Disease Control and Prevention reports that each year, unintentional CO poisoning kills more than 400 Americans, requires 20,000 more to seek emergency medical attention, and causes more than 4,000 hospitalizations. H.1796 is a strong first step toward preventing these tragedies. I commend Congressman Matheson for his leadership in elevating this critical public health and safety issue.

H.1796 would focus much-needed federal attention and resources toward ending accidental carbon monoxide poisoning. The bill's provisions to create a grant program supporting residential CO alarm laws are especially important. However, for the purposes of today's hearing, my comments will focus on describing the carbon monoxide hazard and how CO alarms operate to provide warning, and on explaining why it is necessary to establish mandatory federal product safety standards, as laid out in H.1796.

Known as the "silent killer," carbon monoxide is a by-product of incomplete combustion. Potential sources are gas-burning appliances such as a furnace, water heater, stove, and grill, as well as other fuel-burning devices like fireplaces and engines. If such devices are improperly installed or malfunction, carbon monoxide can build up inside a home. Carbon monoxide easily mixes with the air and can quickly reach dangerous levels. Because one cannot see, taste or smell carbon monoxide, the only safe way to detect the gas is to install working CO alarms. Kidde and fire safety experts such as the National Fire Protection Association recommend placing CO alarms outside each bedroom and on every level of an occupied dwelling.

When inhaled, carbon monoxide bonds with the blood's hemoglobin to form carboxyhemoglobin, which then deprives cells of oxygen. A CO alarm works by measuring CO concentrations over time to ensure that an alarm will sound before a person's blood level reaches 10-percent carboxyhemoglobin. Below this level, a normally healthy adult will not experience symptoms of CO poisoning.

Consumers must have confidence that a properly installed and maintained CO alarm will warn them about the presence of dangerous CO levels, and avoid nuisance alarms. This need for accuracy and reliability is the cornerstone of Underwriters Laboratories (UL) 2034, the independent, third-party standard to which U.S. carbon monoxide alarms are voluntarily tested and listed.

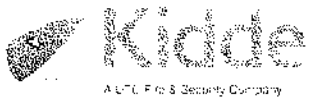
UL 2034 is an American National Standards Institute – or ANSI - accredited standard that combines input from medical experts, approval bodies like UL, government agencies such as the Consumer Product Safety Commission (CPSC), the National Fire Protection Association, users and manufacturers in order to create a robust standard of performance.

First published in 1992, UL 2034 has gone through several revisions, each of which is based on years of field test data intended to progressively strengthen the standard. Kidde supports this standard because it specifically tests the product design for electrical safety, mechanical robustness and the accuracy of CO detection over time and in different environmental conditions. UL 2034 is continually reviewed by a standards technical panel in order to keep pace with technological advances and past lessons learned. This revision process has led to the creation of CO sensing technology that is more advanced, stable, and reliable than past generations.

To date, 24 states have enacted laws requiring CO alarms in residential dwellings, and while most mandate that CO alarms meet UL 2034, there is no uniform requirement. More states will likely adopt similar legislation. In order to avoid confusion among regulators, consumers, and the industry, state lawmakers need a consistent standard to define what constitutes an "approved" alarm. Without such a reference, conflicting regulations arise that counter one of the CPSC's objectives, which is "to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations."

In closing, each week we hear of families whose lives have been saved through the use of CO alarms. Having a CO alarm does make the difference between life and death. Consumers must have confidence that their CO alarm will work reliably and accurately. A federal standard would provide an umbrella of protection for all consumers in the US, as well as increase awareness and save lives.

Again, I thank committee members for their consideration of H.1796, and for raising awareness about CO dangers. Congressman Matheson, we look forward to working with you to pass this important legislation expeditiously. Thank you again for the opportunity to contribute to this discussion, and I will be glad to answer any questions.



Understanding the standard for carbon monoxide alarms and why it should it be mandated

What is the Standard for carbon monoxide alarms?
Underwriters Laboratories (UL) 2034, is the independent third-party test and performance standard to which U.S. carbon monoxide alarms are voluntarily tested and listed. This American National Standards Institute (ANSI) recognized standard combines input from medical experts, approval bodies such as Underwriters Laboratories, government agencies such as the Consumer Product Safety Commission (CPSC), and the National Fire Protection Association (NFPA), users and manufacturers. This group of interested parties is referred to as the Standards Technical Panel (STP)

What is the purpose of the UL 2034 standard?
The purpose of UL 2034 is to describe and set-forth an orderly process for ensuring CO alarm designs perform to critical performance requirements. For example, the UL standard covers electrical safety and mechanical robustness of design for CO alarms and also requires tests of the alarms at various CO levels to ensure they activate according to the requirements set forth in the standard.

Why is it important to consumers that such a standard exist?
CO alarms continuously monitor the home's environment. They are designed to sound before a healthy adult would feel the effects of CO poisoning. The only safe way to detect this odorless, colorless and invisible gas in a home is with a working CO alarm. Consumers should have confidence that their properly installed and maintained CO alarm will function appropriately in the presence of dangerous CO levels, while avoiding unwanted nuisance alarming that may otherwise cause them to doubt the accuracy of the alarm. The UL 2034 standard accomplishes these goals.

How has the UL 2034 standard evolved?
UL 2034 was first published in 1992 and has since gone thru several revisions. Each revision is intended to strengthen the standard, and each revision is supported by years of field test data. All currently manufactured CO alarms approved by UL must meet this updated standard.

The UL 2034 standard is reviewed by the STP in order to keep pace with technological advances and past lessons learned. In accordance with ANSI rules, any member of the STP can recommend a revision in order to improve product performance or reliability. This revision process has led to the creation of CO sensing technology that is more advanced, stable and reliable than prior generations.

Why should the Federal Government set a mandatory federal Consumer Product Safety Standard for CO alarms?
Today, it is voluntary for a manufacturer to test and certify its CO alarms to the UL 2034 standard. While most states with laws requiring residential CO alarms mandate that the alarms meet UL 2034, there is no uniform requirement. By setting a mandatory Consumer Product Safety Standard, the federal government would provide a consistent standard of protection for all consumers in the US. This has been done in the past involving such standards for garage doors, bike helmets, ATVs, toys, cribs and pool drains.

To date, 25 states have enacted laws requiring CO alarms in residential dwellings, and more states are likely to adopt similar legislation in the coming years. In order to avoid confusion among regulators, consumers and the industry, state lawmakers need a consistent standard to define what constitutes an "approved" alarm. Without such a reference, conflicting regulations may arise, which would directly run counter to one of the CPSC's guiding objectives "to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations."

Mr. RUSH. Mr. Devine is recognized for 5 minutes.

TESTIMONY OF MARK DEVINE

Mr. DEVINE. Thank you very much, and good morning. As the chairman indicated, I am Mark Devine, vice president of marketing for First Alert and BRK Brands in Aurora, Illinois. I would like to first take this opportunity to thank all of the members for bringing this important issue in front of us all today. I would like to also thank Chairman Rush for his kind words regarding our company. We do enjoy being in Illinois with you, sir. In addition, I would like to thank Mr. Matheson for really representing this whole event in front of us today.

First Alert is a whole-home safety company with a foundation in fire safety, carbon monoxide safety and extinguishing products. Our name is very synonymous with alarms, and like Mr. Andres, we also take pride in our quality, innovation, engineering and our manufacturing. We are also a leader in our industry in terms of public outreach and collaboration with all the fire safety organizations.

I speak for First Alert when I say that we are concerned about protecting and preserving human lives. That is the primary reason that we support in its entirety the Residential Carbon Monoxide Poisoning Prevention Act, H.R. 1796. As we understand it, this bill would require carbon monoxide alarms to be installed in residential dwellings and places where people sleep. This provides an effective way to reduce the incidence of carbon monoxide poisoning.

The need for such federal regulation is strong. Carbon monoxide continues to be the number one cause of accidental poisoning in the United States. Each year, tens of thousands of people as we have heard are driven into the medical care facilities as well as over 400 lives are lost each year. We are keenly aware of how many fatal CO poisoning incidents occur in this country. Another example is just recently Amanda's Law took effect in the State of New York. This was named for Amanda Hansen. She died of CO poisoning at age 16 while sleeping at a friend's house. The law requires that New York State residents take necessary precautions to protect themselves from the silent killer. Amanda's father, Ken Hansen, has become a vocal proponent of measures that would require consumers to protect themselves from carbon monoxide poisoning.

Moreover, each year we receive hundreds of calls, letters and e-mails from individuals whose families have been saved, and I brought just a few examples today of the literally hundreds of examples that we receive from people who purchased alarms and who have had unfortunate incidents but the alarms saved their lives. These people take the time to literally write in, call in, e-mail, send photographs because they feel so compelled after they have had the saving incident from the alarm, so it is a strong testimonial as to why I am here today is to help more individuals understand the necessity for alarms within their homes.

To better ascertain consumers' knowledge about carbon monoxide and their awareness, we conducted a survey in 2009 where we spoke to 1,000 adults across the United States. The survey that we conducted, we found some very startling statistics. Forty-seven percent of households still do not have carbon monoxide alarms. These

products have been in existence for well over 10 years, a lot of education, a lot of information, but again, nearly 50 percent still do not have alarms. We also asked consumers do you understand the importance of carbon monoxide. Seventy-three percent of those individuals said yes, they do understand carbon monoxide is very hazardous and it is very important to them that they have protection but yet they are not going out and purchasing products to protect themselves. We also learned that 23 percent of those individuals who have purchased alarms have never replaced them. These products, as you stated, have been in existence for well over 10 years. They do need to be replaced as time goes on, just like any electronic device within your home. So the message is not fully penetrating the American public at this time.

With this said, we can also confidently state that education can work. In 2002, there was a study that indicated that 40 percent of households claim to have a carbon monoxide alarm, but in our recent study that number has only increased in 7 years by 9 percent. So there are still many homes that are unprotected. Because of the effectiveness of education, we do support earmarking grant money for additional public education efforts. We believe this will further curb the rate of accidental carbon dioxide poisoning. We greatly are encouraged by the number of States and municipalities who have enacted legislation. We also are grateful to legislators like yourselves who are now working hard to gain that federal support.

Again, I want to thank all of this committee and the chairman, Mr. Rush, for allowing us to be here today to provide this testimony.

[The prepared statement of Mr. Devine follows:]

March 18, 2010

The Honorable Bobby L. Rush
Chairman
Subcommittee on Commerce, Trade, and Consumer Protection
House Committee on Energy and Commerce
Washington, DC 20515

The Honorable Ed Whitfield
Ranking Member
Subcommittee on Commerce, Trade, and Consumer Protection
House Committee on Energy and Commerce
Washington, DC 20515

Dear Chairman Rush and Ranking Member Whitfield:

On behalf of First Alert, a trusted name in consumer home safety products and a leading manufacturer of carbon monoxide detection and notification devices, I am writing to formally convey our company's support for the Residential Carbon Monoxide Poisoning Prevention Act (H.R. 1796), introduced by Representative Jim Matheson. We join Representative Matheson and the National Electrical Manufacturers Association (NEMA) in their concerns for protecting and preserving human lives and in their confidence that carbon monoxide alarms installed in residential dwellings, and other places where people sleep, provide an effective way to reduce the incidence of CO poisoning.

Each year, we receive hundreds of calls, letters and emails from individuals and families whose lives have been saved by our carbon monoxide alarms. Still, CO continues to be the number one cause of accidental poisoning in the United States, claiming nearly 400 lives each year and driving tens of thousands of others to seek medical attention (American Medical Association). In far too many cases, these incidences could have been prevented with proper detection and notification devices.

Last year, we conducted two nationwide surveys* related to the consumer use and replacement of residential carbon monoxide alarms. The findings were alarming. Nearly half of Americans (47 percent) do not have CO alarms in their homes. Equally disturbing is the fact that nearly a quarter (23 percent) of those who do have CO alarms at home have never replaced them, and five percent haven't replaced their CO alarm(s) in more than five years, the recommended replacement timeframe.

We are greatly encouraged by the numerous states and municipalities that have enacted legislation requiring CO alarms in residential dwellings. We also are grateful for legislators like yourself and Representative Matheson who are working hard to gain federal support to prote all Americans from the dangers that CO poses in homes.

Carbon monoxide poisoning is a threat to everyone. However, we believe bills like the Residential Carbon Monoxide Poisoning Prevention Act coupled with education and awarenes will help to reduce the number of accidental poisonings from this "silent killer." We enthusiastically support H.R. 1796 and thank you for your attention to this life-threatening issue.

Sincerely,

Mark Devine
Vice President, Retail Marketing
First Alert

cc: The Honorable Jim Matheson

**The First Alert survey results are based on the responses of 1,000 adults in the United States who answered telephone surveys conducted Jan. 29 through Feb. 1, 2009 and July 31 through August 3, 2009. Results are accurate to +/-3 percent points with a 95 percent confidence level and can be generalized to the entire U.S. adult population.*

Mr. RUSH. Thank you. The Chair thanks all the witnesses, and now the Chair recognizes himself for the purposes of asking questions of the witnesses, and the Chair recognizes himself for 5 minutes.

I am going to begin with you, Mr. Howell. In your testimony, you state that a properly functioning carbon monoxide alarm should be installed in all residences and currently many States and localities require that carbon monoxide detectors be installed in homes to protect against carbon monoxide poisoning. The question that I have, actually four questions, I will ask them all in consideration of the time that I have and you can answer them, and if anybody else wants to chime in, please. The first question is, have these State and local regulations generally been effective in protecting people from harmful exposure to carbon monoxide, and are there any inconsistencies that give you concern? Should some form of these State and local requirements be adopted at the federal level, and lastly, States and localities also have regulations on fire detection. Are there efforts being made to ensure that the two detectors, fire and carbon monoxide, that they work together or be combined in some way?

Mr. HOWELL. Thank you, sir. In regards to the first question, as far as the effectiveness of State and local codes in requiring alarms, they certainly are effective. Given the fact that our data shows that 35 to 50 percent of homes have no alarms at all, I think I need to emphasize that there is an urgent need to get an alarm in every home, so whether it be a federal requirement or a State or local requirement, any move that would put an alarm in every home would certainly be effective in reducing the number of incidents, death and injuries, from carbon monoxide poisoning. As far as the question regarding a need for a federal requirement versus State and local, you know, I represent the technical arm of the agency and that truly would be a policy question. From a technical perspective, once again, regardless of what the source of the requirement was, any move to get an alarm in the home would certainly improve the odds of the American consumer surviving if exposed to hazardous levels of carbon monoxide.

Mr. RUSH. And what about combining fire and——

Mr. HOWELL. There are combined smoke alarms and CO alarms. You know, at this point in time as technology advances, you know, certainly there be an opportunity to combine those but the sensing technologies required for those devices are certainly unique and we want to ensure that the performance standards for each device reflect the particular hazard that is trying to identify an alarm to.

Mr. RUSH. Dr. Lavonas, do you have any response to that?

Dr. LAVONAS. Certainly. In answer to your first question, I absolutely agree with Mr. Howell. The State and local laws are generally effective. They are a patchwork quilt of some strong and some weak provisions. However, every step in the right direction gets you one step further in the right direction. There are inconsistencies, and I would love to see a federal standard on this, but that would be a much longer discussion than what we are prepared for today.

In terms of the combinations, in my home I have two combination dual-head smoke-carbon monoxide alarms, three wire nuts to

switch them. I dropped down the existing smoke head, three wire nuts, put up a smoke-carbon monoxide combination head. That takes advantage of the interconnect system that is part of smoke alarms in the code. Both of the major building standards, code-setting organizations have adopted carbon monoxide alarms. It is in the most recent version of both the international residential code and the National Fire Protection Association 720 code. However, building codes only trigger when you build or renovate a structure so if we are going to use building codes to solve this problem, it will take a good 30 years. We are losing people every week, so I would love to see a strong federal initiative on this question. That is my opinion.

Mr. RUSH. I am going to now recognize Mr. Whitfield for 5 minutes.

Mr. WHITFIELD. Well, thank you, Mr. Chairman, and thank you all very much for your testimony.

Mr. Howell, I want to start off with you, a couple questions. I notice in your testimony that you said that the Consumer Product Safety Commission supports the goals of H.R. 1796. Do you all support this specific legislation?

Mr. HOWELL. We do certainly, and this is from a technical staff perspective. Technical staff certainly supports the intent of the legislation. We believe that there is a need to work together on the language of the warning label, but beyond that, certainly putting a smoke alarm in every home, a grant program and, you know, making the UL standard for carbon monoxide alarms mandatory, we certainly support that language.

Mr. WHITFIELD. So on the technical side, the warning label is just one area that you would like to——

Mr. HOWELL. And it is really a minor issue. Warning labels are a tricky science and we have human factor experts that would certainly be willing going forward to work with committee staff to develop the appropriate language for a warning label.

Mr. WHITFIELD. And would there be any other technical areas that you would be concerned about?

Mr. HOWELL. No, sir.

Mr. WHITFIELD. Now, one other question I wanted to ask you. Under section 7 of the Consumer Product Safety Act, you all have the authority to promulgate a safety standard if two conditions are met. Do you have the authority to mandate the standard of alarms?

Mr. HOWELL. Section 7 of the CPSA requires the Commission to rely upon voluntary consumer product safety standards rather than promulgate a consumer product safety standard whenever compliance with the voluntary standard is adequate or would eliminate or adequately reduce the risk of injury and it is likely that there is substantial compliance with the standard. At this point we believe that the standard is indeed adequate to reduce or eliminate the risk of injury and we also believe that there is substantial compliance.

Mr. WHITFIELD. So that would prohibit you from making it mandatory?

Mr. HOWELL. Yes, sir.

Mr. WHITFIELD. Thank you.

I notice in the legislation on page 4, and Mr. Andres, have you read this legislation?

Mr. ANDRES. Yes, I have.

Mr. WHITFIELD. It says, "Paragraph 2 does not apply to any carbon monoxide detector not covered by the standard as provided in section 1.4 of the standard." What is that referring to?

Mr. ANDRES. We actually read through that and we were a little bit confused by some of the language in there, and I think we need to work with Mr. Matheson to look at some of the language. I think the way that the provision is written right now, there is a lot of confusion between the term "detector" and "alarm" and they use those two terms interchangeably, and technically they are actually two different devices. So I think there is some language adjustments that need to be made to clean that up because honestly I didn't really understand what they were referring to in that section.

Mr. WHITFIELD. Yes, so I think it is important that we remember alarm and detector are two separate things, correct?

Mr. ANDRES. That is correct, and oftentimes a different UL standard would be applicable.

Mr. WHITFIELD. And on page 3 where they make this a mandatory standard, it says "mandatory consumer product safety standard, the American National Standard for single and multiple station carbon monoxide alarms." What is that safety standard in layman's terms? What is that?

Mr. ANDRES. Well, UL 2034 is the standard for conformance so——

Mr. WHITFIELD. For performance?

Mr. ANDRES. It not only looks at performance but also has requirements for design characteristics, so Underwriters Laboratories would actually accept a manufacturer's, a number of their alarms, and that particular standard would be used to test the design characteristics of that. When it comes to carbon monoxide alarms, they are going to look at not only electrical and mechanical safety but they are also going to look at specificity to detection of carbon monoxide. They are also going to look at the accuracy of carbon monoxide detection, which is very important, and they are going to look at the accuracy over time. So the UL 2034 standard has evolved over the years and it is actually a very good standard now. It has gone through a number of changes that have made it a very robust standard.

Mr. WHITFIELD. I know that we have an issue in the United States of not enough people have these in their homes, but how many alarms would you say are being sold in the United States today that do not meet this standard that is set out in this legislation, or would you have any idea?

Mr. ANDRES. I actually think today we are fortunate that most alarms that I am aware of are actually listed to this ANSI standard. I am not aware of any right now that are not.

Mr. WHITFIELD. Even imported alarms?

Mr. ANDRES. Correct.

Mr. WHITFIELD. OK. I see my time has expired, Mr. Chairman.

Mr. RUSH. The Chair now recognizes the gentleman from Utah, the author of the legislation, Mr. Matheson, for 2 minutes.

Mr. MATHESON. Thank you, Mr. Chairman.

Mr. Howell, you may have referenced this a little bit in your opening statement but there is a Senate version of this bill, as you are aware, and in the Senate version, it includes a provision that mandates the use of a shutoff switch, it is my understanding, on portable generators, where the machine would—you know, there is detection of carbon monoxide level at some point and it would disable the generator. And I understand the CPSC has been working in conjunction with the University of Alabama in looking at the development of this type of a device. Could you just give us a quick update on the progress of this study and how effective the shutoff switch has been in reducing the dangers of carbon monoxide poisoning?

Mr. HOWELL. Yes. CPSC staff investigated two approaches to the concept of a gas-sensing shutoff device to shut nff an operating portable generator before it created a hazardous CO exposure. Both methods pose significant disadvantages. One approach was that of a shutdown system in which the CO-sensing device was mounted on the generator to detect the level of CO in the vicinity of the generator. Staff found that a disadvantage to this approach was a propensity for false shutdowns when the generator was operated in a ventilated outdoor environment but where the exhaust tended to accumulate around the generator. Staff also is concerned about the sensory reliability and life which may be comprised when exposed to the door environmental conditions, engine vibration, combustion products and heat.

The second approach the staff investigated involved a CO-sensing device located in a remote location away from the generator where occupants in the house might be that would shut down the portable generator using wireless technology if unsafe CO was developing inside the house. We conducted a demonstration using off-the-shelf components including a residential CO alarm, a radio frequency receiver and transmitter, and a portable generator. One disadvantage, and I want to say a major disadvantage of this approach was that it required the consumer to properly locate the remote sensor in the occupied area in order for it to work successfully and therefore it could be easily defeated by the consumer.

Mr. MATHESON. I appreciate that.

Mr. Chairman, I just wanted to get the Consumer Product Safety Commission's understanding of those difficulties because that is one of the differences between the House and the Senate bill, and the reason we did not include this language in the House version was because of these concerns about how well a shutoff switch would work, and I will yield back.

Mr. RUSH. The Chair thanks the gentleman.

The Chair now recognizes for 2 minutes the gentleman from Nebraska, and the Chair acknowledges the fact that the gentleman waived his opening statement so if you require an extra 2 minutes——

Mr. TERRY. I appreciate that. My questions will be short. I am not sure about the answers, though.

Let me first attack, or not attack but talk about the standards for both the detectors and the alarms. You need to help me work through why we need to have Congressional law to mandate the

standard when it seems to me that that isn't really what the issue is. The issue is that too many homes don't have CO detectors. Which one of you said that you actually had incident in your own home? Was that you, Doctor?

Dr. LAVONAS. That was me, Mr. Terry.

Mr. TERRY. Yes, we have had the same thing in our home. I have got three little kids, and we had our CO detector go off and found out that there was some crack in a part of the furnace, and so I am a believer in having those, but making the standard that everyone seems to agree on is adequate today mandatory, I am not sure we need to do that.

Mr. Howell, you are on the technical side. Explain to me why the voluntary standard that two of you have already said seems to be adequate needs to be made mandatory.

Mr. HOWELL. Mr. Terry, the decision to make this standard mandatory certainly would be the prerogative of the Congress. CPSC, as I indicated, not only is not currently involved in a move to make this standard mandatory but the CPSA actually prohibits us from making it mandatory as long as we feel like there is substantial compliance and that the standard adequately protects the American consumer.

Mr. TERRY. So if there wasn't compliance to this voluntary standard and that was inadequate, then you could make it mandatory?

Mr. HOWELL. We could make it mandatory or we certainly could promulgate a standard that was more stringent than the current UL standard.

Mr. TERRY. But you think that the current voluntary standard is adequate, if I buy a CO detector that is going to meet the standards?

Mr. HOWELL. Absolutely. Having said that, if I may, making this standard mandatory would give CPSC greater authority to keep any non-complying carbon monoxide alarms out of the U.S. market should they try to enter the market.

Mr. TERRY. Have you found instances of noncompliance?

Mr. HOWELL. At this point we have not.

Mr. TERRY. And then the other is on the warning labels and pictograms on portable generators. I think Jim has done a good job of showing why I think we probably need to do that, but the question then is begged, why does Congress need to mandate that on you? And that would be your-sorry, Mr. Howell. You get to represent the agency that has the authority.

Mr. HOWELL. That is not a problem. As I indicated before, in 2007 CPSC actually mandated warning labels on portable generators and on the packaging, and very clearly identified the risk to the consumer and the correct behavior. Our label clearly states using a generator indoors—and this part is in bold and caps—can kill you in minutes. There are also pictograms that indicate the behavior that we wanted to discourage. It says never use inside a home or garage even if doors and windows are open, and then it also illustrates the correct behavior. Only use outside and far away from windows, doors and vents. The Commission upon staff's recommendation and the development of this label by our human factors experts felt like this was a good label and served the purpose.

Mr. TERRY. Thank you very much. Yield back my 4 seconds.

Mr. RUSH. The Chair thanks the gentleman.

The Chair wants to apprise members that the staff has just informed me, or reminded me, rather, that there are 5 minutes under the committee rules for questioning, 2 minutes for opening statements and 5 minutes for questioning, and those who have gone before, if you require more—you are OK for now? All right. Well, thank you very much.

The Chair now recognizes the gentlelady from California, Mrs. Matsui, for 5 minutes.

Mrs. MATSUI. Thank you, Mr. Chairman.

Mr. Andres, the CPSC has estimated that 180 unintentional nonfire carbon monoxide poisoning deaths occurred in 2006 and were associated with consumer products. Of these deaths, 71 percent took place in homes. The data also showed that carbon monoxide poisoning deaths are more likely to arise in homes with no functioning alarms. To reduce deaths, CPSC has attempted to reduce carbon monoxide levels in homes by examining the limitations and detection capabilities of low-cost carbon monoxide alarms. Mr. Andres, I want to know how industry has worked with the CPSC and other stakeholders to develop voluntary standards to improve consumer product performance.

Mr. ANDRES. Yes. In fact, as outlined in some of the ANSI protocols to develop a recognized standard, there is a technical committee that is formed. We refer to it as the standards technical pattern, and in fact, the Consumer Product Safety Commission oftentimes participates in technical discussion on the performance of carbon monoxide alarms, and I have personally attended a number of these technical panel reviews over the years, and if anybody were to look at the amendments that have been made towards UL 2034, you would see that the standard has evolved into a very robust-type standard. Some of the major changes that have been made toward the standard are, number one, a requirement to demonstrate whatever sensing technology you are employing that that technology be proven to be accurate, not just accurate on day one at the time that the Underwriters Laboratory engineering is going to test the product, but certainly accurate years down the line. We have at Kidde, for example, over 10 years of ongoing test data that is third-party witnessed by Underwriters Laboratories. At the same time, Underwriters Laboratories has imposed environmental tests so that sensing technology is proven to be accurate under high humidity extremes or low temperature extremes or high temperature extremes. The Consumer Product Safety Commission has participated in many of these technical discussions and they have also raised issues in the past about performance of these sensing technologies, brought those into industry so that we could all discuss it, and that has led to the evolution of much better sensing technology today.

Mrs. MATSUI. I think that many of us have been made aware, particularly some of the testimony here, about the tragedies that occurred, and I think some of us have experienced this historic storm that we had in February where many of us lost our power and our heat sources, and once again we were reminded about the dangers of carbon monoxide. And it is unfortunate that things like that have to happen for us to be reminded of that, and that is why,

you know, I look at some of the data about the deaths and injuries that might occur. Do you believe that you are at a point where you don't need the stronger regulatory law? I mean, can we reduce more deaths or risks of deaths if we have a stronger regulatory law or reduce the risk of carbon monoxide as source?

Mr. ANDRES. Alarms have evolved to a point where you can buy an excellent alarm for an $18 price tag that covers you for multiple sources of CO source. You know, we talked about generators but it is beyond generators. There are fireplaces, charcoal grills, attached garages with running cars, water heaters. I mean, for a $20 device being able to protect against all those individual sources, that is just a fantastic deal. I mean, the same time we look at what we are doing here today. I mean, this is National Poison Prevention Week. We are having a very good discussion on, you know, a very pertinent point, carbon monoxide. Anything we can do to raise awareness will naturally leave to saving additional lives, so we are going to raise the awareness to the American public. They are going to react to that, many of them, and purchase carbon monoxide alarms. What you are doing here today will help raise that awareness.

Mrs. MATSUI. And I just wanted to comment, I think that, you know, we are looking at these things sometimes in silos. We are looking at the alarms right now. But you mentioned the other aspects of it, you know, the generators and all of this that are really a greater part of it too. So in a certain sense, we have to address some of those concerns and how they might affect as being the source of this and so I think that you are right, it is absolutely important to do this but I also think that we need to look beyond this also because this is—partly it is education but part of it is also the interconnectedness of all of this, and I think that is really the important thing. So with that, I yield back my time.

Mr. RUSH. The Chair recognizes now the gentlelady from Colorado, Ms. DeGette, for 5 minutes.

Ms. DEGETTE. Thank you very much, Mr. Chairman, and I want to give an official welcome to Dr. Lavonas, who is my constituent, and almost as importantly works for Denver Health, which this committee has heard me sing the praises of many, many times and does such a wonderful job not just with providing health care to folks but with some of these public health issues throughout our region. I want to welcome you, and Mr. Matheson and I both agreed that the entire panel provided excellent testimony and in particular you, Doctor.

I just want to ask a couple of questions of the panel. The first one, as we know, the legislation provides for grants to States and localities to assist in certain activities related to preventing carbon monoxide poisoning. Dr. Lavonas, do you think that the grants are a helpful way to address this issue?

Dr. LAVONAS. Yes, I do. I have been through—this is my third time working with a governmental body on questions regarding carbon monoxide alarms, and so I have heard from my previous experience the barriers that they face. The biggest barrier that the State of Colorado faced was cost. It costs money to implement a standard, particularly if there is government-owned housing or government-imposed requirements that are going to require training.

I think this bill does address that. I think that it may be helpful to allow the States to use this grant money in some additional ways as well as they see fit, for example, to allow the States to apply for grant money to put alarms in State-controlled housing or to fund alarm programs to provide subsidized alarms for low-income communities. But fundamentally, cost is a barrier. Every State in the Nation is struggling with their budget this year.

Ms. DEGETTE. Yes, and also the local governments, many of which like Pitkin County which passed a law after that tragic death in the family that you described and many other counties, they are struggling with their budgets too. So what you are saying is, if we are going to do a grant system, be sure we give maximum flexibility so that that money can be used as wisely as possible.

Dr. LAVONAS. Yes, ma'am.

Ms. DEGETTE. I wanted to ask you, one struck me during your testimony about the patient that you had who had brain injuries from carbon monoxide poisoning because we do hear, there are these tragic deaths. Mr. Devine has letters from people who survived. But my question is, we have the tragic deaths but we have many more people who have the poisoning who are somehow rescued. What are the long-term health impacts on folks who have survived from these poisoning episodes?

Dr. LAVONAS. These impacts can be significant. About three-quarters of survivors do OK. About a quarter of survivors develop a brain injury that sometimes can get worse for a few days after the poisoning. The problems have to do with—everybody is a little different but problems with concentration, problems with what is called executive processing like can I read a map, can I follow instructions, problems with short-term memory and problems with movement, tremors, similar to somebody with Parkinson's disease.

Ms. DEGETTE. And do we have any sense annually about how many of these lasting brain injuries there are as a result of carbon monoxide poisoning?

Dr. LAVONAS. Well, we know there are—if you add the suicide and the unintentional exposures together, probably about 45,000 or 50,000 people who visit an emergency department for carbon monoxide poisoning each year. We know from good research that about a quarter of these, perhaps more, will develop a lasting brain injury.

Ms. DEGETTE. Mr. Howell, I am wondering if you can tell me, as you know, the bill requires the CPSC to publish the existing voluntary Underwriters Laboratories 2034 standard for carbon monoxide alarms as a federal mandatory standard. Do you know how—can you tell us—I am sure you know how—the Underwriters Laboratories standard for carbon monoxide detectors was determined?

Mr. HOWELL. If you are asking how the standard came to be, it certainly is a gathering of technical experts, industry, stakeholders and of course CPSC is represented. Performance standard design criteria is developed and it is balloted and approved by technical experts that work to develop these standards.

Ms. DEGETTE. Do you think it will sufficiently protect the public?

Mr. HOWELL. At this point our indications are that it is adequate to protect the public from the risk as we see it today.

Ms. DEGETTE. OK. Just one last question. What proportion of carbon monoxide alarms currently available on the market conform to that standard?

Mr. HOWELL. I do not have an exact number but it is our indication that there is substantial compliance with the UL 2034 standards.

Ms. DEGETTE. Mr. Devine, do you know?

Mr. DEVINE. At this time we really understand that all the alarms that are available at retail establishments for consumers to purchase are compliant to the UL 2034 standard. Essentially all of the major retailers require us as manufacturers to have compliance to this standard today.

Ms. DEGETTE. Thank you.

Thank you very much, Mr. Chairman.

Mr. RUSH. The Chair thanks the gentlelady.

There was a question that came to mind, so the Chair will entertain any requests for one additional question from the members here, and the Chair recognizes himself for 1 minute.

Can anybody provide any information on the threat of carbon monoxide poisoning in any other place other than homes? And I am particularly concerned or interested in any evidence of carbon monoxide poisoning in automobiles.

Mr. HOWELL. Let me take the question as it began, which is any place outside of homes. CPSC actually has recorded incidents of people in outdoor environments, campers and tents, whether either through the use of generators or other fuel appliances that are used to either heat or cook have resulted in deaths to those from carbon monoxide poisoning.

Mr. RUSH. Anyone else?

Mr. DEVINE. Yes, Mr. Chairman. In addition to outside of the residence, also concerning to us is the hotel-motel while people are traveling. There have been occurrences, unfortunate incidents where people have had carbon monoxide poisoning while they are in a hotel-motel from a variety of different sources as well.

Mr. RUSH. Thank you.

The Chair recognizes the ranking member for 1 minute.

Mr. WHITFIELD. Thank you.

Mr. Howell, I wanted to ask you a question. You didn't come up to testify on H.R. 4805, the formaldehyde bill, which applies to hardwood, plywood, medium-density fiberboard and particleboard, all of which are products, and since you are the Consumer Product Safety Commission, are you familiar with this formaldehyde legislation?

Mr. HOWELL. I am aware that it was there. I have not actually studied the legislation at this point.

Mr. WHITFIELD. I was just thinking that these are products and you all deal with products and whether or not maybe your agency should have the jurisdiction over this formaldehyde issue, but we can talk about that later. I was just curious if you had looked at it. Thank you.

Mr. RUSH. The Chair wants to thank the witnesses. You have really been providing an invaluable service to this committee with your testimony and your answers to the questions. The Chair would like for you to know that we will keep the record open for

2 weeks, and if there are any members of the subcommittee who are not present who would like to submit questions to you in writing, would you please respond to those questions promptly within a 2-week period. Thank you so very much, and thank you for your time and your investment in the future of America. Thank you so much and God bless.

The Chair wants to thank the members of the second panel for their participation in this hearing and wants to introduce the second panel of this hearing for a discussion on the other matter that is before this subcommittee, the bill introduced by Mrs. Matsui. The Chair wants to thank all the witnesses for your investment of your time in this hearing.

The Chair wants to introduce beginning at his left Mr. James J. Jones, who is the deputy assistant administrator for the Office of Prevention, Pesticides and Toxic Substances of the U.S. EPA. Seated next to Mr. Jones is Mr. Tom Julia, who is the president of the Composite Panel Association. And seated next to Mr. Julia is Mr. Andy Counts, who is the CEO of the American Home Furnishings Alliance, and Mr. Don Ryan is sitting next to him, who is of the Sierra Club and a founding board member of the National Center for Healthy Housing. And next to Mr. Ryan is Dr. Melvin E. Andersen, who is the director of Program in Chemical Safety Sciences at The Hamner Institutes for Health Sciences. Again, we welcome all of the witnesses.

It is the practice of this committee to swear in the witnesses, so will you please stand and raise your right hand?

[Witnesses sworn.]

Mr. RUSH. Please let the record reflect that the witnesses have all answered in the affirmative.

The Chair now recognizes Mr. Jones for 5 minutes for the purposes of an opening statement.

TESTIMONY OF JAMES J. JONES, DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF PREVENTION, PESTICIDES, AND TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY; TOM JULIA, PRESIDENT, THE COMPOSITE PANEL ASSOCIATION; ANDY COUNTS, CEO, AMERICAN HOME FURNISHINGS ALLIANCE; DON RYAN, SIERRA CLUB, FOUNDING BOARD MEMBER, THE NATIONAL CENTER FOR HEALTHY HOUSING; AND MELVIN E. ANDERSEN, CIH, PHD, DART, DIRECTOR, PROGRAM IN CHEMICAL SAFETY SCIENCES, THE HAMNER INSTITUTES FOR HEALTH SCIENCES

TESTIMONY OF JAMES J. JONES

Mr. JONES. Thank you, Chairman Rush, Ranking Member Radanovich and members of the subcommittee. Thank you for the opportunity to speak with you today regarding the U.S. Environmental Protection Agency's efforts on formaldehyde and the potential legislative action in Congress.

Formaldehyde is a widely used chemical and may be found both indoors and outdoors. It is used in building materials and household products and also produces a byproduct of combustion. In homes, the most significant sources of formaldehyde are likely to

be pressed wood products made using adhesives that contain urea-formaldehyde resins.

Inhalation of formaldehyde can cause irritation of the eyes, nose, throat and skin as well as inflammation and damage to the upper respiratory tract. Additionally, there is growing evidence that formaldehyde exposure may impact pulmonary function and increase respiratory symptoms, asthma and allergic sensitization in children. In 1989, EPA classified formaldehyde as a probable human carcinogen.

EPA is currently engaged in a reassessment of the potential cancer and non-cancer risks of formaldehyde that will be entered into EPA's Integrated Risk Information, or IRIS program. As a result of this reassessment process, EPA is reexamining its conclusions regarding the cancer and non-cancer effects of formaldehyde. This assessment will be ready for external review soon. The agency has also asked the National Academy of Sciences to provide independent external scientific peer review, and EPA will offer opportunities for public comment on the underlying science.

The recent focus of formaldehyde in the Office of Prevention, Pesticides, and Toxic Substances resulted from a March 2008 petition to adopt the California State regulation concerning emissions of formaldehyde from three types of composite wood products. They petitioned EPA to exercise its authority under TSCA section 6 to adopt and apply nationally the California formaldehyde emissions regulation for these composite wood products. In response, EPA announced on June 24, 2008, that it was partially granting and partially denying the petition. While the agency denied the specifics of the petition request, EPA announced plans to issue an Advanced Notice of Proposed Rulemaking to initiate a proceeding to assist us in obtaining a better understanding of the available control technologies and approaches, industry practices and the implementation of the California regulation.

The ANPR was issued on December 3, 2008, and describes EPA's initial steps in that investigation and requested comment information and data relating to formaldehyde emissions from pressed wood products.

The challenge of regulating chemicals under our current TSCA authority is worth noting. As Congress moves toward TSCA reform legislation, we have stated in previous hearings that as a result of the legal and procedural requirements TSCA places on EPA to collect data, there are large, troubling gaps in the available data and state of knowledge of many widely used chemicals in commerce. Chemical producers are not required to provide EPA the data necessary to fully assess a chemical's risks. In cases such as formaldehyde where EPA has adequate data on a chemical and it wants to protect against well-known risks to human health and the environment, there are legal hurdles that prevent quick and effective regulatory action.

In regards to formaldehyde, the agency noted in its 2008 ANPR that EPA does not have sufficient information to evaluate whether the CARB standard would likely be the least burdensome alternative necessary to protect adequately against such risks. This finding illustrates the inherent difficulty the agency faces in regulating chemicals under TOSCA even for a chemical such as form-

aldehyde where data and information are available regarding its health effects.

Restoring confidence in our chemical management system is a top priority for EPA and an environmental priority for the Obama Administration. This Administration's principles for how TSCA should be revised and modernized call for stronger and clearer authority for EPA to collect and act upon critical data regarding chemical risks. Under a reformed TSCA, EPA should have the necessary authority and tools to quickly require testing and obtain other information from manufacturers that is relevant to determining the safety of chemicals and should also have clear authority to take risk-management actions when chemicals do not meet safety standards.

EPA currently anticipates being able to make a determination on whether to pursue regulatory action on formaldehyde in 2011. If we were to propose a new regulation at that time, a final rule could be anticipated 1 to 3 years later depending on the comments we receive and additional analysis and consultations which may be required in order to finalize.

As this committee considers legislation on formaldehyde, we agree that formaldehyde is a hazardous chemical and support the goal of legislation in reducing the risks of formaldehyde in pressed wood products. Reducing formaldehyde emissions in pressed wood products should be an important public health goal. California has made a valuable contribution to formaldehyde emissions reductions through it standards and is providing a clear model for addressing the problem.

We look forward to working with this committee as it moves forward to reduce exposure to formaldehyde from these products. It is our hope that Congress will also be able to act on TSCA reform since the Administration believes it is important to work together to quickly modernize and strengthen the tools available in TSCA.

Thank you for the opportunity to present EPA's views, and I am happy to answer any questions the subcommittee may have.

[The prepared statement of Mr. Jones follows:]

Testimony of James J. Jones
Deputy Assistant Administrator
Office of Prevention, Pesticides and Toxic Substances
U.S. Environmental Protection Agency
before the
Subcommittee on
Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
United States House of Representatives
March 18, 2010

Chairman Rush, Ranking Member Whitfield, and members of the Committee, thank you for the opportunity to speak with you today regarding the U.S. Environmental Protection Agency's efforts on formaldehyde and potential legislative action in Congress.

Formaldehyde is a widely-used chemical and may be found both indoors and outdoors. It is used in building materials and household products and can also be produced as a by-product of combustion. In homes, the most significant current sources of formaldehyde are likely to be pressed wood products made using adhesives that contain urea-formaldehyde (UF) resins. Pressed wood products made for indoor use include particleboard, plywood, and fiberboard.[1]

Inhalation of formaldehyde can cause irritation of the eyes, nose, throat, and skin, as well as inflammation and damage to the upper-respiratory tract.[2] Additionally, there is growing evidence that formaldehyde exposure may impact pulmonary function, and increase respiratory symptoms, asthma, and allergic sensitization in children.[3] There is evidence that some people can develop sensitivity to formaldehyde.[4] In 1989, EPA classified formaldehyde as

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[1] Formaldehyde Emissions From Pressed Wood Products, Advanced Notice of Proposed Rulemaking 73 FR 73620, at 73622 (December 3, 2008)
[2] ATSDR ToxFAQs, http://www.atsdr.cdc.gov/tfacts111.html; OSHA Safety Fact Sheet, http://www.osha-safety.org/osha_formaldehyde.asp
[3] McGwinn, Gerald. Jr, Jeffrey Liener, and John J Kennedy Jr., Environmental Health Perspectives. Vol 188 (Number 3), March 2010.
[4] Agency for Toxic Substances and Disease Registry. Toxicological Profile for Formaldehyde. 1999. http://www.atsdr.cdc.gov/toxprofiles/tp111.html

a probable human carcinogen. At that time, there was sufficient evidence in animals and limited evidence in humans from a set of 28 epidemiology studies.[5] In 2005, the International Agency for Research on Cancer (IARC) concluded that there is sufficient evidence in humans and sufficient evidence in experimental animals for the carcinogenicity of formaldehyde.[6]

EPA recognizes that since 1989 there has been additional research into the health effects of formaldehyde. EPA is currently engaged in a reassessment of the potential cancer and non-cancer risks of formaldehyde that will be entered into the EPA's Integrated Risk Information System (IRIS) program. As a result of the IRIS reassessment process, EPA will be reexamining its conclusions regarding the cancer risk of formaldehyde after considering the currently available scientific information, including human data. EPA will also be evaluating the non-cancer health effects of inhalation of formaldehyde.

The recent focus on formaldehyde in the Office of Prevention, Pesticides and Toxic Substances resulted from a March 2008 petition from 25 organizations and approximately 5,000 individuals to adopt the California state regulation concerning emissions of formaldehyde from three types of composite wood products: 1) hardwood plywood; 2) particleboard; and 3) medium density fiberboard. They petitioned EPA to assess and reduce the risks posed by formaldehyde emitted from these products by exercising its authority under TSCA section 6 to: adopt and apply nationally the California formaldehyde emissions regulation for these composite wood products; and to extend the regulation to include composite wood products used in manufactured homes.

In response, EPA announced on June 24, 2008, that it was partially granting and partially denying the petition. While the Agency denied the specifics of the petition request, EPA announced plans to develop and issue an Advance Notice of Proposed Rulemaking (ANPR) to initiate a proceeding to assist us in obtaining a better understanding of the available control

[5] IRIS File for Formaldehyde, http://www.epa.gov/iris/subst/0419.htm
[6] IARC Monographs *on the Evaluation of Carcinogenic Risks to Humans* (see http://monographs.iarc.fr/ENG/Monographs/vol88/index.php and http://monographs.iarc.fr/ENG/Meetings/88-formaldehyde.pdf)

technologies and approaches, industry practices, and the implementation of California's regulation.

The ANPR was issued on December 3, 2008 and describes EPA's initial steps in that investigation and requested comment, information, and data relating to formaldehyde emissions from pressed wood products. The notice also announced a series of public meetings to obtain additional stakeholder input which took place in early 2009. In 2009, the Administration conducted an additional meeting in New Orleans to provide an opportunity for residents of the so-called "FEMA trailers" to offer their views.

As I noted, EPA is working towards an updated IRIS cancer and non cancer assessment regarding health effects of inhalation exposure to formaldehyde, and this should be ready for external review soon. The Agency has asked the National Academy of Sciences to provide independent external scientific peer review and EPA will also offer opportunities for public comment on the underlying science. Also, we are conducting an exposure assessment this year and will focus on exposures in communities with environmental justice concerns. In addition, we are developing an industry survey to characterize the current industry practices, control technologies and the extent to which the industry has adopted the California standards.

The point of these efforts is to gain a greater scientific understanding of the potential health risks associated with the use of formaldehyde in pressed wood products. In turn, this vital information will inform the regulatory approach EPA will take on formaldehyde, as we consider whether it is appropriate to use our authority under TSCA to ban or restrict the use of formaldehyde in pressed wood products.

The challenge of regulating chemicals under our current TSCA authorities is worth noting. As Congress moves toward TSCA reform legislation, we have stated in previous hearings that as a result of the legal and procedural requirements TSCA places on EPA prior to collecting data, there are large, troubling gaps in the available data and state of knowledge on

many widely used chemicals in commerce. Chemical producers are not required to provide, without further action from EPA, the data necessary to fully assess a chemical's risks.

In the cases where EPA has adequate data on a chemical and wants to protect the public against well-known risks to human health and the environment, there are legal hurdles that prevent quick and effective regulatory action. Meanwhile, the public may be exposed to chemicals for which we have little understanding of the consequences.

As has been frequently cited, after years of study, EPA issued a rule in 1989 phasing out most uses of asbestos – a chemical whose health effects had been exhaustively studied and demonstrated to cause lung cancer, mesothelioma and asbestosis in humans. Yet, a Federal court overturned the rule because EPA failed to clear the hurdles imposed under TSCA before existing chemical risks can be controlled. In regards to formaldehyde, the Agency noted in its 2008 ANPR that,

> "On the basis of the significant differences in the legal standards applicable to the California Health and Safety Code (H&SC) and TSCA section 6, and the insufficiency of the information available to EPA for purposes of conducting the TSCA section 6 analysis, EPA is not granting the specific request in the petition to commence a proceeding under TSCA section 6 to impose the CARB formaldehyde ATCM nationwide. Even if the information available to EPA were sufficient to support an evaluation of whether formaldehyde in composite wood products presents or will present an unreasonable risk, petitioners have not provided sufficient information, and EPA does not otherwise have sufficient information, to evaluate whether the CARB ATCM would likely be the least burdensome alternative necessary to protect adequately against such risk."

This finding illustrates the inherent difficulties the Agency faces in regulating chemicals under TSCA.

Restoring confidence in our chemical management system is a top priority for EPA and an environmental priority for the Obama Administration. This Administration's principles for how TSCA should be revised and modernized call for stronger and clearer authority for EPA to collect and act upon critical data regarding chemicals risks. Under a reformed TSCA, EPA should have the necessary authority and tools, such as data call in, to quickly and efficiently require testing or obtain other information from manufacturers that is relevant to determining the safety of chemicals, and should also have clear authority to take risk management actions when chemicals do not meet the safety standard, with flexibility to take into account a range of considerations, including children's health, economic costs, social benefits, and equity concerns.

EPA currently anticipates being able to make a determination on pursuing regulatory action on formaldehyde in 2011. If we were to have the information and data necessary to propose a new regulation at that time, a final rule could be anticipated one to three years later, depending on the comments we would receive and the additional analysis and consultations which may be required in order to finalize.

As this Committee considers legislation on formaldehyde, we agree that formaldehyde is a hazardous chemical and support the goal of legislation in reducing the risks from formaldehyde in pressed wood products. Reducing formaldehyde emissions in pressed wood products should be an important public health goal. California has made a valuable contribution to formaldehyde emissions reductions through its standards and is providing a clear model for addressing this problem. We look forward to working with this Committee as it moves forward to reduce exposure to formaldehyde from these products. It is our hope that Congress will also be able to act on TSCA reform, since the Administration believes it is important to work together to quickly modernize and strengthen the tools available in TSCA.

Thank you for the opportunity to present EPA's views, and I am happy to answer any questions the Subcommittee may have.

Mr. RUSH. Mr. Julia, you are recognized for 5 minutes.

TESTIMONY OF TOM JULIA

Mr. JULIA. Thank you, Mr. Chairman, Ranking Member Radanovich, members of the subcommittee, and thank you in particular to Mrs. Matsui for taking the leadership to introduce this important piece of consumer legislation.

I am Tom Julia, president of The Composite Panel Association, a not-for-profit association representing more than 90 percent of the North American production of particleboard, medium-density fiberboard and hardboard. We are representing manufacturers of two of the three products regulated under this legislation, and we are here to offer to our strong support.

Composite panel products used in construction materials, furniture, cabinets and for hundreds of other uses are a major worldwide industry. In the United States alone, panel mills employ thousands of workers and the sale of our product affect hundreds of thousands of manufacturing jobs, typically in small rural communities throughout the Nation. We are among the greenest industries in the world, and most U.S.-made products use 100 percent recycled residual or post-consumer wood. CPA itself is a world leader in quality assurance, product testing and certification and sponsorship of voluntary industry standards.

I am proud to say today that nearly 100 percent of U.S. production capacity of particleboard and MDF is compliant with the California standard phase I and in many cases phase II, the levels that would he required under this legislation. Our sister trade association, the Hardwood Plywood Veneer Association, represented in the audience today, can tell you a comparable story for hardwood plywood products, the other product regulated under this bill.

None of this happened by accident. It took a long-term commitment to lower emission levels, a major and ongoing capital investment in new technology, and an early commitment to the California rule and to meeting its deadlines. We wish that everyone would share this strong commitment to product stewardship and lower formaldehyde emissions, especially some of those making products overseas that are bound for American markets. Fortunately, most of the U.S.-based trade associations representing offshore producers have strongly committed themselves to supporting this bill and responsible importers are meeting the CARB rule. But there is still too much product entering the U.S. market made by companies who don't participate in trade associations, who don't get their products tested and certified, who don't sell into California and who often sell low-priced goods to the most vulnerable of our citizens. These are the bad actors that H.R. 4805 will reach while at the same time ensuring a consistent standard of compliance and enforcement throughout the United States.

By establishing national requirements, you will give the American public full confidence that panel producers are doing everything possible to minimize the environmental footprints of our products, that a rigorous federal standard stands behind these products and that compliance doesn't just happen some of the time, it happens all of the time. We submit to you that is good for public

health, this is good for domestic jobs and this is good for the American consumer.

We are here today at a rare moment in history when industry and environmentalists, labor and health care groups can come together and support a common result. This is also a day to think, as we heard earlier today, about the emergency housing units provided to victims of Hurricane Katrina and Hurricane Rita. Had there been a national emissions standards in place and third-party testing and certification to validate compliance, it is very possible there never would have been a FEMA trailer problem, at least one related to formaldehyde emissions from composite wood. And by passing this bill, you can make a statement that says we will never let it happen again.

I cannot say enough about third-party testing and certification. Responsible industries around the world are embracing it and it indeed has become our industry's equivalent to what President Reagan called trust and verify. It is also the key to the success of this bill.

In closing, I urge you to take what California has called the toughest production standard in the world and make it America's standard too. Earlier today there were some questions about preemption and the impact of this bill on the States, and I would be happy in my responses to questions to address those, Mr. Chairman, or at this time. Thank you so much.

[The prepared statement of Mr. Julia follows:]

US HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION
LEGISLATIVE HEARING ON HR 4805
THE FORMALDEHYDE STANDARDS IN COMPOSITE WOOD PRODUCTS ACT
MARCH 18, 2010

STATEMENT OF THOMAS A. JULIA
PRESIDENT, COMPOSITE PANEL ASSOCIATION

Thank you Mr. Chairman and members of the Subcommittee for this opportunity to address you today about a bill with significant implications for American consumers.

I am Tom Julia, President of the Composite Panel Association (CPA), a trade association celebrating its 50th anniversary of service this year. The CPA represents companies responsible for more than 90% of the North American production capacity of particleboard, MDF and hardboard. We also represent most of the companies making wood-based decorative surfacing materials, as well as others affiliated with the composite panel industry.

The CPA represents manufacturers of two of the three major products that would be regulated under HR 4805, and I am here today to offer our strong support for this legislation.

Composite panel manufacturing and the use of our products in both construction applications and home and office furnishings, is a major worldwide industry. In the US alone our mills employ more than 20,000 workers, and affect more than 350,000 additional jobs, typically in small rural communities through the nation.

We pride ourselves as being among the greenest industries in the world, as almost all of our members' panel products are made with 100% recycled, residual or post-consumer wood. Indeed our industry is predicated on recycling and always has been. The CPA itself is a world leader in quality assurance, product testing and certification, sponsorship of voluntary industry standards, and development of technical data about industry products. Moreover, we have shared our technical expertise with organizations throughout the world, even assisting several international consumer product testing organizations who today are testing panel

products in China that are bound for the US. We believe this it is a good think that the consumers have high confidence in the composite wood products in their homes and offices regardless of the source, and we are committed to supporting global manufacturing too, even though our members' markets are exclusively domestic.

I am also proud to say that virtually 100% of both US and Canadian production capacity of particleboard and MDF is already certified to meet or exceed the CARB Phase 1 emissions levels, and many are already meeting the Phase 2 limits that go into affect for our products beginning next year. A sister association, the Hardwood Plywood Veneer Association, reports similar success for hardwood plywood products, the third of the three products regulated under HR 4805.

None of this happened by accident. It took a long term commitment to lowering emission levels, a major capital investment in technology, and an early commitment to the CARB rule and to meeting its deadlines. In no other part of the world has there been such a commitment and urgency to product stewardship and regulatory compliance, even for US markets where the CARV rule is not enforceable.

For decades CPA has operated the largest and most stringent third party testing and certification program for composite panels in North America. It includes monthly audits and random testing to assurance compliance with both formaldehyde emission requirements as well as physical properties. We operate a state-of-the-art International Testing and Certification Center in Leesburg, Virginia, where we can test to even the exceeding challenging tolerances of CARB Phase 2 emission requirement as well as other ultra-low emitting criteria.

The third party testing and certification requirements embedded in California's emission rules are based in large part on the CPA's Grademark Certification Program, and we were the first organization worldwide to be recognized and approved as a CARB-approved Third Party Certifier.

In short, we know a lot about composite wood products and about the use of formaldehyde based adhesives, and we have a demonstrated record of helping industry achieve and document increasingly lower emission profiles for its products.

We are convinced that it is imperative that our customers and the American public have full confidence that panel producers are doing everything possible to minimize the environmental footprint of our products and – equally important – full confidence that a rigorous, reliable testing and certification program stands behind our products, as mandated by federal law.

We wish everyone felt the same way and would demonstrate the same commitment, especially some of those responsible for the massive influx of composite panel products entering the United States from overseas. While things have improved since the CARB rule went into effect, and US-based trade associations representing many of these producers have strongly committed themselves to compliance with the CARB rule, there is still too much product that enters the US market without any regulatory oversight.

These are the bad actors that HR 4805 will enable the EPA to reach, while at the same time ensuring a consistent standard of compliance and enforcement not only in California but also throughout the United States.
To be clear, not all importers are of the same mind, and not all products manufactured offshore are suspect. Indeed many companies have a long track record of product stewardship on a global scale, and many others have moved quickly to make sure their products meet the CARB rule as well as any prospective national standard. But there are, and a Congressional directive can help EPA make sure that compliance doesn't just happen some of the time but rather all of the time. That means putting in place the first ever federal standard governing emission levels from composite panel products– no matter where they are made in the world if sold in the US, and no matter where they are sold in the US.

With CPA's considerable experience, we know that in the rare instances when products are found to emit high levels of formaldehyde, they are most often products made without regard to industry standards, international accreditations or in-house testing.

Beginning with HR 4805, and its counterpart in the Senate, the Congress has a chance to change this. I submit that your real challenge is not whether to move ahead and direct EPA to enact a sensible rulemaking but rather how quickly and comprehensively they can do so to effect meaningful change.

A lot of eager lawyers and expert consultants are waiting in the wings, hoping a multi-year extravaganza that costs the federal government and

American taxpayers millions of dollars, that costs industry even more, and that bogs EPA staff down for years before a federal rule is adopted.

Who would be served by this? Certainly not the American consumer, nor the domestic composite panel industry – nor public health itself.

Last summer CPA submitted comments in response to the Sierra Club's petition for rulemaking by the EPA. We said yes, fill the void and establish a national standard. We said base it on the work done by the California ARB over the past seven years to formulate its Air Toxic Control Measure for Composite Wood Products. No more, no less. We said resist the urge to go down the path of a complex TSCA 6(a) rulemaking approach and find a better way. We said this is a moment in history when industry, environmentalists, labor and health care groups can come together all support the same approach.

Last but hardly least, we were are still cognizant of the allegations of high formaldehyde emissions from the emergency housing units provided by FEMA to victims of hurricanes Katrina and Rita. The Sierra Club has it right on this one: had there been a national standard in place and a third party testing and certification regimen to validate compliance, its likely there never would have been a FEMA trailer problem, at least not one related to formaldehyde emissions from composite wood products manufactured here or abroad.

I am here today to urge Congress to give direction and urgency to EPA, and not permit the agency to be drawn into a long, complex and expensive rulemaking. Instead, I urge you to memorialize what California has done and take the "toughest production standard in the world" (CARB's words, with which we agree), and make it America's standard too. Do it now, do it this year and give the American people the full confidence that what's in our homes and offices has been subject to rigorous in-mill quality assurance, to third party testing and certification, to verifiable chain of custody documentation, and to an enforcement regimen with teeth.

CPA is pleased to be part of a coalition supporting this bill that includes the American Home Furnishing Alliance, the Business and Institutional Furniture Manufacturers Association, the Hardwood Plywood Veneer Association, the Kitchen Cabinet Manufacturers Association, the American Forest and Paper Association, the APA-Engineered Wood Association, and other major business groups. We are equally pleased that this coalition includes the

Sierra Club, the National Center for Health Housing, the United Steelworkers Union and other influential environmental and public health advocates. We thank and commend them for their early leadership on this matter, and note that many are represented on the panel or in the audience here today.

I will close be addressing two questions that have sometimes been raised during our discussions with members of Congress and others since last year, and that bear repeating.

The questions are why not pre-emption in this bill, and why not give EPA the opportunity to establish emissions ceilings that are different than those established by California.

While the CPA might support pre-emption, the typical reasons for desiring it do not necessarily apply here, and so we do not believe it is essential. This is not the case of asking EPA to develop an entirely new regulation that is unfamiliar to the 50 states. Rather, compliance with the CARB rule is already being practiced by industry throughout the United States, though perhaps less by some than others. Indeed, California's rule is becoming a *de facto* national standard, so the incentive for any state to do anything different is not there. If Congress directs the EPA to establish a federal standard based on California's parameters, this will only help ensure that other states are not tempted to initiate a rule of their own, and will ensure the certainty that all stakeholders look for in a regulatory outcome.

Our reasons for not making pre-emption a condition of passing this bill are also pragmatic. Indeed, the breadth of stakeholder and Congressional bipartisan support for this legislative approach to date has been the result of consensus. If pre-emption were to be made an issue now we beleve that consensus would unravel.

As to the levels themselves, the formaldehyde emission ceilings called for under the CARB rule are already exceedingly low, and the rule incentivizes the manufacture of what are termed Ultra Low Emitting as well as No Added Urea Formaldehyde adhesive systems. This is memorialized in HR 4805, and the American ingenuity – and the free market – is already responding by manufacturing dramatically lower emitting products over the past two years. This the appropriateness of once again addressing formaldehyde emissions from industry products again down the road is becoming moot. A federal standard based on CARB's approach will boost this positive direction and given everyone the assurance that at least the wood products sector is in full

compliance. Thus while we appreciate the desire to continue to address health related concerns about formaldehyde exposure, we submit that the levels of exposure that are possible under the CARB rule and a corresponding national standard are significantly below any reasonable level of concern. Moreover, the third party testing and certification requirement of the rule is the mechanism that will provide full confidence to the marketplace if implemented properly by the EPA.

Thank for again for holding this hearing and for the opportunity to address you today. CPA looks forward to continuing to support the work of the Congress on this important matter.

More information: tjulia@cpamail.org or 703.724.1128 ext. 243, or 703.405.5602 (mobile)

Mr. RUSH. Thank you.
The Chair recognizes Mr. Counts for 5 minutes.

TESTIMONY OF ANDY COUNTS

Mr. COUNTS. Good morning. I am Andy Counts, chief executive officer of the American Home Furnishings Alliance. I would like to thank Chairman Rush, Ranking Member Radanovich, members of the subcommittee for this opportunity to testify. I would especially like to thank Congresswoman Doris Matsui for her leadership along with Congressman Vern Ehlers for advancing this important legislation.

The AHFA is the world's largest trade association, serving the home furnishings industry. Member companies comprise an extensive global network of manufacturers who produce home furnishings or component parts constructed of composite wood products.

AHFA supports the regulation of formaldehyde emissions from composite wood products, and we support H.R. 4805. We believe that a national approach is crucial in order to avoid conflicting State standards and allow for the harmonized distribution of products and supplies.

AHFA along with wood products industry, environmental, health and labor organizations worked for more than 7 years with the California Air Resources Board to establish formaldehyde emission limits for composite wood products. These new emission limits are the most stringent in the world. Outside these emissions limits, however, there are several aspects of the California rule that cannot be implemented nationally. H.R. 4805 provides EPA the platform and flexibility needed to address these issues and modify the California approach, providing a commonsense, pragmatic national regulation.

Of critical importance will be the inclusion of adequate compliance timelines and sell-through provisions. Due to the unprecedented economic conditions of the last few years, inventory levels remain high. Unlike in California where noncompliant inventories could be moved to other markets, adequate sell-through provisions are needed nationally to accommodate increased inventories and slow inventory turns. We request a sell-through period of 36 months finished products following the compliance deadline for composite wood products.

It is important to note that the California formaldehyde standard and the national standard proposed under H.R. 4805 regulate emissions from composite wood products and not the finished products that contain composite wood components. In fact, the value-added steps associated with finished products such as lamination and finishing have been proven to lower emissions of composite wood components. EPA must focus compliance and enforcement where it belongs: at the point of manufacture and process control. The regulations should not contain any provisions for the testing of finished goods such as furniture or cabinets. If the raw board component parts are properly regulated, downstream users of these products will be required to purchase them and to only use or resell these safe products to consumers. This ensures the overall safety of the

global supply chain and the citizens who purchase home furnishings.

AFHA applauds the efforts of our global suppliers that have worked tirelessly to comply with the California standards. We stand ready to educate the industry on the new national standard and provide the tools necessary to ensure compliance on a global basis. We also look forward to working closely with EPA during the development of this regulation.

Thank you for this opportunity, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Counts follows:]

Oral Testimony of Andy S. Counts

American Home Furnishings Alliance

Before the U.S. House of Representatives Subcommittee on
Commerce, Trade, and Consumer Protection

March 18, 2010

Good Morning. I am Andy Counts, the Chief Executive Officer of the American Home Furnishings Alliance (AHFA). I would like to thank Chairman Rush, Ranking Member Stearns and Members of the Subcommittee for the opportunity to testify. I would especially like to thank Congresswoman Doris Matsui for her leadership, along with Congressman Vern Ehlers, for advancing this important legislation.

The AHFA is the world's largest trade organization serving the home furnishings industry. Member companies comprise an extensive global network of manufacturers who produce home furnishings or component parts constructed of composite wood products. AHFA supports the regulation of formaldehyde emissions from composite wood products and we support H.R. 4805. We believe that a national approach is crucial in order to avoid conflicting state standards and allows for the harmonized distribution of products and supplies.

The AHFA along with the wood products industry, environmental, health, and labor organizations worked for more than seven years with the California Air Resources Board (CARB) to establish formaldehyde emission limits for composite wood products. These new emission limits are the lowest anywhere in the world. Outside these emission limits there are several aspects of the California rule that can not be implemented nationally. H.R. 4805 provides EPA the platform and flexibility needed to address these issues and modify the California approach providing a commonsense, pragmatic national regulation.

Of critical importance will be the inclusion of adequate compliance timelines and sell through provisions. Due to the unprecedented economic conditions of the last few years inventory levels remain high. Unlike in California where non-compliant inventories could be moved to other markets; adequate sell through provisions are needed nationally to accommodate increased inventories and slow inventory turns. We request a sell through period of 36 months for finished goods following the compliance deadline for composite wood products.

It is important to note that the California formaldehyde standard and the national standard proposed under H.R. 4805 regulate emissions from composite wood products and not the finished products that contain composite wood components. EPA must focus compliance and enforcement where it belongs, at the point of manufacture and process control. The regulation should not contain any provisions for the testing of finished goods, such as furniture or cabinets. If the raw board component parts are properly regulated, downstream users of these products will be required to purchase only these regulated products, and to only use or resell these safe products to consumers. This ensures the overall safety of the global supply chain and the citizens who purchase our products.

AHFA applauds the efforts of our global suppliers that have worked tirelessly to comply with the California standards. We stand ready to educate the industry on the new national standard and provide the tools necessary to ensure compliance on a global basis. We also look forward to working closely with EPA during the development of this regulation.

Thank you again for the opportunity to share our views on this important issue and I look forward to answering any questions you may have.

Mr. RUSH. Mr. Ryan is recognized.

TESTIMONY OF DON RYAN

Mr. RYAN. Thank you, Mr. Chairman, Mr. Radanovich and Representative Matsui. My name is Don Ryan. It is my pleasure to testify today in strong support of H.R. 4805. I testify on behalf of two organizations: the National Center for Healthy Housing and the Sierra Club. The National Center is dedicating to ensuring that all Americans' homes are healthy and safe through proven and practical steps. The National Center is concerned about formaldehyde because of the enormous body of scientific evidence documenting formaldehyde's human health risks. Formaldehyde is an irritant, an allergen, a cancer risk, and composite wood products are a significant source of exposure, and just as importantly, an opportunity to significantly reduce exposures.

The Sierra Club is one of the Nation's oldest and largest environmental organizations. It is committed to protecting public health as well as natural resources. And it was the Sierra Club that first called the Nation's attention to the dangers of high formaldehyde levels in FEMA trailers after Hurricanes Katrina and Rita. The primary source was manufactured wood products with formaldehyde glue, most of which apparently came from overseas.

The painful story of formaldehyde and FEMA trailers is not yet over as just last week the federal government announced the sale of 120,000 of these travel trailers. I am concerned about the sale at several levels. The trailers may pose formaldehyde hazards. They may pose other health hazards. Some of these trailers may come to be occupied as permanent homes, even though that is not their designed intent, and there is a chance the warning labels may be removed before the resale to future buyers. What I want to drive home is that all these health hazards, these headaches, these heartaches could have been completely avoided, and that is why H.R. 4805's enactment is so important.

I want to applaud Representatives Matsui and Ehlers for introducing this bill. I want to thank this subcommittee for holding this hearing and moving it forward.

I also want to take a minute to salute the staff of the California Air Resources Board because the opportunity before us today to advance public health across the Nation is due to their hard work over the past 7 years to carefully craft the standard that is protective, that is practical, that is enforceable. But there are limits to what one State can accomplish when it comes to a worldwide market for products such as composite wood products. As we have seen with other consumer products, with drywall, with dog food, with children's toys, ensuring compliance by overseas manufacturers is absolutely critical and often very difficult. The California formaldehyde standard is the toughest production standard in the world. The standard has already taken effect. The standard is already working. Manufacturers are already complying.

So at the most basic level, what H.R. 4805 does is two things. It extends the California standard's public health protections across the country as quickly as possible, and number two, it strengthens enforcement to level the playing field so that unscrupulous manufacturers cannot undercut responsible manufacturers.

So this bill is a giant step forward for public health. It has the support of environmental, health, labor and consumer advocates and this bill is a giant step forward for responsible manufacturers because it levels the playing field. It will create green jobs for American workers.

And finally, I want to note this bill is a big win for the American taxpayer because it avoids the complexities and the clumsiness of TSCA by directing EPA to issue its regulation without delay.

So I would urge this subcommittee's support of the bill. I think it deserves your bipartisan support. I hope it wins your unanimous support, and I ask each of you to urge the full Energy and Commerce Committee to recommend this bill's early approval by the full House.

[The prepared statement of Mr. Ryan follows:]

Don Ryan Statement on behalf of the Sierra Club and the National Center for Healthy Housing before the

House Subcommittee on Commerce, Trade, and Consumer Protection

March 18, 2010

Chairman Rush and members of the Subcommittee, I thank you for the opportunity to testify in support of H.R. 4805 as a representative of the Sierra Club and the National Center for Healthy Housing. Both organizations wholeheartedly support the bill and applaud the leadership of Representatives Matsui and Ehlers in introducing this important legislation.

The National Center for Healthy Housing is the nation's leading organization dedicated to creating healthy and safe homes for children through proven and practical steps. NCHH conducts research and provides training to health and housing professionals across the United States and promotes policies that make homes healthier. As one of the National Center's founders and a member of its board, I want to assure you the healthy homes community believes this bill takes our nation an important step closer to making homes healthier for all.

The Sierra Club is one of the nation's oldest and largest environmental organizations. For over 113 years, the Sierra Club has been dedicated to protecting our nation's natural resources and public health. Sierra Club, on behalf of its members, works to protect and enhance the health of the environment throughout the country. The Sierra Club has over 1.3 million members and supporters living throughout the United States.

Sierra Club has taken the lead nationally in fighting the battle to protect people from high levels of formaldehyde exposure. As a grassroots organization, Sierra Club got involved in this issue when the Club's Mississippi chapter began getting reports of serious respiratory problems from Hurricane Katrina and Rita survivors who were living in FEMA trailers. The Chapter chair, Becky Gillette, learned that formaldehyde may be a cause and began sampling the trailers for formaldehyde. The tests showed very high levels that – the Centers for Disease Control and Prevention conceded years later – were serious enough to warrant quick evacuation of the residents from these FEMA trailers. Wood products made with formaldehyde glue appeared to the primary source. While lawsuits may eventually resolve who was at fault, it appears that much of the wood involved was imported from overseas in the rush to meet the huge demand for FEMA trailers, and that little or none of it was subject to compliance with any federal or even voluntary industry standard. A national standard on formaldehyde emissions could have prevented all of this.

The Sierra Club and NCHH remain concerned about the long-term health impacts of the residents who unwittingly were exposed to such high levels of formaldehyde. We also remain concerned that last week, the federal government sold 120,000 of these trailers with only a simple warning in an effort to recover pennies on the dollar. As Ms Gillette told the Washington Post, "What if Toyota ordered a recall, then simply put a sticker on its vehicles saying they were unfit to drive before reselling them? There's a double standard for the government."

Beyond looking backwards to clean-up the mistakes from Hurricane Katrina and Rita, the Club looked forward to prevent future tragedies. For years, it had been tracking rulemaking by the California Air Resources Board to protect Californians from formaldehyde as a toxic air contaminant. In April 2007, California established aggressive technology-based standards to reduce formaldehyde from hardwood plywood, particleboard and medium-density fiberboard. These regulations set the most protective standards in the world through a practical, technology-based approach. More importantly, the standards included rigorous third party testing and certification to ensure compliance.

The North American manufacturers of the wood products responded immediately by committing to full compliance with the California rules. While they believed that California overstated the risk of formaldehyde, they saw the value in reducing the formaldehyde emissions and in being responsible stewards of their products.

Unfortunately, there are limits to State leadership when it comes to a worldwide market for products such as composite wood products. While California's use of third parties to certify compliance with the rule allows overseas manufacturers and importers to comply with the rule, it is especially difficult to enforce their compliance. And as we have seen with consumer products such as drywall, pet food, and children's toys, overseas compliance is critical – and difficult to ensure.

Therefore, the Sierra Club drafted a petition to ask the U.S. Environmental Protection Agency (EPA) to exercise its authority under the Toxic Substances Control Act (TSCA) and enact a national standard on formaldehyde emissions from composite wood products based on California's approach. More than 20 organizations joined in signing onto this petition. And, to its surprise, in less than a week more than 5,000 individuals representing every state signed the petition too.

The Club submitted the petition to EPA in March 2008. Three months later, EPA decided to hold a series of public meetings across the country. It eventually held seven hearings with the last hearing held in New Orleans in March 2009.

While reading the comments submitted by the industry, the Club realized that the manufacturers were committed to resolving the problem despite their opposition to the specific request in the Club's petition. It reached out to the key association – the Composite Panel Association – and through extensive discussions, NCHH and the Club realized that there was common ground for a legislative solution that would accomplish three goals:

- Set a framework for EPA rulemaking that gives stakeholders confidence that the outcome will be reasonable, timely, and effective
- More quickly level the playing field for North American producers to the benefit of public health
- Avoid a prolonged regulatory and legal battle over the risks presented by formaldehyde by relying on a technology-based approach that, while aggressive, can be achieved using current technologies

For the next year, Sierra Club and NCHH negotiated joint consensus legislative language and broadened the consensus to include the key industries that rely on composite wood products, such as furniture and cabinets.

Senators Klobuchar and Crapo introduced S. 1660 in September 2009. Under their leadership and the leadership of the Senate Environment and Public Works Committee, final language has been crafted that all stakeholders can support. The National Center for Healthy Housing and the Sierra Club fully support this compromise language.

H.R. 4805, which mirrors S. 1660, represents a careful crafted compromise balancing many competing interests. It builds on the excellent work of the California Air Resources Board. It will not single-handedly address all issues related to formaldehyde, but it takes a major step forward by addressing one of the most significant sources of formaldehyde emissions in a way that is responsible, enforceable, and is already being accomplished by most of our domestic manufacturers and some others around the world. Therefore, NCHH and the Club fully support this legislation. We thank Representatives Matsui and Ehlers for introducing it, and encourage the Subcommittee and the full Committee on Energy and Commerce to support this bill and recommend its early approval the full House to give EPA clear direction.

-- End --

Mr. RUSH. Thank you.
Dr. Andersen, you are recognized for 5 minutes.

TESTIMONY OF MELVIN E. ANDERSEN

Mr. ANDERSEN. Thank you, Mr. Chairman. Good morning. I am Dr. Mel Andersen, director, Program in Chemical Safety Sciences, The Hamner Institutes for Health Science.

I completely applaud the legislation. I think it is important for the American people, and I am here actually to take objection with the scientific basis of the California risk assessment that has been used to support the emissions standards.

My professional career spans 40 years and five or six employers. My primary area of expertise is pharmacokinetics, how chemicals get to target tissues in the body, what they do there. In 1998 I served as a peer reviewer for an alternative risk assessment other than the California risk assessment that was developed by an organization, the Chemical Industry Institute of Toxicology, peer reviewed in Canada. I was a peer reviewer for that process.

The Hamner is the successor to CIIT. I have worked at The Hamner since 2002. Before that I was a professor of environmental health at Colorado State University in Fort Collins, Colorado. Over the past 5 years, I have conducted research at The Hamner funded by the Formaldehyde Council to understand the changes in genes and gene expression in the nose when rats are exposed to formaldehyde. More recently, we have been studying this area called pharmacokinetics of formaldehyde in the nose.

I want to stress that today I am here neither representing the formaldehyde council nor The Hamner. I am here representing a 40-year practitioner in toxicology and risk assessment.

You, me, all of us have substantial amounts of formaldehyde in every single cell in our body. The number actually is 12,000 parts per billion. It is part of normal metabolism. We have to have it. Formaldehyde causes toxicity when inhaled concentrations increase the levels in the tissues in the front of the nose to cause toxicity, cell death, regeneration and ultimately cancer at high concentrations.

Our studies show that at 100 parts per billion, there is no increase in the amount of formaldehyde in tissues in the nose compared to background levels, background physiological levels. But formaldehyde is a carcinogen, yes. It is a nasal irritant, yes. In trailers where people are closed, it has irritant properties. It could cause asthma. And we need to protect against it and this legislation is a good legislation to help us protect people who are in these trailers, people who live in all kinds of homes.

My comments really come down to just two points. The California risk assessment is extremely conservative using what are now antiquated approaches from the 1970s. They have not been updated by a better understanding of the biology of formaldehyde, its effects on tissues or a better understanding of cancer biology now that we have moved into the 21st century. They are technologies that are quite old. The CIIT assessment that was done 10 years ago is still in some ways outdated. It is better. It actually predicts risks that are probably 2,000-fold lower than estimated by the California risk assessment but it is still outdated. Neither one of them

take account of the fact that there is a good bit of indigenous formaldehyde.

I provided two visuals, one a table showing this comparison of the risks from what is an EPA risk assessment, almost equivalent to the California one, and one is the CIIT assessment. I provided a table that shows as a function of concentration different effects, different exposures going from 5 to 10 parts per million in outdoor air to higher concentrations, and then ones in which we have irritancy, 300 parts per billion, the threshold limit value of the American Conference of Government Industrial Hygienists, and then on to concentrations which are clearly toxic.

The proposed legislation sets limits on emission rates from building products. I am an industrial hygienist. Among all the letters after my name, CIH is certified industrial hygienist. As a certified industrial hygienist, it makes good sense to me to limit off-gassing of formaldehyde from these products by good manufacturing processes and to protect people from irritation, from a likelihood of asthma and from respiratory distress. However, I am here today because I find it, in my professional judgment, I find it objectionable that this decision is being taken based on outdated biologically deficient risk assessment, an assessment that neglected a broad body of research on formaldehyde carcinogenicity, on formaldehyde toxicity, ignores the attributes of biochemistry of cellular formaldehyde, a physiological material in our bodies, and it creates the impression that formaldehyde at concentrations only several parts per billion poses a substantial, quantifiable cancer risk in people. That is the piece of the legislation that I find most worrisome that you are indirectly agreeing when you accept this—that levels of formaldehyde well below any that would cause any significant changes in formaldehyde in the body will cause cancer in some definable number of people in a population.

This legislation should endorse the reduction in emissions, clearly. I applaud the legislation. I applaud the people who have brought this legislation to the committee. I wish it could be done without endorsing the questionable risk assessment from California that significantly overestimates the risks of inhaled formaldehyde, and I believe in public concerns about some particular end points, especially cancer.

Thank you very much for this opportunity to provide this perspective on House 4805 and to visit a panel of this kind for the first time in my career. Thank you very much.

[The prepared statement of Mr. Andersen follows:]

Testimony on H.R. 4805
Committee on Energy and Commerce
March 18, 2010

"Formaldehyde Emissions and Formaldehyde Risk Assessment"

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Introduction: Good morning. I am Dr. Melvin E. Andersen, Director, Program in Chemical Safety Sciences, The Hamner Institutes for Health Sciences, Research Triangle Park, NC. I am very pleased to be here today to offer brief personal comments on the science used to assess the risk of inhaled formaldehyde by the State of California. The California risk assessment, dating from 1992, provided the rationale for decisions about acceptable formaldehyde emission rates from various building materials. These acceptable emission rates have found their way into H.R. 4805 - the bill under consideration. The 1992 California risk assessment used methods that date back to the 1970's when our knowledge of cancer biology and of the steps in cancer causation were very primitive. Their approach over-estimates cancer risks of formaldehyde at low exposure levels.

My Background: My professional career, spanning nearly 40 years, has focused on understanding how chemicals enter the body, how they make their way into cells and tissues, and how they affect tissues to cause toxicity. My resume' lists nearly 400 published papers and book chapters. The goal of my work has been to make the best use of contemporary science in improving chemical health risk assessments. I am regarded as an international expert in the area of pharmacokinetic (PK) modeling, i.e., a discipline describing the processes by which chemicals reach tissues at sufficient concentrations to cause toxicity. Among my papers are six that describe aspects of toxicology and risk assessment challenges with formaldehyde. In addition, in 1998 I served on a multi-stakeholder panel – US EPA, Health Canada, CIIT and TERA - convened in Ottawa, Canada to peer-review an alternative formaldehyde risk assessment that more adequately considered the extensive toxicological data base on formaldehyde and nasal cancer. CIIT here refers to the Chemical Industry Institute of Toxicology – the organization that developed the alternative risk assessment. TERA - Toxicology Excellence for Risk Assessment – organized the peer-review process. Aspects of the CIIT risk assessment were published in 2003 and 2004.

Current Hamner Research with Formaldehyde: CIIT was the predecessor organization to the Hamner where I have worked since 2002. Scientists at CIIT first discovered the nasal carcinogenicity of formaldehyde in rats about 30 years ago and have conducted a diverse array of studies to understand the changes in nasal tissues caused by inhalation of various concentration of formaldehyde and the role these changes play in nasal cancer. Over the past 5 years, The Hamner has been involved in research supported by the Formaldehyde Council to look at the changes in expression of genes in the rat nose after formaldehyde exposures and especially to see the differences in gene expression for different levels of exposure. Gene expression patterns differed markedly for concentrations causing nasal cancer in rats, above 6000 ppb, and those where no nasal cancers occur, 2000 ppb and below. Two papers from this research, by me and by my colleague Dr. Russell Thomas, received awards from the Risk Assessment Specialty Section of the US Society of Toxicology. Over the last 3 months, we have extended our formaldehyde research program at The Hamner to examine the manner in which inhaled formaldehyde enters nasal tissues and increases concentrations of formaldehyde in epithelial cells at the front of the nose. This newest portion of our formaldehyde research, focusing on pharmacokinetics, has not been supported by the Formaldehyde Council. It has been self-funded by The Hamner. It also bears some emphasis that today I am representing myself and my professional opinions. I am neither representing the Formaldehyde Council nor The Hamner.

You, me and formaldehyde: Formaldehyde is not simply a commercial chemical. It is present in every cell in our bodies –your cells and mine - at substantial concentrations. Formaldehyde is formed during normal metabolism and participates in important cellular functions. Cells in the body have specialized chemical processes to deal with formaldehyde, keep its free cellular concentration low, and stay healthy. Formaldehyde toxicity occurs when inhaled concentrations lead to a significant increase of tissue formaldehyde in the epithelial cells in the front portion of the nasal airways. Our current studies, in an area called pharmacokinetic modeling, show that formaldehyde inhaled at concentrations of 100 ppb or below would not increase cellular formaldehyde in cells in the nose significantly over physiological concentrations. This aspect of formaldehyde biology, i.e., its presence in all cells as a natural metabolite, was not considered in either the 1992 California assessment or in the 1998 CIIT-assessment. Table 1 compares the relationship between exposure levels in ambient and indoor air with inhaled concentrations that lead to specific biological or pharmacokinetic responses.

Formaldehyde and Nasal Cancer in Rats: Formaldehyde unquestionably has the potential to cause toxicity when inhaled concentrations become sufficiently large. When people breathe formaldehyde at 1000 ppb, it causes burning and irritation of the eyes and tissues in airways. The American Conference of Governmental Industrial Hygienists (ACGIH) has recommended an

occupational exposure for formaldehyde of 300 ppb as a ceiling – a concentration that is not to be exceeded in the workplace. In rats that breathe formaldehyde for 6 hrs per day every week day for two years, higher concentrations, 6000 ppb and above, caused squamous cell cancer in the front of the nose. At 15000 ppb, over half of the exposed rats developed nasal cancer. It is my professional judgment that formaldehyde is likely to be a 'high dose' human carcinogen: it would cause cancer if you or I were exposed to 15000 ppb, which is a highly irritating, locally corrosive concentration, every day for most of our life. However, a large body of research now shows that nasal cancer from formaldehyde in rats is closely associated with epithelial cell toxicity and with the recurrent scarring and healing processes that go on in these two-year exposures. The CIIT-risk assessment was based on a better understanding of the relationship between cellular toxicity of formaldehyde, the repeated damage and healing, and cancer. My professional judgment, similar in principle to the conclusions of the CIIT assessment and shared by many other toxicologists/risk assessors, is that formaldehyde only poses a cancer risk if concentrations are high enough, above 1000 ppb, to kill cells in the nose. Differences in the estimated risks based on the older methodology versus the CIIT risk assessment are captured in Figure 1. The California risk assessment, similar to the EPA assessment dating to 1987, indicated that 100 ppb exposures over a lifetime would result in 700 cancers in a million exposed individuals. The CIIT assessment indicated a risk of only 0.33 cases in the same size population.

Recommendations: The proposed legislation sets limits on emission rates from building products. Setting the limits based on reductions of off-gassing compounds into breathing zones is a good public health practice. As a certified industrial hygienist, it makes sense to me to follow good manufacturing practices to keep emission rates low. However, it is highly objectionable to take this decision based on an out-dated, biologically-deficient risk assessment – an assessment that neglects a broad body of research on formaldehyde carcinogenicity and toxicity, ignores key attributes of the biochemistry of cellular formaldehyde, and creates an impression that formaldehyde at concentrations of only several ppb poses a substantial, quantifiable cancer risk in people. The legislation should endorse the reduction in emissions without endorsing the questionable risk assessment.

Some References:

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Exposure Category	Concentration Range
Ambient Air	1-5 ppb
Indoor Air	10-50 ppb
FEMA Trailers	77 ppb (Geometric mean)
PK: No Increase in Tissue Concentration	100 ppb
Occupational Standard, TLV Ceiling	300 ppb
Genomic Threshold	700 ppb
Genomic Oxidative Stress Markers	≥ 2000 ppb
Rat Nasal Cancer	6000 ppb

Table 1: Comparisons of human formaldehyde exposures, including the occupational exposure limit of 300 ppb, with the formaldehyde concentrations associated with increases in tissue formaldehyde in the nose, alteration in gene expression in nasal tissues, and rat nasal cancer. **PK** stands for pharmacokinetics; **TLV** is Threshold Limit Value, a trademark of the American Conference of Governmental Industrial Hygienists.

Upper-Bound Excess Cancer Risk at 100 ppb formaldehyde

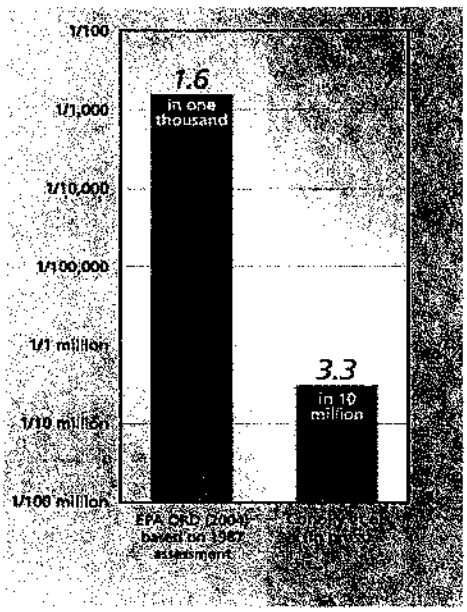

Figure 1: The graph shows the *estimated upper-bound excess lifetime cancer risk levels* for continuous long-term exposure to **100 ppb** formaldehyde in the air. At this exposure level, EPA's published assessment from 2004 predicted an additional cancer risk of 1.6 in one thousand people. The CIIT assessment estimates the cancer risk level to be 3.3 in ten million people. The 1992 California assessment estimated a risk of about 0.7 in one thousand, close to the EPA ORD assessment. This figure was adapted from the ACC-LRI Perspective- September 2004.

Mr. RUSH. Thank you very much, and I thank all the witnesses. The Chair recognizes himself for 5 minutes for the purposes of questioning the witnesses.

There are a number of questions that I might raise, and I guess in consideration of the limited time that I have, I really want to focus on this proposed sale that you alluded to, Mr. Ryan and Mr. Counts and others. This sale of these FEMA trailers and mobile homes, is this a wise undertaking by the federal government and are these mobile homes and trailers safe, and what course of action do you recommend that the federal government consider? I want to ask Mr. Jones and Mr. Counts and Mr. Ryan this question.

Mr. JONES. I don't feel it is appropriate for me as an EPA official to comment on FEMA, Homeland Security. We have briefed the officials from FEMA about our assessment and so they have awareness of how we view the risk associated with FEMA but it really, I think, is up to FEMA and Homeland Security to respond specifically to the appropriateness of their actions.

Mr. RUSH. Mr. Counts or any other—Mr. Ryan, Dr. Andersen, if you have any comments, I have 3 minutes.

Mr. RYAN. I would note the FEMA trailers present a vexing problem. We certainly can't say they are safe. FEMA can't say they are safe or EPA or CDC. In fact, the trailers are being sold with a label, a cautionary label that is intended to warn future buyers. The trailers are not intended as permanent housing units but we have a housing crisis in this country and almost certainly some of them will come to be occupied and used as housing, and there is a concern in the resale of those homes, whether the warning label may fall through the cracks.

Mr. RUSH. Mr. Counts.

Mr. COUNTS. I feel I wouldn't be qualified to respond on the FEMA trailers. Our members are not in the trailer business nor do they supply to that industry. So I will——

Mr. RUSH. Mr. Julia, Dr. Andersen raised some serious disagreements on concerns about the California standards, and what percentage of your membership are affected by the California standards?

Mr. JULIA. Mr. Chairman, it is fair to say that virtually the entire U.S. industry is affected by the California standards, and indeed we believe that even prior to California our industry was manufacturing using exceedingly low levels of formaldehyde and emissions levels are exceedingly low, and once perfected under phase II of California and under federal law will be truly de minimis standards. Moreover, the California rule as this federal bill does incentivizes industry to develop even lower, what are called ULEF and NAUF adhesive systems which indeed would do exactly what I believe public policy should do which would be to promote technological innovation and capital investment in lower-emitting technologies. But it is fair to say that the California regulation has become a de facto law of the land. It is indeed practiced almost throughout the United States by virtually every significant manufacturer or user of composite panel products. The problem with the California rule is that it is only enforceable in California.

Mr. RUSH. The Chair's time is expired. The Chair recognizes Mr. Radanovich.

Mr. RADANOVICH. Thank you, Chairman Rush, and I appreciate the testimony of all the witnesses.

Mr. Andersen, I am going to ask you a question. As I understand your testimony, your research in the weight of the current scientific evidence on formaldehyde shows that emission levels significantly higher than those permitted in California would not pose a health risk. Give me an idea of why you object to the standard set in California but also if you can give me an idea of the consequences of an emittance level that is set dramatically low.

Mr. ANDERSEN. I think the consequences from my point of view is that California law is based on causing cancer. It is based on an observation of cancer in rats at high doses when formaldehyde is corrosive. I mean, formaldehyde would cause cancer in you or I if we let ourselves be exposed to levels which were corrosive in our nose for our whole lifetime. We would walk away from it. But that is the basis. So they use that to make projections of very low-dose cancer risks, levels where the contribution of the formaldehyde is minuscule, absent to natural formaldehyde. That is the first. The second consequence from my opinion is the stress on trying to set the standard based on cancer. The FEMA trailer issue was one of irritation, respiratory distress and asthma. The levels should be based on asthma recognizing that formaldehyde doesn't pose a low-dose cancer risk. That is my professional opinion, which is shared by a large number of individuals.

Mr. RADANOVICH. Does formaldehyde air out? If you open the trailers in Louisiana for a certain amount of time, will that level diminish?

Mr. ANDERSEN. It will diminish, depending on how long this—there is so much in the wood and it will come out for a period of time and the concentrations in the air will continually diminish.

Mr. RADANOVICH. Thank you.

Mr. Julia, I appreciate your testimony. Your association comes out with a statement saying that the California standard is way too high and yet in your testimony, you support the bill and the legislation that sets it at the California standard. As I understand it, your association doesn't agree with what you are saying there. Do you want to reconcile that?

Mr. JULIA. I am not sure what is inconsistent, Congressman.

Mr. RADANOVICH. In March 1, 2002, in wood products, there was a belief that risk assessments upon which formaldehyde is being considered for regulation by the CARB in California are outdated and greatly overstate the potential for formaldehyde-related health problems. This was in a testimony on March 1st under Wood and Wood Products by Chris Leffle, who is the senior vice president for Composite Products Association.

Mr. JULIA. That is absolutely correct. When this regulation was introduced at the very end of 2001, it called for a de facto ban on our products, a de facto deselection of wood products, which we felt would have been a dramatic overreach and was initially linked to a very great degree on what we believe were challengeable health findings. In the 7 years as that evolved, California through significant evaluation of economic conditions or economic performance of our industry, technical capabilities of our industry and a whole lot of public workshops, I then came to be persuaded that their regula-

tion should be guided and I would have to therefore respectfully differ a little bit with the conclusion of my colleague on the panel here. California's decision, and indeed, I was in every one of those workshops, has been guided by technology, not by perceived cancer risk. Certainly they did that research and we have never said that—we have never acquiesced and said that we agree with those conclusions but their conclusions on the levels that they set in California were based on technological capability. It is, as they have characterized it, a "technology-driven regulation" and we think that is a very important distinction, one that is preserved in this legislation so it does not become a battle or a presumption that somehow current industry practices or current industry products present a health risk.

Mr. RADANOVICH. Thank you, Mr. Julia.

Mr. Andersen, that is kind of in conflict with what you were mentioning a little bit earlier, that it is a cancer risk assessment process and that your statements earlier mentioned being outdated and——

Mr. ANDERSEN. I think the cancer——

Mr. RADANOVICH [continuing]. Less scientific. Go ahead and respond to that.

Mr. ANDERSEN. I think the cancer risk assessment from 1992 fails to take into account a great deal of information about formaldehyde, its toxicity, its biology and it is outdated in that context. It is my understanding as I look through this legislation, and I have only been aware of it for a brief period of time in background, that the presumed risks from formaldehyde in the air were linked to this cancer model to develop emission rates.

Mr. RADANOVICH. All right. Thank you very much, Mr. Chairman.

Mr. RUSH. The Chair recognizes the gentlelady from California, Mrs. Matsui, for 5 minutes.

Mrs. MATSUI. Thank you, Mr. Chairman.

I have a question for Mr. Julia. H.R. 4085 would build upon the CARB rule by establishing national technology-based limits founded on the technological feasibility of the standards on formaldehyde emissions from most composite wood products. Now, industry has had a longstanding commitment to lowering emission levels, investing in technology and working collaboratively with regulatory authorities and public interest groups to set limits on emissions. Now, despite the strong commitments from domestic producers to voluntarily comply with the CARB rule, unacceptable levels of composite wood products are entering the U.S. markets without meeting our standards.

Mr. Julia, what are your estimates for the kind of economic productivity that heightening formaldehyde emission standards for composite wood products would create?

Mr. JULIA. Well, when the State of California first introduced its regulation, I think I was quoted at one of the first public hearings as saying that this was going to be the law of unintended consequences, that if in fact it didn't address trade issues, and indeed care and ensure a level playing field for domestic production, that we would in fact have the law of unintended consequences, that in fact domestic producers would be required to comply with a poten-

tially very onerous regulation whereas offshore producers would perhaps not have to comply with it, and indeed more of that product, the very product that California was concerned about, would enter the U.S. marketplace.

I think what we have seen is a significant evolution over 7 or 8 years, particularly in the offshore industry, which are represented by at least one individual here in this room such that they have come to make, I would say, a significant commitment among the responsible ones to comply with this regulation. I can tell you a story, a brief story of one of the largest home furnishings manufacturers in the world which does a tremendous amount of sourcing in Asia, and it has reduced over the past 2 to 3 years its number of suppliers by almost 75 percent. It really becomes a survival of the fittest sort of the thing where they have taken a look at the ability of their sources to meet the expectations not only in California but throughout the United States of the stewardship that is required in the California rule and would be required here and they have made the internal decision that for a matter of public policy, for a matter of corporate policy and for a matter of liability, they will only be sourcing for companies who can verify indeed that they produce products to lower formaldehyde levels.

And if I may, just in closing, return to the testing and certification part of this legislation. That is indeed the key because on all these issues, if you get to what level is the right level, what level is the lowest level, how do we enforce against imports, how do we enforce against domestic products, the secret to all of that, I believe, is to have third-party testing and certification whereby nobody is going to try to test every single table, every single chair, every single nightstand. That is physically impossible to do. Nobody is going to go into every store, nobody is going to go into every furniture mill whether for the federal government or the state of California or anybody else. That would be prohibitive. But you can verify all that through third-party testing and certification and create a chain of custody and a label where you can track every product all the way up to the testing agency that actually performed the initial testing.

Mrs. MATSUI. Mr. Julia, I take it you have no concerns about the implementation of the CARB rule nationwide at all?

Mr. JULIA. Concerns?

Mrs. MATSUI. Yes. No concerns about this implementation of the CARB rule nationwide?

Mr. JULIA. Well, I do have concerns. I think quite frankly there are 49 States in which you cannot enforce the CARB rule. The CARB rule—you know, I draw my analogy, the earlier comments today about carbon monoxide. Like Congressman Gingrey, I have a personal experience where my daughter was exposed to carbon monoxide poisoning at Virginia Tech 2½ years ago and nearly died, and I understand that in the State of Virginia we have no regulation of carbon monoxide. I understand that in the State of Maryland there is a very significant regulation on carbon monoxide detectors. The ability to simply say that because you have a rule in California which industry is embracing that that somehow solves the problem, I would submit to you, Congresswoman, that it does not solve the problem because you don't have a patchwork of dif-

ferent States doing things. In fact, you have nobody else doing anything. There is not a single State that is able to enforce that rule.

Mrs. MATSUI. That is why we are here today in actuality. So I don't have much time so I would yield back until—unless we have further time later on?

Mr. RUSH. The Chair will consider that.

The Chair now recognizes the gentleman from Louisiana, Mr. Scalise, for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. Just a few questions, first for Mr. Julia.

You had stated that if Congress directs the EPA to establish a federal standard based on California's parameters, this will only help ensure that other States are not tempted to initiate a rule of their own, and so I guess what I want to know is, do you know where specifically in the bill are other States prevented from passing different laws and regulations?

Mr. JULIA. Congressman, they are not. There is nothing in this bill that calls for federal preemption, and obviously that has been an issue of concern to a lot of folks. We would say perhaps in a typical situation, federal preemption is something we would support. This is a unique circumstance in which you have a State regulation where there has never been a federal regulation, there has never been any other State regulation, there is no other State that we are aware of thinking about a regulation, that California spent an awful lot of time working on and indeed a regulation they thought they would take a year or two to do. It took them 7 years to do, largely because they had a lot of input from stakeholders.

Mr. SCALISE. And it hasn't been fully implemented.

Mr. JULIA. It is in the process of being implemented. By the time this federal schedule kicks in, it will be fully implemented other than the sell-through periods of it.

We believe that because of the unique situation here and because of the difficulty of reaching accommodation within the Congress on this issue of preemption or not preemption, if you take a look at the particular facts and circumstances that really make this situation unique, you have a rule that the regulatory community, you have a rule that all of the industry stakeholders throughout the supply chain have embraced, that the environmental community, health care and labor community have embraced. We would argue that, you know, there is—I would pose the question, the rhetorical question, where else would California or any other State go at this point if the federal government stepped in and said we are going to take that model, we are going to make it apply to the entire United States. Essentially I would say problem solved. There is really no other place for a State agency, California included, to go at that point in terms of regulating our products, and that is certainly our hope and intention.

Mr. SCALISE. Mr. Counts, you had stated that "We believe that a national approach is crucial in order to avoid conflicting State standards and allow for the harmonized distribution of products and supplies." Yet of course, this legislation doesn't do anything to stop other States from enacting different or conflicting regulations. Would you be concerned if other States enacted different laws or regulations?

Mr. COUNTS. It is certainly a concern. Any time you have to create different products for your supply chain in different States, it would be very cost prohibitive. It is our thought that this is the most stringent standard in the world and there is no incentive for other States to follow and develop their own formaldehyde standard if we have a national standard that is in place.

Mr. SCALISE. Thank you. I yield back.

Mr. RUSH. The Chair wants to announce that we will have additional questions of the witnesses. The Chair recognizes himself for up to 3 minutes and the Chair will allow 3 minutes for each member to ask additional questions.

I want to clarify something for the record. In your written statement, Mr. Julia characterized the legislation as not giving EPA the ability to establish emissions limits that are different from those set by California. Mr. Jones, doesn't the legislation permit EPA to set formaldehyde standards at a given level after the initial rulemaking required by the bill?

Mr. JONES. Chairman Rush, the bill initially requires the agency to set formaldehyde standards that are the functional equivalent of the CARB standard. That is what the provision itself does. That wouldn't take away EPA's existing authorities under TSCA section 6 to regulate formaldehyde if it could make the findings required under section 6. So that authority would remain intact despite implementation of the bill that is before the Congress right now.

Mr. RUSH. The Chair recognizes the ranking member for 3 minutes.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. Julia, I recognize the national standard sounds good. I recognize your industry's concern about the bad players on composite wood. But does the industry also have a concern about a standard that is set unnecessarily low as it relates to the cost of the product that you are trying to produce?

Mr. JULIA. We absolutely would have such a concern, and at very many of the workshops in California this is exactly the argument that we made because if you look at the record, the initial proposals coming out of California were indeed very different than what ended up being the California rule and we felt that over a period of years and education and working cooperatively with the staff of the California Air Resources Board, they came to appreciate the technological capability of the industry, the curve that we have been on of lowering, lowering, lowering our emission levels. We have never said either prior to the California rule or since then that anything that we make is in any way, shape or form dangerous to public health. We have never addressed in those hearings that issue of the perceived risk.

We believe it is a legitimate inquiry but we don't think it bears on the issue here in that the levels that we are talking about in this legislation are so low we don't believe that they rise to the occasion of asking the health concerns and the exposure concerns that some parties would like to bring to the table.

Mr. RADANOVICH. Yet Mr. Andersen, your conviction is pretty firm that the standard could be 10 times higher and not pose a risk.

Mr. ANDERSEN. I believe that, but there is another significant concern I have, this idea that we are going to be conservative based on cancer and then talk about numbers of cancers people will have. I think this is a disservice to public health. It is a disservice to my neighbors, who only hear that this can cause cancer when it is not a significant carcinogen. It needs to be regulated based on the right reasons, and these regulations and assessments need to take in the body of information. I guess you are hearing a purist here that we have to do this for the right reason, and we shouldn't be scaring people. Right now we scare people with these conservative estimates that say you are going to have cancer. One in a million will have cancer. All people hear is, you will have cancer. And especially for things that aren't legitimate carcinogens at realistic human exposure levels. This is terrible public health policy. That is my professional judgment.

Mr. RADANOVICH. Thank you, Mr. Andersen.

Thank you, Mr. Chairman.

Mr. RUSH. Mrs. Matsui is recognized for 3 minutes.

Mrs. MATSUI. Thank you, Mr. Chairman.

I have a question for Mr. Counts. You know, we understand that this has been a long process and I think it has been addressed before—at the beginning of the process there was wide disagreement but through the process, I guess took about 7 years or so, there became a cooperative effort here between industry, the regulatory authorities and the public interest groups. And I think that is something that you have to look at, the fact that this wasn't done overnight and it really took people working together. But after years of review and rulemaking, CARB finalized the rules establishing these standards, the first phase of which went into effect on January 1, 2009. Now, we know H.R. 4085 will apply these standards nationwide. Now, Mr. Counts, do you believe that manufacturers of composite wood products outside the United States will be able to comply with this proposed standard?

Mr. COUNTS. I am confident that if they are given the appropriate compliance times and sell-through provisions that they will be able to comply. They have had to comply with stringent European and Japanese standards for several years now. The biggest hurdle with California was a brand-new testing requirement that international labs were not familiar with, but they are getting up to speed on that and compliance is coming along very aggressively. So I am confident that on a national basis, given the proper timeline, they can comply.

Mrs. MATSUI. Does AHFA anticipate any issues maintaining adequate supply levels once the regulation is promulgated?

Mr. COUNTS. Well, the United States is the largest market for home furnishings in the world, and this is the most stringent standard in the world, so as we get to phase II of the California levels on a national basis, there is going to be some trial and error from our panel suppliers to make sure that they are complying. Unless the economy improves greatly, there is going to be a lot of inventory out there that is not compliant. We have to make sure we have adequate time to sell through all that product and work through the kinks but hopefully that will not be a major issue.

Mrs. MATSUI. And what steps has industry generally and AFHA taken to reduce formaldehyde emissions over the years?

Mr. COUNTS. Well, we have several members that distribute nationally and they are embracing the California standard on a national level. We have some members that do not sell in California and they are finding it harder and harder to find panel that would not be compliant with California. So we are instructing them that the national standard is very likely and they need to move forward in that direction, and we are providing education and tools to make that happen.

Mrs. MATSUI. Thank you, and I yield back.

Mr. RUSH. Mr. Scalise.

Mr. SCALISE. Thanks, Mr. Chairman.

A couple of questions for Mr. Jones. Some of the panelists lament the perceived length of a section 6A rulemaking process. If in attempting to apply the CARB standard, if EPA used the quality control order provisions in section 6B instead, are there such concerns?

Mr. JONES. Thank you, Mr. Scalise. Section 6B under TSCA allows the agency to do facility-by-facility regulation. For some industries where there may be two facilities, it might be more expeditious to go in that manner. In the case of formaldehyde in pressed wood, I believe there are hundreds of facilities and so it may actually be longer using 6B going facility by facility than just having a national standard under 6A.

Mr. SCALISE. It seems to me that the major issue is imports. What can EPA do under all the existing legal authorities to address the issue of wood products with higher formaldehyde levels that are coming into our country from other nations?

Mr. JONES. So if there were a federal regulation either because we acted under 6A or this bill became law, it would apply to imports.

Mr. SCALISE. But what can you do under your current legal authority? Are there more things you can be doing right now to address those imports that are coming in from other countries that have higher levels of formaldehyde?

Mr. JONES. We would have to have a regulation in place, either one that we initiated or that was initiated because this bill became law before we could do anything related to imports, and right now there is not a federal regulation——

Mr. SCALISE. Clean Air doesn't give any kind of ability to you?

Mr. JONES. I don't believe that a hazardous air pollutant regulation would have any ability to influence imports, but that is something we can confirm.

Mr. SCALISE. All right. Thanks. I yield back.

Mr. RUSH. The Chair will recognize himself for just a couple more questions. Any other member who has additional questions, you will be recognized.

Mr. Jones, if EPA were to set different standards in the future, they would have to be issued under TSCA. Is that correct?

Mr. JONES. That is correct, Chairman Rush.

Mr. RUSH. But EPA has found it exceptionally difficult, if not impossible, to use that statute to regulate chemicals like formaldehyde. Would you agree that the inherent limitations of TSCA raise serious legal obstacles for EPA on this or any other issue?

Mr. JONES. I would agree with that. The agency is pursuing a formaldehyde assessment that may well lead to a regulation but it is going to be very difficult and tricky for us to get over the hurdle of least burdensome, the potential permutations that you need to analyze before you could be affirmative in your determination that you picked the least burdensome. It has proven to be very difficult for the agency. And so we are probably 3 to 4 years away from having a formaldehyde regulation in place but we are going to try to work with the existing statute to see what we can do.

Mr. RUSH. Mr. Ryan, do you have any comments on this issue that I raise?

Mr. RYAN. I would just endorse Mr. Jones' comments in terms of TSCA authority and the clumsiness of TSCA in getting to an early solution to the public health opportunity at hand.

Mr. RUSH. Thank you very much.

The Chair thanks the witnesses, all of you. You have been very sacrificial in terms of your time and we really appreciate it. The Chair wants to thank the members who were present and those who have remained present. The Chair wants to note that we will have hearings of this type in the future, and now the Chair announces that the committee is hereby adjourned.

[Whereupon, at 12:45 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Statement of the Honorable Joe Barton
Ranking Member, Committee on Energy and Commerce
Legislative Hearing on H.R. 4805
And H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act
Subcommittee on Commerce, Trade, and Consumer Protection
March 18, 2010

Thank you for holding this hearing today to discuss these two bills. I am told there is a consensus behind the formaldehyde legislation we are considering today. Mr. Chairman, nothing is quite as intoxicating as feeling that you are part of a "consensus deal." And, nothing is as deflating as realizing the unintended ramifications of an ill-considered "consensus deal."

I know, because I felt the euphoria when we passed the precautionary Consumer Product Safety Improvement Act and, now, I feel the pain of seeing the major unintended consequences that law has wrought.

There are probably sensible reasons to support the provisions of this legislation. I think it is important, however, that we dissect what our committee is being asked to enact, and explore its implications rather than accepting, at face value, pleas to simply ratify a negotiated product as-is.

The overarching purpose of this bill is to codify the State of California's air emissions regulatory standard for formaldehyde in furniture and composite wood board. The bill uses explicit references to the state regulation -- something that not even the elected officials of California enacted.

I am troubled by this approach for two reasons: First, press articles around the time that California developed its regulation indicate that many people questioned the very risk assessment that was used to support the regulation. Indeed, many people believe that several subsequent studies, which bring the latest science to bear, actually refute California's conclusions about the role of formaldehyde emissions and their harm to humans. We should never use outdated science to regulate, particularly when both economic and human health are at stake. Second, the California regulation has been fully phased in yet. We don't yet know if it has resulted in an incremental improvement in either public health or affordable products. I regret that the State of California is not here as a witness to answer obvious questions about how this regulation is working.

This bill claims to be about EPA handling formaldehyde under the Toxic Substances Control Act (TSCA). But I am not sure why we would have the EPA regulate consumer products through TSCA rather than give that authority to the Consumer Product Safety Commission (CPSC) which is tasked with protecting the public from unsafe consumer products. Structurally, I think we need to know why TSCA is the appropriate venue when the Consumer Product Safety Act or the Federal Hazardous Substances Act might be better authorities for this effort.

Beyond the issue of blindly codifying one state's regulatory standard and applying it to 49 more states, the provisions of H.R. 4805 are all the more curious since TSCA has existing procedures for EPA to take the actions contemplated in this bill. In fact, EPA is considering a petition filed on March 24, 2008, by 25 organizations and 5,000 individuals to adopt as Federal law the same California regulation that H.R. 4805 contemplates. Given the controversy surrounding the risk assessment studies used in California, I would hope that EPA gets the science right this time. Moreover, I question whether the quality-control orders under TSCA Section 6(b), rather than TSCA generic regulatory authority under TSCA Section 6(a), might be a more efficient way to effectuate a change if needed. I hope our witnesses can explain this aspect of the debate to me.

I also have serious concerns about the lack of Federal pre-emption under this bill. I am told this legislation has been constructed to avoid the pre-emption section of TSCA and I am quite concerned about the implications this has for interstate commerce. In particular, because of the way this bill is drafted, the states could create and endless loop of new regulations and laws that makes selling these products in multiple markets a nightmare. This is terrible precedent and bad policy. If the weight of high-quality scientific study shows the problem to be serious enough to warrant federal intervention, we should have a meaningful national standard to address it. We should not send the message to Sacramento or other state capitols that we think they should be setting 50 different policies in 50 different places.

My last point about this bill is about the delegation of legislative powers to the Executive Branch. H.R. 4805 gives EPA the power to modify by regulation the standard we are create by statute. This is a recipe for trouble. We should write clear definitions about what Congress means. If EPA does not think that the law is doing what it should, then the Agency should come back up here and tell us what needs to be changed. We should not give the Agency a blank-check to do our job. I hope we will change that feature of this bill if we intend to mark-up this legislation.

I have reservations about H.R 1796, the Carbon Monoxide Poisoning Prevention Act, as well. As a principle matter, Congress should not simply pick and choose which voluntary safety standards should become mandatory. The CPSC is fully empowered to promulgate mandatory standards if the voluntary standards are inadequate or industry is not complying with those voluntary standards.. Neither is the case with CO detectors.

Similarly, this Committee travelled this path for a number of different existing standards in the previous Congress. We set a bad precedent and we are repeating the mistake. Industry has developed good standards. My Democrat colleagues acknowledge as much because they have plucked those standards and attempted to write them into law. But if we continue down this path, industry stakeholders are unlikely to continue to participate in the voluntary standard development process. And if that happens, the burden will fall to the CPSC alone and turn the CPSC into nothing more than a rule-writing agency for tens of thousands of consumer products. The CPSC will not be able to focus on enforcement. And that will not improve product safety.

Finally, I respect the sponsor of the legislation for his interest in promoting safety, but a grant program to states directing them to enact this policy is neither warranted nor appropriate. Twenty five states have already enacted laws requiring monoxide detectors in homes, generally as part of state building safety codes and permits. While the grant money may be a small amount by Washington standards, every taxpayer penny counts. It is our obligation to ensure that grant money is not used by the states as essentially the marketing arm of private companies to promote detectors. I think the responsibility for advertising should fall on the companies that make them.

I welcome our witnesses and look forward to their testimony. Although I have been critical in my opening remarks, I keep an open mind -- it's just going to take some serious convincing. I remain concerned that dealing with the issues these bills raise may be compromised by a desire not to disrupt a "deal" that private stakeholder interests have cut amongst themselves and other legislators. I hope this Committee will address these problems in a worthy manner.

I yield back the balance of my time.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
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Majority (202) 225-2927
Minority (202) 225-3641

April 14, 2010

Dr. Eric J. Lavonas, MD
Associate Director
Rocky Mountain Poison & Drug Center
777 Bannock Street, MC 0180
Denver, CO 80204

Dear Dr. Lavonas:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on March 18, 2010, at the hearing entitled "H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act, and H.R. 4805, the Formaldehyde Standards for Composite Wood Products Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by April 28, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

RMPDC
Rocky Mountain Poison & Drug Center
Affiliated with the American Association of Poison Control Centers

April 29, 2010

Hon. Doris Matsui
c/o Earley Green, Chief Clerk
Committee on Energy and Commerce
Unitest States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115
Transmitted electronically

RE: HR 1796, the Residential Carbon Monoxide Poisoning Prevention Act

Dear Representative Matsui,

Thank you for your interest in HR 1796. I am happy to answer your questions, and apologize for my brief delay in doing so. I do need to state that the opinions I am about to express are my own, and do not necessarily represent the views of the Denver Health and Hospital Authority.

In response to your questions:

The U.S. Consumer Product Safety Commission (CPSC) has employed a three-part approach to address CO poisoning from consumer products that: (1) reduces or eliminates CO production at the source, (2) alerts customers to CO hazardous levels, & (3) educates consumers to the dangers posed by CO.

1. Is it possible or warthwhile to expand this approach?

As you correctly point out, any effective plan to reduce deaths due to CO poisoning will require three elements: (1) source reduction, (2) early detection and warning, and (3) public education.

The CPSC has taken positive steps in each of these dimensions. Using a data-driven approach, they have identified the type of consumer product responsible for the largest number of severe CO poisoning cases (electrical generators) and prioritized this product for engineering controls, studies of automatic shut-off devices, and mandatory warning labels.

A Collaborating Center of the National Poison Data System

Poison Center • Drug Consultation Center • Old Surveillance • Research & Consulting • Medical Toxicology

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Location: 990 Bannock Street • Denver, CO 80204-4028
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DENVER HEALTH

The strength of this approach is that CPSC has engineering and risk-communication expertise, and knows how to work with industry to drive effective change. I support the CPSC efforts to date, and hope these efforts will continue.

There are limitations which CPSC cannot overcome, even with an expanded CPSC-based strategy. These limitations will have to be addressed by another means.

First, consumer products are only responsible for about half the unintentional CO poisoning in the US, and only a small fraction of the attempted suicide by CO poisoning. Motor vehicles cause more CO poisoning deaths overall than consumer products. Motor vehicle emissions are regulated by EPA, not CPSC. CPSC is not permitted to work on CO poisoning related to motor vehicle exhaust. The structure and customs of federal government operations make it difficult for topic experts to work together across agency lines on anything but the most informal basis.

Second, there is a practical limit to the ability of each element of the CPSC approach. Although engineering controls can greatly reduce the amount of CO produced by a new item (generator, stove, furnace, etc.), items eventually wear out, go out of adjustment, or simply break. People routinely ignore safety warnings and actively defeat safety devices engineered into consumer products. Although we'd all like to see a CO detector coupled to an automatic shut-off device on electrical generators, my understanding is that reliable technology just isn't there yet.

It is possible and worthwhile for CPSC to expand the approach they've taken with generators to other consumer products. In particular, priority should be given to engineering studies of CO detection/alarm/shut-off devices integral to home heating systems. In addition, I would propose:

(1) The creation and funding of a CO poisoning group within the CDC. With 3-5 dedicated FTE's and a modest research/implementation budget for CO poisoning prevention, the Air Pollution and Respiratory Health Branch of the CDC's National Center for Environmental Health could focus on this issue and finally make real progress on reducing death and disability due to CO poisoning.

(2) A statement from Congress directing Federal agencies to improve interagency cooperation on CO poisoning prevention issues. This need not cost money: we just need to give staff at CPSC, EPA, CDC, HUD, etc., permission to work with each other more closely.

(3) A directive from Congress that the EPA establish a standard for CO levels in indoor air. Although OSHA has workplace standards for indoor air, to my knowledge there is no regulatory standard for indoor air in general.

I recognize that these proposals go beyond the wording of H.R. 1796. I would be happy to work with the Committee or interested Representatives to explore these or other ideas in more detail.

2. In addition to supporting H.R. 1796, which industry has largely done, what other ways could stakeholders be helpful to comprehensively address the problem of CO poisoning?

Of the three approaches described above, I think that the "low-hanging fruit" is early detection by the widespread use of CO alarms. The fastest way to reduce the death and disability numbers is to increase the number of homes and businesses with working CO alarms. Although I'm not discounting the value of improved engineering and public education campaigns, CO alarms are something that we can implement rapidly and at low cost.

In an ideal world, I would like to see a requirement for CO alarms in all occupied structures, similar to the current smoke alarm requirement. Although we'll get there eventually (both the International Residential Code – 2009 and the National Fire Protective Association Standard 720-2009 require CO alarms), the Congress could save hundreds of lives and prevent thousands of cases of severe CO poisoning each year by taking this step.

Short of such a bold move, some partial steps might include:

(1) Requiring CO alarms in all housing units paid for by the federal government. Each agency (HUD, DoD, Park Service, State Department, etc) already has a list of minimum requirements, including smoke alarms. Congress could direct each agency to add CO alarms to this list of requirements, thereby saving the lives of HUD beneficiaries, federal employees, and their families and reducing federal health care costs used to treat CO poisoning in these victims.

(2) Requiring CO alarms in day care centers, dormitories, and other places where large numbers of children sleep. Current mandates require smoke alarms, but not CO alarms. Children are unable to take personal steps to prevent CO poisoning, and must rely on adults to do so on their behalf. Congress could require that adults provide CO alarms to protect children.

(3) Requiring CO alarms in hotels, motels, and other places where travelers sleep. Current mandates require smoke alarms, but not CO alarms. Recent research shows that serious CO poisoning events in hotels, motels, and resorts are too common to ignore.[3] Travelers are unable to take personal steps to prevent CO poisoning, and must rely on property owners and managers to do so on their behalf. Congress could require that property owners provide CO alarms to protect travelers.

(4) Providing funding to the states to defray their costs associated with implementation of CO alarm programs. When states enact CO alarm laws, they have to pay to install alarms in property they own and manage, such as dormitories, prisons, and official residences. This cost is a barrier to the passage of state CO alarm laws. Although H.R. 1796 provides some

[3] Weaver LK, Deru K. Carbon monoxide poisoning at motels, hotels, and resorts. *American Journal of Preventive Medicine* 2007; 33(1): 23-7.

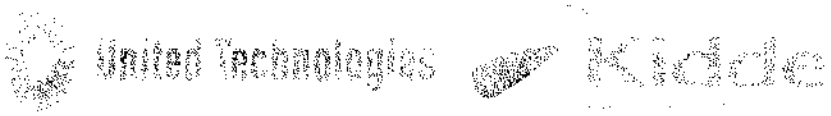
funding, the amount of money is probably insufficient to have a large impact. Congress could support states that wish to implement CO alarm programs by assisting with these costs.

Once again, I recognize that these proposals go beyond the current wording of H.R. 1796. I am happy to explore these or other ideas in more detail, either for this bill or future legislation.

Thank you very much for taking time to learn more about CO poisoning, and for taking steps to reduce the number of Americans burned each year. I am happy to address any further questions.

Sincerely,

Eric Lavonas, MD, FACEP, FACMT
Associate Director



ANSWERS TO QUESTIONS FOR THE RECORD
PROVIDED BY
JOHN ANDRES, DIRECTOR OF ENGINEERING,
KIDDE RESIDENTIAL AND COMMERCIAL
ON
CARBON MONOXIDE POISONING PREVENTION

APRIL 27, 2010

1. How has industry worked with the CPSC and other stakeholders to develop voluntary standards to improve consumer product performance?

Answer: Via the standard's technical panel, industry leaders and the CPSC remain in contact regarding new studies, technology advances, and other criteria to ensure quality product performance. In addition, both parties provided input into the evolution of UL 2034, the third-party standard to which CO alarms are voluntarily tested and listed. In the 18 years since first being published, the standard has gone through several revisions, each of which is based on years of field test data intended to progressively strengthen the standard.

2. How will analyzing product safety performance of CO alarms help foster private sector innovation and create jobs in our economy?

Answer: As the standard for CO alarm quality becomes mandatory, there will be potential for new businesses to evolve surrounding specific industry needs. In addition, the awareness of the standard could lead to an increase in technology innovation, which would stem from entrepreneurs and other business development.

3. Is it possible to reduce deaths and injuries associated with CO poisoning without a stronger regulatory law or reducing the risk of CO at its source?

Answer: Yes, it is possible to reduce CO poisoning deaths and injuries without stronger regulatory laws. This bill, we believe, appropriately strengthens the regulatory requirement and offers grants to raise education and awareness. We believe that both stronger regulations and education are critical. Most state laws requiring CO alarms do not have strict compliance measures for homeowners, and officials/nonprofit organizations/fire departments rely on education and awareness to encourage them to install CO alarms. Without funding to educate the public about the dangers of CO and the need for CO alarms, a reduction in CO poisonings will be limited.

4. What are your estimates for the kind of economic productivity that designing and building products in a manner that would ensure greater consumer protection from CO exposure would create?

Answer: We estimate that the need for safer products could result in additional positions in service and innovation markets, as well as prompt new business development.

For additional information please contact Libby Elliott at (202) 336-7406 or Tom Sri at (919) 563-5911 ext 8543.

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 Rayburn House Office Building
Washington, DC 20515–6115

April 14, 2010

Mr. Tom Julia
President
The Composite Panel Association
19465 Deerfield Avenue, Suite 306
Leesburg, VA 20176

Dear Mr. Julia:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on March 18, 2010, at the hearing entitled "H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act, and H.R. 4805, the Formaldehyde Standards for Composite Wood Products Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by April 28, 2010, to Farley Green, Chief Clerk, via e-mail to Farley.Green@mail.house.gov. Please contact Farley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

COMPOSITE PANEL ASSOCIATION

19465 Deerfield Avenue, Suite 306, Leesburg, Virginia 20176
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April 28, 2010

Honorable Henry Waxman, Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman:

Thank you for the opportunity to testify before the Subcommittee on Commerce, Trade and Consumer Protection on March 18, 2010. The Composite Panel Association (CPA) represents companies that are among those most impacted by H.R. 4805 and we strongly support passage of this bill.

H.R. 4805 has significant value to American consumers and public health generally, as well as to the competitiveness of domestic wood products manufacturers and hundreds of thousands of American jobs.

My responses to the questions posed in your letter dated April 14, 2010, are provided below.

Rep. Barton questions on pre-emption.

The bill as introduced contains no pre-emption provision that would prevent a state from initiating a rule of its own covering formaldehyde emissions from composite panel products, but CPA believes this is highly unlikely. This is because California enacted an exceedingly comprehensive regulation in early 2008 after more than six years of work with a wide range industry stakeholders. CPA spearheaded this industry dialogue with CARB through the broad based California Wood Industries Coalition (CWIC), which included both California-based and national organizations and companies. California's regulation was enacted with broad support, and there is no incentive for CARB or any other state agency to replicate or expand on this approach. Moreover, this rule has filled a vacuum and become a "de facto" national standard, since there never has been a comprehensive federal regulation in this area.

Affected parties throughout the U.S. and around the world have quickly seized on California's rule as their means of assuring environmental compliance regardless of where they sell products in the U.S., and H.R. 4805 creates a further disincentive for a competing approach by California or any other state. Also, the "third party testing and certification" (TPC) mechanism called for by California's rule embraces a stewardship approach already widely practiced in the U.S. and Canada, and now around the world too.

CANADA
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The CARB rule is working, and this result has made a positive contribution to product quality assurance and to fair trade. The long term result could be good for domestic jobs and manufacturing, as well as for public health, and the prospect of any other state coming up with its own regulatory approach is remote.

The problem with California's rule is that it cannot be enforced in any state except California, and that there is a risk of harm to domestic industries for this very reason. A federal standard modeled on the CARB approach would remedy this form the standpoint of nationwide enforceability. It would also provide additional assurance that no other state might seek to develop a different enforcement mechanism of its own.

If any state were to develop a regulatory approach inconsistent with what CPA hopes the federal government will do, we would strongly oppose such an effort and expect to be supported by a broad coalition of industry, environmental, labor and health care groups, all of which have come together in an unusual way in support of H.R. 4805 and its counterpart S. 1660.

Rep. Matsui question on economic productivity.

H.R. 4805 will go a long way toward successfully addressing concerns about formaldehyde emissions from wood products, and toward providing further consumer confidence in industry products sold in the U.S. regardless of where they are made in the world. Most concerns that have arisen over the years about formaldehyde emissions from wood products relate to finished goods made offshore and those that do not comply with even the voluntary industry standards that have overwhelmingly embraced for decades by American manufacturers. Composite panel products are made almost exclusively from highly "green", recycled and residual raw materials, and by effectively addressing concerns about formaldehyde emissions from these products (including incentivizing the use of non-formaldehyde based adhesive systems), H.R. 4805 will have a positive impact on the competitiveness of these products in existing and new markets. That's good for American jobs and economic productivity.

Rep. Matsui questions on jobs, innovation and compliance by offshore manufacturers.

As conveyed in these responses and in previous CPA testimony before CARB, EPA and other public bodies, there are important direct and ancillary benefits to having a national standard on formaldehyde emissions whereby Congress ensures that offshore and other non-U.S. manufacturers are covered by the same ruels as American manufacturers.

Beyond the direct considerations of public health and consumer protection, there are positive domestic jobs and fair trade aspects to this legislation. It is unfair for American manufacturers to be expected to compete in a global marketplace when our industries embrace, invest in and are held to high standards of product efficacy and safety, if at the same time those who export competing products for sale in the U.S. are not held to the same standards.

This consideration is not unique to H.R. 4805. Rather it is a profoundly important one in any such Congressional mandate – i.e., there should be equity when it comes to the economic impact of such a regulation so American manufacturers are neither kept nor placed at a competitive disadvantage insofar as manufacturing and regulatory compliance costs. Passage of H.R. 4805 will contribute to global fair trade and to the expansion of domestic, green jobs as well as to continued capital investment and green product innovation by domestic wood products manufacturers. These are all good things for the American economy.

Rep. Matsui question on third part testing and certification.

Third party testing and certification (TPC) is key to the success of California's rule and will be for the effective enforcement of a federal standard. Self-certification will not work, especially for many offshore manufacturers. The U.S. industry has known this for decades and has overwhelmingly embraced a stringent third party testing and certification component to its business practices, long before there was a CARB rule. A rigorous TPC approach is essential if the federal standard contemplated by H.R. 4805 is to be credible, enforceable and effective. It should be based on internationally recognized criteria and accreditations, as is California's. There is nothing protectionist about this approach, and the evidence of international acceptance is compelling even in the first 16 months of the CARB rule.

H.R. 4805 asks the EPA to embrace a stewardship approach being used in California and already widely practiced in the U.S. and Canada, and around the world too. California has already approved 33 TPC agencies around the world, and they in turn have recognized 753 manufacturing facilities as qualified to meet the formaldehyde emissions requirements that are called for in H.R. 4805. The numbers are impressive:

33 CARB-approved TPCs
- 13 in Europe
- 9 in North America (all in US)
- 9 in Asia
- 2 in Australia/New Zealand

753 CARB-certified composite panel mills worldwide
- 474 in Asia
- 148 in Europe

- 109 in North America
- 16 in South America
- 6 in Australia/New Zealand

Rep. Matsui question on actions by other states.

CPA believes no state will develop a regulation to compete with California's if H.R. 4805 passes. Moreover, California is now in its second year of experience with its own regulation and will have no incentive to change or expand it if H.R. 4805 succeeds, even without a pre-emption provision. If the bill is unsuccessful though, there could be such a temptation even before the US Environmental Protection Agency completes action on its own planned rulemaking. See also the response to Rep. Barton's questions, above.

Please let me know if there is any additional information CPA can provide to the Committee.

Very truly yours,

Thomas A. Julia
President
tjulia@cpamail.org

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 Rayburn House Office Building

Washington, DC 20515–6115

April 14, 2010

Mr. Andy Counts
CEO
American Home Furnishings Alliance
317 West High Avenue, 10th Floor
High Point, NC 27260

Dear Mr. Counts:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on March 18, 2010, at the hearing entitled "H.R. 1706, the Residential Carbon Monoxide Poisoning Prevention Act, and H.R. 4805, the Formaldehyde Standards for Composite Wood Products Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by April 28, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

100 Years

AHFA

American Home Furnishings Alliance

The Honorable Doris Matsui

The State of California, in a cooperative effort between industry, regulatory authorities, and public interest groups (environmental, public health, and labor organizations), recently established limits on formaldehyde emissions in most composite wood products. In 2008, after several years of scientific review and rulemaking, the California Air Resources Board (CARB) finalized rules establishing higher standards in composite wood products, the first phase of which went into effect on January 1, 2009. H.R. 4805 would apply CARB's rule nationwide by establishing emissions standards for formaldehyde in domestic and imported composite wood products.

1. Do you believe that manufacturers of composite wood products outside of the United States will be able to comply with the proposed standard?

> *The AHFA believes manufacturers of composite wood products outside the United States will be able to comply with both Phase 1 and Phase 2 of the California ATCM or H.R. 4805. The global composite wood industry has successfully worked through the challenges of reformulating glue resin systems and production modifications. Currently, there are 33 CARB approved domestic and international 'Third Party Certifiers' (TPC). The TPC provide testing, certification and documentation to the manufacturers of composite wood products (CWP) sourced by fabricators and importers that become component parts of finished products. While the challenge will always be adequate lab 'space' AHFA believes these 33 labs have sufficient space to accommodate the potential increased sourcing demand created by a national standard.*

2. Does AHFA anticipate any issues maintaining adequate supply levels once the regulation is promulgated?

> *Sourcing issues will always be the critical challenge of maintaining an adequate supply of compliant composite wood products. Currently there are 750 TPC certified CWP 'mills' (manufacturers) globally supplying the sourcing needs for fabricators and importers of finished products containing CWP component parts. These 750 certified mills have the capability and capacity to supply Phase 1, Phase 2, NAF (no added formaldehyde) and ULEF (ultra low emitting formaldehyde) composite wood products. It is imperative that sourcing and supply issues are addressed to ensure an*

adequate supply of compliant composite wood products. While the California ATCM has become the 'de facto' international standard and most fabricators/importers are sourcing compliant board for products sold in states outside California, demand must be monitored once there is a 'national standard.' There must be a sufficient supply of Phase 2 board and the wood products industry must continue working to implement emerging resin technologies. The transition from a 'California only' standard to a national standard must be seamless with no unintended 'bottlenecks' that would impede the supply of compliant composite wood products.

3. What steps has industry generally and AHFA specifically taken to reduce formaldehyde emissions over the years?

Historically, the wood products industry has worked with glue resin suppliers and CWP suppliers to steadily reduce potential formaldehyde emissions. Beginning with the voluntary HUD standard (1985), the wood products industry has worked with ASTM and ANSI to develop testing standards to properly identify emissions, evaluate a baseline and begin reducing formaldehyde emissions from our products. AHFA member companies have worked with their suppliers to source glues and composite wood products that meet the current emission requirements. AHFA participates as a member of the ASTM/ANSI standards rule making 'canvas' and has been at the table from the inception with CARB, EPA and the federal legislature as a key stakeholder.

The Honorable Joe Barton

1. In your written testimony you state: "we believe that a national approach is crucial in order to avoid conflicting state standards and allows for the harmonized distribution of products and supplies." Yet this legislation does nothing to stop another state from enacting different or conflicting regulations. Would you be concerned if other states enacted differing laws or regulations?

The AHFA believes that a national approach is crucial in order to avoid a 'patchwork quilt' of conflicting state standards and allows for the harmonized distribution of products and supplies. Multiple state standards would be a concern but we believe states would not have any incentive to develop a specific standard if a national one was in place. California expended considerable time resources to develop the ATCM. Time and resources other states do not have or are willing to allocate toward the development of a specific state rule that would be dramatically different.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

MAJORITY (202) 225-2927
MINORITY (202) 225-3641

April 14, 2010

Dr. Melvin E. Andersen, CIH, PhD. DABT
Director, Program in Chemical Safety Sciences
The Hamner Institutes for Health Sciences
Six Davis Drive PO Box 12137
Research Triangle Park, NC 27709-2137

Dear Dr. Andersen:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on March 18, 2010, at the hearing entitled "H.R. 1796, the Residential Carbon Monoxide Poisoning Prevention Act, and H.R. 4805, the Formaldehyde Standards for Composite Wood Products Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by April 28, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

April 27, 2010

The Honorable Doris Matsui
Committee on Energy and Commerce
2125 Rayburn Office Building
Washington, DC 20515-6115

Dear Congresswoman Matsui,

In the email and letter from Henry Waxman, Chairman of the House of Representatives Committee on Energy and Commerce dated April 14, 2010, you asked me to address the following question:

"Formaldehyde is a chemical known to have adverse effects on human health. It has been recognized by the International Agency for Research on Cancer and by the Environmental Protection Agency (EPA) as such. This chemical can cause difficulty in breathing in some humans exposed at elevated levels (above 0.1 parts per million). In addition, inhalation of formaldehyde can cause nose and throat irritation, burning sensations in the eyes and throat, and nausea. Other effects include coughing, wheezing, chest pains, bronchitis, and severe allergic reactions.

1. While I fully recognize that formaldehyde is a natural product, would you concur that efforts to lower exposure to formaldehyde emissions would protect public health, bolster consumer confidence, and benefit our economic recovery efforts?"

My response follows.

A stated in my prepared remarks, I believe lowering emission standards within reason would protect the public from excessive formaldehyde exposures, bolster confidence by insuring that products with excess formaldehyde would be removed from the market, and benefit recovery by assuring that US corporations following good manufacturing practices would not face competition from unregulated foreign manufacturers. My main concern is that you and your colleagues have generated a good law based on a faulty premise, i.e., the formaldehyde cancer risk assessment conducted by the State of California that does not acknowledge the background of formaldehyde in each of our cells. It seems all too likely that the benefits provided by the law will soon be forgotten and the precedent set by acceptance of the faulty risk assessment will live on and influence other bills and policy decisions in coming years. My purpose in testifying was to support the legislation while asking that the legislation distance itself from endorsement of the California cancer risk assessment. Your comments above on the respiratory irritation from formaldehyde are accurate and indisputable. The cancer risk assessment and conclusions that formaldehyde is a human carcinogen at lower levels of exposure, however, are highly questionable. I believe them to be incorrect.

Sincerely,

Melvin E. Andersen

Director, Program in Chemical Safety Sciences
The Hamner Institutes for Health Sciences
Tel: 919-558-1205 Fax: 919-558-1300
MAndersen@thehamner.org

5 K DAVIS DRIVE PO BOX 12137 RESEARCH TRIANGLE PARK NORTH CAROLINA 27709 [illegible] OFFICE 919 558 1200 FAX 919.558.1400

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 2011

WEDNESDAY, APRIL 14, 2010

U.S. SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 2:30 p.m., in room SD–138, Dirksen Senate Office Building, Hon. Richard J. Durbin (chairman) presiding.

Present: Senators Durbin and Collins.

CONSUMER PRODUCT SAFETY COMMISSION

STATEMENT OF HON. INEZ TENENBAUM, CHAIRMAN

OPENING STATEMENT OF SENATOR RICHARD J. DURBIN

Senator DURBIN. Good afternoon. This hearing of the Financial Services and General Government Appropriations Subcommittee will come to order.

And I've got to report that Senator Collins will arrive momentarily. She'll miss my opening remarks. It will be devastating, but she'll recover.

Today's hearing is on the President's fiscal year 2011 budget request for the Consumer Product Safety Commission (CPSC). And testifying is Chairman Inez Tenenbaum.

Thank you for being here.

The Consumer Product Safety Commission is the Federal regulatory body tasked to protect children and families from unsafe consumer products. Every day, infants sleep in cribs, children don bike helmets and ride bicycles, and adults purchase medicines. We rely on the Consumer Product Safety Commission to make sure that infants aren't strangled by the slats or sides of the cribs, that children don't sustain head injuries while biking, and that parents don't worry that their children will open the child-resistant packaging.

Two years ago, the Consumer Product Safety Improvement Act (CPSIA) was enacted, giving the CPSC new authorities and resources, and significantly strengthening its ability to protect Americans from defective and unsafe products. Many people deserve credit for that, and I want to single out Senator Mark Pryor of Arkansas. What a great job he did bringing us all together for a bipartisan bill to authorize and empower your Commission.

For example, lead content levels for cribs, bunk beds, infant rattles, and children's jewelry have been reduced. Levels must be certified, based on independent third-party testing by a CPSC-recognized laboratory. Tracking labels will soon be on children's products, accompanied by product registration cards. And a publicly available, searchable database with safety information on consumer products is being established and will be operational early next year, we hope.

While the new lead limits are among the most stringent in the world for some children's products, the Commission voted to defer enforcement of testing and third-party certification requirements until February 10, 2011, in order to increase the number of available testing and certification facilities.

What a difference a few years can make. The Consumer Product Safety Commission has been transformed from a quiet, modest little agency with mostly voluntary enforcement powers to a more robust and proactive agency with enhanced enforcement authority.

Staffing, at a low of 385 in January 2008, is now at 502 and will grow to more than 530 by the end of this year. The budget this year, 2010, is double what it was 6 years ago. The first foreign office in Beijing has been opened, after all of the publicity that came out about products that were being exported from China into the United States. The need—now, this is a significant—of all the statistics—the need for toy recalls has declined 75 percent from 2008 to 2009, including an 80-percent decline in toy recalls due to lead-content violations.

For fiscal year 2011, CPSC is requesting $118.6 million—$400,000 more than the fiscal year 2010 enacted amount of $118.2 million, and a staffing level of 576, which is an increase of 46 FTEs.

I'm not going to go through all the details of the budget request. They're going to come up during the course of our questioning here.

I'm looking forward to the testimony of Chairman Tenenbaum, and I am going to introduce her after I defer to my colleague here, Senator Collins.

STATEMENT OF SENATOR SUSAN COLLINS

Senator COLLINS. Thank you, Mr. Chairman.

And thank you for calling this hearing.

While the Consumer Product Safety Commission is a relatively small agency, as your statements pointed out, it has a critical mission of keeping the public safe from dangerous products. We all remember the alarming and too frequent tragic stories of hazardous toys that demonstrate the need to strengthen protections for consumers, particularly for children, as the chairman has pointed out.

In 2008, we acted to strengthen the laws governing the safety of goods entering this country and to provide much-needed additional resources to intercept unsafe products by passing the Consumer Product Safety Improvement Act. This new law included provisions resulting from a 2007 product safety investigation that I conducted in my role as the ranking member of the Homeland Security and Governmental Affairs Committee. That investigation produced provisions that included better coordination and information sharing between the Commission and Customs and Border Protection

(CBP) so that inspectors at our Nation's ports can focus their resources on the most risky shipments, targeting products, manufacturers, and importers with poor consumer safety records. And I'll be interested today to hear more about this improved import surveillance plan and the efforts to improve coordination with CBP.

While it is crucial for the Consumer Product Safety Commission to implement regulations to protect children from lead and other hazardous materials, we do want to ensure that the regulations do not prove overly burdensome or costly to small businesses, such as thrift shops and those who produce handmade crafts, clothing, and toys. The Commission needs to consider these small, often home-based businesses when issuing its rules and guidance, particularly for third-party testing.

Again, I very much look forward to hearing from the Chairman today, and appreciate our chairman, as we consider the budget request for the Commission.

Senator DURBIN. Thanks, Senator Collins.

I'm pleased to welcome Chairman Inez Tenenbaum, the ninth Chairman of the Consumer Products Safety Commission, sworn into office on June 23, 2009. Previously, Ms. Tenenbaum was elected as South Carolina's State superintendent of education, where she served two terms. She has extensive experience in legal, legislative, administrative, and regulatory matters and served on numerous task forces that provide oversight on children and family services.

Thanks for being here. I look forward to your testimony.

Ms. TENENBAUM. Good afternoon, thank you—thank you. I'll start all over again.

Good afternoon, Chairman Durbin and Ranking Member Collins. Thank you so much for this opportunity to appear in front of you.

I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's fiscal year 2011 budget. During the past 9 months as Chairman of the CPSC, I have had the opportunity to see firsthand the great work that the Commission undertakes every day. From new regulations to ensure the safety of cribs, to enforcement action against children's jewelry with harmful levels of lead, cadmium, and other toxic metals, the CPSC is once again an agency that means business when it comes to protecting the safety of the American consumer.

Much of this progress would not have been possible without the reauthorization of the Commission through the Consumer Product Safety Improvement Act of 2008 and the additional funding received by the agency in fiscal years 2009 and 2010. I greatly appreciate the increased resources that members of this subcommittee have supported over the past 2 years, and can assure you that these resources have been put to good use through increased staffing and improved import surveillance and enforcement efforts. It has also provided the resources necessary for the Commission to develop robust responses to new and emerging hazards, such as contaminated drywall, that has caused serious problems for thousands of homeowners. The results of this new commitment to the CPSC are already very encouraging.

One concrete example of this increased staffing and resources at the agency: During 2008, the number of CPSC full-time employees,

FTEs, had dropped to only 385. This was the lowest level in the agency's history and down from a high of 978 in 1980. Section 202 of the CPSIA required the agency to increase the number of FTEs to at least 500 by the end of fiscal year 2013. And I'm very pleased to report that we've already reached that milestone and currently have 505, as of April 9, dedicated FTEs at the CPSC.

But, employee numbers are only one indicator of change. Another key metric is results. One concrete example of that is our ability to stop dangerous products before they enter the stream of commerce. In fiscal year 2007, the CPSC collected approximately 750 samples of suspect products entering our country. In 2009, that number rose to almost 1,600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls, from 563 in fiscal year 2008 to 466 in fiscal year 2009. The Commission's proposed 2011 budget requests $118.6 million—and it's designed to accelerate this forward momentum by continuing internal modernization and rebuilding efforts.

As noted in my written statement, the proposed 2011 budget is only $400,000 over our current 2010 level, but it will allow the Commission to support the key areas of emphasis by reallocating $13.9 million in funds used in 2010 nonrecurring activities. Specifically, the proposed budget will allow the Commission to pursue new and enhanced initiatives in four key areas:

The first is the Commission's compliance initiative. Since the passage of the CPSIA, the Commission's staff has worked diligently to promulgate and implement the numerous rules required by that law. In 2011, the CPSC's work will shift from developing rules mandated by the CPSIA to enforcing those rules, both within our borders and at ports of entry. To further facilitate those efforts, the CPSC's 2011 budget requests approximately $4.6 million and an addition of 41 full-time employees to support additional responsibilities associated with three key elements of the compliance program: regulatory enforcement, import surveillance, and defect investigations.

The second area is information technology modernization and Commission implementation of a searchable public database of consumer product safety information. Section 212(b) of the CPSIA requires the Commission to upgrade its information technology systems and to develop a database that allows consumers to submit incident reports that can subsequently be reviewed by all members of the general public.

In response to this mandate, CPSC is developing a single, integrated, Web-based environment. The Consumer Product Safety Risk Management System, or RMS, will change the way the Commission receives and analyzes data. With the new RMS, the CPSC will be transformed. The Commission will have one powerful database for the input and analysis of multiple sources of data. Overall, this new capability has the potential to uncover more defect patterns for staff to examine and to triage. This, in turn, could lead to an increase in recalls of defective products and the prevention of injuries and deaths. The Commission has already allocated approximately $20 million to fund many of the initial planning and design costs of the RMS and deeply appreciates this subcommittee's past support of the program.

In 2011, funding resources—requirements will largely shift from design-and-build costs to maintenance items. Therefore, the 2011 budget requests $1.8 million for a staffing combination of eight FTEs and contract positions to maintain the system and comply with OMB's requirements for information technology governance, cybersecurity, and privacy.

The third area is consumer outreach and education. Providing consumers with recall and product hazard information that helps make families and communities safer is one of my top priorities. Over the past year, the Commission has made great strides in consumer outreach by reestablishing our presence on network television, in the national newspapers, and on the radio. The agency also launched CPSC 2.0, a social media initiative that is reaching out to tens of thousands of consumers via YouTube, Twitter, Flickr, the OnSafety blog, and our own recall widget. This year and in fiscal year 2011, the Commission plans to accelerate efforts to conduct grassroots education and advocacy in hard-to-reach and vulnerable populations. We will also continue to focus on public education and outreach efforts to prevent drownings and entrapment involving children in residential and public pools.

Fourth, the 2011 budget proposes an additional $2 million for the CPSC to support the National Nanotechnology Initiative. In the last few years, there have been increasing public concerns over potential health impacts associated with this technology. Although nanomaterials may have the same chemical composition as nonnanomaterials, at the nano scales, they may demonstrate different physical and chemical properties and behave differently in the environment and the human body. The $2 million proposal will allow the Commission to conduct exposure and risk assessments of nanotechnology materials, allow for database updates to properly flag reports of nanotechnology incident with consumer products, and conduct consumer outreach efforts, such as public meetings.

PREPARED STATEMENT

Mr. Chairman, thank you again for the opportunity to testify on the proposed 2011 budget for the U.S. Consumer Product Safety Commission, and I look forward to working with you and other members and Ranking Member Collins on this subcommittee, and will be happy to answer any of your questions.

[The statement follows:]

PREPARED STATEMENT OF INEZ TENENBAUM

Good afternoon, Chairman Durbin, Ranking Member Collins, and Members of the Subcommittee on Financial Services and General Government. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's (CPSC) fiscal year 2011 budget request.

During the past 9 months as Chairman of the CPSC, I have had the opportunity to see first-hand the great work that the Commission undertakes every day. From new regulations to ensure the safety of cribs to enforcement action against children's jewelry with harmful levels of lead, cadmium and other toxic metals, the CPSC is once again an agency that means business when it comes to protecting the safety of American consumers.

Mnch of this progress would not have been possible withont the reanthorization of the Commission through the Consumer Product Safety Improvement Act of 2008 (CPSIA), and the additional funding received by the agency in fiscal year 2009 and fiscal year 2010. I greatly appreciate the increased resources Members of this Subcommittee have supported over the past 2 years, and can assure all of you that

those resources have been put to good use through increased staffing, improved import surveillauce, and increased compliance activities. It has also provided the resources necessary for the Commission to develop robust responses to new and emerging hazards such as contaminated drywall that has caused serious problems for thousands of homeowners.

The results of this new commitment to the CPSC are already very encouraging. One concrete example of this is increased staffing and resources at the agency. During fiscal year 2008, the number of CPSC full-time employees (FTEs) had dropped to only 385—the lowest in the agency's history. Section 202 of the CPSIA required the agency to increase the number of FTEs to at least 500 by the end of fiscal year 2013. I am very pleased to report that we have already reached that milestone, and have 502 FTE positions filled at the CPSC as of April 1, 2010.

But employee numbers are only one indicator of change. Another key metric is results. One concrete example of that is our ahility to stop dangerous products before they enter the stream of commerce. In fiscal year 2007, the CPSC collected approximately 750 samples of suspect products entering our country. In fiscal year 2009, that number more than doubled to almost 1,600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls from 563 in fiscal year 2008 to 466 in fiscal year 2009.

The Commission's proposed fiscal year 2011 budget request of $118.6 million is designed to accelerate this forward momentum by focusing on modernization efforts that will flag emerging hazards and help us keep those products out of our country and the hands of children.

While this request is only $400,000 over the fiscal year 2010 level, it will allow the Commission to increase the FTE level by 46 in fiscal year 2011 (for a total of 576 FTEs), fund a broad new compliance initiative, implement the second phase of the Commission's continued Information Technology (IT) modernization, continue to improve consumer outreach, and direct $2 million in support of the Federal National Nanotechnology Initiative by reallocating $13.9 million in funds used for fiscal year 2010 nonrecurring activities.

THE COMMISSION'S COMPLIANCE INITIATIVE

Since passage of the CPSIA, Commission staff has worked diligently to promulgate and implement the numerous rules required by that law. In 2011, the CPSC's work will shift from developing rules mandated by the CPSIA to enforcing those rules—both within our borders and at ports of entry.

To further facilitate those efforts, the CPSC's fiscal year 2011 budget requests $4,647,000 and the addition of 41 full-time employees (FTEs) to support additional responsibilities associated with three key elements of the compliance program: regulatory enforcement, import surveillance, and defect investigations.

Regulatory Enforcement

Experience shows that enforcing new rules takes considerably more resources than enforciug an existing rule that has been iu place for a uumber of years. The number of new rules mandated by the CPSIA during fiscal year 2009 and fiscal year 2010 are more than douhle the number of rules promulgated by the Commission since 1990—and will result iu a dramatic increase iu euforcement respousibility.

The fiscal year 2011 budget, therefore, requests $1,647,000 and 15 FTEs to enforce the new rules. This includes four new compliance officers, five field investigators, three lab testing and other technicul specialists, two attorneys, and one FTE to coordinate with state and local authorities.

Import Surveillance

The Commission's import enforcement workload will also increase as investigators ramp up efforts to verify testing certifications and collect increasing numbers of suspect product samples at our Natiou's ports. The need for more staff and better coordination with U.S. Customs and Border Protection (CBP) was specifically highlighted in an August 2009 Government Accountability Office (GAO) report. Mr. Chairman, I know this is an area of critical interest for both you and Ranking Member Collins, and the Commission is eager to fully address this issue.

Accordingly, the fiscal year 2011 budget requests $1,965,000 to expand coverage at the ports, verify third-party testing certifications, collect samples of suspect products, and—most importantly—stop unsafe products from entering the country. This request will support an additional sixteen FTEs dedicated to import surveillance (five investigators and analysts that will be stationed at ports, two compliance officers to process additional import samples, and nine FTEs for lab testing and other specialties), as well as $100,000 for the destruction of goods refused at the ports by CPSC.

Defect Investigations

The number of product incident reports the Commission receives almost doubled between fiscal year 2003 and now. With the rollout of the searchable public database by March 11, 2011, we expect that the number of incident reports will grow exponentially. These reports often provide critical information and data to the CPSC. However, with current resources, CPSC staff is only able to thoroughly investigate a very small number (approximately 10 percent) of the total reports received.

Increased resources are needed to enhance our defect investigation capability, and ensure that the Commission can adequately review and process the rapidly increasing number of product incident reports. Therefore, the fiscal year 2011 budget requests $1,035,000 and ten additional FTEs (three compliance officers, five field investigators, one technical specialist, and one attorney) to support this critical effort.

INFORMATION TECHNOLOGY MODERNIZATION

Section 212(b) of the CPSIA requires the Commission to develop a database that allows consumers to submit incident reports that can subsequently be reviewed by all members of the general public and upgrade its information technology systems.

As noted above, the searchable public database will be launched in less than 1 year, and I look forward to working with Members of this Subcommittee to ensure that your constituents know how to access and use it. In the course of completing the database, we are also working to solicit extensive public input and establish clear rules for how the database will operate and how CPSC will interact with consumers and manufacturers.

In order to support the data that will be generated by the database and meet the information technology modernization mandate, CPSC is developing a single, integrated, web-based environment, the Consumer Product Safety Risk Management System (RMS), that will change the way the Commission receives and analyzes data. Current systems at the Commission are fragmented, and information flows often have to be manually sorted by staff to identify new and emerging hazard patterns.

CPSC will be transformed with the new RMS. The Commission will have one powerful database for the input and analysis of multiple sources of data. This capability will be absolutely critical as data streams from the new public database start flowing into the Commission. In addition, the system will have new predictive "data mining" tools that will allow the CPSC to compare new incidents electronically with all prior incidents. Overall, this new capability has the potential to uncover more defect patterns for staff to examine. This, in turn, could lead to an increase in recalls of defective products and the prevention of injuries and deaths.

The Commission has already allocated approximately $20 million to fund many of the initial planning and design costs for the RMS, and deeply appreciates this Subcommittee's past support of this program. In fiscal year 2011, funding requirements will largely shift from design and build costs to maintenance items. Therefore, the fiscal year 2011 budget requests $1.880 million for a staffing combination of eight FTE and contract positions to maintain the system and comply with Congressional and Office of Management and Budget (OMB) requirements for information technology governance, cybersecurity and privacy.

CONSUMER EDUCATION AND OUTREACH

Providing consumers with recall and product hazard information that helps make families and communities safer is one of my top priorities. Over the past year, the Commission has made great strides in consumer ontreach by re-establishing our presence on network television, in national newspapers, and on the radio. We have also re-established the trust of consumers that CPSC is putting their interests first.

The agency also launched "CPSC 2.0," a social media initiative that is reaching tens of thousands of consumers via YouTube, Twitter, FlickR, the OnSafety blog, and our Recall Widget. This year the Commission plans to further accelerate this initiative by expanding the platforms we use to include cell phone text messages.

The Commission also plans to accelerate efforts to conduct grassroots education and advocacy in hard-to-reach and vulnerable populations. In August 2009, the GAO released a report recommending that the CPSC increase its focus on reaching minority populations. Since becoming Chairman of the CPSC, I have directed Commission staff to explore additional outreach efforts to underserved populations. In carrying ont a special Minority Outreach initiative, we will increase our use of existing tools, such as the Neighborhood Safety Network (NSN) program—that provides vital information to more than 5,600 community organizations and leaders—as well as use new tools, such as targeted, grassroots programs for Hispanics, African-Ameri-

cans, American Indians, and other minority groups. This will also remain a key priority of the Commission in fiscal year 2011.

One of the most tragic subjects the Commission deals with are drownings and entrapments involving children in residential and public pools. I am pleased to note that the fiscal year 2011 budget contains $1,000,000 specifically for continuing pool and spa safety education. This funding will build on the previous funding of $8.1 million in fiscal year 2009 and fiscal year 2010, and continue to help the agency drive down the 300 child drownings each year and increase compliance with the Virginia Graeme Baker Pool and Spa Safety Act.

NANOTECHNOLOGY

The CPSC's fiscal year 2011 budget also proposes $2 million to snpport the Federal National Nanotechnology Initiative, and seeks to collect additional data and explore environmental, health, and safety issues related to the increasing use of nanotechnology in consnmer products.

In the last few years, there has been increasing public concern over potential health impacts associated with this technology. Although nanomaterials may have the same chemical composition as non-nanomaterials, at the nanoscale they may demonstrate different physical and chemical properties and behave differently in the environment and in the human body.

The $2 million proposed will allow the Commission to conduct exposure and risk assessments of nanomaterials, allow for database updates to properly flag reports of nanotechnology incidents with consumer products, and conduct consumer outreach efforts such as puhlic meetings. Perhaps even more importantly, it will also allow the Commission to take a very proactive approach to this emerging issue, rather than merely reacting to incident reports after they are received.

Mr. Chairman, thank you again for the opportunity to testify on the proposed fiscal year 2011 budget for the U.S. Consumer Product Safety Commission. It provides the funding necessary to continue the transformation of this agency from what some have described as a "teething tiger" into the world's leading lion of consumer protection.

I look forward to working with you and other members of the Subcommittee on the Bndget Request, and would be happy to now answer any questions you may have.

STAFFING INCREASES

Senator DURBIN. Thanks, Chairman Tenenbaum.

And I might note that the increase—or, should I say—the restoration of employees at the Consumer Products Safety Commission, we thought, was warranted, because of the massive numbers of products that come your way, and particularly the increase in imports into the United States, which created a brand new challenge for us. And so, just for the record, that was our thinking behind the increase in full-time equivalent employees.

I want to discuss about five issues, and I'm sure I won't get into all of them.

LEAD STANDARDS

So, let me ask about lead, because we were concerned, when we wrote the bill, as to whether or not we came up with a reasonable standard for lead in toys. And before the bill was written, there was no lead limit at all for children's products. In February 2009, permissible lead levels in children's products were reduced to 600 parts per million. By August, the lead limit in children's products were to come down to 300 parts per million. In those coated with paint, the limit dropped to 90 parts per million.

A stay of enforcement on third-party testing requirements was granted by the Consumer Products Safety Commission in February 2009 for 1 year because there was "substantial confusion," in the industry, regarding specific requirements related to the applica-

bility, as well as testing and certification. An extension of that stay of enforcement was granted in December of last year on testing and certification for many children's products for 1 year, until February 2011, while the CPSC continues to accredit third-party-testing labs.

Now, I want to make sure I understand. If we have written this law in a fashion that makes it difficult for you to either understand or enforce—when I read the word "confusion," I want to make sure I understand what's behind that—then it's our responsibility to step forward and correct any errors that we've made there. If, however, this is a question of just setting up the mechanism for enforcement, that, to me, is a different question, and I can understand it takes more time. So, could you address the lead issue in toys and children's products first?

Ms. TENENBAUM. Thank you, Mr. Chairman.

Yes, we did stay the enforcement on certain products while we put in place the specific testing requirements for those products, so that we could have laboratories who knew how to go about testing those products. But, third-party testing and certification was never stayed on lead in paint, which now is at 90 parts per million. We are also enforcing full- and nonfull-sized cribs; pacifiers; small parts; and lead content on metal children's jewelry. What we stayed was lead content in nonmetal, not in children's jewelry or in paint. So, it could be lead content in brass or something else, but not children's jewelry.

But, we've also realized that the strict levels under 101, which says that you can exempt articles where the lead is inaccessible to the child or if you can show that, through normal and foreseeable use and abuse, any lead is not absorbed into the body. So, it's that "any lead," where you might have very small levels and contact with the children's product is very infrequent. For example, bicycles and all-terrain vehicles (ATVs).

Senator DURBIN. We heard about that.

Ms. TENENBAUM. So, we stayed the bicycles and the ATVs, in terms of testing, until we could work this out, and also certain books. The newly printed ordinary children's books do not contain lead, but, the children's books printed before 1985 do. We had a problem with exempting those. So, if we had more flexibility around section 101 for any lead, then we would be able to work with the products as they came up for our consideration.

We have proffered a discussion around functional purpose. It would require industry to come to us and say, "We need this lead in our product for the functional purpose. If it's an ATV, we need it to make the ATV stronger. The contact with lead components on the ATV will be infrequent. It will have no adverse health effect on the user." And so, then, we could give the ATV or the bicycles an exemption.

So, it's a narrow class of products that, if we had a functional purpose amendment to the CPSIA, then we would be able to exempt those products, like ordinary children's books.

Senator DURBIN. But, do you think that's going to require an amendment to the law?

Ms. TENENBAUM. We do.

Senator DURBIN. Okay. So, we ought to look at that.

Now, let—and to make it clear, the stay does not apply to lead paints, small parts, or children's jewelry. We are talking about functional products and ATVs and the like. If——

Ms. TENENBAUM. And we stayed enforcement of the lead in ATVs last year.

Senator DURBIN. Okay.

OTHER TOXIC SUBSTANCES

Now, I'm going to go 2 extra minutes and give Senator Collins the same time, because I wanted to ask, as a followup—and we're finding that there were replacements by some who are sending products into the United States—replacing lead with cadmium and antimony. And are you regulating those, as well?

Ms. TENENBAUM. Well, I issued a stern warning to Chinese manufacturers, in a speech to the Chinese, back at the beginning of this year. I was unable to attend the conference in China, because I had a hearing in Congress. But, we gave a stern warning. And our counterpart in China, the AQSIQ, issued the same stern warning to manufacturers and said, "Do not substitute any of these metals for lead." Now, we really don't think that that is occurring, that they're intentionally substituting. But, we think they're being careless in not realizing that you cannot use these metals in children's products.

Under the ASTM F963 standard, which is the toy standard, the surface coating on toys is regulated.

Senator DURBIN. But, I understood——

Ms. TENENBAUM. Also, children's jewelry is regulated under the Federal Hazardous Substance Act. We could call a toxic metal a banned hazardous substance. And right now, we are doing our research to establish the level of what we will allow for cadmium and other metals in children's jewelry.

Senator DURBIN. So, I understood that the children's pets—Zhu Zhu pets out of China, there was—they found some evidence of antimony in those. Are you saying that——

Ms. TENENBAUM. Well, the company——

Senator DURBIN [continuing]. They did or didn't?

Ms. TENENBAUM. The company who manufactures the Zhu Zhu pets came to the CPSC, just days after one nonprofit organization announced they had found the antimony, and showed us all of their laboratory tests. We did our own testing, and then we established that the antimony was not at harmful levels to children. And we put that press release out that there were no harmful levels of antimony in Zhu Zhu pets.

Senator DURBIN. Okay.

Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Obviously, our first priority is to make sure that all products, including toys for children, are safe. There has been an issue with small home-based businesses finding it very expensive to comply with the standards in the new law. They obviously do not want to be selling products that aren't safe, that are not—that would in any way endanger our children. But, the cost of third-party testing can be prohibitive.

And I want to give you an example. Last year, I met with a woman who owned a business called The Little Hat Company in South Berwick, Maine. And she produced children's hats. And she had this network of women who made the hats out of their homes. It worked so well for them, because they all had young children and they could stay home with the children, yet be able to make some money. Well, the combination of the cost of third-party testing for the Consumer Product Safety Improvement Act plus the economic downturn has forced this business to close up altogether. And that affected not only the business owner, but all of these part-time sewers whom she employed who were producing these cute little caps out of their homes.

As a result of this concern, last year we included language in the report accompanying the omnibus bill noting the concerns of these very small manufacturers—seems even odd to call them "manufacturers"; they're really craftspeople—regarding the third-party testing requirements. And we urged you to consider these types of home-based businesses when you issue your rules and your guidance on third-party testing, because we really need to find a way that allows them to ensure their products are safe, but doesn't put them out of business when, in fact, their products are safe.

What efforts have you made to address the concerns of these small businesses?

Ms. TENENBAUM. Thank you, Senator.

We have been extremely sensitive to the concerns of small businesses and crafters throughout the implementation of the CPSIA. In fact, we wrote a guidance on the CPSIA for small businesses, resaler crafters, and manufacturers of children's products. And over the last 9 months, the Commission has had four actions which provided relief to small businesses and crafters. And here are the four rules that we promulgated to do this:

First of all, tracking labels. The CPSIA required that children's products have a tracking label. We decided that there was no "one size fits all" and for small crafters, that was very important to them.

Two, lead determinations proceeding. This was a rule that we wrote, and we said products made out of cotton, paper, untreated wood, to name a few, do not—will never have—contain lead. Therefore, businesses like The Little Hat Company, if it was a cotton hat, would not have to have third-party testing. And we put that out to tell people that you do not even have to have a certificate, which would save them a tremendous amount of resources.

The third thing was component-part testing. If the hat was made of cotton, the hat would not have been testing, but if they had buttons sewn on it to make it decorative, if they bought buttons from a company that could certify they were lead-free, then The Little Hat Company would not have had to do additional testing. And so, if you could just test the component, then you would not have to test the whole product.

And the fourth is, we continue to stay enforcement on testing and certification for many children's products, giving people time to understand this law, and also to let the component-part testing market develop. Groups like the Handmade Toy Alliance have recognized our work, and they continue to work with us. We, for ex-

ample, just last month, we had two Webinars with the ETS4 community, which is the handmade toy and handmade crafters, on eBay, and the Handmade Toy Alliance, so that we could talk to them about what the CPSIA requires and make sure they understood how to comply with the law.

We will continue to keep small manufacturers in mind as we go into our rulemaking. And we also want to make our small business ombudsman, which is a part-time job, a full-time job, and expand this into education and outreach, so that we can have regularly broadcast Webinars for small businesses and answer their questions individually to allay their concerns with compliance.

Senator COLLINS. Thank you. Those sound like very worthwhile and protective moves on the Commission's part.

This women's business was cotton hats. And she did ornamate them, at times, with buttons, and was concerned about having to test the buttons. And I remember raising with her, "Well, wouldn't that be the button manufacturer's job?" So, I'm very happy that you've clarified that. And I will relay that information to her, in the hopes that, when the economy improves, she can get back in business and not have to worry about adding what really is a tremendous cost to a very small business.

I'd like to, in my remaining moment, just ask you a little more about the small business ombudsman, since I did note that you plan to establish a full-time position. How would you ensure that this position is truly going to be able to assist small businesses? How are you going to inform small businesses that it even exists?

Ms. TENENBAUM. Well, we've had a small business ombudsman for a number of years, and most recently the small business ombudsman was located in the Office of International Programs and Intergovernmental Affairs, and the duties were only part time.

We are working with Booz Allen Hamilton to write a new strategic and operational plan for the Commission. And we are already beginning to realize that one of our primary functions should be education and outreach. So, we could place this full-time small business ombudsman in a larger Office of Education Outreach, where we would work with colleges and universities. We could invite professors to participate. We could work with nonprofits. And also, we would have a regular curriculum, where we would regularly host workshops. Since I've been the Chairman, we've hosted two workshops. One was a workshop for the database and another one was for continued testing. And we reached out and reserved a block of seats just for the Handmade Toy Alliance and small businesses. And so, we will continue to be very sensitive to small businesses in that regard.

Senator COLLINS. Thank you.

Thank you, Mr. Chairman.

ADDRESSING HARMFUL CHEMICALS/ELEMENTS IN PRODUCTS

Senator DURBIN. I want to ask you about a couple of issues that raise a larger question: the relationship of the CPSC to some other agencies of the Federal Government, when it comes to particular hazards.

The first one is known as BPA—I'm going to mispronounce this—Bisphenol A, which is, as I understand it, a plastic coating that

may be in virtually every canned product we buy and shows up in other things—baby bottles and sippy cups, sometimes; maybe pacifiers. And it's been linked to heart disease and cancer in humans and abnormal development in animals.

The EPA, Environmental Protection Agency, listed BPA as a chemical of concern. Although some products are labeled BPA free, they're still found to contain this chemical. So, to what degree does the Consumer Product Safety Commission feel a responsibility, under the law, to verify labeled contents or claims, such as "BPA free" in consumer products?

Ms. TENENBAUM. We feel very responsible. In fact, we work regularly on interagency committees with the EPA, with the National Institute of Standards and Technology (NIST), with the National Science Foundation (NSF), and the National Institutes of Health (NIH). And the research that all of these agencies do, we read and take very seriously. So, we are tracking the research on BPA and other chemicals. We track all the nanotechnology research. And then, our scientists will make determinations and recommendations, and we will eventually go into rulemaking if we think that it's necessary.

We also can take the information and begin voluntary recalls or mandatory recalls.

Senator DURBIN. Have you done that in relation to BPA yet?

Ms. TENENBAUM. Let me get back with you. I know we have done extensive work on BPA. And before I misspeak today, let me get you a full report on what we've done on that.

[The information follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION ACTIVITY ON BISPHENOL-A (BPA)

Overview

Bisphenol-A (BPA) is used in the manufacture of polycarbonate plastics and epoxy resins. Small amounts of BPA can migrate out of products made out of polycarbonate (such as reusable bottles and food containers) during their normal use. BPA is considered an endocrine disruptor. BPA has also been shown to canse reproductive and developmental effects in animals at high doses. However, there is a lack of scientific consensus over whether BPA causes these types of effects at low doses.

Regulatory Jurisdiction

Jurisdiction over BPA is split between two agencies: The Food and Drng Administration (FDA) and the CPSC.

—BPA used in food containers or snrfaces that come in contact with food is considered an unintentional food additive and is subject to the jnrisdiction of the FDA.

—Polycarbonate is also used in bicycle helmets and safety glasses, which is under CPSC jurisdiction. These products are made of polycarbonate because that material is very hard. The hardness of the polycarbonate in these products is beneficial in terms of the safety provided to the user, and CPSC Health Sciences staff does not believe the exposures from these prodncts would be significant compared to products under FDA jnrisdiction that come into contact with food or liquids.

—If BPA is used in children's products that are intended for children to mouth or which children could mouth, that would also fall under CPSC jurisdiction. In such products, staff would have to look at the hazard, the exposure and the subsequent risk posed by any BPA present.

—Several Federal agencies (the National Institute for Environmental Health Sciences (NIEHS), FDA, the National Toxicology Program, and the U.S. Environmental Protection Agency (EPA)) are currently conducting research on the safety of BPA, especially at low levels of exposure. CPSC staff is monitoring

these studies and are participating, as appropriate, to provide technical input and peer review.

Current Efforts Involving CPSC and Our Federal Partners to Further Study BPA

CPSC's Heath Sciences staff recently participated in an Office of Management and Budget (OMB) coordinated Federal agency review of the EPA draft Notice of Proposed Rulemaking (NPRM) to establish the Concern List under section 5(b)(4) of the Toxic Substances Control Act (TSCA). This list included BPA.

Health Sciences staff are also currently participating in the activities of the revitalized President's Task Force on Environmental Health and Safety Risks to Children. One of the reasons for revitalization of this task force is to create a high-level group that can ensure coordination across agencies that are dealing with common chemical concerns. CPSC was specifically recognized as a key partner on this group.

Staff from EPA's Design for the Environment (DfE) project recently invited CPSC staff to participate in a group being organized to look at BPA alternatives in thermal paper. CPSC staff has participated in meetings with that working group.

Senator DURBIN. So, now let me raise another question, another issue, involving other Federal agencies, from a slightly different perspective. The first example was a claim that a product was BPA free. And, as I said, it could have contained a chemical of concern, and the manufacturer said, "No, it doesn't." And you're saying that you accept the responsibility to test to make sure that it doesn't.

Ms. TENENBAUM. We would.

If it's within our jurisdiction as a consumer product, we would follow the research and we would ask for copies of the reports. Our scientists also sit on numerous committees with the other Federal agencies.

Senator DURBIN. So, let me give you another example that comes at it from a different angle. Recent research has questioned whether Triclosan—I hope I'm pronouncing it correctly—an antibacterial chemical widely used in home products, such as liquid soaps, hand sanitizers—I probably put it on my hands 10 times a day—dishwashing liquid, shaving gels, toothpaste, some clothing and toys—may disrupt the body's endocrine system—so, that explains my problems—and whether it helps to create bacteria that are resistant to antibiotics. Now, the Centers for Disease Control has found that the chemical is so pervasive that it has been found in 75 percent of Americans.

This chemical is regulated by three agencies: Food and Drug Administration (FDA), Environmental Protection Agency, and the Consumer Product Safety Commission. The FDA now says that recent research raises valid concerns about the possible health effects of this chemical, and EPA is also reexamining it.

So, what—in light of that situation, where no claim is being made that it's free of Triclosan, but there have been questions raised by other Federal agencies about its safety and impact on humans—what is the CPSC's responsibility, and what have you done, related to this?

Ms. TENENBAUM. We saw the same article and were discussing it on the way over here. And again, we will receive the research, work with our colleagues in the other agencies, and if their concerns are such that we think consumers are endangered, then we will take action either to issue a safety warning, do a voluntary recall, or write regulations.

Senator DURBIN. So, here's what I'm getting at, Madam Chairman. Assume, hypothetically—I won't mention this particular chemical—but, assume the set of circumstances I just described for

chemical *x*. But, assume that the industry says, "Well, you're just wrong. It doesn't create these problems. And we have our scientists, who come to a different conclusion." What is the threshold at which the CPSC says, "Here is what we're looking for. We are looking for an assertion—a credible assertion by a certain Federal agency that puts us on notice that we have to be sensitive to and look for this certain chemical. It can be litigated in court, it can be disputed in laboratories, but we are looking for this threshold." What is that threshold on a chemical, such as Triclosan, as to when the CPSC says, "We are sufficiently warned that it could be dangerous that we are going to step forward and try to protect Americans from exposure"?

Ms. TENENBAUM. The threshold would be whether or not it causes harm or the threat of harm to a consumer.

Senator DURBIN. Who makes that decision on——

Ms. TENENBAUM. We would on our products. For example, in this year's—in the 2011 budget, we're requesting $2 million so that we can work with the National Nanotechnology Initiative to get the agencies who are doing the research on nanotechnology to test our consumer products so that we will know, firsthand, what we have to do with those products, regarding nanotechnology.

Senator DURBIN. So, you aren't looking to the FDA or the EPA or the Centers for Disease Control. You're basically establishing testing standards to establish whether there's a danger to humans, and then regulating, based on your conclusions.

Ms. TENENBAUM. We have our own scientists who draw the threshold. In fact, they are working right now to come up with a threshold, in children's jewelry, for cadmium and any other metals. So, we will look at what the research other agencies have done. We would not duplicate it. But, if we feel like—that the work is good science, good solid data, then we can act on it.

Senator DURBIN. Do you take into consideration if States have decided to regulate? For example, BPA, if I'm not mistaken, has been regulated—I think it's in California, maybe even in Connecticut. Do you take that into consideration?

Ms. TENENBAUM. We do. And, in fact, when I became Chairman, I asked the Office of General Counsel to have quarterly meetings with all the States' attorneys general. We wanted to not have an adversarial position with them. We felt like they were our partners, because we're a small agency. We need our attorneys general in all 50 States—and I came out of State government—to work with us. And in the last meeting we had, nearly every one of them attended either in person or by conference call they or their representative. So, we feel like California, for example, is very aggressive when it comes to consumer products, and they give us information on what they find.

Senator DURBIN. Thank you.

Senator Collins.

Ms. TENENBAUM. Illinois' attorney general is also very proactive.

Senator COLLINS. Madam Chairman, I want to go back to an issue I raised in my opening statement, and that is, I authored provisions of your new law that were intended to bring about better coordination and information sharing between the Commission and Customs and Border Protection. I was alarmed to learn that CBP

had so little authority, prior to this law, to actually seize and destroy dangerous consumer products. So, what was happening is, a lot of times, the products were turned back at one port and then would be shipped through another port.

So, we were trying to close that port-shopping hole, if you will. The bill authorized CBP to seize and destroy these products that are entering our ports, rather than just refusing them. But, the success of that depends on close coordination with the Commission, and the Commission was charged with developing a comprehensive risk assessment so that there would be better targeting of the incoming shipments for inspection. So, the idea was that the Consumer Product Safety Commission was supposed to target the shipment, and then CPB would go inspect that, and could actually destroy the products, rather than just refusing them.

That is why I was disappointed when the Government Accountability Office (GAO) reported, last August, that not as much progress been made in this area as I would have held—hoped. The Commission, for example, it says, does not have access to key CBP import data that it could use to target the incoming shipments. It said that it—the agreements hadn't been updated between the two agencies, that there still was not the kind of information sharing that's absolutely essential for this to be successful.

Why hasn't there been more progress made in this very important area? Because this is really critical to keeping dangerous products from ever coming into our country in the first place.

Ms. TENENBAUM. You are so right. And actually, the GAO report helped propel us to having even closer coordination and cooperation with the CBP.

On March 25 of this year, we submitted our concept of operation to define our plans for using the International Trade Data System to the CBP. And that will help us look at the types of products and the names of importers, to help us quickly and more proactively identify potential risk and provide more timely responses.

And we're also asking for resources, in the 2011 budget, so that we can have the capacity for our IT system and CPB's to talk to each other; we need to be able to data-mine between the two agencies.

We are working with the CBP and have piloted enforcement programs that are developing new and streamlined import procedures with them. So, we already have pilot projects going. We have placed a full-time employee at the Commercial Targeting and Analysis Center (CTAC), right here in Washington, which is CTAC, which allows us to look at pre-arrival manifest systems, so that our people know what is coming in on the shipments. We can target whether or not our products—consumer products—are on that shipment.

We also have developed a repeat-offender listing and work with the CBP to identify and stop potentially hazardous shipments. Also, we work with them to have specific targeting operations which have proven that, when we can target shipments, we're finding a very high percentage of products that are violative of the standards.

We have the Operation Guardian Program, which we use the CBP's resources, and they will go ahead and identify violative holi-

day lights, Christmas lights, children's upper- and outerwear with drawstrings, and seize those products.

Right now, we're waiting to have the memorandum of understanding (MOU) between the two agencies signed. Once that MOU is signed, then we hope that we will have access to their automated targeting system. And once we have access to their system, we will have greater knowledge and potential information on how to improve further targeting methodologies. In fact, we will have a risk assessment methodology, and we're asking for funding in the 2011 budget to help us with this project, because then we'll be able to have information to develop a full-risk assessment methodology so that CBP and the CPSC can share data and collectively target incoming ships.

Senator COLLINS. Well, I'm pleased to hear of that progress, a lot of which is quite recent. I think it might be helpful, after 6 months or so, if the Chairman and I ask the GAO for a new assessment on how that relationship is working.

I just have one final issue that I wanted to raise with you, and that's the Chinese-made drywall problem. Now, I feel fortunate, because my State, fortunately, did not, apparently, get a lot of the Chinese-made drywall that has produced such problems in 37 other States. What concerns me is, there were some 3,000 reports from residents of 37 States related to problems with this drywall, including health concerns, noxious fumes, metal pipe corrosion—significant problems. What can CPSC do to better anticipate and prevent problems like this? It seems like you shouldn't have to get to a point where you have 3,000 complaints before a problem is identified.

Ms. TENENBAUM. Well, let me start by saying that I understand the anxiety and stress that the families that have had the impacted drywall have gone through. I've visited homes in Florida and Virginia, and I saw, firsthand, the impact that they had on people's lives. Young families, where all their equity was tied up in this one home, had to move out and move in with relatives. Some of them had to file for bankruptcy. And it was a crisis that I walked into when I became the Chairman last year.

There have been more resources spent on this—over $3.5 million—than any other investigation we've ever undertaken at the CPSC. It's taken longer than we had liked for it to, but, we were also pioneering protocols and testing to validate a new science.

We partnered, last year, with other Federal agencies to do a 51-home study. We were able to find out that certain gases were being off-gassed in the homes. With that information, we then went to Lawrence Berkeley Laboratories. We recently released the findings of those chamber tests, in which we found that the Chinese drywall was off-gassing hydrogen sulfide at 100 times greater limits than domestic drywall.

Now, not all Chinese drywall was off-gassing the hydrogen sulfide. In fact, there were over 6 million pieces of Chinese drywall imported into the country after Hurricane Katrina, and not all of it had the problem. What we are able to do working with the Department of Housing and Urban Development (HUD), is to develop an identification protocol to determine if you have the off-gassing in your home. We've just come out with our own protocol for reme-

diation, which basically is, remove all the Chinese drywall, rewire the house, and remove the pipes. This is the only way to make the homeowner able to move back into the home.

Now, we provided all of our research to the multidistrict litigation, which was a Federal lawsuit in Louisiana, and the judge in that case, last week, even went further. There was a company—a Chinese company, called Taishan, which did not respond to the complainant. It was a damages hearing tried in their absence, in which the judge awarded $2.6 million to seven Virginia homeowners. In that case, he said, "Take out all the drywall, Chinese and non-Chinese. Take out all the wiring. Take out all the cabinets and appliances, carpet. And essentially take the home down to the studs, and rewire. So, it was more extensive than what we said was the remedy.

And now we are wrapping up studies. We have one study ongoing on long-term corrosion. How much would this corrosion result in any kind of fire hazard, for example? And that's what the long-term corrosion is. But, this was an anomaly, the off-gassing of hydrogen sulfide, because it wasn't found in all the Chinese drywall, just some out of parts of China.

So, the next step is, how can homeowners find resources to remediate? There are really four ways.

In some cases, the builder has gone back in—I've seen this in Florida and in Virginia—and torn out the drywall, torn out the wiring, rewired the house, put in new drywall, and moved the homeowners back in. And that has happened in both States.

In other cases, there have been civil suits. We have the multidistrict suit, down in Louisiana. There have been other civil suits where builders, retailers, manufacturers on up the chain of commerce are being sued.

A third way is to try to find some kind of public funding. I know that the Director of HUD has sent a letter saying States can use the community block grant funding. If that funding is available, that funding can be used.

And then, the fourth way is to try to get some participation from Chinese manufacturers. We have told the AQSIQ and the Chinese, from the Chinese Ambassador to all the people with whom we deal, that we are going to work with the Chinese companies to try to find a just and fair solution. We want them to participate in some way, financially. And so, we will begin those talks relatively soon.

Senator COLLINS. Thank you.

Senator DURBIN. I had the same issue on my list to bring up, and I'm glad Senator Collins did. And I think her question, though, is one that I still want to try to probe a little more.

After 3,000 complaints, we knew we had a problem. The question is, when it comes to children's products and toys, we're basically trying to reach a point where we have a certification of testing before they arrive in the United States. So, let me ask about a product like drywall, here. Is it your impression that there is any requirement for testing in China of such things before they are exported to the United States?

Ms. TENENBAUM. The regulations relating to drywall in the United States have to do with the strength, in terms of how much weight it can bear. We did not have regulations which said, "You

cannot off-gas hydrogen sulfide." It was a novelty. And so, therefore, we had to build the protocols. We had to start from the ground up and work through getting the test designed to even figure out what was coming off the drywall.

Senator DURBIN. So, look at it prospectively. If there was another shipment of drywall being manufactured in China for export to the United States, would it be subject to testing for this hydrogen sulfide?

Ms. TENENBAUM. Not right now. And it was only after Katrina, when we needed more drywall than we could manufacture domestically, that we started importing the drywall. We were handling our own needs just in the United States, and we did not have the problem.

Senator DURBIN. Well, I would say——

Ms. TENENBAUM. But, the other thing is, we have started requiring labeling. We want tracking labels so that we know the company and the area of China in which the drywall was manufactured. And we also have worked with the CBP, where they have stopped shipments into the country. In fact, they found a shipment coming in from San Francisco, and they notified us. And then we went out to check on it, and it was not gypsum.

Senator DURBIN. Well, I can tell you that—whether it's this situation with drywall or the melamine spiking into the pet food, which showed up as a higher level of protein, and therefore, was worth more—nominally worth more, until they discovered it was dangerous. It really might be beyond us to imagine how many possible things could happen from products coming in from a place where there are very few standards being applied at the source of manufacture.

I'd like to close by asking about one of your beloved retirees, whom we talked about over and over again in this subcommittee. And I don't even remember his last name, but his name was Bob. And Bob was the toy-tester. And some of our staff went out with their cameras and took pictures of Bob's workshop, which consisted of a table with toys stacked up on them. And Bob had made some marks on the wall at certain levels—4 foot and 6 foot—and then would drop the toys from those levels and see if they busted into little pieces that kids could swallow. And it didn't strike most of us as the kind of sophisticated testing most Americans would expect from an agency with your reputation. Now, Bob has retired, God bless him. And I know he did a good job for us while he was there, with the resources available. But, please tell me what the world of toy testing looks like at CPSC after Bob.

Ms. TENENBAUM. Well, thank you. Bob the toy-tester has retired. And we do not have just one person testing toys. Our staff estimates, depending on the workload, that toy-testing involves up to 20 staff from the Office of Hazard Identification and Reduction at any given time, including the laboratory, the engineering, human factors, and health scientists.

In addition, our field and import surveillance staff tests or screen toys at the port and the field. For example, investigators at the port have XRF machines, and they can screen for lead and other metals. If the toy fails XRF screening, it's sent to the laboratory for further analysis by our toxicologists and our chemicals. And if the

toy fails on the small-parts screening, then it's sent to human factors to conduct an age determination to identify the age of the child for whom the toy will be purchased and is most appropriate. And based on this age determination, the laboratory and health scientists test the toy for small parts and sharp edges.

For toy hazards that fall outside of a specific toy regulation, many other CPSC technical personnel conduct product safety assessments on the specific toy in support of compliance activities.

And if you give me a moment, I'd like to tell you about our new lab. We brought pictures of the new lab. After 35 years at our current antiquated lab space, the CPSC will open a new modern testing facility in Rockville, Maryland. We're leaving Gaithersburg. And we will open it in December 2010. And this facility has 63,000 square feet, and we will be able to hold 100 staff and guest researchers in our laboratory. And for the first time, we'll have all of our technical personnel involved in testing housed under one roof.

This building was built by a private company as a laboratory. And it's very impressive. And we invite you, when we open the lab later on this year—you might want to wait til January 2011—to go with us out to see our new lab.

Senator DURBIN. Only if you invite Bob.

Ms. TENENBAUM. All right. We'll bring Bob back.

But, we want to show you—this is our new lab, and this is the old lab. The old lab has 37,000 square feet, as compared to the 63,000 square feet. And these were nine buildings that were 1950s-era buildings, all over that campus. And it only was able to hold 42 people. And we would have to do one test and then take the equipment down to reassemble it to do another test. This new lab allows us to test multiple products at one time. It enhances our ability to look at the children's electrical, combustion, sports, recreational equipment. We will have a dedicated space for children's testing. So, we'd love to show it to you, when we're ready.

ADDITIONAL COMMITTEE QUESTIONS

Senator DURBIN. Chairman Tenenbaum, we're going to send you some more questions in writing——

Ms. TENENBAUM. Thank you.

Senator DURBIN [continuing]. And open it up to other members of the subcommittee who might like to do the same.

Keep the record open until Wednesday, April 21, at 12 noon for subcommittee members to submit statements or questions.

And I thank you very much for your testimony.

I thank Senator Collins for joining me today.

[The following questions were not asked at the hearing, but were submitted to the Commission for response subsequent to the hearing:]

QUESTIONS SUBMITTED BY SENATOR RICHARD J. DURBIN

CHINESE PRODUCTS

Question. How are things progressing with the safety of Chinese products?

Answer. Recalls of product manufactured in China have begun to decline. After increasing steadily for many years, from a low of 121 in fiscal year 2003 to a high of 346 in fiscal year 2008, the number of recalls of consumer products manufactured

in China dropped to 230 in fiscal year 2009. Through June of fiscal year 2010, we have recorded 80 recalls of these consumer products, indicating a rate that should put the China recalls well below 200 for fiscal year 2010.

In general, we find the Chinese government cooperative in pressing its industry to correct specific issues. However, while the government has publicly stated its policy that industry should comply with best manufacturing practices for making safe consumer products, it needs to put more resources behind that policy.

Question. Have the Chinese disseminated information on standards and manufacturing processes throughout China and are their toys being tested and certified? How does the process work?

Answer. The Chinese government has stated that its own laboratories that inspect toys for export under Chinese rules must adhere to the safety requirements of the export market. We have conducted training for these laboratories on numerous occasions. CPSC also has made a significant amount of information about toy safety requirements available in Chinese on our web site and Chinese toy industry publications have picked up our material and reprinted it for their readers on several occasions.

All toys imported from China (and elsewhere) are subject to the CPSIA mandate that they be certified compliant with U.S. regulations and tested for compliance by an independent third party conformity assessment body (lab) accepted by CPSC. Importers typically select a lab from CPSC's list and instruct their Chinese suppliers to have the product tested by the lab. Alternatively, they permit the Chinese suppliers to select the lab from our approved list.

Question. In October 2009, the Chinese CPSC (AQSIQ) agreed to take immediate action to eliminate the use of lead paint in toys. Have the Chinese banned products with lead paint? What about products with lead?

Answer. There is an AQSIQ directive in place prohibiting the practice. AQSIQ has been aggressive in taking corrective action with manufacturers who attempt to use lead paint on toys exported to the United States. Overall, we have seen a substantial decrease in cases of toys with lead paint level exceeding current limits.

Question. When is your next meeting with Chinese officials and what do you hope to accomplish?

Answer. I will participate in a trilateral U.S.-EU-China Product Safety Summit in October 2010. AQSIQ will participate at the ministerial level and the European Commission will send their Commissioner responsible for product safety. Both the CPSC and our European partners view the event as an importaut opportunity to impress upon AQSIQ the need to get Chinese manufacturers to rely on best manufacturing practices for producing safe consumer products.

Question. Have any other countries followed suit to make their products safer?

Answer. The European Commission is a close partner with CPSC in our work with China. We have conducted joint training for manufacturers and continue to coordinate our messaging on product safety to the Chinese government.

BEIJING OFFICE AND ACTIVITIES

Question. I understand that at the end of last year, you established CPSC's first overseas office at the U.S. Embassy in Beijing and hired a Product Safety Specialist to work there. What are the responsibilities of this individual?

Answer. The Product Safety Specialist—

—acts as a pro-active resource distribution point for Chinese suppliers and government officials who need U.S. consumer product safety compliance information;

—serves as a liaison with AQSIQ to ensure timely exchange of critical regulator-to-regulator information;

—reports regularly to CPSC, in writing, on China's regulatory implementation of product safety measures and the effectiveness of Chinese product safety reform efforts;

—works closely with the CPSC Office of International Programs and Intergovernmental Affairs' China Program Coordinators to facilitate implementation of the U.S.-China Product Safety Work Plan (i.e., personnel and information exchanges);

—proposes and coordinates monitoring and evaluation activities to determine the impact of CPSC product safety initiatives for Chinese suppliers;

—analyses data from Chinese government and industry sources regarding safety and qnality of consnmer products;

—provides information to CPSC and the Beijing Embassy Economic Section on changes in Chinese practice, regulations, laws, or structures associated with product safety;

—translates relevant product safety documents and verifies document translations;
—coordinates visits to China of CPSC officials and assists with visits to CPSC by Chinese officials;
—with approval from CPSC headquarters and using fully cleared materials, provides selected Chinese audieuces with briefiugs ou U.S. requirements for cousumer products;
—upon specific request by CPSC headquarters, visits production facilities and test labs, by arrangement with, and at the invitation of Chinese government officials and facility managers, in order to observe specified operations and verify specific activities.

Question. What are your plans to hire a Regional Product Safety Officer? What will be the responsibilities of that individual and what countries will be overseen?

Answer. The recruiting announcement for the Regional Product Safety Officer was listed on USAJOBS.gov on August 6, 2010. The deadline for applications is September 6, 2010.

The Regional Product Safety Officer will have the following responsibilities in the Asia-Pacific region:

—act as a pro-active resource distribution point for Asia-Pacific regional regulators, suppliers, and other stakeholders, who should understand U.S. consumer product safety compliance information;
—serve as a liaison with regional regulators to ensure timely exchange of critical regulator-to-regulator information;
—report regularly to CPSC on important regulatory implementation of product safety measures in the region and the effectiveness of national product safety programs;
—speak at appropriate events in the region to brief key target audiences on U.S. requirements for consumer products.
—with CPSC headquarters approval, visit regional production facilities and test labs, by arrangement with, and at the invitation of local government officials and facility managers, in order to observe specified operations and verify specific activities; and
—supervise the local hire Product Safety Specialist working in Beijing.

STAFFING

Question. Your 2010 operating plan states that staffing will remain at 530 FTEs in 2010, however, our enacted fiscal year 2010 conference report language states that the increased funding we provided shall support new staff hires, including at key ports of entry. May I have your assurances that you intend to hire additional staff in 2010? What will your FTE goal be? How many part-time and full-time employees are currently employed at the Commission?

Answer. The Commission continues to aggressively hire key staff during the remainder of fiscal year 2010. As of July 28, we have made 96 new hires since the start of the fiscal year 2010, which represents a 21 percent increase in overall agency staffing. During the current fiscal year, we have hired four additional employees at ports of entry for our Import Surveillance Division, and currently have five additional hires pending in this Division.

To date in fiscal year 2010, the CPSC has had 38 resignations and retirements. As a result, we project that we will average about 490 "annualized" FTEs for the fiscal year. This is a 13 percent increase over the annualized FTE usage for fiscal year 2009. The current FTE ceiling target we have given managers for fiscal year 2011 is 576 FTEs. This is the FTE number funded in the fiscal year 2011 CPSC budget request.

As of August 7, 2010, CPSC employment stood at 520.4 FTEs. This number includes approximately 25 temporary student hires that count against our FTE limit. As of August 7, 2010, we also have 15 pending hires and over 69 active vacancy announcements.

Question. I am aware that a number of long-time, well-qnalified and knowledgeable staff have left the Commission. What are you doing to fill the gaps left by these important staff members? Are yon having difficulty recrniting the highly technical staff that yon need?

Answer. Our attrition rate has remained steady and is 5.9 percent thus far in fiscal year 2010. We continne to hire in all of onr technical areas to handle the workload, provide for expertise in each technical area and ensure the transfer of knowledge as staff leave.

We have had difficulty filling positions for a few technical areas such as Mathematical Statisticians, Engineering Psychologists, Fire Protection Engineers, Toxi-

cologists, and Chemists. To maximize hiring potential in these areas, we have utilized the full range of recruitment flexibilities and incentives available for these positions, including recruitment and relocation bonuses, annual leave service credit, superior qualifications appointments, and telework opportunities. We have also opened many of these positions at both the entry grade level and at the senior journeyman level to ensure opportunities for applicants with varying degrees of education and experieuce.

The CPSC has also sought to expand the pool of qualified applicants by attending targeted job fairs, posting ads in professional journals and engaging in outreach to colleges and universities with a concentration in the technical areas we are recruiting.

WORKLOAD

Question. The reauthorization placed many new requirements on CPSC along with deadlines for achieving those milestones. How is CPSC managing the balance of meeting its long-standing responsibilities with the new mandates placed on the agency by the Consumer Product Safety Improvement Act?

Answer. In the Consumer Product Safety Improvement Act (CPSIA), Congress set an aggressive regulatory agenda for the CPSC over the course of the first 2 to 3 years after enactment. While the CPSIA mandates 42 separate action items for the Commission to undertake, that number nnderstates the agency workload that results from each of those mandates. For example, that count does not include any interpretative rules, such as the definition requirements for "child care article" and "toy" under section 108.

To put this in context, mandatory rulemaking activity averaged less than seven per year from fiscal year 2000 through fiscal year 2008, with the number of rulemaking projects per year ranging from a low of one in fiscal year 2005 to a high of 10 in both fiscal year 2007 and fiscal year 2008. With the passage of the CPSIA, rulemaking activity has increased significantly, averaging about 26 substantial rulemaking activities each year for fiscal year 2009, fiscal year 2010 and proposed fiscal year 2011. The Commission also conducted an additional 15 activities supporting rulemaking proceedings in fiscal year 2009 and 15 to date in fiscal year 2010.

The work required by the CPSIA is in addition to the Commission's ongoing regulatory activity in a variety of areas, including upholstered furnitnre, portable generators and cigarette lighters, as well as our ongoing compliance work in evaluating and recalling products that present hazards to consumers.

Timely implementation of the CPSIA is the agency's top priority, but we have also tried to prioritize our work in a way that maximizes effectiveness and provides flexibility if new hazards emerge. One example of this flexibility is the Commission's ongoing investigation of contaminated drywall, which is now the largest investigation in the history of the CPSC.

Question. How is the Commission prioritizing work associated with new responsibilities as a result of the reauthorization act? What criteria are being used to prioritize this work?

Answer. The CPSIA established a schedule of mandatory rulemaking activities, and these requirements have heen placed on the Commission's rulemaking agenda.

In addition, the CPSC has a regulation entitled "Policy on Establishing Priorities for Commission Activities," (16 CFR § 1009.8) that guides its efforts to prioritize the work of the agency. A description of the process for prioritizing Commission action can be found in our semi-annual regulatory agenda/plan submission that snmmarizes the regulation cited above and lists following general criteria: frequency and severity of injuries; causality of injuries; chronic illness and future illness; cost benefit of CPSC action; unforeseen nature of the risk; vulnerability of the population; probability of exposure to the hazard; and any additional criteria.

Completion of congressionally mandated tasks is a key agency priority and resources have been allocated accordingly. Other work, such as the investigation of contaminated drywall and other potential emerging hazards are also allocated priority resources as necessary.

Question. In what areas do you feel that CPSC has been slow to act due to the complexity of issues and why?

Answer. The development of a draft proposed rule addressing the third-party testing requirements under CPSA section 14(d)(2) has been extremely complex and involved thousands of hours of staff resources. This proposed rule has the potential to offer families a vital new layer of safety and reassure U.S. consumers that toys and other children's products are free of many known hazards. On the other hand, the rule also impacts tens of thousands of mannfacturers and importers across all

of the various industry sectors producing children's products, including small business entities.

Given the complexity of the global snpply chain and the number of various industries affected by these requirements, CPSC staff has sought extensive pnblic comment from all interested stakeholders to further inform development of the proposed rule. On December 10 and 11, 2009, the Commission held a Testing Policy Workshop and invited public comment on aspects of section 14 of the CPSA, as amended by the CPSIA. Staff presentations were given, and breakout sessions were held on the following topics: Sampling and Statistical Considerations; Verification of Third-Party Test Results; Reasonahle Test Programs and Third-Party Testing; Challenges for Small Manufacturer/Low Volume Production; Component Testing and Material Changes; and Protection Against Undue Influence.

A draft Federal Register notice for the proposed rule was published April 1, 2010, and the comment period expired August 3, 2010. Work is progressing, with the final rule scheduled for completion this year.

PORT SURVEILLANCE

Question. How many full-time CPSC staff work at how many U.S. ports?

Answer. The Import Surveillance Division currently staffs 11 U.S. ports with 14 on-site compliance investigators. The 11 U.S. ports with current on-site CPSC staffing include: Buffalo, New York; Denver, Colorado; Houston, Texas; John F. Kennedy International Airport, New York City, New York; Los Angeles/Long Beach, California; Miami, Florida; Newark, New Jersey; Norfolk, Virginia; San Francisco, California; Savannah, Georgia; and Seattle, Washington. We are cnrrently recruiting for four additional locations (Chicago, Illinois; Laredo, Texas; Detroit, Michigan; and Port Everglades, Florida) and expect to have staff in place in those locations by October 30, 2010.

CPSC has also co-located staff in the Commercial Targeting and Analysis Center (CTAC) located within the Office of International Trade at U.S. Customs and Border Protection in Washington, DC.

Question. How will your fiscal year 2011 bndget request augment this?

Answer. The fiscal year 2011 budget request proposes to increase the number of personnel in the Import Snrveillance Division to 23 FTEs. Of those 23 FTEs, 19 would be stationed in ports of entry.

Question. In what ways are you working with Customs and Border Patrol?

Answer. CPSC has partnered with U.S. Customs and Border Protection (CBP) on a series of efforts focused on increasing surveillance of imported consumer products.

In March 2010, CPSC submitted to CBP our revised Concept of Operations that defines CPSC's plans for nsing the International Trade Data System. This plan includes defined processes to create screening and targeting criteria and the overall automation of import enforcement mechanisms. By doing so, we have identified touch points between the agencies where cooperation and coordination can be developed.

On April 26, 2010, CPSC was the first agency to sign an interagency Memorandnm of Understanding (MOU) with CBP allowing CPSC personnel to co-locate at the Commercial Targeting and Analysis Center (CTAC). This MOU will greatly improve upon our interagency communication and information sharing.

This month, CPSC also formally executed an MOU with CBP that will give CPSC access to information in the Treasury Enforcement Communication System (TECS). This will assist CPSC investigators in the ports by providing them access to information that will improve local targeting and prodnct interdiction activities.

CPSC is also actively involved in supporting the Importer Self Assessment-Product Safety (ISA–PS) program that is currently being piloted by CBP. The ISA–PS is envisioned to be a partnership among CBP, CPSC and importers to maintain a high level of product safety compliance to prevent unsafe imports. The ISA–PS is a voluntary approach to product safety compliance and will allow the agency to direct our resources to those companies with higher risk.

Question. For the future, do you envision locating a testing laboratory on the west coast so that many of the nation's imports can be tested at, or near their point of entry?

Answer. It does not appear that funding will be available in the near future for an additional CPSC testing laboratory on the west coast. However, CPSC and CBP have been in discussions for several months on utilizing CBP laboratories to test samples collected by CPSC at import. Training of select CBP laboratory personnel has been completed and beginning September 20, 2010, targeting will begin for an operation at several ports of entry focusing on potentially violative imitation jewelry.

Products collected as part of this operation will be sent to both CPSC's lab and a CBP lab for analysis. This pilot analysis program will enable ns to determine if the results obtained at a CBP lab are comparable to those obtained at the CPSC lab. If the pilot confirms that the resnlts are comparable, the anticipated next step is to begin having CBP labs test CPSC samples independently, with Compliance relying on those resnlts to make admissibility determinations. When implemented, the nse of CBP labs will increase the number of import samples that can be collected and tested.

GAO REPORT ON CPSC'S OVERSIGHT OF IMPORTED PRODUCTS

Question. A GAO report from August 2009 found that CPSC didn't have access to key Cnstoms and Border Patrol import data that conld be used to target incoming shipments for inspection. Further, the report fonnd that CPSC's activities at U.S. ports could be strengthened by better targeting incoming shipments for inspection and hy improving CPSC's coordination with CBP. What is being done to address these issnes? Are you revising your agreements with Customs and Border Patrol? Please address the additional key issues raised in the Angust 2009 GAO report (GAO–09–803) on CPSC's Oversight of Imported Products, and discuss steps taken to address these concerns.

Answer. As noted in a previous response, CPSC is now an active participant in the Commercial Targeting and Analysis Center (CTAC) that has been developed by U.S. Customs and Border Protection (CBP) to spearhead the coordination of the efforts of the various Government agencies responsible for import safety enforcement.

On April 26, 2010, CPSC and CBP signed a Memorandnm of Understanding (MOU) for the exchange of information within the CTAC. This document gives both agencies authority to share information, combining for the first time CBP entry and advance cargo data with CPSC violator information. This partnership has enhanced information exchange, improved targeting decisions, and assisted in development of risk analysis capability.

In addition, CPSC and CBP just execnted an MOU that gives CPSC access to information in the Treasury Enforcement Communication System (TECS). This will assist CPSC investigators at the ports by providing them access to information that will improve local targeting and product interdiction activities.

NANOTECHNOLOGY

Question. Yonr fiscal year 2011 reqnest includes $2 million to support the Federal National Nanotechnology Initiative data collection activities and environmental, health and safety research, related to consumer products. Why are nanomaterials of concern? What kinds of activities will CPSC nndertake as part of the National Nanotechnology Initiative?

Answer. The National Nanotechnology Initiative (NNI) has developed a definition of nanomaterials that specifies that these materials have a specific size range in the nanoscale, 1–100 nm (a nanometer (nm) is one-billionth of a meter), and nniqne physical and chemical properties that differ from other materials not in that specific size range. Becanse of the small size and uniqne properties of nanomaterials, there is a concern that they may cause health effects in humans or organisms in the environment. In particular, there is concern about nanomaterials incorporated into consumer prodncts, and the potential risk of nanomaterials entering the bodies of adults and young children who use products that contain these materials.

As part of the NNI activities, several Federal agencies, including the CPSC, have worked together to identify and prioritize the qnestions that should be addressed and the types of research to be conducted to ensure the responsible development of nanotechnology and the safe use of nanomaterials. These research priorities are listed in the Federal environmental, health, and safety research plan that is cnrrently undergoing revision by several Federal agencies. (A copy of the plan is available online at http://www.nano.gov/NNI_EHS_Research_Strategy.pdf).

There are also international efforts, including the OECD Working Party on Manufactured Nanomaterials (WPMN), to prioritize the testing needed for nanomaterials, sponsor health effects studies, and share information on test results. The CPSC staff participates in the international efforts along with several Federal agencies.

CPSC staff is aware of its role in the national and international efforts to address nanomaterial health and safety concerns, and has proposed a number of projects for fiscal year 2011 that address the identified needs outlined in the Federal strategy. In fiscal year 2011, CPSC plans to establish agreements with a number of agencies including the Environmental Protection Agency (EPA), National Institute for Occupational Safety and Health (NIOSH), the National Institute for Standards and Technology (NIST), and the National Science Foundation (NSF) to develop testing meth-

ods and conduct studies to quantify the releases of a variety of nanomaterials from several classes of consumer products. The information derived from these studies will be used in evaluations to determine if there are any potential risks associated with identified releases of nauomaterials from tested products. The CPSC also iutends to work with other Federal agencies to increase the availability of information about nanomaterials in publically available databases and literature.

CHINESE DRYWALL INVESTIGATION

Question. I understand that CPSC and HUD have now issued guidance to homeowners with problem drywall, instructing that all problem drywall and wiring be eliminated and replaced. Is your guidance the culmination of your work on this subject or what are the next steps with regard to Chinese drywall?

Answer. CPSC and HUD have provided the public an effective means of identifying homes with problem drywall and of remediating those homes through the issuance of our interim guidance. In our remediation guidance, we have recommended the replacement of all possible problem drywall, all fire safety alarm devices, all electrical components and wiring, and all gas service piping and fire suppression sprinkler systems. CPSC and HUD expect to fine-tune our guidance documents as we analyze the results of our scientific studies as those studies wrap up.

While our scientific investigation is wrapping up, the CPSC continues to vigorously pursue avennes for relief for consumers as we continne to monitor private litigation and remain engaged with AQSIQ.

LABORATORY STATUS

Question. I believe you were scheduled to move into yonr new laboratory space this year but the contract award process took longer than expected and you now expect to move at the end of the year. What activities will occur at the new laboratory space?

Answer. The CPSC Laboratory supports the overall CPSC mission to reduce unreasonable risk of injury associated with consumer products. This function requires selecting, procuring, calibrating, operating, and maintaining sophisticated laboratory equipment by knowledgeable and skillful personnel. Work results must be competent in order to withstand the scrutiny of litigation.

The new laboratory will house facilities for the testing and evaluation of products for hazards under Sections 7, 8, 12, or 15 of the Consumer Product Safety Act. This includes facilities for testing of regulated products such as children's sleepwear, general wearing apparel, mattresses and futons, and carpeting.

The flammability test laboratory will include a 2-hour fire-rated burn room for large- and bench-scale ignition test, various hoods and test chambers for small-scale ignition tests, and a chemistry laboratory and chemical hood for fiber analysis and specialized (plastic film, chemicals and solids) flammability testing.

The chemistry laboratory will house all the analytical instrumentation used by the chemists to evaluate children's and consumer products and household chemicals. This laboratory will contain four separate laboratory testing cells used for sample preparation where solvents and acids are used, the analysis of total acids and bases, testing for flash point and viscosity analysis and extractions such as those used in the phthalate plasticizer project.

The Instrumentation Laboratories will house the inductively conpled plasma spectrometer, which is used for analysis of metals, two Gas Chromatograph Mass Spectrometers, a Fourier Transform Infra-red Spectrophotometer, and two small indoor air quality exposnre chambers.

CPSC's combustion products and appliances laboratory will contain three specialized and highly sophisticated chambers and instrumentation for testing a range of residential appliances including furnaces, stoves, ovens, gas-fueled fireplace sets, unvented space heaters, and camp stoves and heaters. A temperature- and humidity-controlled carbon monoxide gas chamber used to test CO alarms will also be situated in that space. Adjacent to these chambers, we plan to install the apparatus of the mechanical test laboratory: a large fatigue cycle test frame, a 14-foot tall monorail head-form drop tester for helmet and playground surface testing, two tensile/compression strength testers for evalnating mechanical support structures (such as bicycle frames), and a hydraulic pressure test facility for evaluating fire suppression sprinklers.

The electrical and mechanical test laboratories will be nsed for testing various consumer products, such as ATVs, small electrical household appliances, cribs, baby walkers, and toys. We will also have fireworks laboratory space to test some of the characteristics of Class C pyrotechnic devices for compliance with Federal regnlations.

Question. I understand that the new facility does not allow for fireworks testing? Are you not testing fireworks then?

Answer. CPSC is not able to conduct the full range of fireworks testing at our current laboratory and will not be able to conduct the full range of testing at our new facility. We conduct testing to evaluate fireworks fuse burn time, functionality and reliability of the fuse to ignite the device, launch tube integrity, functionality and location of the aerial effects, and other characteristics at the Blossom Point Research Facility in southern Charles County.

SEARCHABLE CONSUMER PRODUCT SAFETY INCIDENT DATABASE

Question. In less than a year, the public will be able to access a CPSC database that will allow an individual to report an incident or injury from a product and also allow an individual to research safety information about a product. Where is the Commission, at this point, in developing the system?

Answer. In September 2009, funds were apportioned by the Office of Management and Budget (OMB) for the development of the public database. Since that apportionment, CPSC staff has worked diligently to complete the tasks required to implement the database by the March 2011 deadline.

In January, public workshops were held with consumer groups and industry to solicit comments and suggestions about how to best meet the requirements of Section 212 of the CPSIA. In April, the Commission proposed a rule specific to the implementation of the database. Comments received through this implementation proceeding have been used to help develop the system.

With strong support from ageucy executives, much of the development work has been completed and internal and several external focus groups have reviewed specific parts of the application. CPSC has also taken advantage of opportunities for presentations at meetings held by the Cousumer Federation of America, the International Consumer Product Health and Safety Organization, and with the National Association of Manufacturers. Comments have been positive.

Later this fall, CPSC plans to hold more workshops with iudustry and consumer groups to garner more feedback. CPSC's Office of Public Affairs is also coordinating the development of the public awareness campaign consistent with the release of the database in March 2011. Overall, development work for the public consumer product safety incident database is on target and we anticipate a successful release in March 2011.

Question. What types of issues are you grappliug with as you envision the system's development?

Answer. CPSC has not run into significant issues with the development of the system. During the public workshops held on the database many useful comments and suggestions were provided by industry and consumer groups. The Commission also received close to 50 comments in response to the proposed rule. These comments are currently being analyzed in preparatiou of the final rule. Although some of the technical details of the database design may be affected by the adoption of the final rule, the possible changes are manageable within the implementation timeframes.

Question. What types of input or assistauce are you receiving for this type of undertaking?

Answer. As noted above, CPSC held public workshops with industry and consumer groups to help provide input for the design and functionality of the system. Meetings with other stakeholders and external focus group testing in recent months have also proven useful. Additional workshops are planned, along with more extensive use of the Commission's saferproduct.gov website to provide more information to the public as updated information becomes available. CPSC will continue to work as closely with industry and consumer groups well in advance of the launch of the public database to ensure its success.

STATEMENT SUBMITTED SUBSEQUENT TO THE HEARING

Senator DURBIN. Subsequent to the hearing Senator Mary Landrieu has requested that a statement she has submitted be inserted into the record.

[The statement follows:]

PREPARED STATEMENT OF SENATOR MARY L. LANDRIEU

Thank you Chairman Durbin and Ranking Member Collins for calling this oversight hearing on the Consumer Product Safety Commission's (CPSC's) budget for fiscal year 2011. The Consumer Product Safety Commission continues to do great work

to ensure that consumers protected against hazardous products. Of particular interest to me and the state of Louisiana is the CPSC's ongoing investigation into defective drywall made in the People's Republic of China. As homeowners in my state, and nationwide face possible health and environmental risks from Chinese-made drywall products, it is my hope that the CPSC will be able to provide a definitive solution in the investigation into this issue facing impacted consumers in the near future.

According to published reports, since 2006 more than 550 million pounds of drywall have been imported to the United States from China. This is enough to make tens of thousands of homes. However, these products may have come into the country as far back as 2000 and could be in over 100,000 homes nationwide. This is because since 2004, builders have turned overseas for materials because our own U.S. snppliers could not keep up with demand created by the U.S. construction boom, as well as a series of hurricanes and other natural disasters. This would include the 2004 Florida hurricanes, Hurricanes Katrina and Rita of 2005, and other disasters. The drywall entered the United States through numerous ports, including the Port of New Orleans. As I understand it, Florida was the number one destination for these products with over 3 million drywall boards. Louisiana was next with almost 660,000 drywall boards. In Louisiana alone, this could be as many as 7,000 homes. Overall to date, the CPSC has received about 3,082 incident reports from 37 states, the District of Columbia, Puerto Rico, and American Samoa. This problem spans the country, from California in the West to right here in the District of Columbia and Virginia. It is not just an isolated issue for homeowners in the Gulf Coast—Chinese drywall is a nationwide problem.

It is my understanding that the CPSC received its first consumer incident report from Florida in December 2008. In Louisiana, we began to see reports from homeowners in southeast Louisiana in late February of 2009. These reports were similar to those seen in Florida homes: a "rotten egg" smell within homes; health issues such as skin irritation, persistent cough, bloody noses, hair loss, and asthma attacks; lastly homeowners noticed blackened and corroded metal components in their homes. According to the Louisiana Department of Health and Hospitals, 990 calls have been received regarding defective drywall, and 551 of those callers have completed the DHH survey. The majority of these reports were centered in New Orleans and surrounding parishes in southeast Louisiana. From Orleans Parish, 151 calls have been received, followed by St. Tammany Parish with 118 calls, and Jefferson Parish, St. Bernard Parish, and East Baton Rouge Parish follow close behind. Just to give you an example of how widespread this issue is in my state, we have seen hundreds of homeowners ranging from St. Bernard Parish Fire Chief Thomas Stone to New Orleans Saints Head Coach Sean Payton report this prodnct in their homes. Many parents have been seeking answers on what might be making their kids sick or, now that more details are coming out, how they should safely remove this product from their homes. This defective Chinese drywall represents an attack on these families and presents another obstacle on our road to Gulf Coast recovery.

In response to these reports, my office has heard from countless constituents on the need for consistent, scientifically-based information on the product, as well clear guidance on the public safety, health, and environmental impact. Families have asked for information on which Federal or State agencies to contact, in addition to any updates we have on the health risks posed by this product. Many families also called concerned about the impact of defective drywall not just on their children bnt also on pets. To address these questions, on April 23rd, my office issued a fact sheet for homeowners updating them on the Federal/State response, providing key contact information, and answering frequently asked questions. My office updates this document regularly as new information becomes available.

On the state level, it is my understanding that the calls which the Louisiana Department of Health has received have ranged from homeowners requesting home inspections, advice on home evacuations, in addition to inquiries on specific health information to provide their primary care physicians and veterinarians. A key question is that of remediation or possible financial assistance in order to deal with this problem. Many of my constituents received either Federal Emergency Management Agency (FEMA) or Small Business Administration (SBA) disaster assistance to rebnild these homes following Hurricanes Katrina and Rita of 2005. These families spent months in FEMA trailers and rental units following these disasters, they paid out of pocket or took on debt to rebuild. Now they find their rebuilt homes in worse shape than these post-disaster temporary units. In this situation, families are looking for answers and a timeline for when more information will be known on the definitive health impacts of this product.

In response to these concerns from my constituents, I have been working closely with Senators whose states contain contaminated drywall. Along with my col-

leagues, I have sent letters to various agencies requesting appropriate assistance for homeowners and I have filed S. 2731, the "Small Business Administration Disaster Recovery and Reform Act of 2009." S. 2731 includes a provision, which with restrictions, would authorize SBA to make disaster home loans for the repair and replacement of Chinese drywall. Senator Nelson has co-signed, and I look forward to pnshing for this bill to become law to provide relief to homeowners.

Earlier this year, CPSC and the U.S. Department of Housing and Urban Development (HUD) issued a protocol to help identify problem drywall in homes. Fnrther, interim remediation guidance was released by these agencies on April 2 based on CPSC's ongoing scientific research. These guidelines are a positive step to relief for affected homeowners, and the coordination of the CPSC and HUD is to be commended. However, it is important for all Federal agencies to better coordinate with CPSC and HUD in an effort to better assist in the remediation and recovery efforts.

While I understand the need to be thorough and build a case that might stand np to future legal scrutiny, and I understand that accnrate scientific testing takes time, my constituents need definitive answers now. Parents caring for sick children or pets need answers, workers removing these products from homes need to know potential health risks, and local health officials need to know what environmental impact may occur if this drywall is dumped into landfills. Though results which have been released and interim remediation protocol are great leaps, I mnst stress the importance of a final solution.

In closing, I believe that the scope of this problem is huge because it touches on so many different stakeholders. The first thonght is on the impact to homeowners and renters, as it shonld be for a health risk of this nature. However, medical professionals and veterinarians are also dealing with this issue as families report health problems. The possible pnblic safety impact also draws in fire marshals, construction workers, and environmental inspectors. So this defective prodnct is not just a concern for homebuilders or homeowners, but is a concern for many other professions in both the public and private sectors. That is why the testing of this hazardous material is so important—we mnst ensnre that there is a timely and effective Federal response in cooperation with local health authorities. I look forward to working closely with my colleagues to support additional efforts to address this critical matter facing our homeowners.

I thank the Chairman and ask that a full copy of my statement appear in the record.

SUBCOMMITTEE RECESS

Senator DURBIN. And this meeting of the subcommittee stands in recess.

[Whereupon, at 3:26 p.m., Wednesday, April 14, the subcommittee was recessed, to reconvene subject to the call of the Chair.]

H.R. 4678, FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT, AND H.R. 5156, CLEAN ENERGY TECHNOLOGY MANUFACTURING AND EXPORT ASSISTANCE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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WITNESSES

H.R. 4678, FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT, AND H.R. 5156, CLEAN ENERGY TECHNOLOGY MANUFACTURING AND EXPORT ASSISTANCE ACT

WEDNESDAY, JUNE 16, 2010

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

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2322, Rayburn House Office Building, Hon. Bobby L. Rush [chairman of the subcommittee] presiding.

Present: Representatives Rush, Sarbanes, Sutton, Stupak, Barrow, Matsui, Braley, Dingell, Stearns, Whitfield, Terry, Murphy, Gingrey, Scalise, and Latta.

Also Present: Representatives Sánchez and Turner.

Staff Present: Angelle Kwemo, Counsel; Felipe Mendoza, Counsel; Michelle Ash, Chief Counsel, Commerce, Trade, & Consumer Protection; Peter Ketcham-Colwill, Special Assistant; Althea Gregory, Intern; and Elizabeth Letter, Special Assistant.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The subcommittee on Commerce, Trade and Consumer Protection will now come to order.

The purpose of today's hearing is to hear testimony on two bills, H.R. 4876, the Foreign Manufacturers Legal Accountability Act, and H.R. 5156, the Clean Energy and Technology Manufacturing and Export Assistance Act.

The chair recognizes himself for 5 minutes for an opening statement.

I want to thank the members of the subcommittee for participating in this important legislative hearing. As I stated before, we will be considering two important bills.

The first bill deals with products manufactured overseas that are flooding the U.S. market and aren't safe for American consumers. And the second bill deals with access to global markets by American manufacturing new products. Both bills aim at protecting American jobs and American consumers. And I would be remiss if I didn't commend Congresswoman Betty Sutton and Congresswoman Doris Matsui for attempting to lean on both of these very critical issues for the safety of the American people.

Last year we were saddened by the tragedies caused by the toxic effects of Chinese drywall on consumers. The victims sometimes from areas still reeling from the aftermath of Hurricane Katrina, finding themselves suffering as a result of serious health problems.

More saddening is the fact that it is very difficult, if not impossible, to hold accountable the foreign manufacturers of those products. H.R. 4876, the Foreign Manufacturers Legal Accountability Act, will fix that loophole and allow suppliers of foreign-made products to be sued for defects in those products used here on U.S. soil. And I must also say that while the U.S. market is open to global manufacturers, the contrary is not always the case.

Our next bill illustrates the need for green technology and the need for necessary remedies. Last year, the subcommittee held a hearing on how to increase the export of green technology products. We heard about the challenges U.S. manufacturers are facing in overseas markets despite the fact that U.S. technology is unquestionably one of the best.

We all agree that clean energy is a vast, untapped market. There is a large world demand for U.S. goods. But our market share in 2008 dropped in from 14 to 9 percent. Even emerging economies are rising and trying to replace the U.S. in its current position as global leader in manufactured goods. It will happen if we don't assert our long-recognized and long-held leadership on this particular matter.

H.R. 5156, the Clean Technology Manufacturing and Export Assistance Act will help our industry do that and will strengthen the manufacturing industry's capacity and also provide them with the tools they need to boost their exports.

We have, on several occasions, highlighted the importance of having a strong domestic policy to allow the manufacturing industries to be confident enough to penetrate the international markets. We are all aware that the events currently taking place in the Gulf of Mexico is another real concern. It reinforces the need for environmentally friendly technologies. This is where our future lies.

As I said before, and I will repeat it again, we must seize every opportunity or fall drastically behind. And I want to thank all of the witnesses again for being here, and I look forward to your testimony on the bills we are considering today.

And now I am going to recognize the ranking member for 5 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. Chairman Rush, thank you very much and we certainly appreciate the witnesses being with us here this morning as we explore two pieces of legislation that I think all of us would agree have great intentions, and I think it's important because this legislation is so important that we listen to some experts today about some concerns that certainly I have about this legislation, although I agree with the intent of the legislation.

For example, on 4678, which holds foreign manufacturers accountable in the U.S. for selling products that comply with our safety standards and require them to have an agent for service of

process, I don't really have any problem with that. But I think we have to explore, for example, in 2002, the Congress passed the Public Health Security and Bioterrorism Act, and under that Act, under certain circumstances, certain companies had to have registered agents. The U.S. Customs law already requires agents for companies that do business in the U.S. in certain instances.

We are signatory to the Foreign Sovereign Immunity Act, and we know that in many countries around the world like China, a lot of those companies are owned by the government and it raises the issue even if you have a service of process you obtain the judgment can you really collect on it, because of sovereign unity and so forth. And then we have the Hague Convention on the Service Abroad of Judicial and Extra Judicial Act and what will the impact of this have on that?

So we have a lot of mechanisms already in place through the government to ensure the people of America that we are dealing and consuming and using safe products. Now, I am not saying that those are enough. But I also know that if we adopt this kind of legislation, we might also expect that other countries may also adopt it, which could have some negative impact on our small exporters that are trying to open up foreign markets, and I know that President Obama, one of his goals is to significantly increase our exports.

So all of these are issues that I think we have an opportunity to work together here, but I think it is important that we explore the ramifications of this legislation. And so we look forward to the witnesses' testimony on that issue.

On the clean energy technology manufacturing export assistance fund, I think all of us are certainly interested in exporting green technology or clean technology, and I know already the Department of Commerce has an extensive assistance program to encourage exports of U.S. products. And it appears that this legislation would simply be carving out clean energy technology, which is fine.

But as I was reading this legislation, just to give you an example of one thing I was concerned about because I am from a coal State. Coal still provides 51 percent of all electricity produced in America, and I don't think anyone believes that renewable energies or wind power or anything else, I guess they are one in the same, over the immediate term will come close to providing our electricity needs.

But if this bill became law, for example, I would like to see some assistance given to carbon capture sequestration technology because China is using more coal every day than the United States even thinks about. And right now, they are just burning coal, low-grade coal, and polluting the environment and if we can export clean coal technology to them, that would be great.

But as I read this legislation, it says to be eligible for this program, the project or the entity has to do one of the following: Generate electricity. Well, carbon capture sequestration does not generate electricity but it removes carbon dioxide. Second thing, substantially increases the energy efficiency of buildings, industry, or agricultural processes. Well, I am not sure that carbon capture sequestration would meet that criteria, or it substantially increases the energy efficiency of the transportation system.

So those are some questions that I think we need to explore because this is very important legislation, it has great goals, and I think we have an opportunity here to explore a lot of these issues and come up with a proposal that all of us can agree to. I yield back my 14 seconds.

[The prepared statement of Mr. Whitfield follows:]

Statement of the Honorable Ed Whitfield
Ranking Member,
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on H.R. 4678, the Foreign Manufacturers Legal Accountability Act, and H.R. 5156

- H.R. 4678 seeks to hold foreign manufacturers accountable in the U.S. for selling products that comply with our safety standards. That is a worthy goal I believe we all share.

- Reading this legislation, I do have concerns whether this is the best policy approach that will achieve the desired result while at the same time not inflicting harm on US companies.

- This legislation prohibits foreign manufacturers from introducing, selling, or holding to sell or distribute merchandise in commerce unless the manufacturer has a registered agent in the United States authorized to accept service of process for all civil and regulatory matters in State and Federal courts.

- It is my understanding that the importer or customs broker is often the manufacturer of record under the Consumer Product Safety Act and certain liability attaches to that role.

- I will be interested to learn from our witnesses what improvement a registered agent will provide over current law? Is there a mechanism to force foreign manufacturers to appear in court and abide by judgments?

- The good multinational companies will likely comply voluntarily, but it is easy to imagine the fly-by-night night companies that manufacture shoddy products in foreign countries may simply disappear and reconstitute themselves to sell under a new company name.

- If the registered agent is the importer or customs broker, it is not clear how the registered agent will be selected by manufacturers that use multiple importers or brokers.

- Turning to H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010", this legislation provides a new $75 million promotion and assistance program for "clean" energy within the Department of Commerce's International Trade Administration.

- I do find it interesting that we are having a hearing on this proposal, after a series of hearings we've held in the Subcommittee on Energy and Environment, looking at so-called "green" jobs.

- I know that the President and others have touted green jobs as a tremendous opportunity for the United States, but I am not as optimistic, and in fact there was a study conducted by a university in Spain, which itself has promoted a green jobs economy, which showed an actual loss of traditional jobs for new green jobs created, and which forecast that for every 4 jobs created in the renewable energy sector, the United States should expect to lose nine jobs.

- While I want to see U.S. innovation rewarded through growth of commercially viable technologies I do believe the approach in this legislation presents serious concerns because it appears to put the cart before the horse.

- The biggest obstacle to increasing our exports of new energy technology is making sure foreign markets are truly open to U.S. manufacturers. The Administration recognizes this and I commend them for focusing their energies on opening these markets and ensuring strong protections for intellectual property exist and are enforced.

- Until tariffs and preferences in some countries for their own domestic manufacturers are eliminated, all our promotion efforts will be in vain.

- If our companies can increase their exports through expanded market access, this new legislation will be justified. However, to gain foreign market access, we will be called on to reciprocate and open our energy markets. As a result, our current domestic markets will likely

face stiffer competition which could limit job growth. Such outcomes must be carefully evaluated.

- With that said, the goal to increase exports is best achieved through continued efforts to negotiate free trade agreements or ensuring our existing agreements with our trade partners permit equal access.

- My concern with this program is that it appears to subsidize the efforts of businesses that want to export their goods. Traditionally, private enterprises must develop these competencies internally or contract expert consultants to provide these services. Viable companies can and will invest in their export capabilities and should not rely upon taxpayer funded subsidies.

- Further, while more government jobs would be created at taxpayer expense, it would likely displace private sector professionals that provide the same or similar services.

- Finally, if we are concerned about long term job growth, we have to be concerned with the overall trade picture and how sensitive issues such as the transfer of intellectual property to developing countries affects America's long term competitiveness.

- I yield back.

Mr. RUSH. The chair thanks the gentleman.

The chair recognizes the gentlelady from Ohio, Ms. Sutton, for 2 minutes.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. I thank the chairman for holding this hearing, and I think both of these pieces of legislation are important. I am proud to be the sponsor of H.R. 4678 along with 61 cosponsors from both sides of the aisle.

I am going to keep my remarks limited to that at this point.

Every year many Americans are injured, sometimes fatally, by dangerous products that have been manufactured abroad and imported into the United States. Recent examples include toxic drywall, faulty infant cribs, lead paint in children's toys and defective tires. These products not only hurt American consumers, they hurt American businesses.

U.S. manufacturers are responsible for insuring that the products that they put on the market are safe, yet it is extremely difficult for injured parties to hold foreign manufacturers accountable because they are unable to serve process or establish jurisdiction. As a result, American consumers and businesses are forced to engage in cost-prohibitive and time-consuming international legal battles rarely receiving the redress they deserve.

The Foreign Manufactures Legal Accountability Act would require foreign manufacturers doing business in the U.S. to identify a registered agent authorized to accept service of process on behalf of that manufacturer. Registering an agent would constitute an acceptance of jurisdiction of the State in which the agent is located. This bipartisan bill would help protect American consumers and businesses from defective products manufactured abroad, would level the playing field for American manufacturers, and provide U.S. consumers with the necessary tools to seek proper redress.

And I want to thank my colleague and cosponsor Representative Mike Turner who is here this morning for his work and support on this legislation.

I also want to thank Representative Linda Sánchez for her leadership and work on this issue, and she may be joining us as well.

I look forward to hearing from the witnesses and to working through whatever concerns that the ranking member may have to a solution on this very, very important work.

At the end of the day, this is about fairness and justice. American consumers and businesses deserve both, and this legislation will help us achieve that.

Mr. RUSH. The chair now recognizes the gentleman from Ohio, Mr. Latta, for 2 minutes.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Thank you, Mr. Chairman, Ranking Member Whitfield. Thank you for holding this hearing today on these two pieces of legislation both related to manufacturing. My congressional district is heavily based in manufacturing, and I am constantly advo-

cating for ways to assist these manufacturers to remain in business and to continue producing goods.

According to the National Association of Manufacturers, my district is the largest manufacturing district in the State of Ohio, the 20th largest in Congress. When I was first elected in December of 2007, I represented the ninth largest manufacturing district, and in two years it dropped to 20th. The current unemployment rate in Ohio is just under 11 percent, and there are many counties in my district that have over 12 percent unemployment.

In looking at these two pieces of legislation, the subcommittee needs to ensure that it does nothing to hinder further economic growth to put further restrictions on U.S. manufacturers. It is important that Americans have safe products for use and that companies comply with U.S. safety standards. However, I have several concerns with H.R. 4678 and that will have unintended consequences on American manufacturers.

They are concerns that under this bill the U.S. companies that have contracted with foreign manufacturers for parts will be the ones responsible for establishing a registered agent on behalf of the foreign supplier. In addition, I have concerns that other nations will reciprocate similar laws that would impose additional compliance regulations or liability exposure to U.S. exporters abroad.

The manufacturers in my district can not withstand either of these scenarios. Many of these companies are still holding on by their fingernails in this troubled economy and will not be able to withstand further government mandates or increased exposure to liability. I have concerns that this legislation could inadvertently lead to an increase in lawsuits on our manufacturers.

My district is also home to many facilities relating to alternative energy sources. Clean energy technology manufacturing is an important piece of the puzzle for America's energy independence. As with all of our manufacturing products, exporting is a key to the U.S. to remain a world leader. However, I do have concerns with H.R. 5156 and its creation of another new government program administered by the International Trade Administration within the Department of Commerce. At a time when our national debt is skyrocketing, I do not believe in expanding our government but should be trying to limit it.

There are also concerns that this new grant program duplicates other programs that have already been created through the energy stimulus bills.

I look forward to the hearing today.

Mr. RUSH. The chair now recognizes Mrs. Matsui for 2 minutes.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. MATSUI. Thank you, Mr. Chairman, and thank you for calling today's hearing.

I, first of all, want to applaud my good friend, Betty Sutton, for introducing H.R. 4678, and I support her legislation. I would also like to thank the witnesses for being with us here today. And I particularly want to welcome our witness from the Sacramento area, Jack Crawford, CEO of Jadoo Power.

Under Jack's leadership, Jadoo Power is a leader in manufacturing clean energy technologies and providing hybrid fuel cell power for military, government, and commercial applications. Jack has a wealth of expertise in the clean energy sector, and I look forward to hearing from him today.

As he can attest, the Sacramento region is well positioned to be a leader in producing clean energy technologies with more than 110 clean tech companies that focus on production of fuel cell technology, biofuels, solar, wind energy, and others.

To continue growth, the U.S. clean energy sector, particularly small and medium-sized firms, need manufacturing expert assistance to boost their competitiveness in the international marketplace. In fact, our Nation's clean tech industry is lagging behind many of its competitors in exports, including Germany and China. This is simply unacceptable. The U.S. must he a leader in manufacturing and exporting clean technologies. That is why I, along with Chairmen Rush and Dingell and Representative Eshoo, introduced H.R. 5156, a bill to boost the competitiveness of American-made clean tech products both here in the United States and around the world.

The bill will create a fund to develop and sustain a national clean energy technology export strategy to provide U.S. clean tech firms with expert assistance and finding and navigating foreign markets to sell their goods and services to new customers.

The President has laid out a laudable goal to double U.S. exports over the next 5 years, and this legislation will ensure clean energy exports are at the forefront of the national export strategy. The bill will also strengthen America's domestic clean tech manufacturing industry.

Ultimately, H.R. 5156 will enhance our standing in the race to be the global leader in clean energy. The BP oil spill only underscores the need for leadership in the clean energy market, and this spill has sent a strong message that America is serious about being the leader in producing and exporting these technologies.

I look forward to working with my colleagues on the committee to achieve this goal, and I thank you, again Mr. Chairman, for holding today's hearing.

Mr. RUSH. Dr. Gingrey is recognized for 2 minutes.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. GINGREY. I want to thank you for holding today's hearing on two pieces of legislation, H.R. 4678 and 5156, to allow us to hold a discussion on important issues facing consumers as we strive to create jobs. I believe that both of these bills are well intentioned as they attempt to assist consumers and improve the clean technology trade deficit that we currently face.

Unfortunately, I believe that both bills will have unintended consequences that could prevent them from accomplishing their respective goals.

Mr. CHAIRMAN, H.R. 4678 seeks to rectify the problems that have been associated with foreign product recalls. While I am saddened by what has occurred to the victims—one of whom is on our first

panel of witnesses—I fear that H.R. 4678 will not fully address the underlying issue.

The purpose of this legislation is to hold foreign manufacturers responsible for the products that come to the United States. However, unintended consequences many times domestic companies contracting with foreign manufacturers will likely be responsible for establishing registered agents, thereby putting American companies at risk as opposed to their foreign counterparts.

I have similar concerns with H.R. 5156. During the budget window of this bill, we provide $75 million in funding instead of tackling two of the biggest problems with our clean technology trade deficit.

Mr. Chairman, the first deals with the raw materials available domestically to support innovation in clean technology. The minerals needed to commercially manufacture these products are either not abundantly available in U.S. or current policies prevent them from being mined properly.

The other problem is the issue of trade. Without access to markets, without burdensome tariffs, we will continue to trail our competitors when it comes to clean technology products. Unfortunately, I do not believe that H.R. 5156 will ultimately alleviate the trade deficit that we face in this area.

Mr. Chairman, despite my concern about these bills though, I do look forward to hearing from both panels of witnesses so they can provide us with their expertise on these matters.

Mr. RUSH. The chair now recognizes the chairman emeritus for the full committee, the gentleman from Michigan, Mr. Dingell, for 5 minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, I thank you. I commend you for holding today's hearings on H.R. 4678, the Foreign Manufacturers Legal Accountability Act, and H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act.

The former will help ensure foreign manufacturers are held accountable for injuries their products may cause to American public health and safety. And the latter will bolster the Nation's exports in the growing sector of green technology. Both are important, and I support efforts such as these and will welcome the input of our witnesses.

Before concluding my remarks, I wish to say a few words in support of H.R. 5156 which you, Mr. Chairman, Congresswoman Matsui, and I are original sponsors.

There is broad agreement that the United States lags behind other nations in terms of exports. Whereas exports can now account for 49 percent of Germany's GDP, they account for only 9 to 13 percent of our own. More alarmingly, while Germany exported $19.6 billion in clean technologies and services between 2004 and 2008, the United States exported only 7.7 billion.

In brief, the United States consumes far more than it produces and in so doing, is squandering not only our valuable resources, our moneys, but our opportunity to be a leader in green technology ex-

ports. H.R. 5156, by establishing a modest support mechanism for the export of such technologies by U.S. manufacturers will significantly help remedy this matter.

Moreover, the tax revenue generated from these exports will pay more than the bill's cost over a 5-year period. The bill should enjoy bipartisan support and must be recognized as a critical component of our Nation's economic recovery.

And to return to H.R. 4678, it should be noted that had such legislation been in effect, our troubles with the matter of Toyota vehicles and their safety consequences would have been handled much easier.

Mr. Chairman, I thank you, and I yield back the balance of my time.

Mr. RUSH. The chair recognizes the gentleman from Louisiana, Mr. Scalise.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. I would like to focus my comments on H.R. 4678, the Foreign Manufacturers Legal Accountability Act, a bill that is relevant to my State and district because of the problems we are experiencing with toxic drywall.

To date the Consumer Product Safety Commission has received over 3,300 incident reports related to toxic Chinese drywall from 37 States. Twenty percent of these reports are from Louisiana, which is second only to Florida. And my office continues to receive complaints from constituents affected by toxic drywall.

Last week, a resident of New Orleans contacted my office at a loss for what steps to take or what to do for help. Like many others, her family was forced to move out of her home because of toxic Chinese drywall, and they can no longer afford to pay the mortgage on the home they aren't occupying while paying rent for temporary housing at the same time.

The CPSC has been investigating toxic Chinese drywall for over a year and a half, and it has sufficient evidence that toxic Chinese drywall manufactured by Chinese companies is responsible for the severe damage we have seen in thousands of American homes. Last month, the Commission even identified 10 drywall manufacturers whose products emitted high levels of hydrogen sulfite in laboratory testing. Unfortunately, no action has been taken against these companies.

We must hold the manufacturers of toxic Chinese drywall accountable, and I have continued to push for this including requesting that the Department of Homeland Security pursue any and all options available to the department including the seizing of assets being shipped into the United States against those entities that manufacture toxic Chinese drywall and have been found liable for the damages associated with the contaminated products.

These foreign manufacturers bear responsibility for serious damage for thousands of homes across the country and have caused homeowners significant financial hardship and in some cases, physical harm. Even more concerning is that they have done so without repercussion. We must take action to hold accountable those who

are responsible for the damages caused by toxic Chinese drywall until they settle with the affected victims or comply with the rulings of U.S. courts.

Given the challenges we are facing in doing this, I am pleased to see some of my colleagues recognizing this issue. The goals of H.R. 4678 are good, but I do have questions about whether its implementation will accomplish its intentions. While it can be argued that this bill would make it easier to prosecute foreign manufacturers in the U.S., foreign courts would still be under no ohligation to enforce such judgements. We would still be dependent on the good will of foreign courts to enforce those judgments.

My constituents and others around the country who have been affected by toxic Chinese drywalls deserve answers and solutions, and this subcommittee must work with the intergovernmental task force on problem drywall to help deliver that.

Mr. RUSH. The chair now recognizes the gentleman from Georgia, Mr. Barrow of Georgia for 2 minutes.

Mr. BARROW. I thank the chairman, and I will waive opening.

Mr. RUSH. The chair now recognizes Mr. Braley for 2 minutes.

OPENING STATEMENT OF HON. BRUCE L. BRALEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. BRALEY. Thank you, Mr. Chairman, for this important hearing.

And as chairman of the Populist Caucus, I am proud that the bill known as H.R. 4678, the Foreign Manufacturers Legal Accountability Act, is part of our America Jobs First platform. This bill requires foreign manufacturers doing business in the United States to identify a registered agent authorized to accept service of process on behalf of the manufacturer.

And one of the reasons I support this legislation is because unlike a lot of people at this hearing, I have actually tried to hold foreign manufacturers accountahle for their defective products in U.S. State courts. It is virtually impossible. There are companies marketing products in this country who put the word "U.S.A." in their company logo and put out publications that say "in an industry dominated by foreign competition, we are proud of the fact that our products are manufactured right here in the United States," and yet when those products gave rise to a defect and suit was pursued, they turned around and said these products, in fact, were not made in the United States. They were made in China. Which then dumps you into the bottomless pit of attempting to get suit on an entity that may be a part of the Chinese government who is manufacturing that defective product.

So you can imagine how difficult it is when you have to translate that document into the native language of the country of where the suit is being served, then get help from a government entity that may be unwilling to subject its manufacturers to liability in U.S. courts. And after all of those delays, nothing happens.

And I have heard some of my colleagues express concerns about U.S. companies heing exposed to increased litigation. They are not well founded concerns because the reality is right now in many States if you cannot find the manufacturer of a defective product and hold them accountable, then some of the immunity that goes

to the distributors of those products, if the manufacturer is available and can be pursued in that State court go out the window and then the U.S. distributors and manufacturers are the one on the hook.

So this bill actually is a great thing for U.S. manufacturers. It levels the playing field and gives them the same opportunities to compete with foreign manufacturers that U.S. companies have.

That is why I support it. And I yield back.

Mr. RUSH. The chair now recognizes the gentleman from Florida, Mr. Stearns, for 2 minutes.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Mr. Chairman, thank you very much.

Having chaired this committee when the Republicans were in the majority, we tried to wrestle with this problem of reciprocity between countries where there is fraud, abuse, and incompetence and intentional mislabeling and things like that. Mr. Braley mentioned some of the problems. We were never able to get to the point where we were able to get together a bill that would deal with this very serious problem. It affects not only manufacturing, but also the Internet, how to go after people that are fraudulent on the Internet or basing their companies outside the United States. So I think the bill is well intended. I think the hearing will be worthwhile listening to.

But I have to tell you that I don't think the problem that Mr. Braley talked about is going to be solved here because this agent is going to like a cardboard agent where he will deliver all of these documents that are in English, and he will just dead file them.

I think this registered agent will be there, but I think we might even have to explore other ways to have reciprocities between countries because that is the larger issue because a lot of these countries are going to just stonewall us.

Can we hold foreign manufacturers accountable for harmful products? Foreign courts are under no obligation to enforce U.S. judgements. So I welcome this hearing, Mr. Chairman. I look forward to what they have to say.

I just conclude with H.R. 5156, the Manufacturing and Export Assistance Act, clean energy technology. This is going to cost us money. This is questionable. I would think all of this, Mr. Chairman, was in the cap-and-trade which passed out of the House. Perhaps it is also in the stimulus bill. So, you know, I think we have to realize that if we didn't get everything together in that cap-and-trade I would be very surprised. There were hundreds of amendments and we discussed it for weeks. So I think a lot of it was there.

I just conclude where are you going to get all of this clean energy technologies bit parts from.

So I think it is worthwhile to have these hearings on these two bills. I just think that perhaps when we mark this up, we might have to make it a little bit stronger.

Mr. RUSH. At this time I am going to entertain a unanimous consent request that two members who are not members of the sub-

committee for the purposes of this hearing. And those individuals are Ms. Sánchez of California and Mr. Turner of Ohio.

Hearing no objections. So ordered.

I will recognize Ms. Sánchez recognized for 2 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. SÁNCHEZ. Thank you, Mr. Chairman, and distinguished members of the committee, and I appreciate you allowing me to participate with the subcommittee today. And I apologize. I am not going to be able to stay for the entire time, but the committee I serve on is currently holding a hearing as well.

I want to share my support for the Foreign Manufacturers Legal Accountability Act that was introduced by my good friend, Congresswoman Sutton from Ohio. I am an original cosponsor of this piece of legislation, and I introduced similar legislation in the last session of Congress, and we held hearings on that in the Judiciary Committee as well.

I have long been alarmed by the steady stream of toxic or defective foreign manufactured foods or products that harm U.S. families every year. Beyond the risks that these products pose to our health and welfare, I am also concerned that many foreign manufacturers have gained an unfair advantage over U.S. manufacturers by avoiding liability for the injuries and deaths that their products cause.

Because of the difficulties associated with serving process on and establishing jurisdiction over foreign manufacturers, many Americans that are harmed by defective foreign-made products have no recourse. They literally never get their day in court.

The Foreign Manufacturers Legal Accountability Act amends current law to facilitate service of process on foreign manufacturers. Quite simply, it just requires manufacturers who want to put their goods in our stream of commerce to establish a registered agent in the United States who then can be served process.

That simple requirement just making sure that they are servable if injuries should arise will level the playing field for U.S. manufacturers by eliminating the unfair competitive advantage enjoyed by foreign manufacturers. This would essentially put them on equal footing making sure that all companies, whether foreign or domestic, are held accountable for the harm that they cause to American consumers.

I want to thank the chairman for calling this hearing, and I am pleased that the subcommittee has taken the time to discuss H.R. 4678.

And again, I appreciate the invitation to come. And I yield back my time.

Mr. RUSH. I now recognize Mr. Terry.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. I appreciate that.

I am concerned. I am also going to discuss the Foreign Manufacturers Legal Accountability Act as one of the original sponsors and worked a little bit with Ms. Sutton on this.

I think this is an important piece of legislation in protecting American consumers from defective goods manufactured outside the United States in the sense that if they don't have any presence within the United States, there may be very little ability for the victim to be compensated or justice to occur which then falls then mostly on the taxpayers instead of the foreign entity. And all this does, and Cliff is correct, the gentleman from Florida, that this doesn't really correct that problem but you can't get to the second hurdle and the third hurdle in this process without being able to effectively hand the petition to a representative of that country. And so this is just setting up the first step here.

We do need to continue the dialogue on this. But this seems to be kind of the first step, the easy, noncontroversial, or for the most part, the least controversial part of the process.

I want to thank the chairman for holding the hearing on this matter. I am anxious to hear from the witnesses and their input.

And I yield back.

Mr. RUSH. Mr. Murphy.

OPENING STATEMENT OF HON. TIM MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. MURPHY. Thank you, Mr. Chairman. We have now reached a point where China is the largest foreign holder of U.S. debt at $900 billion, and more than 2.3 million manufacturing jobs have been displaced to Chinese companies that sell products like drywall that causes terrible illness, lead in toys, and fungus in diapers and toxins in baby bottles.

I am thankful we are having a hearing on how to hold better manufactures of a harmful product liable, but the larger issue is, how we are going to pursue policies that are going to invigorate American manufacturing in a fair playing field. And if we are going to tame an economic dragon like China, it is not going to be about lofty theories or more government spending, but how to make sure that it is a level playing field. I know that along with Congressman Tim Ryan of Ohio, he and I have introduced H.R. 2378, the Currency Reform Fair Trade Act, which stops some of the unfair trade practices of China, particularly some of their currency manipulation, which we consider vital.

As we are looking at legislation that tries to find ways to help promote American businesses, I believe that often times we do not need American businesses to get more ideas on how to wade through complex trade laws, but make sure that we have trade laws that are fair and they are fairly enforced. Recently the Steel Caucus, which I am vice chair, has pushed for and been successful in getting some findings where China has dumped pipe and in the past steel, rolled steel in unfair trade practices. This is what manufacturers want to see. But we also want to make sure we have a system whereby we are not setting up laws here such as cap-and-trade and light bulb laws which basically turn our jobs over to China.

I am looking forward to hearing some insight today from this panel today to make sure we do have fair trade laws and make sure what we are doing. Not just to tell American companies how to wade through this complexity but make sure they are able to use their ingenuity, their creativity and their manufacturing skills to bring back American jobs.

And I yield back. Thank you.

Mr. RUSH. The chair now recognizes the gentleman from Ohio, Mr. Turner, for 2 minutes.

OPENING STATEMENT OF HON. MICHAEL R. TURNER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. TURNER. Thank you, Chairman Rush and Ranking Member Whitfield. I thank you for allowing me to participate in today's hearing on H.R. 4678, the Foreign Manufacturers Accountability Act of 2010. I am an original cosponsor of H.R. 4678, and I want to thank my Ohio colleague, Betty Sutton, for her hard work on this important piece of legislation. Representative Sutton has been a steadfast advocate for her community and for manufactures in Ohio.

I also want to thank the U.S. Chamber of Commerce, who has been working with both my office and Representative Sutton's office on H.R. 4678, and I look forward to the continued collaboration as we move forward with this important legislation. The Chamber has expressed concern about a provision that may permit jurisdiction in U.S. courts for non- U.S. matters it is an unintended consequence and both Betty Sutton and I are looking at language that could adjust that.

In this hearing I know there could be other unintended consequences, and I look forward to those being addressed. But mostly I appreciate the manner in which Representative Sutton has worked on this in a bipartisan manner and worked with the Chamber to ensure that the bill will protect consumers while at the same time avoid jurisdiction in U.S. courts concerning matters that have not caused injuries in the United States.

The State of Ohio has faced many challenges as it transitions from being a manufacturing-based economy. Many of our local manufacturers have worked to remain competitive but find themselves in an uphill battle with foreign manufacturers because of unfair trade practices. One way in which foreign manufacturers are given an unfair advantage is by their ability to often times avoid the American judicial system. Because service of process in establishing jurisdiction is difficult with these products, maintaining a registered agent in the U.S. will assist American consumers in their ability to redress injuries. How does it do this? By establishing agents, it allows U.S. courts to have jurisdiction over the foreign entity and thereby allow them to render a judgment including the issue of seizing assets.

And it will also help level the playing field for domestic manufacturers as they also have to avail themselves of the American judicial system. I want to thank you again for the opportunity to participate and for holding this important hearing. I look forward to reading the testimony from the witnesses today and hearing the

comments and working with Congresswoman Sutton for drafting this important legislation.

Mr. RUSH. The chair thanks all of the members of the subcommittee for their opening statements.

It is now time for us to hear from the policy experts, our witnesses who have been invited to testify before this hearing. And let me again welcome you and thank you so much for extending your valuable time to this subcommittee.

And I want to introduce you all beginning on my left, Mr. Jeremy Baskin, who is with the Office of the General Counsel for the U.S. Consumer Product Safety Commission. Seated next to Mr. Baskin is Ms. Ami Gadhia. She is a policy counsel for the Consumers Union. Next to Ms. Gadhia is Mr. Bill Morgan. He is the victim of defective Chinese drywall. And seated next to Mr. Morgan is Professor Andrew Popper, and Professor Popper is a professor of law at the American University in Washington. And next to Professor Popper is Marianne Rowden. She is the President and CEO of the American Association of Exporters and Importers, or the AAEI.

The chair again welcomes you. And it is the practice of this committee that all of the witnesses be sworn in.

So will you please stand and raise your hands.

Let the record reflect that all of the witnesses have responded in the affirmative.

And now we will have 5 minutes of opening testimony from our witnesses beginning with you, Mr. Baskin.

STATEMENT OF JEREMY BASKIN, OFFICE OF THE GENERAL COUNSEL, UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; AMI GADHIA, POLICY COUNSEL, CONSUMERS UNION; BILL MORGAN, VICTIM OF DEFECTIVE CHINESE DRYWALL; ANDREW POPPER, PROFESSOR OF LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; MARIANNE ROWDEN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS (AAEI)

STATEMENT OF JEREMY BASKIN

Mr. BASKIN. Good morning, Chairman Rush, Ranking Member Whitfield. My name is Jeremy Baskin. I am the general attorney who works with the import surveillance division of the Office of Compliance of the U.S. Consumer Product Safety Commission.

I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's efforts in the area of import surveillance and H.R. 4678, the Foreign Manufacturers Legal Accountability Act. Before I begin, let me first note that the testimony that I give this morning is mine and has not been reviewed or approved by the Commission and may not necessarily represent the views of the Commission.

From 1998 to 2007, the volume of consumer products imported into the United States increased over 100 percent. During that time period, imports from China nearly quadrupled and now constitute over 40 percent of all consumer goods. The shift in specific product areas has been more pronounced.

In 2002, approximately 60 percent of toys purchased in the United States were imported from China and Hong Kong. By 2008, that number had risen to almost 80 percent of the U.S. market.

In response to the rapid increase in consumer product imports, the CPSC has taken several steps to inspect products entering the country to ensure that they comply with applicable safety standards. In 2008, the Commission announced its import safety initiative and established a new import surveillance division within the Office of Compliance. The establishment of this new division allowed the CPSC to collocate permanent full-time compliance investigators at key ports of entry of the United States.

In 2009, the division had 10 full-time employees, FTEs, dedicated to port surveillance. That number is scheduled to rise to 14 FTEs by the end of fiscal year 2010 and 19 by fiscal year 2011. In addition, the division can call on the resources of the entire Office of Compliance which has over 100 FTEs when necessary.

The CPSC has also sought to enhance its relationship with larger agency partners such as the Department of Homeland Security. Through the operation guardian program, CPSC partners with U.S. Customs and Border Protection, CBP, staff in order to leverage joint resources. In addition, CPSC recently assigned two FTEs to CBP's new commercial targeting and analysis center, called to CTAC, and executed a memorandum of understanding with CBP that allows the agency direct access to pre-arrival cargo data. This allows CPSC inspectors to target suspect shipments before they arrive, and most importantly, before potentially dangerous goods can enter the U.S. stream of commerce.

We have also conducted training programs with CBP to educate both government personnel and the importing community on CPSC and CBP product detention and seizure authorities. So far, the results of these initiatives are encouraging.

In fiscal year 2007, CPSC collected approximately 750 samples of suspect products entering our country. In fiscal year 2009, the number more than doubled to almost 1,600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls from 5,063 in fiscal year 2008 to 466 in fiscal year 2009.

In most cases, CPSC has been able to work with domestic partners of foreign manufacturers such as importers or retailers on enforcement activities to obtain relief for consumers without resorting to adjudicative proceedings. In a few cases, however, the lack of a registered agent for service of process has hindered the Commission's ability to develop information that would help us provide relief to consumers.

One example of this is the CPSC's effort to provide relief to U.S. homeowners impacted by problem drywall imported from China. In a number of cases, CPSC staff attempted to send requests for information to Chinese drywall manufacturers only to have these requests returned to the Commission refused and unopened.

The lack of registered agent for service of process has also been recognized by Chinese industry groups and some local lawyers in China have provided legal advice seeking to exploit this situation. Thankfully this type of sentiment appears to be rare. However it is foreseeable that additional attempts to stymy or obstruct commission efforts to obtain information voluntarily from manufactur-

ers outside of U.S. legal jurisdiction and that could occur in the future.

Any such recalcitrance could impede commission efforts to assist consumers with potentially defective consumer products. Additional authority allowing CPSC to require that foreign manufacturers designate a U.S. registered agent for service of process could be helpful in some cases, particularly those involving administrative requests for documents or information.

On January 15, 2010, CPSC chairman Inez M. Tenenbaum noted in a statement accompanying a report to Congress that helpful changes to existing statutes might include service of process requirements for foreign manufacturers so the agency can more easily pursue recalls.

Currently, any action against an identifiable foreign manufacturer would require service of process using The Hague convention.

As the subcommittee moves forward however some additional direction would be helpful with regard to the range in size of manufacturers that would be subject to the registration process. In addition, it might also be helpful to involve the import safety working group in this process to ensure that appropriate jurisdictional and operational details are addressed.

Mr. Chairman, thank you again for the opportunity to testify. I would be happy to answer any questions at this time.

[The prepared statement of Mr. Baskin follows:]

Statement of
Jeremy Baskin
Import Surveillance Division
Office of Compliance
U.S. Consumer Product Safety Commission

Before the
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

Legislative Hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act"

June 16, 2010

Good morning, Chairman Rush, Ranking Member Whitfield, and Members of the Subcommittee on Commerce, Trade and Consumer Protection. My name is Jeremy Baskin, and I am a general attorney who works with the Import Surveillance Division of the Office of Compliance at the U.S. Consumer Product Safety Commission (CPSC).

I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's efforts in the area of import surveillance and H.R. 4678, the "Foreign Manufacturers Legal Accountability Act." The testimony that I will give this morning is mine, and has not been reviewed or approved by the Commission and may not necessarily represent the views of the Commission.

I. CPSC Efforts to Increase Oversight of Imported Products

From 1998 to 2007, the value of consumer products imported into the United States increased over 100 percent. During that time period, imports from China nearly quadrupled – and now constitute over 40 percent of all imported consumer goods. The shift in specific product areas has been more pronounced. In 2002, approximately 60 percent of toys purchased in the U.S. were imported from China and Hong Kong. By 2008, that number had risen to almost 80 percent of the U.S. market.

In response to the rapid increase in consumer product imports, the CPSC has taken several steps to inspect products entering this country to ensure that they comply with applicable product safety standards. In 2008, the Commission announced its Import Safety Initiative and established a new Import Surveillance Division within the Office of Compliance. The establishment of this new Division allowed the CPSC to co-locate permanent, full-time compliance investigators at key ports of entry into the United States. In 2009, the Division had ten full time employees (FTEs) dedicated to port surveillance; that number is scheduled to rise to fourteen FTEs by the end of fiscal year (FY) 2010, and nineteen FTEs in FY 2011. In addition, the Division can call on the resources of the entire Office of Compliance, which has over one hundred other FTEs, when necessary.

The CPSC has also sought to enhance its relationships with larger agency partners, such as the Department of Homeland Security. Through the Operation Guardian program, CPSC partners with U.S. Customs and Border Protection (CBP) staff in order to leverage joint resources. In addition, CPSC recently assigned two FTEs to CBP's new Commercial Targeting and Analysis Center (CTAC) and executed a Memorandum of Understanding with CBP that allows the agency direct access to pre-arrival cargo data. This allows CPSC inspectors to target suspect shipments before they arrive and – most importantly – before potentially dangerous goods can enter the U.S. stream of commerce. We have also conducted training programs with CBP to educate both government personnel and the importing community on CPSC and CBP product detention and seizure authorities.

So far, the results of these initiatives are encouraging. In FY 2007, the CPSC collected approximately 750 samples of suspect products entering our country. In FY 2009, that number more than doubled to almost 1600. At the same time, we started to see a commensurate decrease in the number of voluntary recalls from 563 in FY 2008 to 466 in FY 2009.

II. Working with Foreign Manufacturers

In most cases, CPSC has been able to work with domestic partners of foreign manufacturers, such as importers or retailers, on enforcement activities to obtain relief for consumers without resorting to adjudicative proceedings. One example of this is a $50,000 settlement with a Hong Kong corporation with offices in the United States that imported toys manufactured in China that violated the Commission's lead paint ban.

In a few cases, however, the lack of a registered agent for service of process has hindered the Commission's ability to develop information that would help us to provide relief to consumers. One example of this is the CPSC's efforts to provide relief to U.S. homeowners impacted by problem drywall imported from China. In a number of cases, CPSC staff has attempted to send requests for information to Chinese drywall manufacturers, only to have these requested returned to the Commission – refused and unopened.

The lack of a registered agent for service of process has also been recognized by Chinese industry groups, and some local lawyers in China have provided legal advice seeking to exploit this situation. In fact, the Chinese Building Material Industry website, in discussing U.S. court judgments, recently featured the following advice from a local attorney:

> How shall these building materials companies face the litigation and sentence of the U.S. court? If these companies don't have any business operation in the United States, and refuse to pay the compensation, then it's impossible to implement the sentence by the federal court.[1]

This type of sentiment appears rare. However, it is foreseeable that additional attempts to stymie or obstruct Commission efforts to obtain information voluntarily from manufacturers outside of U.S. legal jurisdiction could occur in the future. Any such recalcitrance could impede Commission efforts to assist consumers with potentially defective consumer products.

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[1] http://www.jiancai.com/info/detail/56-8459.html (translated on June 7, 2010).

III. H.R. 4678, the Foreign Manufacturers Legal Accountability Act

Additional authority allowing the CPSC to require foreign manufacturers designate a U.S. registered agent for service of process could be helpful in some cases – particularly those involving administrative requests for documents or information. On January 15, 2010, CPSC Chairman Inez M. Tenenbaum noted in a statement accompanying a report to Congress on the progress of implementing the Consumer Product Safety Improvement Act of 2008 that helpful changes to existing statutes might include "service of process requirements for foreign manufacturers so the agency can more easily pursue recalls." Currently, any action against an identifiable foreign manufacturer would require service of process using the Hague Convention.

As the Subcommittee moves forward, however, some additional direction would be helpful with regard to the range and size of manufacturers that would be subject to the registration process. In addition, it might also be helpful to involve the Import Safety Working Group in this process to ensure that appropriate jurisdictional and operational details are addressed.

* * * * *

Mr. Chairman, thank you again for the opportunity to testify on H.R. 4678 and the Commission's overall efforts to increase oversight of imported consumer products. I would be happy to answer any questions at this time.

Mr. RUSH. Thank you, the chair now recognizes Ms. Gadhia for 5 minutes.

STATEMENT OF AMI GADHIA

Ms. GADHIA. Thank you, good morning, Chairman Rush, Ranking Member Whitfield, and members of the subcommittee. My name is Ami Gadhia, and I'm policy counsel with Consumers Union, the nonprofit publisher of Consumer Reports Magazine. We appreciate the opportunity to testify the today in support of the Foreign Manufacturers Legal Accountability Act. I offer my testimony on behalf of both CU and the Consumer Federation of America. My full comments are contained in my written testimony, but I will summarize them briefly here.

H.R. 4678 is necessary to ensure that consumers who are harmed by unsafe products can obtain redress no matter where the product is manufactured. It will also create a level playing field for all manufacturers, both domestic and foreign, by holding the responsible party accountable when consumers are injured. CUA and CFA have long fought for legislation and regulation that will result in safer products on our store shelves. But in the event that an unsafe product makes it into the marketplace, consumers should be able to pursue all remedies for the harm they suffer whether the manufacturer of the unsafe product is a foreign company or a domestic one.

The products that Americans use every day are increasingly being manufactured overseas. According to the Toy Industry Association in 2007, toys made in China made up 70 to 80 percent of the toys sold in the U.S.

Of the products recalled by the CPSC since 2006, more than 75 percent of products were manufactured outside of the U.S.

We have too many frightening examples in recent years of dangerous or deadly foreign made products melamine, which is toxic to animals, was blended into pet food to give artificially high protein readings. Diethylene glycol, potentially lethal to humans, was substituted for its higher cost cousin glycerin, in the manufacture of toothpaste. Tires were manufactured with either a minimal or missing gum layer needed to prevent catastrophic tread separation. Toxic lead paint was substituted for the paint that was originally approved for popular children's toys presumably to save money.

These are all cases were unscrupulous business practices have jeopardized the health and safety of the consumer.

This legislation would assist our Federal agencies as well in their ability to recall consumer products manufactured by foreign entities.

The following example is illustrative in May 2001, the CPSC recalled a home soda machine manufactured by Drinkmaker of Sweden. Components inside the soda machine broke apart and went flying, and there were reports of lacerations, fractures and contusions caused by the machine. However, the manufacturer, Drinkmaker of Sweden AB, either could not be contacted by the Commission or would not cooperate with the voluntary recall. Fortunately, a responsible company, the Soft Drink Company of Seattle, Washington, agreed to conduct the recall of these machines with the CPSC and to repair the Drinkmaker.

It is untenable, however, to have a system of accountability that relies upon this kind of altruistic and rare behavior. By requiring that foreign manufacturers have registered agents in the U.S., H.R. 4678 will make considerable strides in assisting CPSC, FDA and EPA in holding the appropriate entities responsible for the products that they introduce and sell to U.S. consumers.

If foreign entities have the benefit of selling products and making profits from sales in the U.S., they should be accountable if the product causes harm.

While in some instances, U.S. retailers and other entities have shouldered the burden of the foreign manufacturers for the products they sell, this cannot be relied upon and is not always fair.

Domestic manufacturers who make safe products should not be undercut by foreign manufacturers who are not prioritizing safety. If a foreign manufacturer knows that they cannot be held responsible in U.S. Courts for the dangerous products they sell, this knowledge has a likely significant impact upon the manufacturing decisions. Did they use the stronger more expensive component? Do they ensure that the product meets safety standards? Holding manufacturing entities accountable in our civil justice system acts as an important deterrent to unethical and potentially harmful business conduct.

Deterring wrongful conduct is a significant attribute of our civil justice system and it does not make sense that foreign manufacturers who sell products in the U.S. Should be outside that system.

We have a modest suggestion for an improvement to the bill. In section 3(a)(3) of H.R. 4678, the minimum size of the foreign manufacturer is left to the discretion of the applicable agency. At a minimum, the heads of each agency must coordinate the definition of which companies would fall under the bill's scope, and ideally there will be a consistent definition. It would be confusing and counterintuitive if a manufacturer were to produce some products that fall under the scope of this bill and some products that do not.

Further, a consumer could be killed or seriously hurt by a product made by a manufacturer of any size. Our groups understand that it may be necessary to make a determination about which manufacturers fall under the bill but ensuring that consumers can obtain redress should be prioritized.

We want to prevent companies from purposely using the size limits to evade responsibility to purchasers and users.

Finally, we oppose efforts to weaken aspects of this legislation including efforts to shift cases from State to Federal courts. Efforts to limit access to State courts have negative consequences for consumers. Corporations that violate State laws are less likely to be held accountable for their wrongdoing when a Federal Court hears the case rather than's State court. Further corporations now seek to avoid responsibility under State law as States enact laws expanding consumer and environmental protections.

When a case is based solely on a violation of State law as many product liability cases are, no compelling reason exists for stripping State courts of the ability of enforce that State law.

Consumers Union and Consumer Federation of America support the Foreign Manufacturers Legal Accountability Act and we look

forward to working with you to ensure that this bill becomes law. Thank you.

[The prepared statement of Ms. Gadhia follows:]

Statement of

Ami V. Gadhia

Policy Counsel

Consumers Union

Before the

Subcommittee on Commerce, Trade, and Consumer Protection

of the House Energy and Commerce Committee

Regarding H.R. 4678, the Foreign Manufacturers Legal Accountability Act

June 16, 2010

I. Introduction

Chairman Rush, Ranking Member Whitfield, and Members of the Subcommittee, my name is Ami Gadhia, Policy Counsel with Consumers Union, the non-profit publisher of *Consumer Reports*® magazine.[1] We appreciate the opportunity to testify in support of the Foreign Manufacturers Legal Accountability Act of 2010. I offer my testimony today on behalf of both CU and the Consumer Federation of America (CFA).[2]

H.R. 4678 is necessary to ensure the fairness of our civil justice system and to ensure that consumers who are harmed by unsafe products can obtain redress no matter where the product is manufactured. It will also create a level playing field for all manufacturers – both domestic and foreign – by holding the responsible party accountable when consumers are injured.

CU and CFA have long fought for legislation and regulation that will result in safer products on our store shelves, and that will require importers of record to post a bond to ensure accountability for recalls and defective products. In the event that an unsafe product makes it into the marketplace, however, consumers should be able to pursue all remedies for the harm they suffer, whether the manufacturer of the unsafe product is a foreign company or a domestic one. This legislation will help consumers to pursue remedies against foreign manufacturers and producers of unsafe products.

II. Importance of the Foreign Manufacturers Legal Accountability Act

The Foreign Manufacturers Legal Accountability Act directs the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC) , and the Environmental Protection Agency (EPA), with respect to products under each agency's jurisdiction, to require foreign manufacturers and producers of such products, in excess of a minimum value or quantity, to establish a registered agent in the United States who is authorized to accept service of process on their behalf for the purpose of all civil and regulatory actions in state and federal courts. The Act further requires the registered agent to be located in a state with a substantial connection to the importation, distribution, or sale of the products and directs the Secretary of Commerce to establish, maintain, and make available to the public a registry of such agents. The Act also prohibits importation into the United States of a covered product or component part if the product or any part of the product was manufactured or produced outside the United States by a manufacturer or

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

[2] Consumer Federation of America (CFA) a non-profit association of more than 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance the consumer interest through advocacy and education.

producer who does not have a registered agent whose authority is in effect on the date of the importation.

A. Many Consumer Products are made by Foreign Manufacturers and have been the Subject of Recalls

This law is important for several reasons. First, more and more consumer products are being made abroad. Whether the products are toys, drywall, dog food, pharmaceuticals or toothpaste, the consumer products that Americans use everyday are increasingly being manufactured overseas. For example, according to the Toy Industry Association, in 2007, toys made in China made up 70 to 80 percent of the toys sold in the United States.[3]

In 2009, the CPSC recalled 465 products; 563 products in 2008; 472 in 2007; and 467 in 2006. In 2006, of products recalled, 24% were manufactured in the United States; in 2007, 18 % were manufactured in the United States; in 2008, 17%; and in 2009, 22% were made in the United States.[4] This means that more than 75 percent of products recalled since 2006 were manufactured outside of the United States.

Unfortunately products made overseas have posed great risks to consumers. In 2006, Consumers Union testified about these issues:

> High profile recalls of 2006 involved safety problems with Chinese imports were characterized by deceptive or dishonest business practices in an effort to cut costs. Melamine, which is toxic to animals, was blended into pet food to give artificially high protein readings. Diethylene glycol, potentially lethal to humans, was substituted for its higher-cost cousin, glycerin, in the manufacture of toothpaste. Tires were surreptitiously manufactured with either a minimal or missing gum layer needed to prevent catastrophic tread separation. Toxic lead paint was substituted for the paint that was originally approved for popular children's toys, presumably to save money. These are all cases where unscrupulous business practices have jeopardized the health and safety of the consumer.[5]

Agencies in the U.S. government were able to recall these products, which is critical for getting the unsafe products off of store shelves and out of consumer's hands. These recalls also focused our nation's attention on product safety and highlighted the weaknesses of our product safety system. Our federal agencies with jurisdiction over these products, including the CPSC, the FDA, and NHTSA, were in need of increased authority and increased resources to prevent these problems and to protect American consumers.

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[3] "As More Toys Are Recalled, Trail Ends in China," by Eric S. Lipton and David Barboza, *NY Times*, June 19, 2007.

[4] This information was provided by the U.S. Consumer Product Safety Commission. It is on file with CU and CFA.

[5] Testimony of Don Mays, Senior Director, Product Safety Planning & Technical Administration, Consumers Union, "Ensuring the Safety of Chinese Imports: Oversight and Analysis of the Federal Response" Before the U.S. Senate Committee on Commerce, Science, &Transportation, July 18, 2006.

B. Previous Legislative Efforts Have Not Focused on Bringing Foreign Manufacturers Into Our Civil Justice System

Regarding the CPSC, Congress acted and passed the Consumer Product Safety Improvement Act in August of 2008. Consumer groups supported this law and hailed its passage as the most significant improvements to the CPSC since the agency was established in the 1970's. The Consumer Product Safety Improvement Act of 2008 is making consumer products safer by requiring that toys and infant products be tested before they are sold, and by banning lead and phthalates in toys. The law also creates the first comprehensive, publicly accessible consumer complaint database, gives the CPSC the resources it needs to protect the public, increases civil penalties that CPSC can assess against violators of CPSC laws, and protects whistleblowers who report product safety defects.

While this law has made great strides in improving product safety, and will continue to do so as its implementation continues, the CPSIA focuses on improving safety by requiring that children's products subject to mandatory standards be tested to ensure compliance with the standard. The law does not address bringing foreign manufacturers into our civil justice system. However, to fully protect consumers from unsafe products, wherever they are made, American consumers must be able to hold manufacturers accountable when they are harmed – no matter where the products are made.

C. This Legislation Would Improve Regulatory Efforts to Protect Consumers From Unsafe Products

This legislation would positively impact an agency's ability to recall consumer products manufactured by foreign entities when the manufacturer does not have a registered agent in the United States. From what we know, the CPSC, for example, has been able to conduct recalls of products made by foreign manufacturers in many circumstances. CPSC has been able to collaborate with foreign entities to get unsafe products off the shelves. The CPSC has also been able to find creative ways to ensure that products are recalled when the foreign manufacture has not agreed to a recall. But our federal agencies need a formal and consistent method to protect U.S. consumers against dangerous products when those products are made by a foreign manufacturer.

The need for legislation is illustrated by the following example. In May of 2001, CPSC recalled a home soda machine manufactured by Drinkmaker of Sweden. According to CPSC's press release,[6] there were three reports of injuries caused by this product: a 7-year-old boy required hospitalizations due to lacerations; a 44-year old man suffered multiple fractures and lacerations to his right hand; and a 52- year old man suffered lacerations, fractures and contusions. Components inside the soda machine broke apart and posed serious risks of laceration to those individuals struck by flying broken parts. However, the manufacturer, Drinkmaker of Sweden AB, either could not be contacted by the Commission or would not cooperate with the voluntary recall.

Fortunately, a responsible company, The Soft Drink Company of Seattle Washington, agreed to conduct the recall of these machines with CPSC and also agreed to offer the remedy for consumers, which was to repair the Drinkmaker. In this case, the CPSC effectively worked with a U.S. company that stepped up to the plate to accept responsibility for the safety of these products. However, it is untenable to have a system of accountability that relies upon this kind of altruistic

[6] CPSC Press Release, "CPSC, Drinkmaker of Sweden AB Announce Recall of Home Soda Machines," May 10, 2001, available on the web at http://www.cpsc.gov/CPSCPUB/PREREL/prhtml01/01151.html.

and rare behavior. We must have a system that enables the federal government to protect U.S. citizens consistently. By requiring that foreign manufacturers must have registered agents in the United States, H.R. 4678 will make considerable strides in assisting CPSC, FDA and EPA to hold the appropriate entities responsible for the products they introduce and sell to U.S. consumers.

D. Fairness and Accountability

If foreign entities have the benefit of selling products and making profits from sales in the U.S., they should be accountable if the product causes harm. While in some instances, U.S. retailers and other entities have shouldered the burden of the foreign manufacturers for products they sell, this cannot be relied upon and is not always fair. H.R. 4678 will place responsibility on the appropriate entity. Importantly, this bill does not eliminate responsibility or liability for domestic manufacturers or retailers if they share responsibility for the product. Fairness dictates that responsible entities should be accountable and this law strives to accomplish that.

In addition, the fact that foreign entities without contacts in the Unites States cannot be held accountable for the unsafe product they sell to American consumers has significant adverse effects upon the consumers who are injured by those products, as well as domestic manufacturers who make safe products. Consumers who are injured by products, no matter where they are made, deserve legal redress when they suffer harm. Domestic manufacturers who make safe products should not be undercut by foreign manufacturers who are not prioritizing safety. Our current system fails to provide this important protection to our citizens at great costs to individuals and to our society.

E. Deterrence

If a foreign manufacturer knows that they cannot be held responsible in U.S. courts for the products they sell, this knowledge has a likely significant impact upon their manufacturing decisions. Do they use the stronger, more expensive component? Do they ensure that the product meets the safety standards? Do they prioritize safety if they know they are not accountable to U.S. consumers in U.S. courts? Holding manufacturing entities accountable in our civil justice system acts as an important deterrent to unethical and potentially harmful business conduct. Deterring wrongful conduct is a significant attribute of our civil justice system and it does not make sense that foreign manufacturers who sell products in the U.S. should be outside of that system.

III. Modest Suggestions for Improvement

Our groups support this bill and its proposed method for ensuring that manufacturers are held responsible for the products they sell in the United States. This bill includes products regulated by the U.S. Consumer Product Safety Commission, the Food and Drug Administration and the Environmental Protection Agency. We support the inclusion of products under the authority of these three agencies but also suggest that the National Highway Traffic Safety Administration be included in the scope of this legislation. In 2007, tires manufactured in China were recalled because they posed significant hazards to consumers.[7] The company sold its tires through a small family owned importer in New Jersey but the company not only denied that the tires were hazardous but

[7] "Chinese Tire Recall to Start Monday," *CNN*, June 28, 2007, at http://money.cnn.com/2007/06/27/autos/chinese_tire_recall/index.htm and "Chinese Tires Are Ordered Recalled," by Andrew Martin, *NY Times*, June 26, 2007.

also lacked the funds to cover the costs of the recall. Thus, issues involving foreign manufacturers can involve automobile parts and we suggest that products regulated by NHTSA be included within the scope of this legislation.

In Section 3(a)(3) of H.R. 4678, the minimum size of the foreign manufacturer is left to the discretion of the head of the applicable agency with jurisdiction over the specific product. At a minimum, the heads of each agency must coordinate the definition of which companies would fall under the bill's scope and ideally there will be a consistent definition. It would be confusing and counterintuitive if a manufacturer were to produce some products that fall under the scope of this bill and some products that do not. Further, a consumer could be killed or seriously hurt by a product made by a manufacturer of any size. Our groups understand that it may be necessary to make a determination about which manufacturers fall within the bill based upon, but ensuring that consumers can obtain redress should be prioritized. We want to prevent companies from purposefully using the size limits to evade responsibility to purchasers and users of their products.

IV. Trade Implications

Some concerns have been raised about whether the Foreign Manufacturers Legal Accountability Act violates World Trade Organization (WTO) agreements. WTO violations occur when foreign entities are treated differently than domestic ones under U.S. laws. This legislation seeks to do the opposite. This legislation actually creates an equal playing field by holding all manufacturers, no matter where there are based, responsible for the safety of the products they sell in the United States. Manufacturers as well as the products produced and sold in the U.S. would be treated equally under this legislation.

V. We Oppose Efforts to Weaken This Legislation

We oppose efforts to weaken aspects of this legislation, including efforts to shift cases from state to federal courts that benefit from the provisions of this bill. Efforts to limit consumer's access to state courts have negative consequences for consumers. Corporations that violate state laws are less likely to be held accountable for their wrongdoing when a federal court hears the case rather than a state court. Further, corporations now seek to avoid responsibility under state law as states enact laws expanding consumer and environmental protections. When a case is based solely on a violation of state law, as many product liability cases are, no compelling reason exists for stripping state courts of the ability to enforce that state law. In addition, state courts should be given the opportunity to develop their own state law in emerging areas by hearing these types of cases.[8]

VI. Conclusion

Consumers Union and Consumer Federation of America support the Foreign Manufacturers Legal Accountability Act. This law is necessary to ensure the fairness of our civil justice system and to ensure that consumers who are harmed by unsafe products can obtain redress no matter where the product is manufactured. This legislation creates an equal playing field for all manufacturers by holding the responsible party accountable. We look forward to working with you to ensure that this bill becomes law.

[8] Based on the principles of federalism, federal law discourages federal judges from expanding liability under state law.

Mr. RUSH. The chair now recognizes Mr. Morgan for 5 minutes.

STATEMENT OF WILLIAM MORGAN

Mr. MORGAN. Chairman Rush members of the subcommittee, thank you for allowing me to come here and testify. Thank you for allowing me the opportunity to come here and share my experiences with you here this morning. My name is Bill Morgan. I'm a retired police officer after having served the City of Newport News, Virginia for 24 years. My wife, Deborah, is a school teacher. She and I have been married 27 years. We have two daughters and our first grandchild was born a couple of weeks ago.

My wife and I bought our dream home in July 2006. It was a beautiful home on a corner lot in Williamsburg, Virginia with a big yard. Both Debbie and I fell in love with the home. It was the perfect home for our family. We paid a little under $400,000 for the home.

After my wife experienced multiple episodes of nose bleeds and headaches and after our house had a series of failures with the air conditioning and electrical systems, we discovered our had been built with defective drywall imported from China. We learned that this drywall contains high amounts of sulfur and that corrosive sulphur gases were circulating in our home corroding our electrical and mechanical equipment. My home was built with almost 200 sheets of 4 foot by 12 feet Chinese drywall.

After a hearing in front of Judge Eldon Fallin in New Orleans earlier this year, he found that the electrical and mechanical systems in my home had been completely destroyed and needed to be replaced. The only solution to this extensive damage is to strip my house back down to the studs and completely rebuild it. I can't afford that.

The corrosive gases have also damaged my computers, televisions and other electrical and electronic devices in my home. We were scared for our family's health and concerned about the risk of fire. We moved out of the house in June, 2009 last year. Since having to abandon our dream home, I've been unable to pay the rent on the place where we are currently living and my mortgage. I have lost my home in foreclosure, and I have had to file for personal bankruptcy.

The company that manufactured the drywall in my home was called Taishan. This company is located outside of Beijing in China. Although the Chinese company sent enough drywall into Norfolk, Virginia to build several hundred homes, it has refused to take any responsibility for its defective product. In the complaint that was filed on my behalf, it was necessary to have a lawsuit translated into Mandarin with special process service flying to China utilizing a time consuming and expensive process.

The Foreign Manufacturers Legal Accountability Act would streamline this process and give victims of defective foreign products a more speedy and equitable procedure to have their claims addressed. My lawyers have advised me that they spent well in excess of $150,000 serving foreign drywall manufacturers for victims like myself.

It's not unusual for these foreign authorities to sit on the lawsuits for 6 months before serving them on the defendant manufac-

turers. The average American, like myself, cannot afford this expensive time consuming and frustrating procedure.

Foreign manufacturers should not be allowed to sell products which destroy homes and make people sick with impunity. Unless these companies require to make themselves amenable to being sued in U.S. Court, they should not be allowed to sell their products here.

U.S. businesses are required to abide by our laws and foreign businesses that profit off of U.S. consumers should do so as well.

I look forward to answering any questions you folks may have, and thank you for allowing me to come here and share this experience with you here today.

[The prepared statement of Mr. Morgan follows:]

Testimony of William Morgan
Chinese drywall victim
6148 South Mayfair Circle
Williamsburg, VA 23188

Before the
Committee on Commerce, Trade and Consumer Protection
Of the
U.S. Congressional Committee on Energy and Commerce

Hearing on
"Foreign Manufacturers Legal Accountability Act"
Rayburn House office building room 2322

June 16, 2010
10:00 AM

Chairman Rush, and members of the subcommittee, thank you for allowing me the opportunity to share my experience with you this morning.

My name is Bill Morgan. I am a retired police officer having served the city of Newport News for 24 years. My wife Debra is a teacher. She and I have been married for 27 years and have two daughters and our first grandchild was born a couple of weeks ago.

My wife and I bought our dream home in July 2006. Our home was beautiful--on corner lot with a big yard in Williamsburg Virginia. Both Debra and I fell in love with it as the perfect home for our family. We paid a little under $400,000 for the home.

After my wife experienced multiple episodes of nosebleeds and headaches, and after our house had a series of failures with the air-conditioning and electrical systems, we discovered that our home had been built with defective drywall imported from China. We learned that this drywall contains high amounts of sulfur, and that corrosive sulfur gases were circulating in our home corroding electrical and mechanical equipment.

My house was built with almost 200 sheets, 4' x 12', of this Chinese drywall. After a hearing in front of Judge Eldon Fallon in New Orleans earlier this year, he found that the electrical and mechanical systems in my home had been completely destroyed and needed to be replaced. The only solution to this extensive damage is to strip my house back down to the studs, and rebuild it. I can't afford that. The corrosive gases have also damaged my computers and televisions and other electronic and electrical devices.

We were scared for our family's health, and concerned about the risk of fire. We moved out of the house in June of 2009. Since having to abandon our dream home, I have been unable to pay both the rent on the place where living now and my mortgage. I've lost my home in foreclosure, and I had to file for personal bankruptcy.

The company that manufactured the drywall in my home is called Taishan (pronounced "tie-shan".) This company is located outside of Beijing in China. Although this Chinese company sent enough drywall into Norfolk Virginia to build several hundred homes, it has refused to take responsibility for its defective product. In the Complaint that was filed on my behalf, it was necessary to have a lawsuit translated into Mandarin, with special process servers flying to China utilizing a time-consuming and expensive playbook.

The "Foreign Manufacturers Legal Accountability Act" would streamline this process, and give victims of defective foreign products a more speedy and equitable procedure to have their claims addressed. My lawyers have advised me that they've spent well in excess of $150,000 serving foreign drywall manufactures for victims like myself, and that future service costs are expected to double that number. Even after these expensive translations, it is not unusual for the foreign authorities to sit on the lawsuits for six months before serving them on the defendant manufacturer. The average American cannot afford this expensive, time-consuming and frustrating procedure.

Foreign manufacturers should not be allowed to sell products which destroy homes and make people sick with impunity. Unless these companies are required to make themselves amenable to being sued in a US court, they should not be allowed to sell their products here. US businesses are required to abide by our laws and foreign businesses that profit off US consumers should do so as well. I look forward to answering any questions you may have about my experience, and thank you again for allowing me the opportunity to testify this morning.

Mr. RUSH. The Chair recognizes Mr. Popper for 5 minutes.

STATEMENT OF ANDREW POPPER

Mr. POPPER. I thank you, Mr. Chairman, and a special hello to Congresswoman Sutton from my alma mater Baldwin-Wallace in Berea, Ohio.

H.R. 4678 is a straightforward appropriate essential step. It is, as far as I can tell, constitutionally sound, beneficial to consumers, beneficial to U.S. businesses and consistent with the laws and practices in many of our trading partners. It is as far as all of the witnesses seem to understand, a way to level the playing field. It strips foreign manufacturers of an unfair advantage. It closes an understandable loophole in our legal system. And that is not a loophole that is illegitimate. There is a constitutional basis for it. But there is also an answer for it. And the answer is this legislation.

It begins at least in terms of how we think about these things with the obvious need, and I don't think any of us could say it better than Mr. Morgan just did. When you place into the stream of commerce millions of products, and we are talking about millions of products with toxic levels of lead, drywall that is destroying a home and a family, cribs that present a risk of strangulation, aqua dots that are coated with date rape drug as part of their paint, contaminated toothpaste and seafood and honey and pet food, you got a problem.

And you might want to think that there are nice ways to get around this or our existing system of laws will account for it, but you really need to take the bull by the horns here.

This is a very wise, very simple piece of legislation. The idea of designating an individual for service of process, and by that designation, establishing consent is, as I think we all said, it's a logical, simple, appropriate and constitutional approach.

Imagine the scenario that was just presented by Mr. Morgan repeated over and over and over again. The majority of our most common pharmaceutical products are manufactured abroad, crash helmets, manufactured abroad, and the list, as you see from my testimony, goes on and on and on.

Here is a bill that deals with the problem finally of the difficulty of haling into court—an interesting term—a foreign entity that otherwise has a minimum contact and reasonability basis for resisting service of process.

Here is a bill that actually solves the problem.

And we all recognize what the problem is. If you don't have an agent or officer in this country, if you don't own property or have a representative in the United States, it becomes difficult under our current system, under our current jurisprudence to establish in persona jurisdiction. Now with one simple bill that mimics legislation in other fields that seems fair that seems a legitimate quid pro quo, a condition for doing business in the United States that is mimicked in many other areas, you solve the problem.

There were other solutions that people thought of, the aggregate of contacts suggestion that comes from the concurring opinion and the plurality opinion in Asahi is a legitimate answer. It's just complicated.

This is simple. This is right. And this is the moment to do it.

You have foreign producers who are creating a risk and are now being given a simple choice. I like to think of this legislation in terms of that word. This is choice. This is party autonomy. You don't have to do business here. If you choose to do business here, then you're subject to our laws. If we are lucky enough under the other legislation that is being considered or in any other area to have our wonderful manufacturing community able to market its goods abroad, do you think that they would get a free pass from other countries? China has just adopted a comprehensive tort law with strict liability, punitive damages, do you think that China is going to recognize a minimum contacts theory and not impose on our companies who do business there the same responsibility that we ought to be imposing on companies who do business in the United States?

I don't think so. I don't think so.

On the question of trade, and on the question of whether this creates an unfair advantage, there was a case involving artificial Christmas trees that catch on fire in the United States District Court about 2 years ago. And that product was manufactured in China. And the court held as follows, in this age of WTO and GATT, it is only reasonable that companies that distribute allegedly defective products to regional distributors in this country anticipate being haled into court.

Well, of course it's reasonable. Of course it's normal, it is a condition of doing business here. And yet a loophole exists. Close the loophole. It's not that complicated. This is leveling the playing field. This is getting rid of a free pass that we are giving foreign manufacturers, a free pass that our manufacturers don't get.

The law of the land in this country, the law of the land in virtually every common law country is lex loci delicti. You apply the law to the place of the wrong. The place of the wrong is here. This is where the manufacturer is harmed. Give the manufacturer the access to our courts, give the harmed individual access to our courts and let our system of justice work.

This is good legislation. It's going to produce fair result. It isn't perfect. No legislation is. The Constitution isn't perfect. That's why we keep amending it.

I ask that you give consideration to this bill. Thank ynu.

[The prepared statement of Mr. Popper follows:]

Testimony of Andrew F. Popper

Professor of Law

American University, Washington College of Law

Before the Committee on Energy and Commerce

United States House of Representatives

111th Congress, Second Session

June 16, 2010

H.R. 4678

The Foreign Manufacturers Legal Accountability Act

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I welcome the opportunity to testify on H.R. 4678, *The Foreign Manufacturers Legal Accountability Act* and am honored by your invitation.

I am a faculty member at the American University, Washington College of Law and have taught torts and administrative law for the last 31 years. I have written and spoken in those fields on a number of occasions and have submitted my resume to the Committee.

After review and analysis, H.R. 4678 strikes me as a strong bill that is constitutionally sound, beneficial to consumers, beneficial to U.S. businesses, and consistent with the domestic laws and practices of many of our major trading partners. It levels the civil liability landscape, stripping foreign manufacturers of an unfair advantage. It addresses a powerful but understandable loophole in our legal system, facilitating access to the courts by injured consumers.

By making possible litigation against those who place into the stream of commerce dangerous, defective, and even deadly goods, the bill triggers corrective justice incentive mechanisms of the tort system. When you create the realistic possibility for liability, you activate incentives to make safer and more efficient products.

H.R. 4678 is a simple, elegant, appropriate, and essential step forward. I believe this bill will make good law and effectuate a positive, highly beneficial change in the civil justice system.

This statement begins with a simple summary of the bill. Next, I address the nature of the problem and the necessity for the legislation. In the following section, I discuss some of the procedural and jurisdictional challenges in this field and the way in which the bill meets those challenges. The next section raises briefly the constitutional

minimum contacts and reasonability requirements and concludes that the bill is constitutionally sound. Thereafter, I discuss the conformity of this legislation to current trade law.

I. A Simple Summary

There are three central features in this bill:

1. Designation of an agent for service of process. H.R. 4678 requires foreign manufacturers of certain products and component parts[1] to designate a registered U.S. agent to accept service of process for civil or regulatory actions. The agent should be located in a state where the manufacturer has a substantial connection either through importation, distribution, or sale of its products. The bill prohibits importation of products or components manufactured by companies who fail to designate a registered agent within 180 days of the regulation.

2. Delineation of affected products or component parts. Three federal agencies[2] will determine those products and component parts subject to the terms of the bill. Each agency will also establish the minimum quantity or value required to trigger the terms of the bill.

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[1] The products or components affected by this bill include drugs, devices, and cosmetics, as defined by § 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321); biological products as defined by § 351(i) of the Public Health Service Act (42 U.S.C. 262(i)); consumer products as defined by § 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052); chemical substances as defined by § 3 of the Toxic Substances Control Act (15 U.S.C. 2602); and pesticides as defined by § 2 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136).

[2] Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency.

3. Consent to the jurisdiction of state and federal courts. Establishment of a registered agent in a state constitutes *consent* to jurisdiction by the foreign manufacturer in the courts of that state and in federal courts.

II. The Nature of the Problem and the Need for Legislation

Foreign manufacturers and distributors of defective goods sold in the United States should be liable for the harm they cause. When sellers place millions of toys in the stream of commerce with toxic levels of lead, children's play-beads containing deadly drugs, and poorly designed cribs that to give rise to the prospect of infant strangulation, they must be held accountable.

Freed of the obligations, incentives, and corrective justice effect of the domestic civil justice system – the tort system – to make products safe, foreign manufacturers and distributors have created an intolerable risk to U.S. consumers and placed a grossly unfair burden on domestic distributors and retailers.

Consider this scenario: failing to exercise that reasonable level of care demanded of every U.S. manufacturer, a foreign producer exports to the U.S. a child's toy, pharmaceutical product (*e.g.*, heparin), motorcycle crash helmet, building materials, animal food (for house pets or livestock), or seafood (for human consumption). As a direct and proximate result of using the product, a U.S. consumer suffers an injury or dies. The consumer (or the grieving family) attempts to hold accountable in a U.S. court the foreign producer only to learn that while our legal system would impose liability on any U.S. company under these circumstances, a foreign producer cannot be sued – *i.e.*, cannot be "haled" into court.

It is both the current state of the law – and wholly unacceptable – that a foreign producer cannot readily be held accountable in the above scenario even if (a) the product was unquestionably dangerous and defective, (b) the harm to the victim was foreseeable, and (c) the foreign producer has sold large numbers of these products in the U.S. in the past.

H.R. 4678 provides a logical, necessary, and constitutionally sound response that will help close this gaping loophole in our civil justice system.

I started writing – and first testified – about this several years ago.[3] At the time, as I focused on the frustrating nature of the jurisdictional and constitutional issues, I began to explore the magnitude of the problem. How often did the above scenario take place? What was – and is – the magnitude of the problem?

Here is my conclusion: Conservatively, there are tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets. Well over 80% of the products regulated by the Consumer Product Safety Commission are manufactured abroad – and many of those producers are not subject to tort liability regardless of the fact that their products are dangerous and are likely to be sold in the U.S.

While this hearing is devoted to the legal issues raised and the powerful and

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[3] Popper, "Defective Foreign Products in the United States: Issues and Discussion," 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, "Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods," 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008); Popper, "Holding Foreign Manufacturers Accountable for Defective Products," Before the United States House of Representatives, 110th Congress, 1st Session, Committee on the Judiciary, Sub-Committee on Commercial and Administrative Law, November 15, 2007, published at http://judiciary.house.gov/oversight.aspx?ID=395.

simple wisdom of the proposed legislative resolution under the bill, consider some of the goods produced abroad that have been recalled in the last two years:[1]

> (Designed for children): Daiso children's jewelry (China) excessive levels of lead; Wendy Bellissimo Hidden Hills Collection Cribs (China) crib-slat strangling hazard; Mini Chef Complete Toy Kitchens (Thailand) choking hazard; MindWare's Animal Tracking Explorer Kit (China) no warning about calcium hydroxide; The Adventure Play Set (China) weak chains; Camouflage Pajama Sets (Vietnam) excessive levels of lead; Playsafe Spinning Quad Merry-Go-Rounds (China) unsafe seating design; "Hip Charm" Key (China) excessive levels of lead; Ardine Cribs (China and Vietnam) head injury/potential stangulation; Cadence-Lea and Trio-Lea Girl's Sandals (China) choking hazard; 2nd Nature Built to Grow Cribs (Slovenia) strangulation hazard; "Thunder Wolf" Remote Controlled Indoor Helicopters (China) fire hazzard; Jackets from Coolibar (China) strangulation; Taggies™ Sleep'n Play Infant Garments (China) choking hazard; "It's a Girl Thing" Bracelets (China) excessive levels of lead; LaJolla Boat Bed and Pirates of the Caribbean Twin Trundle Beds (China) strangulation; Children's Necklaces with Ballet Shoes Charms (China) excessive levels of lead; Children's Charm Craft Kits (China) excessive levels of lead; "Faded Glory" Lip Gloss (China) excessive levels of lead; It's My Binky's Personalized Pacifier (Maylasia) choking hazard; Bright Starts Ring Rattles (China) choking incidents; Classic Horseshoe Magnets (China) excessive levels of lead; U-shaped Magnets Bar Magnets (China) excessive levels of lead.
>
> (Products for general use): The Topsy-Turvy Deluxe Tomato Planters (China) instablity; SoundStation2W Wireless Conference Phones (China) fire risk; "Remy" shag rugs (India) fire risk; HP Fax 1010 and 1010xi Machines (China) fire risks; Shopko and Boscov TV stands (China) instability; Dirt Devil Vacuums Power Brush Attachment Tools (China) shatter hazzard; Santorini Chairs (Taiwan) faulty welding/chair collapse; Arctic Cat All-Terrain Vehicles (Taiwan) defective speed coutrol mechanism; All-Terrain Vehicles from KYMCO and Kawasaki (Taiwan) design/loss of control of the vehicle; Paintball Gun Remote Line Adapters from Real Action Paintball (China) overtightening could cause an explosion; SLA90 Youth All-Terrain Vehicles (Chiua) lacked front brakes, a manual fuel shut-off, and proper padding; Amsterdam Bicycles (Taiwan) faulty chain derailer; Infra-Red Sauna Rooms (China) overheating hazard; Bosch Hammer Drills (Malaysia) operates in off" positinn; Crafters Square Hot Melt Mini Glue Guns (China) fire risk; Bench Scale Adapters (China) fire hazard; Cuddly Comfort Pillows (China) pillows contain small metal fragments.

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[1] *Id.* This list was presented in a white paper I delivered at an American Association for Justice/American University, Washington College of Law program, *Dangerous Products: From Lead Toys to Tainted Drugs, A Discussion for Consumer Protection Professionals and the Media*, Washington, DC, November 14, 2008.

This list barely scratches the surface of the problem. The child's toy, Aqua Dots, was recalled after it was alleged to be contaminated with a "date rape" drug. Litigants in Florida allege that Chinese drywall installed in their homes is dangerous, malodorous, and contaminated with high levels of sulfur. There are allegations regarding contaminated toothpaste, seafood, pet food, honey, and claims regarding product integrity deficiencies in steel pipes and automobile tires. While countries outside the U.S. claim they can insure product safety, the record suggests a very different result.[5]

Every U.S. manufacturer of any product is subject to the U.S. rule of law, the U.S. civil justice system, and U.S. regulatory mandates. That foreign entities and individuals profit from the sale of goods – on occasion, dangerous or even deadly defective goods – and are somehow outside this system is offensive, dangerous, and unfair. It is time to put an end to this injustice.

III. H.R. 4678: A Simple, Elegant, Appropriate, and Essential Change

H.R. 4678 provides a remarkably elegant and simple solution to the jurisdictional and constitutional challenges that have thwarted scores of victims in the past.

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[5] After the tainted pet food debacle a few years ago, China, the source of tens of millions of dangerous goods, claimed it would implement 10,000 new safety regulations. As of the date of this testimony, many of those regulations are not in place. *More Legislation to Combat Shoddy Products*, FINANCIAL TIMES, January 9, 2008. http://www.legalinfo.gov.cn/english/News1/content/2009-01/20/content_1024166.htm?node=7604; *Chinese Officials Dealing With New Pesticide Tainted Food Crop*, March 3, 2010, http://chinadigitaltimes.net/2010/03/chinese-officials-dealing-with-new-pesticide-tainted-food-crop/; *Melamine Reprise: Who Knew What When?*, http://chinadigitaltimes.net/2010/01/melamine-reprise-who-knew-what-when/, January 2010.

We all recognize the legal issue: assertion of jurisdiction over an individual or entity presents a challenge when the entity's contacts with state are limited or minimal. Not surprisingly, many foreign manufacturers do not have an officer, agent, representative, employee, office, or property (indicia of more than minimal contact) in a particular state where their products cause harm. At present, such manufacturers cannot readily be haled into court if their contacts fail to meet the constitutionally compelled "minimum contacts" requirement. Notwithstanding the presence of a citizen injured by an overtly defective product manufactured by a known (but foreign) defendant, U.S. courts have, to date, been unreliable fora.

In the absence of the ingenious solution presented in H.R. 4678, access to justice is limited or denied. To hale a foreign manufacturer into court, a victim must show that the foreign entity has "purposefully established 'minimum contacts' in the forum State."[6] In addition, the assertion of judicial power must be consistent with notions of fair play and substantial justice, fundamental fairness, and reasonability – for the defendant. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*.[7] This test requires courts to assess the burdens the defendant faces in having to defend a claim in the U.S., including an assessment of whether the defendant "purposefully availed" itself of the rights and obligations of the forum state.[8] Foreseeable presence of a product alone is unlikely to meet these requirements.[9]

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[6] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1984).

[7] 480 U.S. 102, 113 (1987); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

[8] *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

[9] *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

Justice O'Connor's plurality opinion in *Asahi* requires contacts that go beyond the "mere act of placing the product into the stream" of commerce such as advertising, marketing, or designing a product for the forum state.[10] Justice Brennan concurred in *Asahi*, suggesting a more fundamental "stream of commerce" approach – a simple notion involving the foreseeable presence of the product – but his view has not been followed in most state courts. In the void created by *Asahi* and similar cases, courts are – at best – unsure about the most basic exercise of power over foreign manufacturers who produce goods that harm U.S. consumers.

Do not accept the assertion that the constitutional and jurisdictional riddle presented by the *Asahi* case is insoluble.

First, in what has become a rather well-known footnote, Justice O'Connor speculated whether "Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits."[11] The footnote simply posed the question and could be seen as an invitation to the Congress to solve the jurisdictional and constitutional question by a legislative declaration that the minimum contacts/reasonability/fairness requirements are met when there is an aggregation of national contacts (though the approach was limited to federal courts). The aggregation of national contacts approach requires definitions of the volume of activity. It is *not* the basis of H.R. 4678.

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[10] *Asahi*, at 111-112.

[11] *Asahi* at 113.

H.R. 4678 is in part predicated on a more fundamental notion – choice or party autonomy.[12] If a foreign producer chooses to sell products in the U.S., as a condition of doing business, the producer or its domestic distributor must consent to the jurisdiction of the U.S. courts and designate a registered agent for service of process. Consent to jurisdiction, much like agreements regarding the body of law to apply in a particular contractual transaction, is common, understandable, and effective.[13]

This is a wonderful step forward both in protecting consumers and leveling the playing field in this area.

IV. HR 4678: A Constitutionally Sound Proposal

Foreign manufacturers are subject to the jurisdiction of domestic courts if there are sufficient minimum contacts with the forum state and if the proceeding comports with our notions of fairness, justice, and reasonability. While *Asahi* requires judges to take into account the unique burdens a defendant faces in a foreign legal system, if a manufacturer reaps the benefits of a distribution network, it should not be able thereafter

[12] The "choice" aspect of this bill is not absolute since it is coupled with the notion of meaningful contacts. However, for large producers and distributors, this can be akin to generalized notions of party autonomy. Support for the notion of party autonomy is not a matter of controversy. See, Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 Am. J. Comp. L. 543 (2005) Michael Whincop & Mary Keyes, *Putting the "Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 Melb. U. L. Rev. 515, 542 (1997); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 52 (1992).

[13] In the automobile safety area, the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. 30164, requires non-U.S. manufacturers selling vehicles in the United States to designate a permanent resident of the U.S. as an agent for service of process and for purposes of administrative and judicial proceedings that might result if the product turns out to be problematic. A clarification of those rules issued in August, 2005 (Fed. Reg. August 8, 2005, vol. 70. no. 151).

to deny the forum court's jurisdiction.[14]

At their core, these dual requirements (minimum contacts and fairness) involve notice and a relationship with a forum state. Designation of an agent in a state where there are substantial contacts (as mandated by H.R. 4678) meets those requirements.

In the absence of H.R. 4678, the problems with the current state of the law will remain unsolved. Two years ago, I studied dozens of case where jurisdiction was denied even though the products in question were made with the purpose of being sold in the U.S.[15] While there are some cases that find it "fundamentally unfair" to allow a foreign manufacturer to insulate itself from the jurisdiction of the court solely by the use of a distributor, they are not the norm.[16]

The minimum contacts puzzle is not complicated. The more a defendant purposefully avails itself of the rights and obligations of the forum state, maintains facilities, bank accounts, owns property, pays taxes, has employees, agents, advertizes, establishes communication with consumers online or otherwise, the less minimum the contact become. All these features infer notice and "relationship" with the forum state – and H.R. 4678 actually *requires* both.

Constitutional concerns are often framed in terms of two other terms: service of

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[14] This paragraph and much of materials in this section are drawn heavily from my articles, Popper, "Defective Foreign Products in the United States: Issues and Discussion," 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, "Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods," 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008).

[15] *Id.*

[16] *Saia v. Scripto-Tokai*, 366 Ill. App. 3d 419; 851 N.E.2d 693 (2006), *cert. denied* 550 U.S. 934 (2007); *Cunningham v. Subaru of America, Inc.*, 631 F. Supp. 132, 136 (D. Kan. 1986) (finding avoidance of accountability "fundamentally unfair" for certain foreign manufacturers who produce goods designed for sale and sold in the U.S.).

process and reasonability. On its face, H.R. 4678 provides s statutory solution for service of process. As to a reasonability assessments based on the Fifth Amendment and Fourteenth Amendments,[17] one approach is to look at the policies underlying the statutes, the interests of the state, the ease of litigating a claim, and fundamental fairness. A state's interest in having a producer or distributor of defective goods held accountable, particularly when the producer has an agent in the state and has consented to the jurisdiction of the state, seems a straightforward matter.

Some courts have simplified the reasonability matter and held that once purposeful availment is found, the reasonability requirement is satisfied ("reasonableness . . . is presumed once the court finds purposeful availment. . .")[18] Consent to jurisdiction imposed by law and the presence of a registered agent in the state would satisfy the reasonableness analysis. However, without H.R. 4678, the reasonability calculus becomes complex.

Typical of reasonability cases is *Bou-matic, v. Ollimac Dairy*[19] which relied on seven factors to assess reasonability: 1) The extent of purposeful interjection; 2) the

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[17] Fifth Amendment (for federal) aad Fourteenth Amendment (for state) considerations still apply. The question becomes whether those considerations are addressed in a statute that mandates an agent for service of process and requires consent to jurisdiction.

[18] *Bou-matic v. Ollimac Dairy*, U.S. District Court, Eastern District of California, 2006 U.S. Dist. LEXIS 14543, March 15, 2006 citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (1995), which cites *Sher v. Johnson*, 911 F.2d 1357, 1364 (9th Cir.1990) ("once a court finds purposeful availment, it must presume that jurisdiction would be reasonable"). The *Bou-Matic* court noted that, "[w]hen such a presumption operates, the burden of proving unreasonableness shifts to defendant. . . who must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (citing) *Ballard*, 65 F.3d at 1500 (and quoting *Burger King*, 471 U.S. at 477, supra, note 6)).

[19] *Id.*

burden on the defendant to defend in the chosen forum; 3) conflict with interests of the sovereignty of the defendant's state; 4) the foreign state's interest in the dispute; 5) the most efficient forum for judicial resolution of the dispute; 6) the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum.[20] The court also noted that one must look broadly to the connections the manufacturer has with the United States, not just to the forum state.[21] H.R. 4678 would greatly simplify this type of inquiry.

H.R. 4678 can be analogized to various registration statutes.[22] While such statutes often facilitate service of process, they have not always resolved *in personam* jurisdiction,[23] and have been only part of a fairness/reasonability due process analysis.[24]

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[20] Id. at 13.

[21] Id. at 16.

[22] *E.g.*, National Traffic aud Motor Vehicle Safety Act, 49 U.S.C. § 30164; 49 U.S.C. § 10330 (requires every interstate carrier subject to the jurisdiction of the Interstate Commerce Commission to designate an agent for service of process in each state which it operates in); Foreign Corporation Act, Minn.Stat. § 303 *et seq.*; Tex. Bus.Corp. Act Ann. art. 8.10(A); 10 Del.Code § 3114 (upheld, *Armstrong v. Pomerance*, 423 A.2d 174 (Del.1980). *Cf.* various state single-act motorist statutes, e.g. *Hess v. Palowski*, 274 U.S. 352 (1927) (discussing what was then Mass.Stat.1923, c. 431, § 2).

[23] *See e.g.*, *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491, 494 (5th Cir. 1989) (service was proper but did not resolve personal jurisdiction.) *but cf. Burnham v. Superior Court*, 495 U.S. 604 (1990) (personal service of process over an individual is sufficient for personal jurisdiction).

[24] *See*, Sean K. Hornbeck, *Comment, Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB.L.REV. 1389, 1433-1436 (1996) ("Unless otherwise indicated, courts will read statutes containing such service provisions as including an authorization for a national contacts test.") *and* ("The Ninth Circuit construed "worldwide" or national service of process provisions as legislatively authorizing both service abroad and the use of a national contacts tests for purposes of asserting personal jurisdiction over foreign defendants.") (internal citations omitted), (citing *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989) (upheld a statutes authorizing international service of process using a "national contacts" approach); Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L.REV. 1, 21, FN (2006) (discussion of personal jurisdiction issues).

However, a designated agent plus a legislative declaration of consent to jurisdiction provides a solid basis for declaring satisfied the reasonability requirement, even when characterized as simple registration.[25] An entity that consents to jurisdiction gives up right to challenge it, even if compelled to consent[26] by statute.[27]

V. H.R 4678: Consistent with Globalization and with the Legal Systems of U.S. Trading Partners

In *Jones & Pointe v. Boto*,[28] a foreign manufacturer sold artificial Christmas trees in Virginia, derived profits from those sales, and maintained a website that invited inquiries regarding the products in question.[29] This information was available to any person and the design of the website inferred no limitations on the areas where the site

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[25] There is some disagreement about the effect on *in personam* of simple registration statutes. *Compare Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) ("One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.") *and Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135, 136 (6th Cir. 1946) ("Service upon an agent so designated in conformity with a valid state statute constitutes consent to be sued . . . The fact that the consent was given under a valid federal statute rather than under a state statute does not detract from the force and legal effect of that consent."), *with Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) ("the mere act of registering an agent [. . .] does not act as consent" and fact that Learjet sold 1% of national business in Texas not enough to establish *general* jurisdiction) *and Ratliff v. Cooper Laboratories, Inc.* 444 F.2d 745 (4th Cir. 1971), *cert. denied* 404 U.S. 948 (1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes.").

[26] *See Knowlton supra* note 25 at 1200 ("The designation of an agent, in accordance with federal law, also operates as consent to the personal jurisdiction of the Minnesota courts.")

[27] *See Knowlton supra* note 25, at 1199-1200 ("Such consent is a valid basis of personal jurisdiction, and resort to minimum contacts or due-process analysis to justify the jurisdiction is unnecessary.") (quoting *Ins. Co. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)).

[28] 498 F. Supp. 2d 822, 829 (E.D. Pa. 2007).

[29] Id. at 829.

was to be accessed or the products sold. Accordingly, the court held that "in this age of WTO and GATT [the General Agreement on Tariffs and Trade] one can expect further globalization of commerce, *and it is only reasonable that companies that distribute allegedly defective products through regional distributors in this country. . . anticipate being haled into court by plaintiffs in their home states* [emphasis added]."[30] H.R. 4678 resolves the question of "home state" and is fully consistent with evolving trends and expectations in our increasingly globalized economy.[31]

In terms of the WTO[32], H.R. 4678 does not create an undue barrier or obstacle to trade. It imposes on foreign manufacturers the same responsibilities and obligations of domestic sellers and producers. The WTO concept of trade without discrimination requires a somewhat level playing field for domestic and non-domestic market participants and H.R.4678 does just that.

Moreover, while I do not teach in the international trade area, it appears that many of the primary U.S. trading partners (including China and most of Latin America) do not give U.S. companies doing business in their countries a "free pass" from their legal systems.[33] It is only logical, therefore, that foreign companies within the U.S. are

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[30] Id. at 831 (citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994).

[31] I discuss some of the special challenges plaintiffs face when trying to pursue claims against foreign defendant in my article in the *Product Safety and Liability Reporter* (supra, note 3) For this testimony, I will only note that Central Authority established by the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters is the likely means of serving process on a foreign defendant (there are other mechanisms, e.g., letters rogatory, that are unreliable at best). Time, costs, and inconvenience plague this process. The ability to secure service of process through a domestic designated agent set forth in H.R. 4678 should ease some of the burden on injured U.S. consumers.

[32] For general information about the World Trade Organization, see, www.wto.org

[33] Yu Shanshan, *Psst. China Has Tort Laws. Oh, And They Are Relevant For Foreigners*, April 1,

likewise subject to the jurisdiction of U.S. courts.

More than a century ago, the Supreme Court recognized that the U.S. legal system did not operate in isolation.[34] As the 19th Century drew to a close, an international vision of commerce emerged. Part of that vision, however, was the understanding that there are rules to follow both in terms of international law and the country-by-country application of domestic law predicated, *inter alia*, on protecting the "rights of [a country's] own citizens or of other persons who are under the protection of its laws."[35] H.R. achieves precisely that objective: without creating any unusual burdens, it gives U.S. consumers access to the civil justice system.

The short of it is that H.R. 4678 aligns the U.S. with our trading partners. It does not create unique or extraordinary trade barriers. Moreover, the general rule in tort law in almost every country regarding forum is *lex loci delecti* – the law of the place of the wrong. H.R. 4678 is fully consistent with this construct.

VI. Conclusion

H.R. 4678 is important not only in terms of injured consumers but in terms of

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2010. http://www.beijingtoday.com.cn/tag/tort-law (on the application of China's New Tort law); Peter Neumann and Calvin Ding, *China's New Tort Law: Dawn of the Product Liability Era*, http://chinabusinessreview.net/public/1003/neumann.html, June 2010; John F. Molloy, *Conference Report, Miami Conference Summary of Presentations*, 20 Ariz. J. INT'L & COMP. LAW 47, 59-63 (2003) (describing the strategic and practical considerations relevant to U.S. companies sued in Latin America countries)

[34] *Hilton v. Guyot*, 159 U.S. 113 (1895).

[35] "But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 164.

U.S. business interests. When foreign entities (through their products) are in the U.S. and are outside the reach of the U.S. court system, a market distortion occurs. Quite simply, foreign entities (and their domestic distributors) are at a distinct cost advantage over their domestic competitors who must both avoid liability by exercising higher levels of care and must insure against the chance of product failure.

In other areas of law (*e.g.*, antitrust[36]) entities located abroad that affect and cause harm to interests within the U.S. bear responsibility for those consequences in U.S. courts. Entities doing business here – selling goods directly to consumers – should also be no less accountable in our courts.

H.R. 4678 levels the playing field and protects consumers. It is constitutionally sound and consistent with trade law. It is a straightforward and essential change, giving injured persons access to the civil justice system.

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I have had the honor of testifying on matters pertaining to tort law and tort reform on many occasions over the last 25 years. Almost every bill I considered during that time raised troubling questions about the protection of consumers. My testimony supporting H.R. 4678 is a first for me.

This is good legislation that will produce fair and just results. I ask respectfully

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[36] *See generally*, Article 5(3) of the Brussels I Regulation applicable to EU countries. *See*, Boast and Pennington, *Extraterritorial Application of U.S. Antitrust Law: An Overview*, http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/boast.pdf; Roger Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213 (1993)

that you adopt H.R. 4678.[37]

[37] My great thanks to American University, Washington College of Law students Katie Leesman, Lucia Rich, Jon Stroud, and Allyson Valadez for their invaluable assistance. AFP

Mr. RUSH. Ms. Rowden, you are recognized for 5 minutes.

STATEMENT OF MARIANNE ROWDEN

Ms. ROWDEN. Thank you, Chairman Rush, Ranking Member Whitfield, and members of the subcommittee, my name is Marianne Rowden, and I'm president and CEO of the American Association of Exporters and Importers. AAEI has been the voice of the International Trade Community since 1921, and we represent the entire spectrum of the trade community. AAEI greatly appreciates the opportunity to testify today. Our written testimony submitted for the record raises five points, but I would like to concentrate on two fundamental issues.

Since enactment of the Consumer Product Safety Improvement Act, product safety has become an integral part of trade compliance. This new responsibility follows the trade community adopting new practices to enhance supply chain security since 9/11.

Our experience over the last decade has been that regulating goods produced outside of the United States requires two things: First a wholistic risk management system; and two, implementation of product safety legislation, which would eliminate the need for H.R. 4678.

Let's turn to the chart entitled A Multi-Layered Approach to Wholistic Risk Management.

This chart categorizes companies based on risk characteristics. This solution will allow the government to spend its limited resources efficiently and effectively to prevent defective products from entering the commerce of the United States, secure the homeland and increase trade compliance.

We would like to highlight the companies who joined CPSC's voluntary partnership program with CBP, the importer self-assessment program for product safety would fall into the ultra low risk category as a result of their demonstrated commitment to ensuring the integrity of their imported products and the safety of U.S. consumers.

This wholistic risk management approach is critical to the implementation of product safety laws enacted by Congress. First, without information about the integrity of imported products, we will continue to see defective products. AAEI is working with CBP, FDA, CPSC and other Federal agencies to leverage the data already collected by CBP to assess risk.

Congress has chosen different methods for dealing with risks posed by different products. For consumer products, Congress has directed CPSC to require certifications demonstrating that the product meets applicable safety standards.

For food drugs and devices, Congress chose to require foreign manufacturers to register with FDA because of the risks posed to the public health by potential bad actors seeking to compromise the integrity of these products.

These laws need time for implementation and evaluation of their effectiveness before adding more legislative requirements.

Finally, AAEI remains concerned that if Congress chooses to pass H.R. 4678, similar requirements will be placed on U.S. companies exporting to foreign markets. We believe it will be difficult for small U.S. companies to expand export opportunities and create

jobs in the United States if they are required to appoint a registered agent in foreign countries to defend lawsuits.

We thank you for the opportunity tn testify today, and I'm happy to answer the subcommittee's questions.

[The prepared statement of Ms. Rowden follows:]

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Statement of Marianne Rowden
President & CEO, American Association of Exporters and Importers

Testimony on "H.R. 4678, Foreign Manufacturers Legal Accountability Act"
before House Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

June 16, 2010

A. Introduction and Overview

Chairman Rush, Ranking Member Whitfield and Members of the Committee, good morning. My name is Marianne Rowden and I am the President and CEO of the American Association of Exporters and Importers (AAEI). AAEI appreciates the opportunity to offer its comments on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act of 2010."

It is a privilege to appear before you today at this hearing, and we are honored that the Committee has invited AAEI to provide our expertise about the impact of H.R. 4678 on international trade and the U.S. trade community. We hope that AAEI's testimony provides the Committee with a broader perspective on the ripple effects that legislation such as H.R. 4678 can have on the global trading system and U.S. companies importing products into the United States as well as those seeking to export to foreign markets as well.

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues. AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as the technical experts regarding the day-to-day facilitation of trade.

B. H.R. 4678 Will Not Enhance Product Safety

AAEI's testimony on H.R. 4678 addresses five areas of concern regarding the impact of this bill on the international trade community: 1) AAEI favors a risk management approach to product safety issues; 2) the U.S. importer of record is the entity which bears the legal responsibility for legal and regulatory action in connection with imported products; 3) recent legislation by Congress already requires many foreign manufacturers in highly-regulated industries to register with U.S. federal agencies; 4) U.S. federal agencies are working with foreign governments to monitor and prevent defective products from being exported to the United States; and 5) requiring foreign manufacturers to appoint a registered agent in the U.S. will negatively impact U.S. exporters, particularly small-medium enterprises.

AAEI believes that Congress is at its best when it enacts legislation that provides a framework and tools to achieve certain outcomes rather than mandating processes to

achieve a particular result. Congress has begun enacting legislation to deal with product safety problems resulting from imported defective products. AAEI believes that Congress should continue its work on product safety legislation for goods which pose a health or safety risk to the American public, and to let the various current pieces of legislation affect change before adding any new requirements.

1. Risk Management for Product Safety

Over the last decade, the international trade community has had to deal with a variety of risks as a result of global sourcing for the U.S. market as well as U.S. companies expanding their sales to foreign markets. These risks include ensuring the integrity of shipping containers to protect the U.S. homeland from a weapon of mass destruction being shipped through the global supply chain as well as ensuring the integrity of the product in the shipping container to protect against defective products which may harm the health and safety of the American public.

Risk management has been the policy adopted by U.S. Customs and Border Protection after the attack on 9/11 to regulate the global supply chain. Congress has ratified this policy by basing CBP's risk-based account management program, the Customs-Trade Partnership Against Terrorism (C-TPAT), in section 211 of the Secure and Accountability for Every Port Act (SAFE Port Act), P.L. 109-347 (October 13, 2006).

Congress has followed this risk management approach for product safety as well in passage of the Consumer Product Safety Improvement Act (CPSIA). Specifically, section 222 provides that:

> (a) RISK ASSESSMENT METHODOLOGY.—Not later than 2 years after the date of enactment of this Act, the Commission shall develop a risk assessment methodology for the identification of shipments of consumer products that are—
>
> (1) intended for import into the United States; and
>
> (2) likely to include consumer products in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission.

See, 15 U.S.C. § 2066. The heart of risk management must be account-based management, which is essentially a pre-entry assessment of a company's risk profile and a post-entry assessment of its actual compliance with U.S. customs and product safety laws.

AAEI has designed a chart entitled "A Multi-Layered Approach to Holistic Risk Assessment" which categorizes importers by risk based on certain characteristics. For example, companies which are "ultra-low risk" are those who join public-private partnership programs (such as C-TPAT or ISA) because they work with CBP on a continual basis to ensure that their compliance level is high. Importers which import cargo from low-risk countries should be designated as low-risk, whereas importers that have high-risk characteristics or import from high-risk countries are medium-risk, and unknown importers with infrequent shipments from the highest risk countries pose the highest risk for both trade compliance and supply chain security. However, such assessments can only be made using an account-based system whereby CBP develops a risk-based methodology to create a company profile for CBP to determine the appropriate tools for the level of risk posed by the company.

CBP and CPSC have developed an account-based risk management program, the Importer Self-Assessment (ISA) for Product Safety. CBP has found a correlation between companies

with good internal controls and highly compliance rate with U.S. customs laws. It is this correlation which forms the foundation of ISA, and can support the development of account-based management programs. Companies join ISA in order to be removed from the annual Focused Assessment audit pool so that they can devote the resources necessary (e.g., compliance personnel) to conduct the periodic self-audits required by ISA. ISA requires companies to document these periodic audits. Unfortunately, only two companies have been accepted into the ISA for product safety program. AAEI supports ISA's risk-based analysis of companies' business processes, and supports the development of "risk assessment" methodologies, such as those required by the CPSIA, for product safety.

2. Role of the U.S. Importer of Record

Under U.S. customs law, the U.S importer of record (i.e., the owner or purchaser of the goods) is the entity which has the legal responsibility to ensure that the goods are entered with "reasonable care" and in compliance with all federal laws. See, 19 U.S.C. § 1484(a). Only entities who can demonstrate their right to make entry, that is show that they have a financial interest in the goods as an owner, purchaser (or in some cases, a license customs broker on behalf of an importer) have the right to make entry.[1]

As the owner of the merchandise, the U.S. importer is the entity over whom the United States exercises legal jurisdiction since generally enforcement actions by federal agencies relating to the imported goods are by their nature *in rem* actions (i.e., actions against the goods). Moreover, implementation of H.R. 4678 would require CBP to develop another complex layer of regulations to determine who the actual manufacturer is for purposes of appointing a registered agent. We believe that such determinations may be difficult to make depending on the particular manufacturing process (e.g., mixtures and compounds) or the variety of commercial relationships (e.g., third-party contract manufacturing).

3. Legislation Already Requires Registration of Foreign Manufactures in High Risk Industries

In 2002, Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act), which President Bush signed into law June 12, 2002. The Bioterrorism Act was passed to protect the U.S. food and drug supply from an act of terrorism. In order to make the food supply more secure, Congress mandated that "any facility engaged in manufacturing, processing, packing, or holding food for consumption in the United States" be registered with the Secretary of Health and Human Services (through the Food and Drug Administration). See, section 305 of the CPSIA. In addition to the registration requirement, the statute also mandates:

> for a foreign facility, the owner, operator, or agent in charge of the facility shall submit a registration to the Secretary and shall include with the registration the name of the United States agent for the facility.

See, 21 U.S.C. § 350d(a)(1)(B).

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[1] CBP has issued a number of Headquarters Ruling Letters (HRL) concerning who has the right to make entry. See, HRL 222020 dated August 1, 1990; HRL 223904 dated November 4, 1992; HRL 224015 date November 18, 1992; HRL 225357 dated December 22, 1994; HRL 114894 dated June 20, 1997; HRL 115110 dated November 2, 2000; HRL 115808 dated October 8, 2002; HRL 115805 dated January 7, 2003; HRL 116024 dated August 14, 2003; HRL W563380 dated May 27, 2006.

Similarly, the Bioterrorism Act requires foreign manufacturers of drugs and medical devices to register as well:

> (1) Any establishment within any foreign country engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or device that is imported or offered for import into the United States shall, through electronic means in accordance with the criteria of the Secretary—
>
> (A) upon first engaging in any such activity, immediately register with the Secretary the name and place of business of the establishment, the name of the United States agent for the establishment, the name of each importer of such drug or device in the United States that is known to the establishment, and the name of each person who imports or offers for import such drug or device to the United States for purposes of importation; and
>
> (B) each establishment subject to the requirements of subparagraph (A) shall thereafter—
>
> (i) with respect to drugs, register with the Secretary on or before December 31 of each year; and
>
> (ii) with respect to devices, register with the Secretary during the period beginning on October 1 and ending on December 31 of each year.

21 U.S.C. § 360(i).

Since federal law already requires the registration of foreign manufacturers of food, drugs, and devices, we believe that H.R. 4678 is unnecessary and would simply duplicate existing federal law.

Instead of requiring the registration of foreign manufacturers, Congress decided to take a different approach for consumer products:

> (1) GENERAL CONFORMITY CERTIFICATION.—Except as provided in paragraphs (2) and (3), every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other Act enforced by the Commission and which is imported for consumption or warehousing or distributed in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate which—
>
> (A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission; and
>
> (B) shall specify each such rule, ban, standard, or regulation applicable to the product.

15 U.S.C. § 2063(a). Thus, Congress chose to require a certification regime rather than require the registration of foreign manufacturers because it was concerned with the prevention of defective products entering into the commerce of the United States, rather than post-entry recall.

Because chemicals are used in a wide variety of industries, they are regulated by multiple federal agencies (e.g., EPA, FDA). In the case of chemicals used in the production of pharmaceuticals (e.g., active pharmaceutical ingredients), the chemicals company may be subject to the Bioterrorism Act. For imported chemicals subject to the Toxic Substances

Control Act (TSCA), the certificate serves as a product declaration to identify whether the chemical is listed in EPA's inventory. Therefore, we believe that enactment of H.R. 4678 would be disruptive to the existing regulatory regime for this highly regulated industry.

4. U.S. Working with Foreign Governments

In addition to the foreign manufacturer registration requirement under the Bioterrorism Act of 2002, Congress empowered the Secretary of Health and Human Services to engage with foreign governments to prevent defective products from being imported into the United States. Specifically, the statute states that:

> (3) The Secretary is authorized to enter into cooperative arrangements with officials of foreign countries to ensure that adequate and effective means are available for purposes of determining, from time to time, whether drugs or devices manufactured, prepared, propagated, compounded, or processed by an establishment described in paragraph (1), if imported or offered for import into the United States, shall be refused admission on any of the grounds set forth in section 381(a) of this title.

21 U.S.C. § 360(i)(3).

As a result of the product safety issues resulting from imported products with melamine, the United States has embarked on a number of bilateral and multi-lateral arrangements to cooperate on product safety, such as through the Security and Prosperity Partnership of North America, the U.S.-China Strategic Economic Dialogue (SED), the U.S. - European Union (EU) High Level Regulatory Cooperation Forum, the Transatlantic Economic Council, and the Global Health Security Initiative. See, Import Safety - Action Plan Update issued by the President's Interagency Working Group on Product Safety (July 2008), which may be found at http://archive.hhs.gov/importsafety/report/actionupdate/actionplanupdate.pdf.

A number of federal agencies (e.g., CPSC, FDA, and HHS) have entered into memoranda of understanding (MOU) with their counterparts in the People's Republic of China to cooperate on product safety matters. Within the U.S. government, CBP has recently signed an MOU to allow CPSC personnel to access CBP commercial automated systems for import safety risk assessments. AAEI believes that this collaborative work among government agencies should continue.

5. Impact on U.S. Exporters

AAEI is particularly concerned about the impact H.R. 4678 would have on U.S. exporters if this bill is enacted by Congress. The President has made it a priority to double U.S. exports over the next five years, particularly through his National Export Initiative. In particular, the Administration seeks to increase exports among small-medium size enterprises since these are the companies which generate the most job growth.

If the United States enacts H.R. 4678 requiring foreign manufacturers to appoint a registered agent to receive service of process, we must anticipate that our trading partners will enact similar measures. It will be difficult and expensive for American SMEs to maintain registered agents in all the foreign markets to which it exports. Moreover, having a registered agent in foreign markets increase the likelihood that these companies will be subject to litigation before foreign courts in countries with legal proceedings which are less transparent than the United States. SMEs have fewer resources to dedicate to trade

compliance, and having to maintain a registered agent in other countries will simply add another disincentive to export to foreign markets due to a lower return on investment because of the risks associated with potential foreign litigation. For these reasons, AAEI believes that the policy underlying H.R. 4678 is ultimately counter-productive to the goals of U.S. trade policy.

Finally, we raise certain other legal issues which the Committee should consider before voting on H.R. 4678. In particular, we note that the United States either has existing statutes or is a signatory to a number of international treaties which may be affected by this bill:

- Foreign Sovereign Immunities Act: We note that many foreign companies are owned, in whole or in part, by the government (e.g., Airbus, China). While U.S. law has recognized "commercial activity" as a general exception to jurisdictional immunity of a foreign state, this Committee should be aware that our trading partners may react negatively if H.R. 4678 is passed.

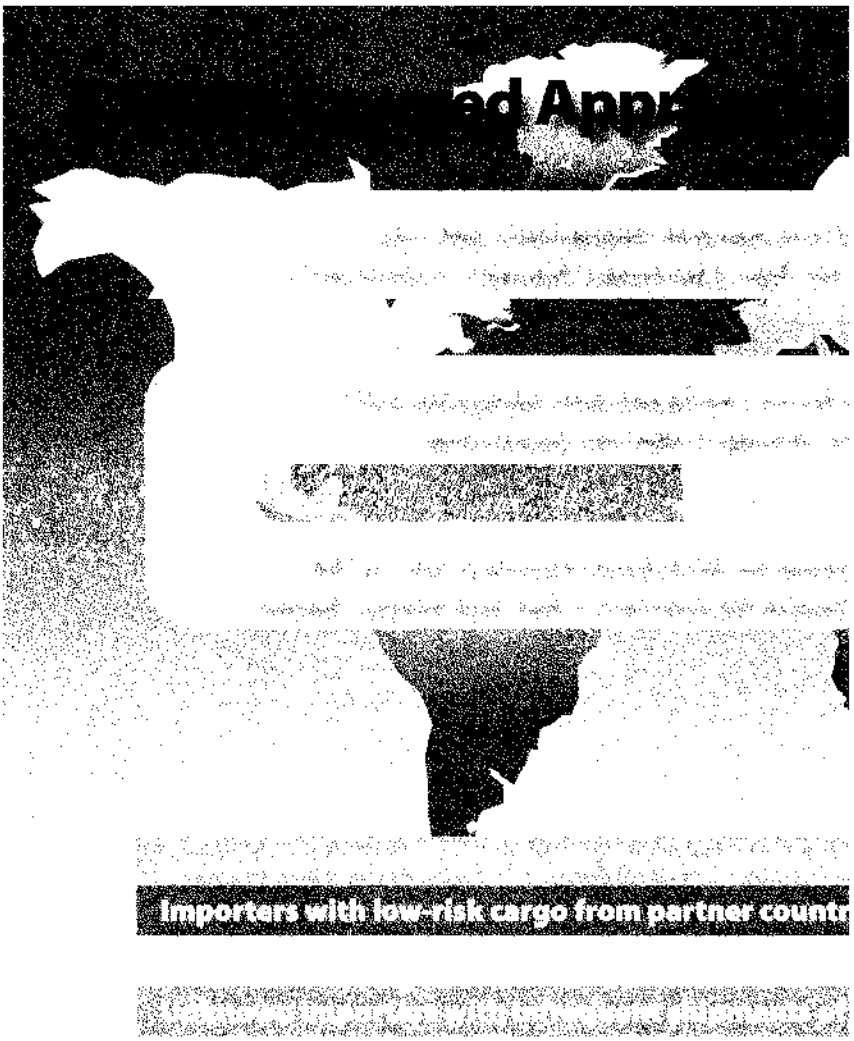
- Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters: This treaty provides for signatory countries to designate a "central authority" to accept service of process from a foreign person or entity on behalf of a domestic individual or entity. (See, also, the Inter-American Convention on Letters Rogatory.)

- Hague Convention on Foreign Judgments in Civil and Commercial Matters: We note that the United States is not a signatory to this treaty, which has not been widely accepted and thus is not considered "international law" due to lack of accession by many countries. Nonetheless, even if H.R. 4678 was enacted and foreign manufacturers appointed registered agents, there is no method by which a judgment for money damages rendered in a U.S. court could be enforced against a foreign corporation with assets outside the United States. (See, however, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration, which the U.S. is a signatory. See, also, Foreign Judgments Act.)

We do not believe that this is an exhaustive list of potential legal issues which may arise if Congress enacted H.R. 4678. Rather, AAEI believes that there are a myriad of policy reasons noted above to dissuade this Committee from moving forward with this legislation.

C. Conclusion

In conclusion, we wish to thank the House Energy and Commerce Subcommittee on Trade, Commerce, and Consumer Protection for its invitation to provide our observations, comments, and suggestions on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act." We greatly appreciate the Committee's consideration of this bill to deal with the consequences of defective products. We hope that our testimony will provide practical ideas for the Committee to explore in developing legislation on product safety, and we are happy to answer any additional questions you may have or provide further clarification and information on any of the ideas described in our testimony today. AAEI looks forward to working with this Committee concerning product safety issues.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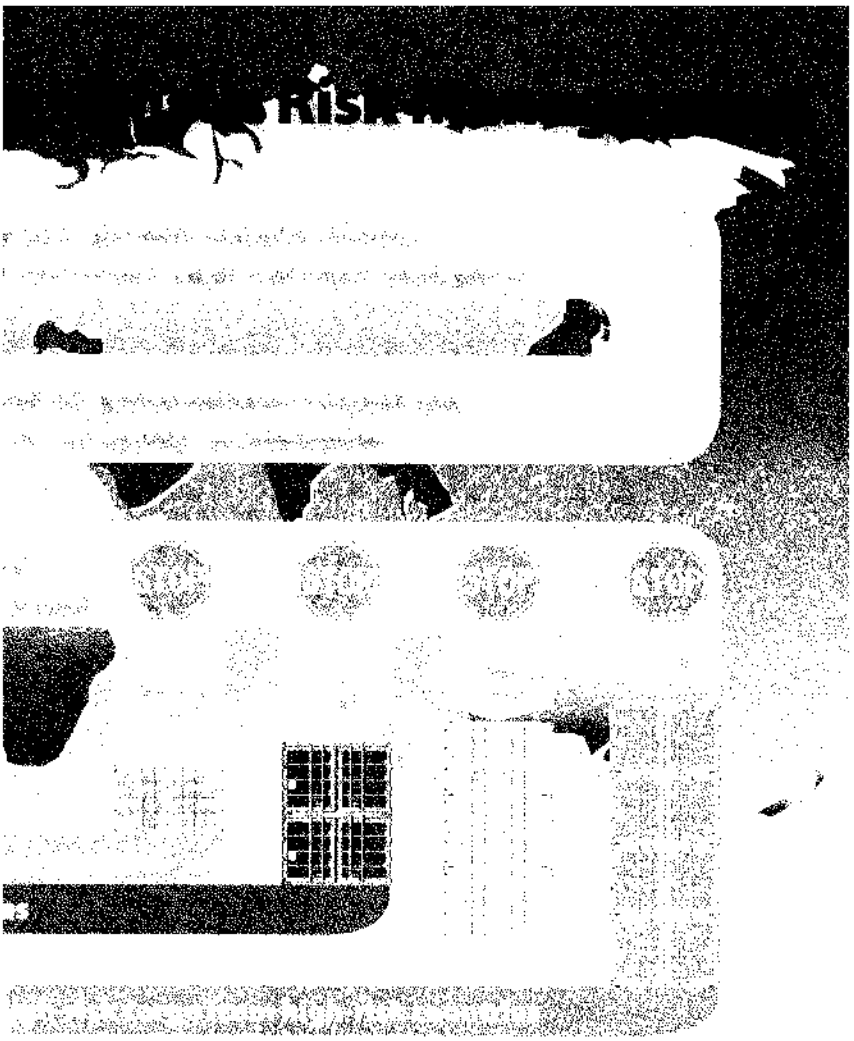

Mr. RUSH. The chair thanks all of the witnesses for their opening statements. And the chair now recognizes himself for 5 minutes for the purposes of questioning the witnesses.

Mr. Morgan, I must begin with you, your story of you and your family, the tragedy that you had to endure was heart wrenching. There is not one of us that wasn't moved by your story that you provided us. And I want to thank you for your willingness to share your story with us today. The story of defective Chinese drywall in what you thought was your dream home has, you said, made your life turned upside down, forced into bankruptcy and forced you to lose your home. And I can't think of anything that would be as horrible as having someone to lose their home under these kind of circumstances.

Your story demonstrates quite clearly to all of us that the expense of foreign defective products on the American consumer can be enormous and can be life altering.

We are not only moved emotionally, but we are also outraged by what happened to you and your family, and what is happening to not only you and your family but to thousands of other American consumers who are victims of this defective drywall, and other products, I might add, foreign manufactured and defective that come in from overseas.

We are just very, very moved by the results that Americans have to suffer from the circumstances.

I guess this might be kind of an interesting elementary question, but can you share how you feel about that and say why you support this legislation?

Mr. MORGAN. Yes, sir. I hear no ill will to China or the companies, 14 months ago, my life was perfect. We had no concerns, no issues, and in 14 months, I'm here today talking with you good ladies and gentlemen. Just hold them accountable like anybody else in this country. I don't think they should be placed on a higher standard. Just put them, hold them accountable like everybody that does business in this country is. As a police officer, my wife being a school teacher, we always had to obey the rules. It's just our nature. And I think that is probably the most frustrating thing is they are not being made to obey the rules of doing business in this country.

Mr. RUSH. Since your story has been made known to the public, have you been able to identify or share your stories with other American citizens who have had a similar story?

Mr. MORGAN. Yes, sir. And my story is very typical. The sad thing is it took almost 2 years for our home to start to display the problems. In other words, we built it brand new in 2006 and it was around 2008 we started experiencing the problems with the electrical systems, the air conditioning, my wife had the nose bleeds the coughing, the headaches, all those types of things. And the homes that were built last year, there are a lot of people that have it in their homes and they don't know it yet. Anything I can do, and that's one reason I wanted to come here today, anything I can do to bring awareness to this, it's hurtful to sit and tell people that I've had to file bankruptcy. May 17th my home went into foreclosure.

My wife and I were always the type of people, our mortgage check was there on the first because we were afraid if it was a day late they were going to come take the house. Here again, we have always done what we're supposed to do, and that's just what I hope anybody that does business with this country will be held to the same standards as those of us that live here and work here.

Mr. RUSH. Again, I want to thank you and members of this committee, our hearts go out to you and we are highly motivated to solve this problem.

Mr. MORGAN. Thank you, chairman.

Mr. RUSH. The chair is extending this time now, the chair now recognizes Mr. Whitfield for 5 minutes.

Mr. WHITFIELD. Thank you very much, and thank you all for your testimony.

When we talk about safety of products in the U.S., of course one part of it is we have a mechanism where we can recall certain items and then what this legislation really is about is giving an individual or a legal entity an opportunity to get a defending party into court. And let's take Mr. Morgan's example, and Mr. Morgan, I also would like to convey my very much concern about you and your family and what has happened to you and other people caught in the same circumstance.

But if this law had been in effect, the one that we are talking about, and Mr. Popper, if we if we were able to serve, get the service of process on the Chinese company that provided this drywall and if we obtained a judgment in a court in the U.S., whether Federal or State, whatever, how difficult would it be to actually obtain the funds to collect to the judgment?

Mr. POPPER. I guess the best way to answer that would be to say that you would never get to that question unless this legislation is adopted. Because you would never get to having that manufacturer in court.

Mr. WHITFIELD. I understand that. If we are going to try to really help people like Mr. Morgan, we can help get service of process very easily. But what can we do to collect on the judgment? In his case for example?

Mr. POPPER. The potential of liability changes behavior. The potential for civil liability is one of the most powerful forces in the American economy. Selling a product in the United States and knowing that you don't get a free pass or a dodge but that you can be haled into court and that you can haled, found liable, I think, creates an incentive that is worthwhile. That is the whole theory behind the tort system. That is the corrective justice effect. I don't mean to avoid your question. But you start with the fact, you asked me how this could happen or how this could be avoided? That is one way. The second way is we position——

Mr. WHITFIELD. How do we collect the money?

Mr. POPPER. You go after the manufacturer and if the manufacturer doesn't cough up the money on the judgment, or if the manufacturer makes it difficult to secure that judgment under The Hague convention, then you have to go after the distributor. But you don't get to do any of that right now. None of those, none of those values are there.

To be clear, this legislation doesn't solve every problem in the civil litigation system when you're dealing with a foreign manufacturer. It does give you a valid starting point. This bill wasn't designed, as I read it to facilitate the collection of foreign judgments. It allows for the entry of the judgment. Now potentially, you have got a judgment creditor, you have a company that is in trouble, you have an enforcement mechanism through the Department of Homeland Security——

Mr. WHITFIELD. Mr. Popper, thank you, I appreciate that. I only have 1 minute and 50 seconds left. Thank you for that.

But the importer of this product, Mr. Baskin, this tainted wallboard that was used in Mr. Morgan's house, would there be any mechanism through a treaty or otherwise that a lawsuit could have been filed against the importer or the distributor of the product in the U.S.?

Mr. BASKIN. The importer is responsible for obligations that the Tariff Act puts on him with regard to importation, but the importer would not necessarily be responsible for paying money damages.

Mr. WHITFIELD. Mr. Morgan did your employers sue the importer of the product?

Mr. MORGAN. Not yet, no, sir.

Mr. WHITFIELD. Have they had talked to you about doing that?

Mr. MORGAN. Yes, sir, I know all things are being looked at, and I would have to defer any additional questions like that to them.

Mr. WHITFIELD. So they have not made a final decision yet. OK. But they are looking in it.

One other question I would like to ask, and I'm not an expert in this certainly, but some experts have told us that this legislation may run afoul of WTO requirements for similar treatment of foreign and domestic products that if the bill passed foreign manufacturers would face the penalty of exclusion of their goods from commerce for failure to have a registered agent and thereby accepting the specific jurisdiction of the State court. However domestic manufacturers do not face this significant penalty of banishment from commerce for any similar violation.

Is there any argument there that WTO would look at this as a discriminatory type action?

Mr. BASKIN. I would have to defer to Customs and International Trade Commission for an answer like that. CPSC wouldn't be in a position to answer that.

Mr. WHITFIELD. But Mr. Popper, you had indicated that recently China had changed their tort law. Is that correct?

Mr. POPPER. My understanding, and it is in my testimony that China adopted a new, what they call a new tort law to take effect July 1, 2010.

Mr. WHITFIELD. Have you had an opportunity to look at that yet? That law?

Mr. POPPER. It has been in the making for 8 years, and I have looked at the components parts of it that are available online. I haven't read it in its native tongue.

Mr. WHITFIELD. May I ask one other question and I know we have other people.

But Mr. Baskin, does the Consumer Product Safety Commission have a position on this bill?

Mr. BASKIN. Yes. We support the concepts of the bill. But as I noted in my testimony, there are some issues that we would have with regard to the range and size of manufacturers that would be subject to the process.

Mr. WHITFIELD. You do support the concept?

Mr. BASKIN. Yes.

Mr. RUSH. Thank you. Ms. Sutton is recognized for 5 minutes.

Ms. SUTTON. Thank you, Mr. Chairman.

Mr. Baskin, in your testimony, you stated that earlier this year Chairman Tenenbaum sent a letter to Congress, and in the letter noted that helpful changes to the existing statutes might include a service of process requirements for foreign manufacturers so that the agency can more easily pursue recalls, is that correct?

Mr. BASKIN. Yes.

Ms. SUTTON. And so this legislation could be helpful to the Consumer Product Safety Commission as well as to providing redress for injured consumers, correct.

Mr. BASKIN. Yes.

Ms. SUTTON. Ms. Gadhia, thank you very much for your testimony as well.

The CPSC has a number of tools as we have heard here today intended to prevent unsafe consumer products from entering the market. And you testified that this bill will make considerable strides in assisting CPSC and other agencies in holding appropriate entities responsible for products that they introduced and sell to our consumers.

Could you elaborate about how this would work together and complement the CPSC's activities?

Ms. GADHIA. Absolutely. As has been noted, there are mechanisms on the front end such as the CPSIA and other statutes in place that hold all manufacturers to certain safety standards that their products have to meet before they are sold in the U.S.

And there are mechanisms once those parts come to our borders, through the good work of CBP and Department of Homeland Security to screen those products. But there are two issues with regards to that, one, not every company is going to follow the safety standards. You're going to have unscrupulous products, manufacturers and products, dangerous products coming through. And with the resources that CBP and others have, they are not able to screen every single one of the products at the border.

So the end result for a variety of reasons is that there are going to be dangerous products on the market, despite everyone's efforts. And so this is yet another mechanism on the other side of things to address the harm when it does occur and allows consumers when they are injured and go through the devastating circumstances that Mr. Morgan and his family have gone through to try to begin to obtain some redress for that.

Ms. SUTTON. Thank you. And of course, Professor Popper, you were just explaining the benefits of also having this kind of legislation pass so that we can give an incentive to those who produce products to make them safe. Would you like to elaborate on that and how this is a useful tool up front as well as providing redress?

Mr. POPPER. I think that there is no question that the potential for liability changes behavior. It means both making sure in the

production process that you have exercised reasonable care and that in the distribution and sale process you provide adequate information and warning. You know that liability is down the road. Whether as has been suggested, you may have difficulty selecting the judgment is a very separate question.

The other piece of this is that once you interject the CPSC into the equation and the way the consumer product safety improvement legislations worked is, you end up with findings of regulatory violations where you don't have the collection of judgments a problem. Those findings become facts that constitute a violation, they constitute a breach of a duty of care and they are readily imported into our legal system. It's the way U.S. manufacturers function. They work both the front end and back end. It's what creates safer products. Why not do that with foreign manufacturers? It seems fair to me.

Ms. SUTTON. I appreciate that very much. Mr. Morgan, thank you so much for being here and for testifying for sharing your experience with the committee in an effort to try and improve the situation for others.

I'm very sorry to hear about what has happened to your family. I'm sorry to hear about the toll that it has taken and the time that you have had to deal with in pursuing some kind of effort at recourse.

To the questions that some of my colleagues have raised about enforcement, I have some ideas about enforcement too so I look forward to pursuing those.

But I just, I'm struck and I think that it was professor Popper who indicated that your words frankly summarize it when you say foreign manufacturers should not be allowed to sell products which destroy homes and make people sick with impunity or the list of any of these other products that come into our stream of commerce, and frankly it will improve safety of products not just for American consumers, but for all consumers. And so I would advise and encourage folks to look at the list of items, Professor Popper, that is contained in your testimony I believe about things that are coming in to this country.

And I don't have much time left, but I would just because I'm not very familiar, Ms. Rowden, with exactly with your entity that you are representing but I believe you said you represent the international trading community in the United States. And you support what I believe you described as fair and open trade policies, did you all support, did your organization support then things like NAFTA and CAFTA and NPTR?

Ms. ROWDEN. Yes, traditionally, we have supported free trade agreements.

Ms. SUTTON. So you support all those things?

Ms. ROWDEN. Yes.

Mr. RUSH. The chair now recognizes Commander Murphy.

Mr. MURPHY. Thank you, Mr. Chairman and thank you to the panel. Professor Popper, a question for you, I just want to make sure I have a proper summary of your testimony, so if we use these products, you can be poisoned, strangled, choked, fall, crash, burned, bruised, cut or die but you can't sue?

Mr. POPPER. That's correct.

Mr. MURPHY. Then given that, then I have a couple of follow-up questions there. And you pointed out that when one has to face the responsibility of litigation or the chance of litigation, it is a motivator for companies to make sure they keep an eye on their products because they are going to be held responsible for that.

Does that add to the cost of products made in America such that products made in other countries that don't bear that responsibility use that as a mechanism to actually undercut the cost of products and sell them cheaper in the United States?

Mr. POPPER. I'm not sure I understand exactly your question, but I believe in my testimony what I stated in the written portion of it was that foreign manufacturers who are freed of this responsibility bear lower costs because they don't have to observe the due care responsibilities and they bear lower insurance costs and companies in the United States do have to observe due care responsibilities, do have to observe statutory obligations, do have to ensure against harm, and do spend more money. Consequently, the U.S. companies are definitely at a disadvantage.

Mr. MURPHY. That is what I wanted to know if you have any kind of dollar figure percent figure you have that it is one of those things that foreign companies may actually, we know they manipulate currency, they do a number of other things to subsidize or manipulate taxes, but I'm wondering along these lines too if we have any kind of dollar figure of what it is that they may by bypassing us actually undercut the cost of products.

Mr. POPPER. It's actually a very wonderful question, and it's very volatile because it is what is referred to in the United States from time to time as the tort tax. If you listen in the tort reform debate to people who don't necessarily agree with me on some of the issues, and they complain about the imposition of liability what they do is they place a percentage number on what it costs to produce good and safe products in this country and comply with our tort system. And I'm going to estimate that it is somewhere in the neighborhood of 15 to 20 percent.

Mr. MURPHY. But that is a significant number——

Mr. POPPER. Massive.

Mr. MURPHY. And companies are saying we will just build in China and send it over here, and we don't have to pay that extra 15 to 20 percent and we manipulate currency which puts another 40 percent savings on, it's hard to compete with those countries.

Mr. POPPER. It's hard to compete with those countries and with those products so long as those products are not subject to the U.S. legal system.

Mr. MURPHY. Thank you. Mr. Baskin, I have a question, too, on your testimony. Does the Consumer Product Safety Commission have sufficient personnel to screen these products before they even get over here?

Mr. BASKIN. That would be a question that would be outside of my range of knowledge here.

Mr. MURPHY. I know you mentioned about the number of people who were involved in this and you have increased the number of screening, which is good news, but, even before they enter our ports, or I don't know where you feel that it's more important to check them before they leave the country of origin or when they

come to our country, it's one of those areas that in order to protect consumer safety, if someone from your agency could get back to us because it's an important question to know what we would need to do with that.

Mr. BASKIN. Certainly, certainly.

Mr. MURPHY. Can someone also answer the question of what happens to U.S. Products in a foreign country? So if we sent something to a foreign country and it is deemed to be unsafe or some other problem, what happens to those products from foreign countries, anybody know?

Mr. POPPER. I will just give you a quick answer.

Footnote 33 in my written testimony, I refer to a couple of pieces, one on the new Chinese tort law, and the other a piece pertaining to South and Central America and the imposition of liability on U.S. companies doing business in foreign countries. And the record varies. But for the most part, I have come to stand behind lex loci delicti. If you're in another country and you commit a wrong, the idea that the United States State Department is going to come in and bail you out when you're being subjected to civil liability, as far as I know, doesn't happen.

Mr. MURPHY. One final question then, do the importers of products in this country, do they mislabel products in terms of country of origin, content, anything else? Is that showing up anywhere, Mr. Baskin, in your findings?

Mr. BASKIN. That is always an issue. I have spent some time in Customs, and that is always a violation that customs would find. It would be no less applicable to CPSC.

Mr. MURPHY. Thank you very much.

Mr. RUSH. The chair now recognizes Mr. Braley for 5 minutes.

Mr. BRALEY. Mr. Morgan, I had the opportunity at the height of the Chinese drywall publicity to inspect some homes in Delray Beach, Florida, and I got to see first hand exactly what you were describing in your home, the corrosive effect on the wiring and the materials, the overwhelming smell of sulfur in there. And it was eye opening for me because the homeowners were devastated about what was happening to homes that they put a lot of money and were very proud of. And then I went back to Iowa where I live, and I was sick for about the next 6 weeks with respiratory problems.

Have you or your family had any types of health-related problems because of being exposed to this Chinese drywall that we were talking about?

Mr. MORGAN. Yes, sir, my wife experienced nose bleeds for a long time, persistent coughing and headaches. After we moved out of the Chinese drywall house into our rental home she had nose bleeds for 2 days and she hasn't had one since.

Mr. BRALEY. You're the perfect example of what foreign manufacturers who aren't subject to having a registered agent available in the United States do manipulate and that is they know that the long period and cost of trying to hold them accountable for what whatever they do, people will get frustrated and give up because at some point you have to move on with your life and you can't wait for that magic solution when you have got bills to pay and people are pushing you into bankruptcy. Has that been your experience?

Mr. MORGAN. Yes, sir, I mean just the cost just to do the translation, you know, $150,000, to myself or people like me it might as well be $1 million. It's just money that we don't have, we can't afford, and being a police officer, I hate to say in public, thank goodness for attorneys. They have been a real lifesaver for us in trying to get some of our life back. It's just been a maddening process. It really has.

Mr. BRALEY. Mr. Popper I want to follow up with you. I have a very clear memory of a front line program talking about the trade imbalance between China and the United States, and they showed the Port of Long Beach with shipping container after shipping container come in with finished consumer products, a lot of them electronics, you name it, coming in and then they showed what was leaving the Port of Long Beach and it was recycled scrap metal and cardboard. That was the extent of what was going on in terms of the bulk of the shipping coming in and out of that port.

And you talked about the practical aspects of enforcing a judgment against a foreign manufacturer.

When you have got a judgment, all it is is a piece of paper. It means nothing whether you're suing a domestic manufacturer or foreign, but it gives you the right to enforce a judgment, and if you have got assets available in the United States, through a domestic manufacturer, you pursue that. If they refuse to pay, or if they are not insured, you can levy on those assets, you can attach them, you can have them sold, and then those proceeds can be used to satisfy a judgment, correct?

Mr. POPPER. That is correct.

Mr. BRALEY. The same thing applies with foreign goods that would be in this country coming in through our ports that are owned by a foreign manufacturer, those are tangible assets that if need be, could be levied upon to satisfy a judgment if you can trace them back to the owner of the manufacturer, and they are doing business in the stream of commerce in the United States, right?

Mr. POPPER. That is correct.

Mr. BRALEY. So it is not like we are developing a remedy without a payoff. It's just that it's very difficult, given the relationships with these foreign manufacturers and their ability sometimes to hide their assets overseas that makes it difficult for people who have been injured by these defective products to actually get a payout at the end.

Mr. POPPER. Yes.

Mr. BRALEY. Would you agree with that?

Mr. POPPER. I would agree with that.

Mr. BRALEY. Ms. Gadhia, one of the things I want to talk to you about is why this is so important? Because when you talk about something as massive as what we've seen with Chinese drywall, the average individual consumer, by themselves, are typically powerless against these large foreign manufacturers many of whom are hard to identify, because when you go into your Lowes or your Home Depot, they may have a product there that looks on the surface like it's a domestic product, and in reality, it was imported by a distributor, and being sold under their name rather than the original manufacturer. Why is it so important to consumers that we move forward on this legislation?

Ms. GADHIA. It's incredibly important because, first of all, I think consumers have an expectation, and rightfully so, that the products that come into their homes regardless of where they come from are safe and it's only fair to domestic manufacturers that the rules that they play by should also apply to foreign manufacturers.

You also need a mechanism that works on the other end of this entire supply chain in this system, where when you have got standards in place and you have got border protection in place, but you still have unsafe products coming through, sometimes you have a situation where you didn't know that this product was going to be problematic. I don't think anybody could have foreseen that you would have a children's toy with a chemical on it that turned to the date rape drug. I don't think you could have foreseen years ago that you would have sulfur coming out of drywall and causing these kinds of horrific problems. You have a lag time between these products coming in sometimes and the problems they cause, and you need that redress on the other side for consumers to be able to be made whole.

Mr. BRALEY. Thank you. I yield back, Mr. Chairman.

Mr. RUSH. The chair recognizes Mr. Sarbanes now for 5 minutes.

Mr. SARBANES. Thank you, Mr. Chairman. Thank you to the witnesses for their testimony.

I always feel at these hearings, and in particular, committee, that I'm always sitting here saying you mean we don't already do that? Whatever the topic is, whether it's regulating chemicals, or in this case, whether consumers are going to have recourse when these foreign manufactured products come into the country, because I think the average American probably expects that this is already being done.

And in that respect, I want to thank Congresswoman Sutton for this legislation because I think as four out of five of you testified, it makes absolute common sense to pursue it.

I once argued in the Fourth Circuit a case on minimum contact. So I'm very familiar with the frustration, of a case called Eloquent Machine Corporation. And we were down to trying to make the case that faxes and other communications that were coming into the State of Maryland were sufficient to establish minimum contact for the purpose of exercising personal jurisdiction, I don't know if you're familiar with that case or not. But in any event, it makes absolute sense to try to fill this, or close this loophole as you have described it. And I wondered, though, if you could, Mr. Popper, respond to Ms. Rowden's arguments about whether we sort of don't need to go there yet, but it's really just a matter of improving the oversight through CPSC and other measures that we can take and that this is just kind of a extra layer that is unnecessary at this time. If you could respond to that, I would appreciate it.

Mr. POPPER. I think about 2–1/2 years ago when we started learning about the problems with pet food and the entire country seemed to mobilize around the issue, your question was answered. Were you dealing with isolated incidents, isolated problems and you had a solid regulatory structure in place, it might be worth waiting to allow that system to mature.

I think that is not the case. I think you are looking at a remarkably broad problem when you're talking about 80 percent or more

of the goods regulated by CPSC, the vast number of our pharmaceutical products, goods throughout the United States that we use in good faith. You started out your comment about why don't we already do this, I think as a country, one of the best things about us is that we operate in good faith, we operate in trust. We believe that when we buy a product sold by a reputable seller that we can rely on its safety and its efficacy. And we have learned with foreign manufactured products we can't do that. The regulatory system needs to be bolstered. The civil liability system needs to be bolstered.

I certainly understand the desire to maximize our trade position. I think that is correct at every level. But requiring companies doing business in the United States, whether they are domestic or foreign, to follow the same set of laws strikes me as not inconsistent with that goal. It strikes me as perfectly consistent with it.

And from my perspective as a law professor, I thank you for saying lawyers are, from time to time, heroes. They are. But you can be a good lawyer and representing a client who has a serious problem and run into exactly what you ran into in the Fourth Circuit, and there is nothing you can do about it. And when that happens, the concerns that we might have about some of our trading partners being miffed about the impositional liability strike me as not particularly the dominant concerns that one ought to have.

Mr. SARBANES. I appreciate it, and I think, Ms. Gadhia, you made the point that even a very rigorous regulatory oversight regime doesn't mean that you're going to completely be able to prevent harmful products from coming into the stream of commerce.

Ms. GADHIA. Correct.

Mr. SARBANES. And you need other ways to create deterrence and/or create some remedy or recourse should that happen.

Ms. GADHIA. That is absolutely correct. And in addition, as I mentioned in my testimony, this type of registered agent can also help agencies like the CPSC that are trying to conduct recalls within that regulatory scheme to do so in a proper fashion.

Mr. SARBANES. I have got 15 seconds. One last question for you Mr. Popper. And that is you spoke a little bit about what other countries have in place. Can you speak about what is happening with Chinese products going into certain other countries in terms of the way they are handling, because China has obviously been a focus of our discussion here.

I mean, are we sort of in good or bad company, however, you might want to characterize it, in terms of the way we are equipped to handle these products coming in from China when we look at other countries or are others ahead of us on that?

Mr. POPPER. To the best of my knowledge, we provide a remarkably generous environment for foreign manufacturers by not imposing liability. I believe in the EU countries and in Latin America and in South America they are treated the same as their domestic companies. And so I think what we are doing is both domestically and internationally leveling the playing field.

And if I might add just in terms of the regulatory obligations, keep in mind that as effective as regulatory systems are, they do not provide individual personal injury remedies. They provide a regulatory recourse, that affects the broad population, but the indi-

vidual affected adversely by the violation of a safety regulation doesn't have recourse before the agency. The agency isn't an Article 3 court. It doesn't provide those remedies.

Mr. RUSH. The chair now recognizes Mr. Stupak for 5 minutes.

Mr. STUPAK. Thank you, Mr. Chairman, thank you all for your testimony. Mr. Morgan, sorry, about your problems there and unfortunately your problems are duplicated many times throughout this country. Just a question though, you said you had your house built, right.

Mr. MORGAN. Yes, sir.

Mr. STUPAK. Did your builder charge you the going rate for drywall or did you get a lesser cost.

Mr. MORGAN. I don't know. I would like to know what the cost difference was.

Mr. STUPAK. I would like know that too. You might have a perfect claim right there against your builder.

Let me ask Mr. Baskin or Ms. Gadhia, what happens when products come into the United States like this drywall, let's say, come came in right now from China high in sulfur, what would happen to it? You discover it at the border.

Mr. BASKIN. Luckily it's not. So that is a good thing in that——

Mr. STUPAK. But if it did, what would happen.

Mr. BASKIN. If it did, it could be detained at the border.

Mr. STUPAK. It sits there, right.

Mr. BASKIN. Yes.

Mr. STUPAK. Why don't we shove it back to the shipper?

Mr. MORGAN. The authorities allow that eventually.

Mr. STUPAK. They do?

Mr. BASKIN. Yes.

Mr. STUPAK. Well, then we had the inferior steel coming in from China, we had a couple of schools collapse in California because of inferior steel, they are telling us they have no authority to return it. In other words, it comes in, if they test the steel, it doesn't have the proper strength, they set it aside, tag it, set it aside, and it sits there, or whoever ordered it comes, picks it up, they are told they can't use it, say, for construction of a school, but it sits there or they take it use it for some other use in theory. So while you have authority to detain it, do you have specific authority to send it back to China.

Mr. BASKIN. I don't know about the steel situation.

Mr. STUPAK. How about drywall? Right now if bad drywall came in, you had the right to detain it at the border I agree with you, but do you have a right to send it back to China? And if so, who pays for it.

Mr. BASKIN. Good questions all. I would have to defer an answer to that, get that question in writing and we can get back to you on that.

Mr. STUPAK. Ms. Gadhia, you indicated, and Mr. Sarbanes, that the registered agent could help in a recall. How would a registered agent help in a recall underneath this legislation.

Ms. GADHIA. The border would help is that you have got an entity here in the U.S. that should the agency need to get information from the agency about the scope of the product and when it was manufactured, the dates that they believe the defective product

was manufactured, where the product went, how it was distributed, you have got an actual agent here that is, as the agent for service, of process, a contact domestically for the agency so they aren't trying to chase an entity overseas.

Mr. STUPAK. But sure but 4647 just requires you to have a registered agent here to accept process. You don't have to know anything about the product. You just have to be able to accept process so you don't have to send it to China and try to chase someone down where the central government holds it for 6 months before they give it to the manufacturer. How would a registered agent help? There would have to be more in the legislation wouldn't there to be able to really help in a recall.

Ms. GADHIA. I think what it would do is it gives the agency one more option, one more entity to try to get that information from rather than sending it to China and having it sent back.

Mr. STUPAK. I agree if you're going to bring a lawsuit, you have a person or individual or entity you serve the process to and that manufacturer in this case is drywall would be considered served, but I don't know if I have a registered agent how that would help in a recall because they are not required to know manufacturing location, physical location, they just have to be a registered agent for a company, right?

Ms. GADHIA. I might defer on the details of what the CPSC would be looking for as far as information the recall process to the agency. But I think it would depend on the case. It would depend on in some situations the agent for service of process might be an entity that has that information. In some cases you're right it could be simply and agent that accepts the paperwork.

Mr. STUPAK. So in this legislation shouldn't we expand the role of the registered agent more than just a person or entity that accepts service? Shouldn't they have greater knowledge of at least, if it's going to help in a recall.

Ms. GADHIA. I think it could certainly help to do that, to expand it.

Mr. STUPAK. So do you suggest we put that in this legislation.

Ms. GADHIA. I would respectfully take a minute to, I would respectfully respond that I would think about that a bit and get back to you on the record, if that's all right.

Mr. STUPAK. Please do. Mr. Chair, when we are in Oversight and Investigations, we see this all the time, whether it's melamine or whatever it might be, and a registered agent doesn't do anything to help you. In fact, all it is is a point of contact here in the United States.

Ms. Rowden, why doesn't the American Association of Exporters and Importers just volunteer to be the registered agent for all these importers?

Ms. ROWDEN. Oh, gosh.

Mr. STUPAK. Oh, gosh? I mean——

Ms. ROWDEN. Our members are importers and exporters of goods. Often it is the U.S. importer who has the legal responsibility under U.S. customs law to deal with product safety and also will ensure——

Mr. STUPAK. Are you saying that the importers are certifying that the product is safe when they bring it in this country.

Ms. ROWDEN. They have the obligation to make sure that that product meets all U.S. laws.

Mr. STUPAK. Really? Under what law is that.

Ms. ROWDEN. All laws, not only U.S. Customs law, the FDA——

Mr. STUPAK. So Mr. Morgan should just sue the importer.

Ms. ROWDEN. He can. The question is I'm not a trial attorney, but whether that would, the causation would be there for the U.S. importer to be liable. I just don't know.

Mr. STUPAK. So the fact that they may have it, it's not real liability that Mr. Morgan could look to the importer of this drywall and say aha, you imported this, you had a responsibility and duty to make sure it met U.S. standards and if not, therefore, Mr. or Ms. Importer, you are subject to our courts and jurisdiction.

Ms. ROWDEN. Certainly, the U.S. importer is subject to U.S. law as a U.S. entity. They are subject to all the regulatory requirements.

Mr. STUPAK. But doesn't the law require them to knowingly know that they imported a defective product, and the burden of proof is really on Mr. Morgan, not on that importer to show that.

Ms. ROWDEN. That would be a normal trial law.

Mr. STUPAK. So it's really useless. But going back to my question. Why wouldn't you just be the registered agent? All you're doing accepting process, so therefore you could cut down on all the expenses, the fear of Congress putting forth regulations that you fear in your statement here, it could be resolved by your agency, just being the registered agent. All you're doing is accepting process and we could short circuit this, get right to the court and see who has liability here.

Ms. ROWDEN. But our association has no commercial relationship with foreign manufacturers.

Mr. STUPAK. You don't have to have a commercial relationship. All you have to be is a person who is present in the United States over usually the age of 21 and be willing to accept the process. You don't have to be an attorney or anything. All you have to be is a person, you are a point of contact to begin that process so Mr. Morgan doesn't have to run all over China to find his manufacturer.

Ms. ROWDEN. It is not our role as a trade association to serve as that function, because that is a legal function.

Mr. STUPAK. Well, if you're trying to promote trade, why wouldn't you do that? Because you're promoting trade, you're providing a service for people importing or exporting in. I would think that would be the service you would want to do.

Ms. ROWDEN. I doubt that our membership would support that.

Mr. STUPAK. I doubt that too, but good argument. I yield back, thank you.

Mr. ROSS. The chair thanks the members, and also the chair thanks the witnesses for your outstanding and extraordinary contribution to this hearing. And with that in mind, again we thank you for the valuable time, you allowed us to utilize your valuable time.

This first panel now is dismissed. Thank you very much for coming. And Godspeed to each and every one of you.

Mr. Morgan, this committee does stand in support of you and your family. Thank you very much.

Will the second panel please be seated.

We certainly want to welcome members of the second panel to this subcommittee hearing. And again, I want you to reemphasize to you how extraordinarily grateful we are for your sacrifice of your time and energy to be here to help make a contribution to the hearings that the subcommittee has to deliberate on the important matters. And I want to recognize each and every one of you by name.

And to the members of the subcommittee on my left, is Mary Saunders. She is the assistant Secretary for manufacturing and services for the international trade administration. Seated next to Ms. Saunders is Ms. Deborah Wince-Smith. She is president and CEO of the council on competitiveness.

And next to Ms. Wince-Smith is Mr. Owen E. Herrnstadt. Mr. Herrnstadt is the director of trade and globalization for the international association of machinists and aerospace workers.

And then next to Mr. Herrnstadt is Mr. Jack Crawford Junior. He is the chief executive officer of Jadoo Power.

And Mr. Anthony Kim is seated next to Mr. Crawford. He is the policy analyst for Heritage Foundation.

Again, welcome to each and every one of you. It is the customary tradition of this committee to swear in the witnesses. So would you please stand and raise your right hand.

Mr. RUSH. Let the record reflect that all of the witnesses answered in the affirmative.

We will begin with you, Ms. Saunders. You have 5 minutes for an opening statement.

STATEMENT OF HON. MARY SAUNDERS, DEPUTY ASSISTANT SECRETARY FOR MANUFACTURING AND SERVICES, UNITED STATES DEPARTMENT OF COMMERCE; DEBORAH WINCE-SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COUNCIL ON COMPETITIVENESS; OWEN E. HERRNSTADT, DIRECTOR OF TRADE AND GLOBALIZATION, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS; JACK CRAWFORD, JR., CHIEF EXECUTIVE OFFICER, JADOO POWER; ANTHONY KIM, POLICY ANALYST, HERITAGE FOUNDATION

STATEMENT OF MARY SAUNDERS

Ms. SAUNDERS. Chairman Rush, Ranking Member Whitfield, thank you for the opportunity to speak to you today about the important topic of clean energy technology and export assistance.

As you are well aware, clean energy is one of the greatest economic opportunities of the 21st century, and promoting the development, production and energy efficiency technologies and services is the highest priority for the Department of Commerce. These technologies are important to economic growth in the United States and locally.

At the International Trade Administration or ITA, we have identified significant overseas market opportunities for U.S. firms in these technologies surfaces areas.

For the record, I will not be commenting on H.R. 5156, but rather, my testimony will provide a prospective on the issues, challenges and opportunities within the clean energy technology and

services sector today, as well as highlight some of the many programs that ITA has put in place to support U.S. industry competitiveness on this front.

ITA is the lead export promotion agency in the Federal Government. Our mission is to create prosperity by strengthening the competitiveness of the U.S. industry, promoting trade and investment, and ensuring fair trade compliance with trade laws and agreements that enhance the ability of U.S. firms and workers to compete in the global marketplace on a level playing field.

At his State of the Union Address this year, President Obama announced the National Export Initiative, or NEI, with the goal to double U.S. exports in years in support 2 million jobs. The President also emphasized that the Nation that leads the clean energy economy will be the Nation that leads the global economy.

Clean energy technologies are a key way to meet global and economic development needs, mitigate climate change and capture the high value of innovation of jobs that this sector offers. Within ITA, we are responding to the NEI and to the President's emphasis on clean energy by hiring trade specialists in emerging growth markets, supporting small and medium size enterprises to broaden their exposure to international markets and developing outreach and trade mission programs to improve exports in high growth replacement clean energy.

U.S. clean energy technologies and services companies face fierce competition in international markets. I want to highlight three factors that have a strong effect on international competitors: The strength of the domestic industry, the availability of international markets that offer U.S. companies a fair opportunity to compete, and the ability of U.S. companies to access the resources and master the skills required to export.

The United States currently has a relatively small share of manufacturing capacity for clean energy-related industries. Nevertheless, there are clear opportunities for the U.S. To lead the world in high technology for clean energy manufacturing. We can leverage the R&D and innovation being pursued by companies, universities, and the Department of Energy national labs.

Just turned on the microphone. Sorry.

U.S. clean energy exports cannot increase if protection and rules and policies prevent open competition. Many countries have adopted policies that make it more difficult for foreign firms to compete in their markets. These include favoring their domestic industry through preferential tendering criteria and burdensome certification requirements.

In addition, concerns regarding adequate protection of intellectual property rights hamper some firms from entering foreign markets.

Intense foreign competition from State-owned enterprises poses another challenge for U.S. companies, particularly in the civil nuclear sector.

And the final challenge to increasing clean energy technology exports that must be addressed is the willingness of U.S. firms to export. In the clean energy sector in particular, companies face challenges to exporting that are not market or policy based but are internal to that particular company's knowledge and comfort with the

export process. Issues include a shortage of available capital or financing, complex domestic and foreign regulatory requirements, lack of knowledge, and comfort in local financial institutions to finance innovative clean energy products and difficulty in finding a local partner or distributor.

ITA has multiple clean energy initiatives to support the President's NEI and works in close collaboration with other agency partners. We have initiatives focusing on sustainable manufacturing energy efficiency for U.S. companies as well as a civil nuclear trade initiative that identifies the sector's most pressing trade challenges and opportunities and coordinates public and private sector efforts to address them.

We are leading a trade promotion coordinated committee effort to develop an export strategy for renewable energy and energy efficiency technologies and Secretary Locke recently established a renewable energy and energy efficiency advisory committee for industry to advise the Department directly on pressing trade promotion activities.

ITA is actively promoting U.S. Clean energy solutions in overseas markets through trade events, foreign buyer programs at major renewable energy trade shows. We have brought delegations from all over the world to these events. We have organized numerous trade missions focused on clean energy.

Most recently, the Secretary led a clean energy business development mission to Hong Kong, other cities in China and Indonesia. We have a number of reports and helpful resources, and I have brought copies of several of them. They provide a useful resource for small and medium-sized enterprises in the clean energy technology industry.

And we recently released a small renewable energy assessment report on Indonesia and have continued to hold informational webinars on diverse topics.

Lastly, I wanted to highlight the market development cooperative program which allows nonprofit groups or universities to propose projects to develop global markets for specific technologies. Last year, we awarded three awards in the clean energy sector. This year we have received numerous applications for MDCP rewards and are currently reviewing them.

In closing, I would like to thank you, Chairman Rush, Ranking Member Whitfield, and members of the subcommittee for the opportunity to highlight what ITA is doing to help U.S. Companies compete in markets for clean emergency technologies and for all kinds of U.S. goods and services around the world.

Expanding opportunities to export clean energy technologies will not only maintain the competitiveness of U.S. companies, but will create jobs and generate economic growth. In addition, it will increase the reliability of our energy supply.

American businesses have the technology, the expertise and the experience to help countries around the world reach their climate and energy goals and this an extraordinary opportunity and a win-win for everyone.

I welcome any questions you might have.

[The prepared statement of Ms. Saunders follows:]

MARY SAUNDERS
PRINCIPAL DEPUTY ASSISTANT SECRETARY
FOR MANUFACTURING AND SERVICES,
MANUFACTURING AND SERVICES
INTERNATIONAL TRADE ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
TESTIMONY BEFORE THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION
for a hearing entitled
"Clean Energy Technology Export Assistance"
June 16, 2010

Introduction

Chairman Rush, Ranking Member Whitfield, and members of the Subcommittee, thank you for the opportunity to speak before you today about the important topic of clean energy technology export assistance.

As you are well aware, clean energy is one of the greatest economic opportunities of the 21st century, and promoting the development, production, and deployment of clean energy and energy efficiency technologies and services remains a high priority at the U.S. Department of Commerce. These technologies are important to economic growth in the United States and globally. At the International Trade Administration -- otherwise known as ITA – we have identified significant overseas market opportunities for U.S. firms in these technology and services areas.

For the record, I will not be commenting on H.R. 5156, but rather my testimony will provide a perspective on the issues, challenges, and opportunities within the clean energy technologies and services sector today, as well as highlight some of the many programs ITA has put in place to support U.S. enterprises competing for market opportunities associated with the deployment of these technologies and services around the world.

ITA is the lead export promotion agency in the Federal government. The mission of ITA is to create prosperity by strengthening the competitiveness of U.S. industry, promoting trade and investment, and ensuring fair trade and compliance with trade laws and agreements that enhance the ability of U.S. firms and workers to compete in the global marketplace on a level playing field. This mission is critical to enhancing America's global competitiveness and expanding commercial opportunities for American manufacturers, farmers, and service workers throughout the world.

ITA's four units are dedicated to expanding export opportunities through a variety of means: 1) The U.S. and Foreign Commercial Service (US&FCS) designs and executes programs that provide companies with practical advice and assistance for exporting; 2) Market Access and Compliance (MAC) focuses on opening foreign markets, monitoring and working with the

Office of the U.S. Trade Representative to enforce trade agreements, strengthening intellectual property rights enforcement, and further reducing or eliminating barriers to trade and investment overseas; 3) Manufacturing and Services (MAS), the unit where I work, provides industry expertise, research and policy analysis used by policy makers to develop and implement domestic and international policies that enhance the global competitiveness of U.S. firms; and 4) Import Administration (IA) identifies, monitors, and works with the U.S. Trade Representative to address unfair foreign subsidization that impedes U.S. exporters' ability to compete in foreign markets, as well as assisting U.S. exporters involved in foreign antidumping cases that may limit U.S. exports.

Within MAS, we provide coverage of all industrial sectors. In-depth coverage of the clean energy sector is a priority. Our Office of Energy and Environmental Industries provides industry expertise and trade policy support for a variety of clean energy technologies and services, including renewable energy, clean coal, energy efficiency, nuclear power, smart grid, and environmental technologies.

Our work to promote clean energy technologies and services focuses on four areas: first, as the government's industry advocate, we make sure that industry's views are taken into account when policymakers formulate economic and trade policy; second, we help U.S. business represent their views at international meetings affecting the clean energy technologies industry; third, we coordinate with industry to eliminate trade barriers; and fourth, we undertake industry, economic, and trade policy analysis on issues impacting the global competitiveness of the U.S. clean energy technologies and service industries.

The President's National Export Initiative

At his State of the Union Address this year, President Obama announced the National Export Initiative or "NEI" with the goal to help double U.S. exports in 5 years and support 2 million jobs. Since the NEI was announced, the President has signed an Executive Order and formed an Export Promotion Cabinet that consists of top leaders throughout the Administration, including from the Departments of Commerce, Labor, State, and Agriculture, the Export-Import Bank, the Office of the U.S. Trade Representative, and the Small Business Administration. The NEI focuses on expanding trade opportunities for U.S. companies, particularly small- and medium-sized enterprises, increasing access to credit for U.S. businesses, and enforcing existing trade laws and obligations.

In addition, in that same State of the Union Address, the President emphasized that "The Nation that leads the clean energy economy will be the nation that leads the global economy." The President has come out in strong support of clean energy technologies as a way to meet global energy and economic development needs, mitigate climate change, and capture the high-value engineering, innovation, and jobs this sector offers.

Within ITA, we are responding to the NEI and to the President's emphasis on clean energy by hiring trade specialists in emerging growth markets, supporting small- and medium- sized enterprises to broaden their exposure to international markets, and developing outreach and trade mission programs to improve exports in high-growth sectors like clean energy.

Specifically, the Department of Commerce and the Department of Energy are co-leading an interagency effort to draft a National Renewable Energy and Energy Efficiency Export Strategy with the goal of doubling exports in these two sectors by 2015. The Strategy will coordinate U.S. government programs to better support U.S. clean energy companies wishing to compete abroad. The Strategy will focus on increasing exports in electricity generation and demand response, including goods and services related to renewable energy, large-scale storage, and energy efficiency. A Federal Register Notice has been issued requesting input from private businesses, trade associations, academia, labor organizations, non-governmental organizations, and other stakeholders.

Global Challenges and Opportunities

President Obama has set a goal of the United States becoming the leading exporter of clean energy technologies. Specifically, he has called for new policies to "advance a cleaner environment, a stronger response to the challenge of climate change and more sustainable natural resources and energy supplies." Reaching this goal requires effort by both industry and government. It is a priority of the Obama Administration and of the Department of Commerce to continue strengthening U.S. competitiveness in this sector and enhance the ability of U.S. firms to export clean energy technologies. However, we have a lot of work to do to meet that goal.

For example, the United States is, overall, the world's largest producer of electricity from wind. Solar installations are increasing as well. However, we currently import roughly three times the renewable energy equipment, such as wind and solar, as we export. GE installed the largest percentage of wind turbine capacity in the United States in 2009, but faces increasing competition from European and Asian companies.

There is a lot we don't know. These statistics do not chart our trade in services. This is a crucial blind spot that needs remedy. While manufacturing clearly needs to be part of the discussion, the United States is a leader in highly skilled services which make up a greater proportion of renewable energy jobs than manufacturing.

With great challenges come great opportunities. Global demand for clean energy technologies is growing rapidly, as are export opportunities for U.S. companies. And exports of clean energy technologies, like any export, will also benefit the U.S. economy by creating and sustaining jobs here at home and by increasing revenues. For instance, global investment in renewable energy and energy efficiency was $145 billion in 2009, having increased every year since 2002. Governments have allocated an additional $180 billion to renewable energy and energy efficiency in the stimulus bills that were passed by many countries last year.

Looking forward, the potential global market for civil nuclear goods and services is valued at $400 billion over next 15 years. The projected demand for U.S. clean coal technology equipment in key global markets which utilize coal for power generation is estimated at $36 billion through 2030. And, according to some reports, the projected global smart grid market is expected to increase from $90 billion in 2010 to $171 billion in 2014. The Department of Energy estimates that $40 billion per year in increased exports of clean energy technologies

would generate up to 750,000 green jobs by 2020. Our ability to realize this potential depends on achieving U.S. leadership in the field.

The U.S. Clean Energy Industry and Factors Affecting their Competitiveness

U.S. clean energy technologies companies face fierce competition in international markets.

Beyond macroeconomic issues of labor prices, currency valuation, health expenses, etc., three other factors have a strong effect on international competitiveness: (1) the strength of the domestic industry, (2) the availability of international markets that offer U.S. companies a fair opportunity to compete, and (3) the ability of U.S. companies to access the resources and master the skills required of exporting.

I will discuss each in turn.

1. Creating a Strong Domestic Industry

A strong domestic industry is a prerequisite for exports. The United States is in fierce competition for new markets in developed countries as well as in developing countries, such as China and India, which have set ambitious national targets for ramping up clean energy. Enforced national targets or renewable portfolio standards give companies certainty in the long-term presence of demand.

The United States has a relatively small share of worldwide manufacturing capacity for clean energy-related industries such as wind and solar. In 2008, the United States had 16% of global wind manufacturing capacity and 6% of global solar manufacturing capacity. Nevertheless, there is a clear opportunity for the United States to lead the world in high-technology, clean energy manufacturing. The R&D and innovations being pursued by companies, universities, and the Department of Energy's national labs will be key to that leadership role.

The American Recovery and Reinvestment Act (ARRA) provides significant support for advancing clean energy technologies within the United States - a total of $36.7 billion of federal funds. These investments, most of which are matched by the award recipients, serve to stimulate our economy, develop new jobs in our manufacturing, service, and R&D sectors, and foster further clean energy investments by the private sector.

Approximately seventy percent of our nation's Clean Energy Stimulus Program is allocated to energy efficiency, renewable energy, and smart grid development and deployment. Specifically, $16.8 billion of stimulus funds have gone towards energy efficiency and renewable energy programs, $4 billion is allocated for renewable energy loan guarantees, $4.5 billion is directed to developing and deploying a fully-integrated smart grid system throughout the United States, and $3.4 billion has been allocated to advance the commercial deployment of carbon capture and storage (CCS) technologies. In addition, the $2.3 billion manufacturing tax credit included in the American Recovery and Reinvestment Act (ARRA) was an important step for the U.S. federal government to provide national incentives that compete with foreign competitors.

To ensure that the United States continues to foster the emergence of smart grid technologies, the Administration has established a Subcommittee of the National Science and Technology Council's Committee on Technology to coordinate agency involvement in this issue and develop a comprehensive policy framework.

2. Opening Overseas Markets

Despite the flood of news about fast-growing clean energy technology opportunities in foreign markets, U.S. clean energy technology exports cannot increase if protectionist rules and policies prevent open competition.

The connection between clean energy technologies and green jobs has led many countries, developing and developed alike, to adopt policies that make it more difficult for foreign firms to compete in their markets. Many countries – either implicitly or explicitly – favor their domestic industry through preferential tendering criteria (China) and burdensome certification requirements (Korea, Japan). In addition, concerns regarding adequate protection of intellectual property rights also hamper some firms from entering foreign markets. This is an area particularly critical to new, small- and medium-sized clean energy companies whose survival might depend on a small number of critical patents.

Intense foreign competition from state-owned enterprises poses another challenge for U.S. companies, primarily in the civil nuclear sector. Foreign firms have enjoyed significant government support, ranging from direct government ownership and management, to concessionary financing, industrial coordination, support for manufacturers and nuclear liability protection. Also, for the civil nuclear industry, a lack of an effective global nuclear liability regime poses significant concerns.

3. Firm-Level Export Challenges

The final challenge to increasing clean energy technology exports that must be addressed is the willingness of U.S. clean energy firms to export. The Economist recently reported that only 4% of all U.S. companies export.

In the clean energy sector in particular, companies face challenges to exporting that are not market or policy-based, but are internal to that particular company's knowledge and comfort with the export process. Many companies face a shortage of available capital or financing, which hampers their ability to increase their manufacturing capacity to meet global market demands. Complex domestic and foreign regulatory requirements also pose issues for companies. Local financial institutions that traditionally facilitate deals involving U.S. exports lack the knowledge and comfort to finance innovative clean energy products. Many U.S. companies, particularly small and medium-sized companies, struggle to understand the local customs and business culture in foreign markets. Likewise, many companies find it difficult to find a local partner or distributor without a keen understanding of local companies' ability. Finally, small companies frequently lack a basic understanding of the export process. Often these companies do not understand foreign tariff systems, currency conversion, or patenting

requirements. Fear of intellectual property rights violations in particular can hinder U.S. clean energy companies from seeking opportunities overseas.

ITA's Role in Supporting U.S. Competitiveness through Exports and Various Clean Energy Initiatives

1. Clean Energy Initiatives

ITA has multiple clean energy initiatives in place and has organized industry promotional events and released a number of publications or educational materials to support exporters. We also engage in bilateral, regional and multilateral negotiations. Recent examples of programs administered by ITA that support the clean energy industry, either directly or indirectly, include the following:

- Last year, ITA launched an **Energy Efficiency Initiative** (EEI) to assist U.S. manufacturers to improve the energy efficiency of their operations as well as to promote the development and deployment of energy efficient technologies. The EEI is focused on the industrial energy efficiency and comprises three pillars--- 1) market development, 2) trade policy and promotion, and 3) outreach and resource development. The EEI targets America's eight high-energy consuming industries—Aluminum, Metal Casting, Forestry Products, Mining, Chemicals, Petroleum Refining, Glass, and Steel.

- Activities to date include an *Energy Efficiency in Manufacturing Road Show* to Toledo, Ohio and a Forum on Energy Efficiency in Manufacturing in Washington, DC both of which I hosted last fall; a *Checklist for Corporate Efficiency*; a Department paper on the global competitiveness of the industrial energy efficiency technologies sector (being developed), a primer on financing options, a smart grid webinar series; and a recent Smart Grid Manufacturers Forum in St. Paul on June 9th organized in partnership with DOE, the State of Minnesota and the University of Minnesota.

- We administer a **Civil Nuclear Trade Initiative** the goal of which is to strengthen the competitiveness of the U.S. nuclear industry as it endeavors to rebuild its manufacturing base by capturing opportunities abroad. The Initiative, developed and administered by MAS, identifies the industry's most pressing trade challenges and opportunities and coordinates public and private sector efforts to address them. As part of this initiative, ITA Under Secretary Francisco Sanchez will be leading approximately ten U.S. civil nuclear companies on a trade policy mission to Poland, Czech Republic and Slovakia in mid July (11-17).

- ITA recently held a **Green Financing Roundtable** (May 21st) which brought together stakeholders and relevant government agencies to improve awareness of existing green finance market space, trends, opportunities, and obstacles facing U.S. financial services firms investing in wind, solar, biofuel, biomass and waste, energy-efficient technologies and other emerging energy options.

- We have organized several events aimed at both informing industry of the latest developments in the international climate change negotiations and eliciting their feedback (i.e., recent **national climate change webinar** hosted by Secretary Locke).

- We also have established an **interagency Working Group on Renewable Energy and Energy Efficiency under the TPCC**, as noted earlier, to focus on coordinating export promotion activities of the U.S. Government within these sectors. In April, this working group agreed to draft a national strategy to help double U.S. exports in those two key sectors. In addition to an in-depth look at the global competitiveness of these sectors, the ensuing report will contain commitments by USG agencies relating to these sectors. We have published a Federal Register Notice requesting public comments.

- Secretary Locke recently established a **Renewable Energy and Energy Efficiency Industry Advisory Committee** in order for industry to advise the Department directly on pressing trade promotion and policy issues.

- **ExporTech** was developed and is delivered in partnership with Manufacturing Extension Program (NIST-MEP.) It is designed to assist new-to-export companies, primarily in manufacturing, with developing an international growth plan customized to the businesses specific exporting objectives. Since its inception, the initiative has seen a 600 percent increase from three programs in 2007 to 21 in 2010. To date over 200 companies in 18 states have participated in ExporTech programs. The ExporTech program enables small and medium-sized companies, including clean energy firms, to accelerate or expand their growth in to new markets and to create and refine an international growth strategy.

- **Sustainable Manufacturing Initiative** – ITA's Sustainable Manufacturing Initiative addresses green technology implementation as a component of business competitiveness. The Initiative encourages U.S. companies to use sustainable practices that improve their bottom line. This can make them more competitive in the global marketplace, and therefore, potentially more interested in exporting. A component of this Initiative is SMART Sustainable Manufacturing American Regional Tours. ITA has held 7 "SMART" TOURS (Seattle, Rochester, Grand Rapids, St. Louis, Seattle, Atlanta, and Beltsville) – The next SMART tour, which will focus on energy efficiency in the forest products sector, will be held in September in Richmond, VA. NIST-MEP centers have between an integral partner on this front.

- **Manufacture America** - This summer, Nicole Lamb-Hale, Assistant Secretary for Manufacturing and Services, will lead a series of road shows to help demonstrate U.S. Government resources to help manufacturers retool their facilities to engage the growth industries of the 21st century, creating and preserving jobs in some of the hardest hit communities around the country. The road shows will help link manufacturers to global demands that provide export opportunities, such as clean energy, and meet President Obama's goal of doubling exports in five years. NIST-MEP centers will also provide a supporting role here.

2. Industry Promotional Events

ITA is actively promoting U.S. clean energy solutions in overseas markets. We have held trade events and foreign buyer programs at major renewable energy trade shows and brought delegations from all over the world to these events. ITA's aggressive clean energy technology promotion program includes over 90 trade events held worldwide last year and many more planned for the rest of 2010. These are in addition to the day-to-day services we offer U.S. companies, such as tailored matchmaking and consulting services, international company profiles, and international partnership searches. We now have a new Green Tech website that aggregates all of our export promotion programs in a single place, providing easy industry access (www.buyusa.gov/green)

In the past year, ITA has held International Buyer Program (IBP) events at two major energy trade shows. The IBP hosted nearly 1100 delegates at the 2010 Offshore Technology Conference in Houston, Texas and 13 delegates at the 2010 Electric Power Show. In December, an IBP will be held at Power Gen International in Orlando, Florida, the largest power generation trade show in the world. In May 2011, ITA will hold an IBP event at the American Wind Energy Association Windpower Conference & Expo in Anaheim, California.

ITA has also organized trade missions focused on clean energy: Solar Energy Trade Missions to India (March 2009 and February 2010) with 14 companies participating; Energy Efficiency Trade Mission to India (November 2009), led by Deputy Chief of Staff Rick Wade, with 16 companies participating; and most recently, the Secretary-led Clean Energy Business Development Mission to Hong Kong, and other cities in China and Indonesia (May 2010), focusing on solar, wind, power generation and distribution/smart grid, green building, and energy information services, with 24 companies participating.

Last year, ITA also led a Clean Energy Policy Mission to Indonesia focusing on geothermal and other forms of renewable energy. We also organized a five-city Green Build Road Show -- to Pittsburgh, Denver, San Francisco, San Jose, and Phoenix -- to help U.S. companies take advantage of the $975 billion construction market in Europe.

During the December 2009 Copenhagen negotiations on climate change, we hosted "Bright Green," an exhibition of U.S. technology that can help fight climate change, and are likely to host a similar event at the next UNFCCC meeting in Cancun. We hosted a U.S. industry promotional event at the IAEA General Conference in Vienna last fall with the U.S. civil nuclear power industry. We expect to host this program again this September.

3. Publications and Educational Materials

As I mentioned earlier, in support of the President's National Export Initiative, we are working with our interagency partners to develop a National Renewable Energy and Energy Efficiency Export Strategy. We are also working on a competitiveness report on small modular nuclear reactors. We have ramped up our efforts to promote the commercialization and export of clean energy technologies through increased outreach to industry on best practices and markets, technical assistance and capacity-building events, and helping develop trade policies that promote cleaner technologies.

In 2009, ITA released a number of reports and helpful resources including a *Checklist for Corporate Energy Efficiency* and a *Trade Finance Guide*, which serves as a useful resource for small- and medium-sized enterprises (SMEs) in the green technology industry. We also have published clean energy exporters' guides for China and India, providing valuable planning information to companies interested in exporting green technologies to these growing markets. The guides contain market overviews, analyses of the clean energy markets in these countries, market opportunities for trade and investment through 2020, and resources available to U.S. businesses to help enter these markets. We recently released a smaller renewable energy market assessment report on Indonesia and have continued to hold informational webinars on topics as diverse as smart grid and biomass funding opportunities.

4. Domestic Regulatory Program

The role of MAS's Regulatory Affairs Program is to represent the competitiveness interests of U.S. companies and industries in the Federal regulatory review process. MAS conducts economic analyses to support regulatory reform and reviews cost-benefit analyses prepared by other Federal agencies. MAS's primary value added arises from its unique industry and international trade expertise.

The MAS Regulatory Affairs Program has participated in interagency discussions for almost three dozen rules since the program started in 2006, including rules from the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Department of Homeland Security (DHS). Through this program, we continue to review key rulemakings that could potentially affect the export competitiveness of the U.S. clean energy and other industries.

5. Bilateral, Regional & Multilateral Dialogues

ITA has also been active in organizing events to spur the exchange of best practices with foreign governments and foreign industry. Such programs have ranged in focus from helping trading partners reduce greenhouse gas emissions in cement manufacturing to explaining what investment framework has been developed to attract investment to the renewable energy and energy efficiency sectors.

ITA has worked on clean energy issues under the U.S.-EU Framework for Advancing Transatlantic Economic Integration and the U.S.-Brazil Commercial Dialogue, and assesses the impact of foreign regulations, such as the European directive on energy-using products, on U.S. interests. We have many similar commercial dialogues with other countries including China, India and others.

Along with the Department of State and other agencies, ITA works within the G-8, G-20 and the Asia-Pacific Economic Cooperation forum, where climate change is becoming a priority issue, to represent the interests of the United States, with a focus on economic and industrial concerns. ITA monitors foreign government climate- and energy-related programs and proposals for potential countervailable or WTO-inconsistent subsidies.

6. Market Development Cooperator Program

Lastly, I wanted to highlight the Market Development Cooperator Program, which MAS manages. The program allows non-profit groups or universities to propose projects to open up foreign markets to U.S. exports. In 2009, we awarded three MDCP awards in the clean energy sector. This year, the Department has received numerous applications for MDCP awards and is currently reviewing them.

The MDCP has been an effective means to promote U.S. exports abroad, especially in the clean energy sector. One particular example I'd like to highlight is the International District Energy Association (IDEA), which has partnered with the Department as a cooperator in the MDCP since 2005. Our MDCP awards to IDEA during this time have contributed to the export of $263 million of U.S. clean energy technologies, principally to Middle East markets.

Conclusion

In closing, I would like to thank you Chairman Rush, ranking Member Whitfield, and Members of the Subcommittee for the opportunity to highlight what ITA is doing to help U.S. companies compete in markets for clean energy technologies and for all kinds of U.S. goods and services around the world. I would like to make one final point, however, before answering any questions you might have:

Expanding opportunities to export clean energy technologies will not only maintain the competitiveness of U.S. companies, but will create jobs and generate economic growth. In addition, it will increase the reliability of our energy supply. American businesses have the technology, the expertise and the experience to help countries around the world reach their climate and energy goals. It is an extraordinary opportunity and a win-win for everyone.

Thank you for your time today. I welcome any questions you may have.

Mr. RUSH. The chair recognizes Ms. Wince-Smith for 5 minutes.

STATEMENT OF DEBORAH WINCE-SMITH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COUNCIL ON COMPETITIVENESS

Ms. WINCE-SMITH. Chairman Rush, thank you for inviting me to testify today on the Clean Energy Technology Manufacturing and Export Assistance Act. This legislation acknowledges the pivotal role that the emerging clean energy industry will play in ensuring America's economic competitiveness and in our national security going forward.

The growth and vitality of this industry depends upon the development of a robust domestic market coupled to access to a burgeoning global market for these essential technologies and services that will take us to a low carbon economy, energy security, and addressing climate change.

Since 1986, the Council on Competitiveness has brought forth creative solutions to America's most pressing competitiveness challenges. Comprised of leaders from industry, academia and organized labor, the Council is unique in its abilities to build synergies and consensus across a wide span of organizations and interests.

Next week on June 23rd, our chairman, Samuel Allen, the CEO and chairman of John Deere Corporation, will be launching with our members a new flagship initiative on U.S. manufacturing competitiveness in the 21st century. I submit for the record a summary of this initiative.

The Council, with our partners in government and the private sector, will deliver a national manufacturing strategy to the administration and Congress at a national summit in 2011. And energy and the clean energy revolution will be at the heart of this agenda.

Our energy security innovation and sustainability initiative where we outlined a very robust plan last September, clearly supports an alliance with the objectives of the Clean Energy Technology Manufacturing and Export Assistance Act.

As the 20th century drew to a close, rising global competition, the opening of global markets, challenged U.S. manufacturers raising concern about the export of U.S.-made goods, offshoring of our manufacturing production, the loss of skilled U.S. manufacturing jobs, and a rising account deficit, currency manipulation and distortion. With the growing strength and consumer demand of the emerging economies, competitors such as China, India, South Korea, and Brazil, now there are many that feel that U.S. manufacturing will spiral into further decline.

The Council believes that no Nation can be a technology and economic leader without a robust multi-sector manufacturing capacity. And the stakes are extremely high. Our roadmap for energy security sustainability and competitiveness highlighted that revenue in just three clean energy sectors—wind, solar and biofuels—is projected to nearly triple over the next decade and markets for clean technologies and their attendant services will expand exponentially.

These markets and the jobs and economic growth that will bring our country to the forefront require a set of enabling policies and programs in research and development, in manufacturing and commercial deployment here in America. So we believe that H.R. 5156

is an important policy step in addressing this challenge, and I am pleased to be here today to voice our support for this proposal and legislation.

But there are many more policy steps required to ensure a vibrant ecosystem that supports America's capacity. For next generation R&D, and battery storage, carbon capture sequestration, and nuclear reactors, to increasing energy productivity and efficiency. We must engage in this intense global competition in Asia, Europe, the Middle East and the Americas.

As an example of what is at stake, within the past decade, the United States has fallen from first to fifth among top solar manufacturing companies and now imports solar cells from the EU and Asia. China now is doing assembly work for solar cells in the United States.

I cannot emphasize enough the importance of taking a systems approach to our energy sustainability and economic policies. We have to understand the linkage between policies and how we integrate them into a holistic strategy, everything from domestic tasks and fiscal policies to regulatory issues to, of course, global standards and trade policy.

Let me highlight quickly four areas in our energy sustainability report that captures the essence of what you are trying to accomplish in this legislation with respect to expanding U.S. exports.

The first is that we must remove tariffs and non-tariff barriers for sustainable energy products and services while not creating a dual track for preferential trade liberalization. We have to ensure that tariff reduction and removal of barriers are transparent, reciprocal, and provide access to all national markets where strong worker and consumer protections are provided.

Two, we have to ensure intellectual property rights for all industrial products and services, copyrights and sustainable energy solutions are protected. This is a huge issue with China, India, and Brazil and other parts of the world.

Three, we must ensure our continued U.S. technological leadership for the breakthroughs and commercializations. The Council has proposed that we need a long-term stable source of funding. And in the future, we argue that 30 percent of any revenue from carbon pricing should be allocated to R&D including the demonstration of clean energy technologies.

And four, to insure that the technologies of tomorrow will be manufactured in the United States, we should allocate 40 percent of revenues derived from any future carbon pricing program to manufacturing initiatives, Federal, State or local clean manufacturing zones, pilot projects as well as immediate expensing and depreciation of the costs of retooling for production and qualified products, and dedicating high-performance computing assets to the clean energy manufacturing revolution.

In conclusion, Mr. Chairman, the Council believes that the transformation to a low-carbon economy will unleash American innovation, it will create new industries, revitalize and rebuild manufacturing jobs across our Nation and keep and grow high-skilled jobs for this generation and the next. But we have to come together around an integrated manufacturing policy and to accelerate this

growth, stewardship, and security for all. Thank you, and I am welcome to answer any questions.

[The prepared statement of Ms. Wince-Smith follows:]

Statement by
Deborah Wince-Smith
President
U.S. Council on Competitiveness
before the
House Subcommittee on Commerce, Trade, and Consumer Protection
June 16, 2010

Council on Competitiveness

Introduction
Chairman Rush, Congressman Whitfield and other distinguished members of the subcommittee, thank you for inviting me to testify today on the "Clean Energy Technology Manufacturing and Export Assistance Act". This legislation acknowledges the important role that the emerging clean energy industry will play in ensuring America's economic competitiveness and national security going forward. The health of this industry depends upon the development of a robust domestic market and access to a burgeoning global market for these essential technologies and services.

It is critical that the United States create the right conditions for breakthrough innovations across the manufacturing eco-system, especially in the field of clean energy. Perhaps more importantly, we need to ensure the environment exists here for manufacturing at scale in order to create high-value jobs and enhance our national prosperity.

Council on Competitiveness
I'd like to start by providing a little background about the Council on Competitiveness - who we are, and how we operate.

Since 1986, the Council has brought forth creative solutions to America's most pressing competitiveness challenges. Composed of leaders from industry, academia and organized labor, the Council is unique in its ability to build synergies and consensus across a wide span of organizations and interests. Our scope of issues reflects many factors that affect our nation's ability to compete: ranging from the business environment, innovation, advancing key enabling technologies, building a world-class workforce and igniting regional innovation through entrepreneurship.

By leveraging its exceptional convening power, the Council attracts the best minds, at the right time to the right issues. Not representing a singular interest, the Council operates at the level of the national interest, taking a systems approach in framing problems and developing solutions. The Council proactively engages all perspectives and forges critical partnerships with stakeholders in the public and private sectors.

The Council is fortunate to have some of America's top leaders serve on our Board of Directors:

- Our Chairman is Samuel R. Allen, Chairman & CEO, Deere & Company
- Our Industry Vice Chair is Michael J. Splinter, Chairman, President & CEO, Applied Materials, Inc.
- Our University Vice Chair is Shirley Ann Jackson, President, Rensselaer Polytechnic Institute
- Our Labor Vice Chair is Edward J. McElroy, Chief Executive Officer, UNITE HERE
- Our Chairman Emeritus is Charles O. Holliday, Jr., Former Chairman, DuPont

Council on Competitiveness

The Council continues to be at the forefront in tackling the key challenges facing U.S. competitiveness. Next week, on June 23rd, we will formally launch a new flagship initiative on U.S. Manufacturing Competitiveness in the 21st century and I submit for the record a summary of this initiative. The Council will prepare and deliver a National Manufacturing Strategy to the Administration, the Congress and its members at a national summit convened in late 2011. With the advice, participation and buy-in from a wide range of stakeholders – this strategy will energize a vibrant, diversified and technologically advanced manufacturing value web, resulting in American jobs, economic growth, energy sustainability and national security.

The manufacturing initiative will build on the Council's other initiatives and our long-standing focus on technology and innovation to drive productivity and competitive advantage:

- The National Innovation Initiative, 2004
- Energy Security, Innovation and Sustainability Initiative, 2009
- Technology Leadership and Strategy Initiative, on-going
- High Performance Computing Initiative, on-going
- Skills and Workforce Initiative, on-going

Today, I will speak directly to our new manufacturing initiative and the findings of our Energy Security, Innovation and Sustainability Initiative which support the objectives of the "Clean Energy Technology Manufacturing and Export Assistance Act".

U.S Manufacturing Competitiveness in the 21st Century

As the 20th century drew to a close, rising global competition and the broad opening of global markets challenged U.S. manufacturers. As a result, there has been continuing concern about the export of U.S. made goods, off-shoring of U.S. manufacturing production and the loss of U.S. manufacturing jobs. With the growing strength of newly-developing low-cost competitors such as China, India, South Korea and Brazil, there are many who fear that U.S. manufacturing will spiral into further decline. Others believe that the U.S. can improve national prosperity through service industries alone without a robust manufacturing sector.

The Council believes that no nation can be a technology and economic leader without a robust multi-sector manufacturing capacity. The global competitive landscape for manufacturing is undergoing a transformational shift that will reshape the drivers of

trade, economic growth, job creation, national prosperity and national security. Manufacturing is and will continue to be an essential path for attracting and retaining high value investments, spurring innovation, increasing exports and creating high value jobs. Developed and emerging nations are in heated competition to create the most compelling opportunities to innovate, build a highly-skilled workforce, improve standards of living and enhance national security.

Council on Competitiveness

Strong export growth will enable the United States to maintain acceptable economic growth rates, improve productivity, encourage innovation and create good-paying jobs. Exports of manufactured goods from the U.S. grew at an average annual pace of almost 9 percent between 2002 and 2008 demonstrating there is considerable worldwide demand for U.S. goods. Yet, the U.S. share of world manufactured exports, as of 2008, dropped to only 9.2 percent, down from almost 14 percent in 2000.[1] The most dramatic change was the rise of China to overtake the United States as a leading exporter of manufactured products. This is a worrisome trend especially in clean energy and other advanced technologies. Just consider that the following are no longer manufactured in the United States at a time when we are transitioning to a low carbon world:

- Lithium-ion, lithium polymer and NiMH batteries for cell phones, portable consumer electronics, laptops and power tools
- Advanced rechargeable batteries for hybrid vehicles
- Crystalline and polycrystalline silicon solar cells, inverters and power semiconductors for solar panels

Higher employee wages and exports go hand-in-hand. Employees in the most trade-intensive industries – where combined exports and imports amount to at least 70 percent of their domestic industrial output—earn an annual compensation package that averages about $86,000. This is 47 percent more than average compensation in the least trade-engaged sectors of manufacturing.[2]

Long-term national and economic security in the United States critically depends on our having innovative and agile manufacturing capabilities. Current economic conditions and energy security challenges have only heightened the need to accelerate competitive advantages for U.S. manufacturing companies in the global marketplace. Manufacturers will maintain their global leadership position through technological differentiation, not through labor cost advantage.

21st century manufacturing spans ideas, products and services; well beyond the production of only goods as in the 20th century. This post-industrial manufacturing ecosystem represents a complex and highly integrated globalized value web. This web includes cutting-edge science and technology, innovation, talent, sustainable design, systems engineering, supply chain excellence and a wide range of smart services; as well as energy efficient, sustainable and low carbon manufacturing.

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[1] *Facts about Modern Manufacturing 8th Edition*, MAPI/National Association of Manufacturers, 2009.
[2] Ibid

Rising energy demand, climate volatility and resource challenges require transformational manufacturing technologies and systems. Other nations are vying for market share in green manufacturing and clean energy industries. To drive economic growth, competitiveness and job creation, America must regain market leadership for technologies lost to other regions and also lead the world in energy efficient, sustainable and low carbon manufacturing. The examples of U.S. generated technologies creating value and jobs elsewhere are growing: ceramic oxides, semiconductor memory devices and production equipment, lithium ion batteries, flat panel displays, videocassette recorders and interactive electronic games.

Council on Competitiveness

The global challenges demand that we act now and not allow further erosion and atrophy of the U.S. industrial base. America must craft and mount a strategic response to provide jobs for our citizens in the 21st century. We need an engaged and skilled workforce, rapid deployment of frontier science and technology, deep pools of risk capital, a more global market oriented capital cost structure and regulatory environment, and 21st century physical and virtual infrastructures that will drive America's competitive advantage.

American public officials, opinion leaders and investors also need to understand and vigorously support these changes if we are to regain and retain our international leadership position. If America fails to adapt, we risk losing this critical underpinning of our economy and failing to reap the value from the investments in next generation energy technologies. America's edge lies with forward looking, high-value manufacturing that looks well beyond traditional assembly and fabrication of products.

The Critical and Transformational Role of HPC in Manufacturing

The use of high performance computing for modeling, simulation, and analysis has already provided a competitive advantage for many of the manufacturing Fortune 50.

These companies employ in-house advanced computing and have access to high performance computing hardware, software, and technical resources through partnerships with national laboratories. Many of these companies recommend that adoption of modeling, simulation, and advanced computing be accelerated throughout the U.S. manufacturing sector. For example, Pioneer Hi-Bred, a DuPont company, uses HPC to manage and analyze massive amounts of molecular, plant, environmental and farm management data, allowing them to make product development decisions much faster than by using traditional experiments and testing alone. For Pioneer, the result has been faster improvement in new seed products, staying ahead of the competition, a major jump in innovation and productivity, and the ability to help meet some of the world's most pressing demands regarding the availability of food, feed, fuel, and materials.

A substantial effort toward wider adoption of modeling and simulation requires the commitment of intellectual capital, computer hardware and software for complex problem solving, and other resources from among the diverse advanced computing assets spread across the nation's regions, states, and advanced computing centers. This truly

successful national initiative will leverage these vital resources from a new public-private partnership to bolster the U.S. manufacturing sector.

Council on Competitiveness

To these ends, the federal government should issue a "call to action" to U.S. manufacturing sector leaders and create a national manufacturing initiative enabled by advanced computing. These leaders in advanced computer-enabled design and manufacturing should be asked to leverage their expertise in modeling, simulation, and analysis and partner with the federal government to improve U.S. manufacturing competitiveness. The outcome of this call to action will be to accelerate and broaden the use of modeling and simulation, to increase penetration of these tools into smaller companies (pushing these tools further down into the supply chain), to solve the biggest complex problems with the latest techniques, and compete through innovation.

Through the national laboratory system, the federal government offers the greatest scientific and engineering resources, computer assets, and research software to be deployed for the initiative. Importantly, while the United States and Japan are the only significant manufacturers of HPC machines - an incredible advantage that must be utilized for economic growth - china is not far behind . To succeed, the initiative should also call upon, bring together, and leverage (all of) the nation's most advanced computing resources—state to state, region to region, center to center.

Modeling and simulation are critical tools needed by manufacturers of all sizes. These tools are especially valuable for the design, development and deployment of clean energy technologies and offer firms a significant cost advantage.

Energy Security, Innovation and Sustainability

The Council believes that energy security and sustainability are two of the defining and intertwined challenges of our time. For virtually every country, access to affordable energy is a basic need for economic growth, social development, improved standards of living, and increasingly for national security. However, neither an affordable nor a reliable supply of energy is a given for any country. As committee members well know, even as a nation with an immense wealth of natural resources, we face soaring energy demand, price volatility, and supply instability. At the same time, pressure is mounting around the world to mitigate greenhouse gas emissions from fossil fuels—with the prospect of a 45% increase in emissions by 2030, driven almost entirely by developing countries.[3]

Without access to cost-effective cleaner energy solutions, developing economies will have no alternative but to increase their dependence on the most rudimentary fossil-fuel technologies, contributing significantly to increased pollution and environmental damage. To summarize, the current trajectory of global energy trends is unsustainable environmentally, socially and economically. They are impacting:

[3] International Energy Agency, *World Energy Outlook 2008*, IEA/OECD, Paris (2008).

- the fundamental ability of American industry to compete in the global economy
- the political ability of our government to play an international leadership role
- the capacity of our military to carry out its missions

Energy security and sustainability are now first-tier economic, national security, and competitiveness concerns. It is, therefore, inevitable that the world will undergo a systems transformation in the way we use and produce energy. As this country moves toward sustainable energy policies and programs, the Council does not believe there is an unavoidable trade-off among economic growth, energy savings, and environmental interests. Indeed, the pending systems transformation offers an opportunity to integrate energy security, sustainability, and competitiveness.

We also know that we have a tremendous opportunity before us. In fact, these challenges have created a perfect storm for innovation. We can move to a new era of technological advances, market opportunity, and industrial transformation if we can successfully unleash the investment and innovation potential of the private sector to meet the challenges and seize the opportunities arising from these new public-private partnerships.

We must be poised to deploy new ideas and innovations that come from the significant new investment in energy research into scalable products, goods and services. Research must be viewed as encompassing basic, applied, development and test beds. If we do not have in place the infrastructure to reap value from our investment, you can rest assured another country will. And when that happens, the jobs and intellectual property will be lost; as well as the component subsystems leading to a hollowing out of the innovation enterprise.

As we enter a new era of technological innovation, driven by the twin challenges of energy security and climate change, we must be vigilant in ensuring that we support these nascent industries here at home. We do not want to repeat the errors of our past when despite having achieved scientific and technology breakthroughs in liquid crystal, plasma and other flat panel display technologies, we ceded market leadership to countries like Japan and Korea, as they rapidly scaled up their high quality manufacturing ability and captured the global display market.

We have learned that we cannot divorce our investments in R&D from our efforts to support each stage of the manufacturing continuum. We must design-in manufacturing considerations upfront in the innovation process. We must ensure that we have the appropriate regulatory and financing framework in place to allow our entrepreneurs to move agilely from testing and pilots to manufacturing and large scale system deployment.

Clean Energy Technology Manufacturing

"U.S. manufacturing of clean energy technologies lags behind its international competitors on almost all fronts. The United States is outpaced by at least one of its Asian competitors in the production of solar cells, wind turbines, and components for

nuclear power plants, and currently has no domestic high-speed rail manufacturing capacity. The United States is also in danger of falling behind in the development of CCS and advanced vehicle technology and is already a laggard in the production of advance batteries for hybrid and electric vehicles."[1]

Council on Competitiveness

H.R. 5156 is an important policy step in addressing these challenges and I am pleased to be here today to voice our support for this proposal. But there are many more policy steps required to ensure a vibrant eco-system that fully supports America's capacity to create, make and market essential clean energy technologies to the world.

The Council's views on the energy-competitiveness relationship have been well-defined over the past few years. We see energy as the lifeblood of our economy and we believe that America's competitiveness cannot be separated from energy issues.

In developing new industries to supply the sustainable energy and related services needed here and abroad, America can drive economic growth, create millions of new jobs and enhance the competitiveness and prosperity of the entire nation.

The United States must invest, create, commercialize and market the new products and services of the low-carbon energy future. We must actively engage in the intense global competition well underway in Asia, Europe, the Middle East and the Americas to capture the economic value, jobs and global market share for these new industries and infrastructure.

As an example of what is at stake, within the past decade the United States has fallen from first to fifth among top solar manufacturing countries and now imports solar cells from the European Union and Asia.

Revenue in just three clean energy sectors —wind, solar and biofuels— is projected to nearly triple over the next decade, from $145 billion in 2008 to $343 billion in 2019.[2] Markets for clean technologies like carbon capture and sequestration for coal plants will expand exponentially as demand for this abundant energy resource continues to grow.

These markets and the employment and economic growth they bring can be ours if we act now with the right set of policies and programs to catalyze research and development (R&D), investment, manufacturing and commercial deployment.

In July 2007, the Council on Competitiveness launched the Energy Security, Innovation & Sustainability (ESIS) Initiative in recognition of the critical linkages among these three issues and their profound impact on future U.S. productivity, standard of living and global market success.

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[1] *Rising Tigers, Sleeping Giant: Asian Nations Set to Dominate the Clean Energy Race by Out-Investing the United States*, Breakthrough Institute and Information Technology and Innovation Foundation, November 2009.

[2] *Clean Energy Trends*, Clean Edge, April 2010

Council on Competitiveness

Drawing upon over a year's work of inquiry and real-time research and analysis, and in anticipation of the new administration, the Council issued *Prioritize: A 100-Day Energy Action Plan for the 44th President of the United States* in September 2008. The plan identified six "pillars" as integral to U.S. energy transformation and as top priorities for presidential action upon taking office.

At that time, the Council stressed that the action plan recommended in *Prioritize* marked the beginning, not the end, of a concerted commitment to ensure the United States achieves energy security in a sustainable manner, while ensuring the competitiveness of its workers, industries and economy.

In September 2009, at a National Energy Summit that the Council convened here in Washington, D.C., we released *Drive: A Comprehensive Roadmap to Achieve Energy Security, Sustainability and Competitiveness*. *Drive* builds upon the energy action plan in *Prioritize* and sets forth the next set of integrated building blocks for America's energy transformation, sustainability and competitiveness in a low-carbon world.

I cannot emphasize enough the importance of taking a systems approach to our energy, sustainability and economic policies.

Let me also flag for the Committee a select number of our recommendations that bear directly upon the intent of HR 5156, that would in fact complement and enhance the efficacy of the provisions of this legislation. With respect to accessing to global markets the Council recommends that we:

1. **Remove tariffs and non-tariff barriers for sustainable energy products and services** while not creating a dual track for preferential trade liberalization. The World Trade Organization should re-launch the Doha Round of trade talks with the leadership of the Group of Twenty (G-20) Finance Ministers and Central Bank Governors to ensure that tariff reductions and removal of non-tariff barriers are transparent, reciprocal and provide access to all national markets, where strong worker and consumer protections are provided.

2. **Assure intellectual property rights (IPR) for all industrial products and services, copyrights and sustainable energy solutions.** The Secretary of State should coordinate with the U.S. Trade Representative to obtain strong IPR protection for all international R&D cooperative programs and technology transfer agreements for sustainable energy and carbon mitigation.

3. **To ensure continued U.S. technological leadership.** We need to guarantee a long-term, stable source of funding. In the future, 30 percent of any revenue from carbon pricing should be allocated to R&D, including the demonstration of clean energy technologies. Three technologies—energy storage including batteries, carbon capture and storage and advanced nuclear reactors—are enabling technologies that are critical to develop if we are to fully exploit our renewable, coal and nuclear resources.

Several demonstrations at commercial scale of each technology should be fast tracked with set dates for timely completion.

4. **To ensure that the technologies of tomorrow will be manufactured in the United States**, a steady stream of financing support should be provided, including 40 percent of the revenues derived from any future carbon pricing program. Supported programs should include: federal, state or local clean manufacturing initiatives; the creation of clean energy development zones; financial assistance for the first two to three commercial manufacturing facilities for energy technologies; the expensing of the costs of retooling for production of qualified products, equipment or energy options; operating Regional Manufacturing Centers to promote advanced manufacturing technology; and dedicating a high performance computing (HPC) center for clean energy manufacturing.

We believe that the recommendations presented in *Drive* will unleash a new era of American innovation, create new industries, revitalize and re-build manufacturing jobs across our nation, keep and grow high-skilled jobs for this generation and the next and accelerate economic prosperity for all Americans as we lead global growth, environmental stewardship and security.

Conclusion

Thank you again for this opportunity to provide testimony on this important topic for American manufacturing competitiveness. We support the intent of the "Clean Energy Technology Manufacturing and Export Assistance Act", while recognizing there is a lot more to be done. It is critical that the United States create the right conditions for breakthrough innovations across the manufacturing eco-system, especially in the field of clean energy. Perhaps more importantly, we need to ensure the environment exists here for manufacturing at scale in order to create high-value jobs and enhance our national prosperity.

Attachment 1: Council on Competitiveness U.S. Manufacturing Competitiveness Initiative Overview

U.S. Manufacturing Competitiveness Initiative

For American Jobs, Growth and Security

Council on Competitiveness

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Vision for U.S. Manufacturing in the 21st Century

The United States needs a vision and goals for manufacturing. We must seek to generate multiples of high-value jobs as American products—synonymous with high quality, lean and green manufacturing—are in high demand around the world. The United States will enjoy the highest level of labor, capital and resource productivity among the world's leading economies, ensuring a sustained competitive advantage in the global economy. Vibrant regional innovation ecosystems and smart networks of lean and agile small manufacturers will drive the U.S. manufacturing sector. By 2020, the United States will be the decisive leader in frontier research in new process technologies and manufacturing productivity, including advanced modeling and simulation. Clean and advanced manufacturing technologies will be widely deployed across the economy, as the risk and cost to commercialize and produce them at scale has been substantially reduced.

Initiative Goal

At a national summit convened in 2011, deliver to the Administration and the Congress a realistic and comprehensive solutions roadmap—with the advice, participation and buy-in from a wide range of stakeholders—that will energize a vibrant, diversified and technologically advanced manufacturing value chain, resulting in American jobs, economic growth and energy and national security.

Initiative Core Premises

Manufacturing, long a cornerstone of U.S. competitiveness, faces intense and accelerating competition from all corners of the globe. The U.S. share of the global market for manufactured exports declined from 19 percent in 2000 to 14 percent in 2007, while the Chinese share rose from 7 percent to 17 percent.[1]

The manufacturing ecosystem represents a value stream that spans from ideas to products. 21st century manufacturing goes well beyond production of saleable objects. It also includes cutting-edge science and technology, sustainable design and systems engineering, supply chain excellence and a wide range of smart services—as well as lean and green production.

Manufacturing is being reshaped by new forces. Half of middle class consumers will live outside the United States by 2030.[2] The rise of new consumers and capabilities in emerging economies will challenge American preeminence. The fast pace of technological change doubled the topple rate for established companies in the 20 years to the mid-1990s,[3] and today's global innovation networks diffuse frontier research and technology allowing competitors to leapfrog their competition.

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[1] *Facts about Modern Manufacturing 8th Edition*, MAPI/National Association of Manufacturers, 2009.
[2] *The Expanding Middle: The Exploding Middle Class and Falling Global Inequality*, Goldman Sachs, 2008.
[3] Huyett, William I. and S. Patrick Viguerie, "Extreme Competition," McKinsey Quarterly, February 2005.

Rising energy demand, climate volatility and resource challenges require transformational manufacturing technologies and systems. Other nations are vying for market share in green manufacturing and clean energy industries. To drive economic growth, competitiveness and job creation, America must regain market leadership for technologies lost to other regions and also lead the world in energy efficient, sustainable and low carbon manufacturing.

The global challenges demand that we act now. America must craft and mount a strategic response to provide jobs for our citizens in the 21st century. We need an engaged and skilled workforce, rapid deployment of frontier science and technology, deep pools of risk capital, and 21st century physical and virtual infrastructures that will drive America's competitive advantage.

Initiative Leadership

CEO-Level Leadership Council and Steering Committee
The Committee, led by Council Chairman Samuel R. Allen, is comprised of chief executives from industry, academia, organized labor and national laboratories, and will frame the critical questions, provide the strategic direction and create the policy solutions that will ensure a vibrant, resilient and sustainable manufacturing base upon which America will grow.

Council Board

Samuel R. Allen, Chairman and CEO, Deere & Company; Chairman, Council on Competitiveness

Michael R. Splinter, Chairman, President and CEO, Applied Materials, Inc.; Industry Vice Chair, Council on Competitiveness

Shirley Ann Jackson, President, Rensselaer Polytechnic Institute; University Vice Chair, Council on Competitiveness

Edward J. McElroy, CEO, ULLICO, Inc.; Labor Vice Chair, Council on Competitiveness

Charles O. Holliday, Jr., Former Chairman, DuPont; Chairman Emeritus, Council on Competitiveness

Deborah L. Wince-Smith, President and CEO, Council on Competitiveness

Industry Lead

James H. Quigley, Chairman and CEO, Deloitte Touche Tohmatsu; Executive Committee Member, Council on Competitiveness

Academia Lead

Susan Hockfield, President, Massachusetts Institute of Technology; Executive Committee Member, Council on Competitiveness

Labor Lead

William P. Hite, President, United Association of Pipe Fitters and Plumbers; Executive Committee Member, Council on Competitiveness

National Laboratories Lead

George H. Miller, Director, Lawrence Livermore National Laboratory; Executive Committee Member, Council on Competitiveness

Executive and Expert Advisors
An equally diverse and expert Advisory Committee is being formed to help shape the substantive aspects of the project, as well as provide ongoing counsel and support to Steering Committee Policy Solutions Groups and Council staff.

Distinguished Member and Affiliate Partners
As a broad-based, non-partisan organization committed to advancing U.S. competitiveness in the global economy, the Council cultivates partnerships with leading national organizations on issues of mutual concern. In bridging the interests and insights of many, the Council brings multi-disciplinary analysis and systems thinking to its work. The Council is proud to be partnering with several distinguished organizations on the U S. Manufacturing Competitiveness Initiative.

Public Sector Engagement
Policies affecting the U.S. manufacturing environment emanate from many quarters of the executive and legislative branch. To foster a holistic and integrated policy roadmap, the Council is proactively engaging policymakers from across the Administration and Congress in the launch of this initiative. Congressional staff from both parties have agreed to serve as advisors to the Council to ensure that the forthcoming recommendations are aligned with Committee jurisdiction and legislative timelines.

2010 Calendar of Events

June 23, 2010	Public Release of Council/Deloitte CEO Survey: Ranking Manufacturing Competitiveness by Country
	National Launch of Initiative, Council Executive Committee Meeting and Inaugural Manufacturing Steering Committee Meeting
October/November 2010	Steering Committee Meeting; Scenarios Released and Develop Preliminary Recommendations
December 8-9, 2010	Council Leadership Unveils Initial Findings and Steering Committee Recommendations
January 2011	CEO-Led Policy Solution Groups Commence Work
October 2011	Steering Committee Meeting and Release of Comprehensive Solutions Roadmap at National Manufacturing Summit
January 2012	Final Proceedings

Why the Council

Since 1987, the Council has brought forth creative solutions to America's most pressing competitiveness challenges. Composed of leaders from industry, academia and organized labor, the Council is unique in its ability to build synergies and consensus across a wide span of organizations and interests. By leveraging its exceptional convening power, the Council attracts the best minds, at the right time to the right issues. Not representing a singular interest, the Council operates at the level of the national interest, taking a systems approach in framing the problem and developing solutions. The Council proactively engages all perspectives and forges critical partnerships with stakeholders in the public and private sectors.

U.S. Manufacturing Competitiveness Initiative
Structure

Goals

The Initiative will bring together a cross-section of America's top private sector leaders to:

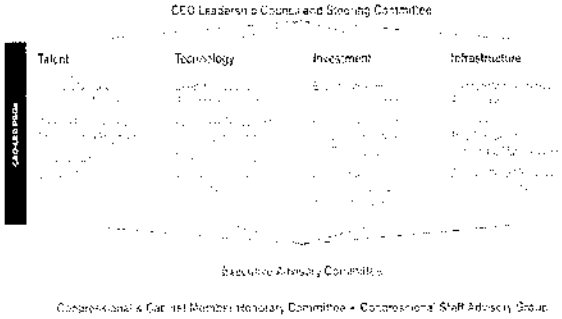
- Develop a shared vision for 21st century manufacturing across the entire manufacturing value chain.
- Sharpen our understanding of changes within the global economic environment and how they are impacting U.S. manufacturing competitiveness
- Create and advocate for a comprehensive set of policy solutions that will make the United States the most fertile and attractive environment for high-value manufacturing.

Council on Competitiveness

Why? America's national and economic security—and our ability to create wealth and new jobs—depend upon a robust and adaptive manufacturing ecosystem that supports the generation and translation of ideas into high-value goods and services that serve U.S. and global markets. Manufacturing accounts for the majority of the research and development and productivity growth in the U.S. economy, and contributes a large share to total gross domestic product. The United States cannot be a global economic and technological leader, nor fully recover from recent economic crises, absent a strong manufacturing base.

Process

A CEO-Level Leadership Council and Steering Committee—comprised of chief executives from industry, academia, organized labor and national laboratories—will frame the critical questions, provide the strategic direction, and develop a comprehensive set of actions to ensure a vibrant manufacturing base for America's future over the next 24 months.



Congressional & Cabinet Members Honorary Committee • Congressional Staff Advisory Group

Members of the Steering Committee will organize and lead Policy Solution Groups (PSGs) to develop recommendations that address specific elements of the manufacturing ecosystem—including talent, technology, investment and infrastructure. Each PSG will study discrete issues and produce an interim and final report for the Steering Committee—that will, in turn, summarize key findings and policy recommendations. The Steering Committee will integrate all of the PSG reports and findings into a final plan that they will present at a National Manufacturing Competitiveness Summit in 2011. CEO chairs will dedicate appropriate staff and executive support to the task.

The Steering Committee will also receive support and advice from an Executive Advisory Committee composed of manufacturing and thought leaders from business, academia, labor and non-governmental organizations.

Mr. RUSH. Thank you very much.
Mr. Herrnstadt.

STATEMENT OF OWEN E. HERRNSTADT, DIRECTOR OF TRADE AND GLOBALIZATION, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

Mr. HERRNSTADT. Thank you, Mr. Chairman.

The International Association of Machinists & Aerospace Workers is one of the largest manufacturing unions in the United States representing thousands of workers who produce goods for exports every day. We strongly believe in the importance of the clean energy industry and we welcome the opportunity to appear before you today.

Support for domestic manufacturing goods related to clean energy is a critical component for our economic recovery, and it is urgently needed. U.S. workers continue to be mired in the economic crisis while the official unemployment rate hovers at around 10 percent, the unofficial unemployment rate is approaching 20 percent. Some 8½ million workers have lost their jobs since December 2007 with a significant number directly working in manufacturing.

Today, there are over 15 million workers who are unemployed. Almost half of all of those who are unemployed have been without work for over 6 months.

The IEM continues to argue for the adoption of comprehensive policies that will address this jobs crisis. In order to be effective, we urge that these policies establish a framework for rebuilding our manufacturing base and ensuring its sustainability for the future.

H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010 represents one element of an overall program that is so desperately needed. If enacted, the bill would assist U.S. companies in exporting clean energy products and services. The bill would also require the Secretary of Commerce to submit a report to Congress which would assess the extent to which the program has been successful in creating jobs in the United States.

While H.R. 5156 represents an incredibly important step towards addressing the need to support manufacturing jobs in the clean energy sector, we urge an even more aggressive approach to ensure that Federal support for companies to export clean energy technology and services does, in fact, result in the creation or maintenance of jobs here at home.

A direct verifiable requirement that Federal support for clean energy exports results in the creation of U.S. jobs is essential. It appears that some companies are only too willing to produce clean energy goods and equipment in other countries. For example, as reported in The Washington Post, BP announced this spring that it would be laying off 320 workers and closing its solar panel manufacturing plant in Frederick, Maryland, the final step in moving its solar business out of the United States to facilities in China, India and other countries. In making the announcement, BP's CEO stated that BP was "moving to where we can manufacture cheaply."

We offer four specific suggestions for moving ahead and for building on H.R. 5156.

One, detailed employment impact statements should be a required factor in any decisionmaking process for government assistance. The employment impact statements would contain information pertaining to employment that would be mandated, created, or lost if the program in question were approved. We also suggest that capital equipment related to production as well as goods to be exported must be domestically made and contain domestic materials.

Strong domestic content requirements uniformly implemented and enforced could be specifically contained in current legislation.

Export assistance should also be sought by the U.S. Export-Import Bank who has also developed expertise in these areas.

And last but not least, domestic production for exports must be based on a fair and level field of global competition.

Clean energy exporters must be able to prosper, and they can only do so if they are able and are able to compete fairly. That means trade barriers removed when dealing with countries like China. Those barriers must be challenged and removed. Demands for transfer of technology and production in return for market access must also be curtailed. Currency manipulation must be formally recognized and addressed, and relatedly subsidies to the industry by other countries like China should also be challenged in a number of forums, including trade complaints.

As mentioned at the outset, U.S. manufacturing workers are in a crisis and not, coincidentally, so is our country's economy. Promoting U.S. clean energy companies to export domestically manufactured goods with U.S.-made materials and products represents one important solution to this crisis.

Again, we very much appreciate the opportunity to appear before you today and we would obviously be happy to answer any further questions.

[The prepared statement of Mr. Herrnstadt follows:]

TESTIMONY OF
OWEN E. HERRNSTADT, DIRECTOR OF TRADE AND GLOBALIZATION
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
JUNE 16, 2010

Introduction

The International Association of Machinists and Aerospace Workers, (IAM) AFL-CIO, represents several hundred thousand active and retired members throughout North America.[1] Our members work in a variety of industries including aerospace, manufacturing, electronics, defense, transportation, shipbuilding, and woodworking to name a few. Our members also work in the energy sector manufacturing equipment and products. We have argued for many years that the health of our economy rests on our ability to develop technology that can contribute to domestic manufacturing opportunities. Clean energy and all of the goods and services related to the industry can serve as a significant factor in providing much needed manufacturing jobs to U.S. workers. Given our unique position as one of the largest manufacturing unions in the U.S., representing thousands of workers who produce goods for exports and as a firm supporter in the importance of the clean energy sector, we welcome the opportunity to appear before you today.

Support for domestic manufacturing goods related to clean energy is a critical component for our economic recovery. It is urgently needed. U.S. workers continue to be mired in the economic crisis. While the official unemployment rate hovers at around 10 percent, the unofficial unemployment rate is approaching 20 percent. Over 8.5 million workers have lost their jobs since December 2007, with a significant number directly working in manufacturing. Today, there are over 15 million workers who are unemployed. Almost half of all of those who are unemployed have been without work for over six months.

The IAM has urged the Administration and Congress to adopt comprehensive policies that address this job crisis. In order to be effective, these policies must go well beyond a band-aid approach: they must establish a framework for rebuilding our manufacturing base and ensuring its sustainability for the future. H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010, represents one element of an overall program that is desperately needed. If enacted, the Bill would assist U.S. companies in exporting clean energy products and services. The Bill would also require the Secretary of Commerce to submit a report to Congress which would assess, "the extent to which the program... has been successful in creating jobs in the United States."

While H.R. 5156 represents an important step toward addressing the need to support manufacturing jobs in the clean energy sector, we urge an even more aggressive approach to ensure that federal support for companies to export clean energy technology and services does in fact result in the creation or maintenance of jobs here at home. A direct, verifiable requirement that federal support for clean energy exports results in the creation of U.S. jobs is essential, since it appears that some companies are only too willing to produce clean energy goods and equipment in other countries. For example, BP, announced this spring that it would be laying off 320 workers and closing, "its solar-panel manufacturing

[1] Portions of this testimony are taken from the witnesses' article, "Green Jobs With Strings Attached", Economic Policy Institute, 12/2/2009.

plant in Frederick (Maryland), the final step in moving its solar business out of the United States to facilities in China, India and other countries..."[2] In making the announcement, BP's CEO, Tony Hayward stated that BP was "moving to where we can manufacture cheaply."[3]

As concluded by the Investigative Reporting Workshop (IRW), "[M]oney from the 2009 stimulus bill to help support the renewable energy industry continues to flow overseas..."[4] The IRW had previously reported about an announcement by a consortium of American and Chinese companies, "to build a $1.5 billion wind farm in Texas, using imported Chinese wind turbines". The IRW report noted that with respect to this project, "[C]ompany officials said they planned to collect $450 million in stimulus grants for the project."[5]

Federal incentives such as those provided by the H.R. 5156 could result in convincing companies in the clean energy industry to build and maintain domestic production to export goods, but only if that support is directly tied to domestic job creation. We are especially concerned that some companies could receive support for the export of capital equipment to other countries, while other exports could contain significant percentages of non-domestically produced parts, components, or materials. Transferring production equipment to other countries, and reinforcing foreign supply chains can, if not properly reviewed, result in creating additional global capacity and competition that could be harmful to U.S. workers. Using taxpayer money to facilitate this offshoring of work is unacceptable for any industry. In light of this hearing, it is particularly objectionable with respect to domestic manufacturing for the clean energy industry which is critical for our economic future.

In order to ensure that federal support for exports of clean energy goods and services will in fact result in the creation of jobs here at home, we offer the following suggestions:

1. **Require employment impact statements (EIS).** Detailed employment impact statements (EIS) should be a required factor in any decision making process for government assistance. The results of the EIS should be a significant factor in the final determination concerning the project or transaction under consideration. The EIS would contain information pertaining to employment that would be maintained, created, or lost if the program in question were approved. It would also contain in detail the duration, wage, location, and category of those jobs. The jobs analysis would also examine the impact on domestic jobs if the transaction involved the export of capital equipment.

   To assure that the EIS is accurate and that they are fully and effectively implemented, federal agencies such as the Department of Commerce should submit annual reports to Congress summarizing the methodology used to calculate the number of jobs supported by federal programs. The reports would also furnish Congress and the Administration with valuable information about how its programs regarding clean energy technology manufacturing and export assistance are assisting with the creation and maintenance of jobs here at home. In terms of HR 5156, such information could be included in Commerce's report as provided under Section 2(d).

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[2] *BP closing Maryland solar manufacturing plant*, The Washington Post, 3/27/2010.
[3] Id.
[4] Russ Choma, *Renewable energy money still going abroad, despite criticism from Congress*, 2/8/2010.
[5] Id.. The announcement and subsequent controversy has led to a number of discussions and at least one legislative proposal offered by Senator Schumer.

2. **Equipment used for manufacturing goods, as well as the goods themselves, must be domestically produced.** Capital equipment related to production as well as goods and services to be exported must be domestically manufactured and contain domestic materials. Current domestic content requirements that are in effect throughout government can be vague and present several questions. For example, how is domestic content measured and applied? What factors are included in determining content? Is the calculation limited to raw materials, production assembly and maintenance, or are intangible items like the value of research and development, marketing, and the value of intellectual property rights, which can be used to inflate domestic content included? How will the origin of components and sub-components be considered? Strong domestic content requirements, uniformly implemented and enforced should be specifically contained in HR 5156.

3. **Export Assistance should also be sought through the U.S. Export-Import Bank.** The U.S. Export-Import Bank's objective is to assist companies in financing exports that will support U.S. jobs. Ex-Im has well-developed expertise in export assistance for short, medium, and long-term transactions. Special expertise has also been developed in the energy and environmental sectors. HR 5156 could adopt provisions seeking specific coordination between Commerce and Ex-Im.

4. **Domestic production for export must be based on fair and level global competition.** Clean energy exporters must be able to compete on fair playing field with producers in other countries. If the domestic clean energy sector is to prosper and result in more U.S. manufacturing jobs, trade barriers that exist in other countries like China must be challenged and removed. Demands for transfer of technology and production in return for market access must be curtailed. Currency manipulation must also be formally recognized by our own government and addressed. Relatedly, subsidies to the industry by other countries, like China, should also be challenged by trade complaints. Moreover, subsidies which may take the form of artificially created cheap laber cost derived from the failure to recognize and enforce fundamental human rights must also be challenged and remedied.

As mentioned at the outset, U.S. manufacturing workers are in a crisis, and not coincidentally, so is our country's economy. Promoting U.S. clean energy companies to export domestically manufactured goods with U.S. made materials represents one important solution to this crisis.

We very much appreciate the oppertunity to appear before you today and would be happy to answer any questions you might have.

Mr. RUSH. Mr. Crawford, you are recognized for 5 minutes.

STATEMENT OF JACK CRAWFORD, JR., CHIEF EXECUTIVE OFFICER, JADOO POWER

Mr. CRAWFORD. Thank you, Chairman Rush, Ranking Member Whitfield, members of the Committee on Energy and Commerce for inviting me to speak here today about ways to increase global competitiveness of small and medium-sized clean technology companies. I would also like to thank Representative Matsui for her kind welcome and applaud her efforts to boost competitiveness of clean technology companies in Sacramento, in the Sacramento area and the Nation.

I am Jack Crawford, Jr., the CEO of Jadoo Power, a small alternative energy technology company based in Folsom, California. I have the experience of starting and investing in and growing several technology companies in my career. I would like to talk about the challenges facing a clean energy technology startup and its efforts to market its clean products internationally.

Jadoo Power is an industry leader in advanced power and energy storage solutions. Jadoo has used its technology tn develop and deliver demonstration products to the military, government and commercial sectors such as portable power for medical devices to support wounded soldier in war zones, emergency response communication solutions, and surveillance and security applications.

Fuel cells such as those manufactured by Jadoo also advance this other advancement of other clean technologies such as solar, LED lighting and wind power solutions. Whatever the energy source, fuel cells save energy and reduce emissions.

Jadoo's technology is being productized for military and commercial uses and additional support to scale or manufacturing will enable us to deliver a future large volume order of our products.

It has been the case for many years that American science and engineering has been pre-eminent in the world. The U.S. is the unequivocal leader in energy innovation just as we have been in such sectors as semiconductors, biotechnology, and the Internet.

As we strive to become a global leader in clean technology, one area of innovation where our advantage is most threatened is manufacturing. While breakthrough technology occurs here in the U.S., we are losing out to countries like China and Germany when it comes to energy manufacturing and exporting in part because these countries are providing hosts of tax incentives and export financial incentives and advantages for their clean technology companies.

Selling our clean energy companies to foreign markets will be imperative to the future growth and sustainability of the clean technology industry in America.

Like all other sectors of our economy, small businesses are the cornerstone of the clean technology industry. However, when it comes to exporting products and services, small businesses are at a disadvantage. Unlike large U.S. companies, small- and medium-sized clean technology companies do not have the financial resources, the expertise, or the relationships to navigate through and succeed in foreign markets.

According to the trade promotion coordinating committee, about 30 percent of nonexporting small- and medium-sized companies would consider exporting if they had more access to international market information and assistance in pursuing export opportunities. Jadoo Power is one of those companies.

This legislation being discussed today will help clean energy technology place clean energy technology at the forefront of our national export strategy and help small businesses find new customers and markets abroad.

A greater level of support from the U.S. Federal Government would level the playing field, particularly for small- and medium-sized businesses and accelerate the ability of U.S. clean technology companies to meet global demand and better compete in the clean energy marketplace.

I commend Representative Doris Matsui of Sacramento, along with Bobby Rush, John Dingell, and Anna Eshoo for introducing H.R. 5156, the Clean Energy Technology Manufacturing Export Assistance Act of 2010. This bill sets out a national strategy to assist U.S. clean energy technology companies with export assistance to find new markets for their products and services and to better compete in the international marketplace.

This bill also provides domestic manufacturing assistance to find new ways to reduce production costs and increase productivity in the clean technology sector.

For Jadoo, H.R. 5156 would provide tangible benefits as the company works to advance its manufacturing clean technology products and secure access and growth in the international marketplace.

In addition to providing a robust business environment for Jadoo Power, the Sacramento region is well positioned to be a national leader in producing clean energy technology. Along with Jadoo Power, there are more than 100 other Sacramento-based small- and medium-sized clean technology companies that would benefit from H.R. 5156, as well as other clean technology companies in California and around the U.S.

Representatives Matsui and Lungren, Governor Schwarzenegger and Sacramento's mayor, Kevin Johnson, have been actively supportive of clean technology companies both locally, Statewide and their continued support will be important to this emerging industry along with new support of government policies.

The emerging global market for clean energy products is ever growing, and it is now time we look to market and sell our U.S. made clean energy products to foreign markets. With a clear opportunity of clean energy technology, the United States can catch up and be a leader of the world with technology in American-manufactured products.

As we look at innovation and entrepreneurship in our country, it is time for us to go green and go global.

Thank you for inviting me to today's legislative hearing and allowing me to present my perspective.

[The prepared statement of Mr. Crawford follows:]

Testimony of Jack Crawford, Jr.
CEO of Jadoo Power
Folsom, California

Before the

Subcommittee on Commerce, Trade and Consumer Protection
United State House of Representatives

Wednesday, June 16, 2010

Introduction

Thank you Chairman Rush, Ranking Member Whitfield, and members of the Committee on Energy and Commerce for inviting me to speak here today about ways to increase the competitiveness of small and medium sized clean technology companies in today's competitive international marketplace. The clean energy technology industry represents a tremendous opportunity for entrepreneurs and investors, and the battle for global leadership is raging. The U.S. is in a fierce competition to develop companies that enable us to generate and utilize energy more efficiently and to do this cheaper and cleaner than our competitors. Nothing less than our global leadership is at stake here. The country that succeeds in innovating and exporting clean technology products and services will be the global economic leader and job creator in the future.

I am Jack Crawford, Jr., the CEO of Jadoo Power, which is a small alternative energy technology company based in Folsom, California. Having had the experience of starting up, investing in, and growing several companies in my career, I bring some amount of understanding to the challenges facing a clean energy technology startup company, and recognize the particular set of problems faced by my own company in this economy in its effort to market our clean tech products internationally.

Company Overview

Jadoo Power is an industry leader in advanced power and energy storage solutions. Our systems provide hybrid fuel cell power for government, military and commercial applications. The industry is evolving and Jadoo Power is at the forefront--moving toward the next evolution of superior power solutions that will greatly surpass current technologies and contribute to a healthier world environment. Jadoo Power continues to enhance fuel cell performance, advance fuel developments, hybridize with other clean energy technologies, improve manufacturing processes, and reduce costs.

We are taking fuel cell advancements into the future delivering portable commercial applications including complementary solar and LED technology that will continue to out-perform existing capabilities and provide better overall solutions.

With the emissions of green house gasses from conventional motors, generators and engines, and the limited power capabilities and toxic chemicals of conventional batteries, advanced fuel cell technology offers the promise of portable, clean, zero emissions power. Photovoltaic solar panels and wind turbines can provide utility scale power, but there continues to be a need for clean, efficient power sources that are small, portable and mobile so that some pollution-producing engines can be eliminated. Jadoo's fuel cell technology and alternative energy research and development programs provide the potential for ubiquitous clean energy storage and production.

Jadoo Power is solving some of today's energy challenges as well as working toward the next generation of power demands that will deliver better energy solutions, greatly surpassing current technologies and contributing to a healthier environment through reduced pollutants. Fuel cells, such as those manufactured by Jadoo, advance the integration of renewables, such as solar and wind power, into the electricity grid by enhancing their stability. Whatever the source, fuel cells save energy and reduce emissions.

To that end, Jadoo is working to realize several objectives. These objectives include:

- Enhancing fuel cell performance
- Hybridizing fuel cells with solar and LED technology
- Reducing production costs and improving manufacturing and integration processes
- Continuing to build key customer and partner relationships in military, government, and commercial markets

Through these efforts, Jadoo will continue to take fuel cell advancements into the future and deliver commercial applications that out-perform existing capabilities and provide better power solutions. As a leader in fuel cell technology and next generation power systems, Jadoo Power's products are providing hybrid fuel cell power in military, government and commercial applications.

Jadoo has used its technology to develop and deliver prototypes to the military, government, and the commercial sectors, in the following application areas:

- Portable and Mobile Power for portable rapid response medical devices supporting wounded soldiers in war zones
- Zero emissions back-up power for both indoor and outdoor operation
- Key communication applications for Emergency and First Responder Solutions
- Unmanned aerial vehicles, robotic, and surveillance applications in the military, government and homeland security applications

Need for Clean Technology Manufacturing and Export Assistance

I commend Representative Doris Matsui of Sacramento, along with Representatives Bobby Rush, John Dingell, and Anna Eshoo for introducting H.R. 5156, the Clean Energy Technology Manufacturing and Export Assistance Act of 2010. This bill sets out a national strategy to assist U.S. clean energy technology companies with export assistance to find new markets for their products and services to better compete in the international marketplace. The bill also provides domestic manufacturing assistance to find new ways to reduce production costs, and promote innovation, investment and greater productivity in the clean technology sector.

Jadoo Power, as a clean energy technology company, is a member of a very promising new category of business that is enjoying particularly strong growth in tems of number of companies and employee count in the U.S., and in particular in California, and in the Sacramento area where Jadoo itself is headquartered. The Sacramento region has more than 100 clean technology companies, and is well-positioned to be a national leader in producing clean energy technology. Since 1995, the Sacramento area has seen tremendous job growth in "green jobs" increasing by more than 87%. The entire state of California showed an increase in green jobs of 36%, or 42,000 in this same period, as compared to an overall job growth in this period of 13% in California. Nationwide, clean energy technology has been adding employees at the average rate 9% per year, as of 2008, for a total of approximately 770,000 jobs in this field (1). As recently stated by industry trade journals, the U.S. has the potential to capture 250,000 jobs in the next 10 years making, installing and servicing fuel cells (2). Clearly, the clean energy technology sector represents many promising employment growth opportunities in the future, and with the proper support from state and federal governments, this future growth potential can be fully realized, along with corresponding product revenues and increases in supporting businesses such as sub-contractors and services companies.

Jadoo has recognized that it has superior technology that is unsurpassed domestically, as well as internationally, and is now beginning to investigate how to scale the company's sales and manufacturing capabilities in order to supply both the domestic and international markets. Jadoo hopes to become competitive in the international market. However, many small clean energy companies, like Jadoo Power, do not have the knowledge of foreign markets or a full understanding how the export process works. That being said, Jadoo recognizes some of the challenges of competing in international markets. In many cases foreign suppliers that may have technically inferior products but have subsidies and support for exports from their own governments which creates a non-level playing field. Similar challenges await other domestic clean tech companies including some in the Sacramento region like WINDensity, a distributed wind power and fuel efficiency product company. With extraordinary opportunities in international markets, the key for this company is also to scale manufacturing and identify efficient access to international markets.

In addition to foreign competitors that have subsidies and support from their own governments, the lack of enforcement of international intellectual property rights further inhibits the entrance of U.S. companies into foreign markets.

Financing and Manufacturing Challenges

Growing a clean tech company is a challenge. We are breaking into a heavily regulated industry with well established players who can sometimes be threatened by innovators upsetting the status quo. But those challenges are minor in comparison to the financing challenges we face when we seek to advance our technology, grow our company, and build a demonstration plant or a first commercial plant. The funding gap that exists at this phase is sometimes referred to as a "valley of death."

The U.S. is the unequivocal leader in energy innovation, just as we have been in such sectors as semiconductors, biotechnology, and the Internet. As we strive to become a global leader in clean technology, one area of innovation where our advantage is most threatened is in manufacturing. Whereas breakthrough technology occurs here in the U.S., we are losing out to countries like China, Germany and Malaysia, when it comes to clean energy manufacturing, in part because those countries are providing a host of tax incentives and other recruitment advantages to lure companies away. First-of-a-kind capital intensive manufacturing facilities are often not able to secure traditional bank loans, due the risky nature of those loans and the lack of hard assets in the company.

As Jadoo and other companies begin to scale up their manufacturing capabilities, in order to reduce product costs and address foreign markets, these companies need assistance in developing and scaling manufacturing facilities that will allow them to compete internationally, not just domestically. The emerging U.S. market for clean energy products is growing and it is now time we look to sell our U.S. made clean energy products to foreign markets. A greater level of support from the federal government – in addition to – local and state governments will level the playing field and accelerate the ability of US clean technology companies to build and operate compliant and cost effective manufacturing.

It has been the case for many years that American science and engineering has been pre-eminent in the world. As a result of our pioneering technologies, we made entire new industries possible and we need to be vigilant in our appreciation and adoption of new and innovative technologies. The President has established a goal to double U.S. exports over the next five years. H.R. 5156 will place clean energy technology products at the forefront of our national clean tech export strategy.

Unfortunately, many times the U.S. has not been able to reap the benefits of this new technology with global sales of American made products, leaving other countries to benefit from our technology lead. We hope that this time, with the clear opportunity of clean energy technology, the United States will lead the world with our technology, and also be able to benefit from the distribution of American manufactured clean energy products because of the support for a U.S. clean energy technology

manufacturing base. Along with providing greater energy security and environmental security, our country's focus on clean technology manufacturing companies will provide greater economic security by creating and sustaining millions of new American jobs.

With proper support and assistance, Jadoo is an example of a company that could be well positioned to expand its manufacturing facilities and grow "green collar" jobs, thereby maintaining these jobs in the U.S. With H.R. 5156 and other such policies, Jadoo is likely to increase its employee base many fold as it scales its manufacturing capability to address both domestic and international sales opportunities. It is Jadoo's belief that, like many other American clean energy technology companies, it is a domestic leader in clean energy, and it can become a global leader in manufacturing, selling clean energy products with the appropriate set of government policies and support.

We believe that the Department of Commerce's International Trade Administration (ITA) can play an important role for U.S. companies that are selling products to foreign buyers. ITA has a wealth of experience in export promotion, helping small and medium sized companies find and navigate foreign markets.

Large, established domestic manufacturers are likely to have the track record, critical mass and ability to raise capital from commercial banks for new efficient manufacturing capabilities required for successful international sales, but small businesses do not have that ability. Presently, the government does not have an appropriate program for small manufacturers such as Jadoo Power to provide critical export and manufacturing assistance.

In summary, we strongly support the goals of H.R. 5156 and support the creation of targeted policies that will enable American companies that have leading clean energy technologies to translate those leads into robust international product shipment though the support of the creation of globally competitive manufacturing capabilities. With capital to grow manufacturing capabilities as well as access to international markets of customers, many US-based small and medium sized clean technology manufacturing companies will become large companies that are global leaders in their industry.

Thank you for inviting me to today's legislative hearing, and allowing me to present my perspective.

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https://docs.google.com/viewer?url=http://www.sarta.org/tasks/sites/sarta/assets/File/cleanStartPR10_8.5x11.pdf

(2) Electric Drive Transportation Association, National Hydrogen Association, US Fuel Cell Council, Press Release, June 11, 2010, "Hydrogen and Fuel Cell Industries Join Call to Increase Clean Energy Investment".

Mr. RUSH. The chair now recognizes Mr. Kim for 5 minutes.

STATEMENT OF ANTHONY KIM, POLICY ANALYST, HERITAGE FOUNDATION

Mr. KIM. Chairman Rush, Ranking Member Whitfield and members of the committee. It is my privilege to testify today concerning the Clean Energy Technology Manufacturing Export Assistance Act of 2010. My name is Anthony Kim. I am a policy analyst at the Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

In recent years, clean energy has become a shorthand sum for the bold policy today on how to achieve green growth and enhance our energy security. The proposed legislation offers a timely opportunity to discuss better ways to trigger innovation in our clean energy technology sector.

Recognizing the urgency of developing a more competitive American clean energy technology sector, the proposed legislation intends to encourage innovation, investment and productivity, particularly via Federal subsidies. However, for the United States to regain economic leadership in the global clean energy industry, our strategy must be driven by real market conditions—not by government financial assistance that may serve as a temporary feel good action and delay more meaningful advancement of the clean energy sector.

Government-mandated funding has often resulted in unbalanced development and lasting government interference in the private sector which dampen dynamic growth and innovation. It also invites the question as to whether government has the expertise to effectively help private companies navigate through rapidly evolving clean energy markets.

The proposed bill also fails to acknowledge that there are existing government resources and market incentives to increase production of efficient or tentative clean energy.

In advancing the competitiveness of our clean energy sector, there are more practical policy alternatives that can and should be implemented. At the top of the list should be further globalization of international trade. Free trade fosters economic efficiency, and economic efficiency is the basis for innovation, growth, and competitiveness.

Over the past decades, the most practical improvements in energy efficiency and protecting environment have not come from government mandate funding. As chairman of the analysis of the Heritage Foundation's index of economic freedom, most progress has been driven by advances in freer trade and economic freedom. These unleash greater economic opportunity generating a purchase cycle of investment, innovation, and dynamic growth.

Comprehensive globalization provides the most efficient export promotion strategy. Such trade globalization can be achieved by advancing freer trade through multilateral as well as bilateral trade pacts. Free trade agreements have spurred competition and economic growth. In recent years, the FTAs currently enforced accounted for more than one trillion in two-way merchandise trade. FTAs also include provisions that safeguard American businesses

from discrimination and protect and enforce intellectual property rights for U.S. firms.

The pending FTA with Colombia, Panama, and South Korea will result in significant new market access and lower types for American businesses, including our clean energy producers.

There is no doubt that accelerating innovation and production of clean energy technology has become an economic necessity for our future. The best strategy to make this happen is not through special subsidies, but rather through dynamic leadership in opening markets and spurring innovation technology.

In conclusion, I want to emphasize that we need a strategy that conforms to conditions in the international marketplace, not one that struggles against it by subsidizing technologies that cannot stand on their own. We know one sure way of doing this, and that is through open markets, not closing them with protectionist measures.

Thank you again for the opportunity to testify before this committee today.

[The prepared statement of Mr. Kim follows:]

Clean Energy Technology Manufacturing and Export Assistance Act of 2010

Testimony before
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

June 16, 2010

Anthony Kim
Policy Analyst
Center for International Trade and Economics
The Heritage Foundation

Chairman Rush, Ranking Member Whitfield, and members of the Committee, it is my privilege and honor to testify before you today concerning the Clean Energy Technology Manufacturing and Export Assistance Act of 2010.

My name is Anthony Kim. I am a policy analyst in the Center for International Trade and Economics at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

The Clean Energy Technology Manufacturing and Export Assistance Act aims to create a government fund in an effort to assist American clean tech firms in advancing their competitiveness in the global market. As a matter of fact, in recent years, "clean energy" has become a shorthand term for the broad policy debate on how to achieve green growth and enhance our energy security in the future. It is encouraging that the proposed legislation offers another timely opportunity to discuss better ways to boost the development of clean energy technology and trigger innovation in the American clean energy industry.

Indeed, the global clean energy industry presents an important market opportunity for the United States, one that could lead to dynamic exports and job creation. Private investment in clean technology is estimated to reach $450 billion annually by 2012 and over $600 billion by 2020 on a global scale, and potentially much larger if recent market opportunity estimates are realized.[1]

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[1] World Economic Forum, "Green Investing: Toward a Clean Energy Infrastructure," January 2009, at *http://www.weforum.org/pdf/climate/Green.pdf*.

Shortcomings of the Clean Energy Technology Manufacturing and Export Assistance Act

Recognizing the urgency of the need to develop a more competitive American clean energy sector that can capitalize on such global market opportunity, the proposed legislation intends to "encourage innovation, investment, and productivity" in the sector, particularly via federal subsidies, by establishing a $75 million fund over the next five fiscal years that will be administered through the International Trade Administration.

However, for the United States to regain economic leadership in the global clean energy industry, our strategy must be driven by real market conditions, not by government financial assistance that serves as a momentary feel-good action and delays a more meaningful advancement of the clean energy sector.

Government-mandated funding has resulted in unbalanced government subsidies and lasting government interference in the private sector, which dampen dynamic growth and innovation of the sector. It also invites the question as to whether the United States government has the expertise and qualifications to effectively help private companies navigate through rapidly evolving clean energy foreign markets.

The proposed legislation fails to identify specific policies to be pursued and risks becoming little more than a financial subsidy grab bag for politically connected special interests. The proposed bill also neglects to acknowledge that there are existing government resources and market incentives for the private sector to invest and develop technological solutions to increase production of efficient alternative clean energy. If this bill becomes law, taxpayer money will be wasted in government bureaucracy.

The American people deserve a government that spends every taxpayer dollar with as much care as taxpayers spend their own dollars. In fact, in response to rising public uneasiness about the widening federal deficit, White House Chief of Staff Rahm Emanuel recently noted that President Obama's goal now is "to change Washington's focus from figuring out how to spend money to how to save money."[2] It seems that the currently proposed bill is more in line with "spending," not "saving."

Freer Trade: Key Ingredient in Making Our Clean Energy Sector More Competitive

In advancing the competiveness of our clean energy technology sector, there are more practical policy alternatives that can and should be implemented. At the top of the list should be further liberalization of international trade.

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[2] Laura Meckler, "Giving Government Incentives to Save," *The Wall Street Journal*, June 7, 2010.

When a country lowers its barriers to trade, it opens its economy to competition and a wider variety of goods and services than was previously available. Competition spurs the movement of labor and capital from industries that cannot compete to those that can, enabling a nation both to produce more efficiently and to attract new investment—critical elements of any long-term economic growth and competitiveness strategy.

The need to adhere to such a strategy is no less important today than before.[3] Free trade fosters economic efficiency, and economic efficiency is the basis for innovation, growth, and competitiveness. Undeniably, trade has opened markets around the world to U.S. goods and services and has created a level of competition that leads to innovation, better and less expensive products, higher-paying jobs for Americans, and the investment needed for long-term economic growth and continued prosperity.

Indeed, the success of America's growth and rising prosperity over the past decades is based on reducing the state's role in the economy, breaking down barriers to international trade and investment, and streamlining the rules and regulations that shape and define long-term competitiveness. Tariffs, quotas, government subsidies, and cheap loans to businesses, outright nationalization of industry, and other policy mechanisms not only serve to distort prices and reduce international markets for goods and services, but also have a chilling effect on private investment and do little to boost business confidence.

These economic facts of life apply to the clean energy technology sector the same as they do to any other. The energy sector also needs freer trade. In fact, freer trade and advancing clean energy technology can go hand in hand, being mutually supportive.

Freer Trade Is Key to Green Growth

In remarks on World Environment Day, the Director-General of the World Trade Organization (WTO), Pascal Lamy, pointed out that "Trade opening has much to contribute in the fight against climate change and to the protection of the environment." Indeed, the most practical improvements in energy efficiency and protecting the environment through clean energy technology over the past decades haven't stemmed from government-mandated funding or regulations. As shown in the analysis of The Heritage Foundation's *Index of Economic Freedom*, the most progress has been driven by advances in freer trade and economic freedom. These

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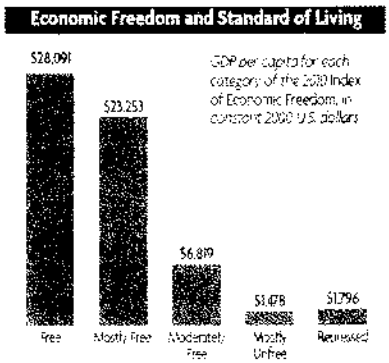
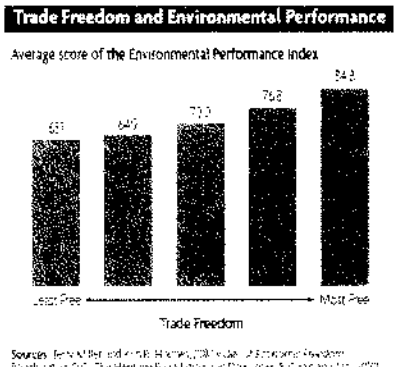
[3] Yet, while the U.S. has long been a leading advocate for open markets and trade liberalization, the recent financial crisis and global economic downturn have led some to question the worth of policies creating more trade freedom. Focusing predominantly on negative impact of trade on our economy, protectionists charge that trade is unfair to U.S. firms and employees. Unfortunately, they see only a small part of the story. Balanced against any trade-related economic pain must be the overall increase in U.S. employment, productivity, and wage rates that stems from an open, liberal trading environment

unleash greater economic opportunity and prosperity, generating a virtuous cycle of investment, innovation, and dynamic economic growth.

Echoing the same message, the WTO chief further noted:

> The entire world is well aware of the environmental dangers posed to our planet. But the ability of governments to respond to these dangers is tied closely to the resources at their disposal. Countries which have had success in alleviating poverty and raising living standards tend to be more adept at creating the conditions for a cleaner environment.





Policy efforts aimed at imposing stricter environmental standards through a national or global regulatory body run great risk of being not only fruitless, but also counterproductive. They undercut the economic growth and efficiency indispensable to effective efforts to protect the environment. Such regulations are likely to be little more that feel-good actions.

The fundamental flaw of those favoring new government directives is the fallacy that there must be a trade-off between economic growth and environmental protection. They seem to think that to get more of one, you have to have less of the other. The truth is just the opposite: To get more environmental protection, you need more growth, not less.

It is encouraging that many Americans see that truth. As a March 2010 Gallup survey reveals, more Americans believe that economic growth should take priority over environmental

protection when the two goals collide, with fewer willing to support environmental measures that may have a negative economic impact.

Freer Trade, Not National Export Initiative, Boosts U.S. Clean Energy Technology

Chairman Emeritus Dingell, a co-sponsor of the Clean Energy Technology Manufacturing and Export Assistance Act, pointed out that the proposed legislation is "part and parcel to the President's goal of doubling exports in five years and gives wonderful incentive to American companies to design and manufacture the environmentally friendly technologies of tomorrow."[4]

The National Export Initiative (NEI), President Obama's trade plan that was unveiled in the 2010 State of the Union address, aims to bolster U.S. international competitiveness by creating an export promotion cabinet that will oversee the expansion of both government programs and special financing for firms and farmers seeking oversees market opportunities.[5]

Recognizing the key role of exports in America's economic strength was an important first step in forming an effective U.S. trade policy. However, the truth is that it is only part of a winning, comprehensive American trade strategy. Our economy needs a plan that addresses *all* aspects of trade. For America to excel in the world marketplace, U.S. trade objectives need to be clear and consistent with the open-market principles America has long promoted and, indeed, demands from other nations.

As a matter of fact, export promotion via comprehensive trade liberalization provides the most efficient, market-based export promotion strategy for U.S. interests. Such trade liberalization can be achieved by advancing freer trade through a comprehensive and substantive conclusion to the Doha Round of trade negotiations and ratification of the three pending free trade agreements with Colombia, Panama, and South Korea without further delay.

According to the WTO, global talks on free trade in environmental goods and services that will have special treatment in a new global trade deal are recording progress.[6] In April, U.S. Trade Representative Ron Kirk asked the U.S. International Trade Commission to investigate the economic benefit of eliminating U.S. tariffs on imported environmental goods and determine how much U.S. environmental goods exporters might benefit from trade liberalization.[7]

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[4] News release, "Matsui, Rush, Dingell, Eshoo Introduce Legislation to Bolster U.S. Clean Tech Industry," Office of Congressman John Dingell, April 27, 2010, at *http://www.house.gov/apps/list/press/mi15_dingell/MatsuiRushDingellEshooIntrolegtobolsterCleanTech.shtml*.

[5] Press release, "Executive Order – National Export Initiative," Office of the Press Secretary, the White House, March 11, 2010, at *http://www.whitehouse.gov/the-press-office/executive-order-national-export-initiative*.

[6] John Acher, "WTO's Lamy Sees Trade Pact Boosting Green Goods," Reuters, May 20, 2010, at *http://www.reuters.com/article/idUSLDE64J13W20100520*.

The U.S. can and should spur global economic growth by leading the Doha Round to a successful and ambitious conclusion. The absence of a new, comprehensive trade pact reduces countries' discipline in keeping a rein on protectionist measures designed to prop up inefficient domestic companies during today's economic slump. Moreover, without the new market access a multilateral deal would bring, it will be more difficult for firms that are struggling domestically to export instead.

In order to open up foreign markets for our clean energy sector more practically, America should enhance existing relationships with important trade and investment allies. NAFTA and other free trade agreements (FTAs) the U.S. has in place have spurred competition, job creation, and economic growth. These agreements have an important role in maintaining American competitiveness and prosperity.[5] In 2008, the FTAs currently in force accounted for more than $1 trillion in two-way merchandise trade, which is about 35 percent of U.S. trade worldwide.

U.S. FTAs go beyond winning lower tariffs on American manufacturing and services exports. FTAs include provisions that safeguard investors from discrimination, increase regulatory transparency, combat corrupt practices, and protect and enforce intellectual property rights. U.S. trade agreements include transparent dispute resolution and arbitration mechanisms to guarantee that the agreements are upheld and fully respect the rights of U.S. firms and consumers.

The pending FTAs with Colombia, Panama, and South Korea will result in significant new market access and lower tariffs for America's businesses: Most Colombian and Panamanian products already enter the U.S. duty-free under various preference programs. Because these countries have already had preferential access to U.S. markets, any impact on U.S. jobs from imports from those countries has already occurred. Instead, these agreements will result in new economic opportunity for America's exporters and the U.S. businesses that support them··· opportunity that will grow over time as these countries continue to develop through trade and mature into larger, more sophisticated markets more closely integrated with the U.S. economy.

Conclusion

There is no doubt that accelerating U.S. clean energy technology innovation and production has become an economic necessity for America's future. The best strategy to help this happen is not

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[4] Office of the Secretary, U.S. International Trade Commission, April 14, 2010, at *http://www.usitc.gov/research_and_analysis/ongoing/332_516_request_letter.pdf.*

[5] As of the beginning of 2010, the U.S. had 11 FTAs with 17 countries. Congress has approved FTAs with the following nations: Israel; Canada and Mexico (NAFTA); Jordan; Singapore; Chile, Australia; Morocco; the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua (DR–CAFTA); Bahrain, Oman; and, most recently, Peru.

through special subsidies or tax breaks for specific American firms, but rather through dynamic leadership in opening markets and spurring global competition so that the most productive and innovative technologies can rise to the top.

We need a strategy that conforms to conditions in the international marketplace, not one that struggles against it by encouraging and subsidizing technologies that can't stand on their own. We know one sure way to do this, and that is through opening markets, not closing them with protectionist measures. This bill, unfortunately, takes the other path.

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Mr. RUSH. The chair thanks all of the witnesses for your testimony, and the chair recognizes himself now for 5 minutes for the purposes of asking questions.

And I am going to ask all of the witnesses to answer "yes" and "no" to the following questions. I only have 5 minutes. If you could please restrict your answer to "yes" or "no," that would be appreciated.

Seizing clean energy export opportunities accelerate U.S. Recovery and become an engine of growth.

You answer "yes," or "no."

Beginning with the first witness, Ms. Saunders.

Ms. SAUNDERS. Yes.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes.

Mr. RUSH. Dollar for dollar, clean energy investment will create more jobs than investments in conventional energy sector.

Ms. SAUNDERS. I can't answer that officially.

Ms. WINCE-SMITH. It depends on how you define "clean energy." I am on the edge.

Mr. HERRNSTADT. I don't know.

Mr. CRAWFORD. Can you ask the question one more time?

Mr. RUSH. Dollar for dollar, clean energy investment will create more jobs than investments in conventional energy sector.

Mr. CRAWFORD. I agree it is difficult to answer without specifically defining "clean energy."

Mr. KIM. It depends. Potentially yes.

Mr. RUSH. With new jobs created in the clean energy sector will create new jobs and provide good wages. Yes or no.

Ms. SAUNDERS. Yes, in particular to export-related jobs which pay more than the average job.

Ms. WINCE-SMITH. Yes, because they take new skills and new capabilities.

Mr. HERRNSTADT. I hope so.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes.

Mr. RUSH. Outside the U.S. borders, there is a promising market for U.S. green products.

Ms. SAUNDERS. Absolutely.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes, sir.

Mr. RUSH. Trade barriers are not the only obstacles tn increasing exports of American products.

Ms. SAUNDERS. Yes, I agree.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes.

Mr. RUSH. Last question. Other countries, especially our main competitors like China and other European countries and Japan, have a more aggressive export policy platform.

Ms. SAUNDERS. Typically exports account for a larger percentage of those economies, and I would agree they strongly support the exports.

Ms. WINCE-SMITH. Absolutely.

Mr. HERRNSTADT. It appears so.

Mr. CRAWFORD. Yes, and it's leading to a significant advantage for them.

Mr. KIM. Yes. I think they are in favor of free trade.

Mr. RUSH. You also have policies that protect their domestic production.

Ms. SAUNDERS. In specific areas, that is correct.

Ms. WINCE-SMITH. Yes. For instance, China's new policy on indigenous innovation is very worrisome.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes and no.

Mr. RUSH. The U.S. needs to have a more robust export assistance policy to its manufacturing industry.

Ms. SAUNDERS. We are operating within our current appropriated levels.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes.

Mr. CRAWFORD. Yes, particularly for small- and medium-sized businesses.

Mr. KIM. Yes, but to get there it is open to debate.

Mr. RUSH. Compared to other countries, the U.S. pays far less on export promotion. Yes or no.

Ms. SAUNDERS. It is hard to take an overall average compared to specific areas. The European Union, for example, that is correct.

Ms. WINCE-SMITH. Yes.

Mr. HERRNSTADT. Yes. I think particularly with some countries. I am not an expert on the others.

Mr. CRAWFORD. Yes.

Mr. KIM. Yes, but I think it depends.

Mr. RUSH. Thank you very much.

The chair now recognizes the gentleman from Kentucky, Mr. Whitfield.

Mr. WHITFIELD. Thank you, and I thank all of you for your testimony. We appreciate you being here today.

Ms. Saunders, I was just curious, you have been so generous with your time today and you have testified that you didn't testify, you said you were not going to make any comments about this legislation. I was just curious why is that or why was that?

Ms. SAUNDERS. The administration has not taken a position on H.R. 5156.

Mr. WHITFIELD. So you have no position.

Ms. SAUNDERS. No position.

Mr. WHITFIELD. Mr. Crawford, I noticed in your testimony you were talking about, particularly in clean energy companies, particularly in manufacturing, it is very difficult to obtain financing; is that correct?

Is that one of the reasons you support this legislation is because of the grant program that it would establish the $75 million grant program?

Mr. CRAWFORD. Yes. I feel like as a country between the venture capital investments and the stimulus, we have seeded innovation in R&D around clean technology. We have gotten to demonstrable products. And now the next logical steps are to scale manufacturing and begin to sell those protects both here and abroad.

Mr. WHITFIELD. This legislation on page 3 says specifically that the Secretary shall administer the funds to promote policies that will reduce production costs. Is that—it seems odd to me.

Mr. CRAWFORD. That is a significant issue for small and medium-sized companies, and here's why.

Mr. WHITFIELD. I thought that you said that primarily you needed it for financing.

Mr. CRAWFORD. Part of investing and financing in the manufacturing process is to reduce the overall costs of producing those products. And so as you deliver demonstration units, they are oftentimes pretty expensive to manufacture and the logical next step is to invest and finance the manufacturing process to reduce the costs of those parts so you can compete in those commercial markets.

Mr. WHITFIELD. Mr. Kim, I noticed in your testimony that you seem to be diametrically opposed to what Mr. Crawford is saying. Your general testimony seems to be you don't think the government should be involved in providing funds for private enterprise.

Mr. KIM. That is correct, sir. I think government can play a much bigger role through free trade, through enhancing free trade agreements via multilateral or at a bilateral level. So there are things they can do, but not through Federal subsidies.

Mr. WHITFIELD. So you think the free trade agreements will play a vital role?

Mr. KIM. I think free trade is vital. For example, the current pending U.S.-South Korea FTA. South Korea has a huge market for green energy technology.

Mr. WHITFIELD. You said the proposed legislation fails to identify specific policies to be pursued and risks becoming little more than a financial subsidy grab bag for politically connected special interests.

Mr. KIM. There is no monitoring mechanism that we can follow. So I think we will have to see how this bill is actually implemented and then the entire process regarding this will be processed. But there is a political risk and then it can invite other problems, too.

Mr. WHITFIELD. Mr. Herrnstadt, I notice that you all—certainly your union certainly favors the intent of this legislation, but I think you are specifically saying that it does not go far enough. And one of the things that you mentioned that needed to be done was to any grant that goes to any company that there be an EIS, as you call it, an employment impact statement, which actually I think is a pretty good idea.

Have you all been successful in getting EIS requirements in other government programs?

Mr. HERRNSTADT. Not yet. But we're still trying. I think it's a really commonsense solution to what we're talking about. It really started off with an idea dealing with government procurement and the billions we spend on it. The government should know what it is getting for its money, and if a specific program is directed to-

wards creating jobs, we need to calculate that with precision and that's something I am not sure the Commerce Department is doing yet.

Mr. WHITFIELD. That sounds like that would certainly improve this bill from your perspective.

Mr. HERRNSTADT. It is one area that would, but I also want to point out that the bill itself is a real acknowledgment that there's a link between clean energy and U.S. jobs and I think that by itself is a real step forward.

Mr. WHITFIELD. I know I only have 3 seconds.

Mr. Crawford, the XM bank is very much involved in exporting technology, environmental technological products abroad. Has your company utilized the XM bank for——

Mr. CRAWFORD. We haven't. My perception is the difference here is we're talking about a focus on one particular industry sector that's of critical importance to our country and small- and medium-sized businesses so the combination of those two things with this policy would not only provide us with access to greater expertise focused on our company but also set up relationships that could be helpful in getting traction in the international marketplace.

Mr. RUSH. The chair now recognizes the author of the bill, Ms. Matsui, for 5 minutes.

Mr. MATSUI. Thank you all for being here today.

As I mentioned in my opening statement, my home town is Sacramento, is home to 110 clean tech companies, many of them are small. And medium-sized companies are just now supporting ways to expand their businesses by exporting their products to foreign markets. But as you know, like large companies, they don't have the resources, time, and manpower to effectively promote their products abroad. And they do need assistance, and I do doubt that many of them have asked for help with Department of Commerce and small business and other entities that we can all think about.

But I particularly have a question, several questions for Mr. Crawford with you being a small business person. Is Jadoo Power currently looking to expand by exploring ways to explore technology products abroad?

Mr. CRAWFORD. We're looking at new markets. In particular, international markets.

Ms. MATSUI. What are the current barriers you face in exporting?

Mr. CRAWFORD. Access to expertise in how best to export relationships and effectively resources, the time.

Ms. MATSUI. So how do you go about it now?

Mr. CRAWFORD. Right now it is independent market research. It is trying to identify people who have expertise in international market places. It's consultants. It's research on the Internet. Those types of efforts.

Mr. MATSUI. As you know, this legislation authorizes about $50 million a year for 5 years. Nnw as a small business person who is really concerned about expenses and resources, do you feel that this legislation, this amount of money is a responsible use and so that this country can actually establish a national clean tech export strategy to boost the competitiveness of small and medium-sized businesses?

Mr. CRAWFORD. As a small business owner and taxpayer, I think you can make the case that this is one of the best case uses of taxpayer money. What we're talking about with regard to our company and others across the country is something that can impact our energy security, our environmental security and have a positive impact on our economy. Those are driving issues in our country today, and this is the type of bill that could have a positive impact on taking small companies effectively that are the cornerstone of our economy and growing them.

So my question actually is why aren't we, as a body, considering 10 or 20 times the amount because this is something that's addressing all of the relevant issues of today.

Mr. MATSUI. Thank you.

Ms. Saunders, do our international competitors, like in the EU and Asia, help their small and medium-size businesses, particularly clean tech businesses, facilitate exports to the U.S.?

Ms. SAUNDERS. Yes, they do.

Mr. MATSUI. How do they do that?

Ms. SAUNDERS. They do that through export promotion programs very similar to the ones we operate out of the Department of Commerce and other trade agencies.

Mr. MATSUI. But they have more emphasis on it?

Ms. SAUNDERS. As I said earlier, specific countries in the European Union and other parts of the world have exports that are a larger part of their economy and they allocate a large portion of their government resources to promoting those exports.

Mr. MATSUI. If this legislation were enacted, what are your rough estimates on the amount of increased Euros clean tech exports in dollar amount or in other measurements?

Ms. SAUNDERS. We can always do more with more resources. We believe we're actively servicing this industry as a current priority of the Secretary and the administration. As far as dollar amounts, it is difficult to speculate as technology and services and actual products being exported have different values assigned to them. I would say generally from the International Trade Administration we have data that estimates that for every dollar invested in International Trade Administration programs, we generate $56 worth of exports.

Mr. MATSUI. Ms. Wince-Smith, now the President has repeatedly stated that he wants the U.S. to be the leader in exporting clean tech to other Nation's. However, international competitors like China and Germany are exporting substantially more clean tech energy products. I know I look at solar fuel cells and all of that.

In your opinion, would this legislation provide the tools and resources to boost clean tech for its competitiveness in exporting their products and services?

Ms. WINCE-SMITH. Like my colleagues, I believe it's a very important first step, and many of the provisions in the legislation in addition to the grant program that's been mentioned are really to accelerate the tools, the practices, the networks that small, medium-sized businesses need.

I think one of the other issues that we really have to address still is how do we stimulate the production in the United States on a viable scale that it can go out globally. And you know that is a

very, very serious part of this because in order for these new clean tech innovators to have a scale, they really have to have access to deep equity and debt capital and that gets into a whole broader set of issues.

Ms. MATSUI. Understood. And I think Mr. Crawford has been experiencing that himself.

But as a small business person, you are excited about the fact that we are having a focus on clean tech exporting as I understand, because it does—it is part of the picture so to speak, it is not the complete picture obviously, but it is part of the picture.

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

Mr. RUSH. The chair thanks the gentlelady.

The chair thanks all of the witnesses who have participated in today's hearing, and the chair particularly thanks Ms. Saunders. You have been very patient with us and you have been very giving of your time and your contributions as it relates to your expertise. And some of your statements are very provocative and certainly we will take all of your statements to heart as we proceed with this legislative process.

The chair thanks ynu and appreciates you very much. Thank you and God bless.

[Whereupon, at 12:49 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on the Foreign Manufacturers Legal Accountability Act (Sutton) and Clean Energy Technology Manufacturing and Export Assistance Act (Matsui)
June 16, 2010

Mr. Chairman, thank you for holding this hearing and thank you to my colleagues Ms. Sutton and Ms. Matsui for introducing these important pieces of legislation. It is important that we closely examine the issues that these bills raise.

As a cosponsor of the Sutton bill, I have considerable concerns about the quality of our imports. I am disturbed by the recent significant increase in imported products that have been found to pose a risk to consumers and have resulted in recalls. In 2007, the CPSC recalled the highest number of products in 10 years. Of those recalls, 82% of them involved imported products. Of these recalled imported products, 74% originated in China. As a direct result of poor quality control by foreign manufacturers, primarily in China, our nation's consumers are placed in peril and our federal regulatory agencies, such as the CPSC must spend already scarce resources to protect us.

While challenges remain to encourage our trading partners to implement stronger safety and quality standards, those affected by these dangers are left with little recourse in our court system. Victims have little ability to provide service of process, aside from pursuing the costly and time consuming method laid out in the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, and jurisdiction is difficult to establish in our courts.

This bill fixes these shortcomings and provides a way to hold foreign manufacturers accountable. It accomplishes this by insisting that foreign manufacturers and producers that import products designate a registered agent who is authorized to accept service of process here. When an entity registers this agent, it is accepting the jurisdiction of the state and federal courts of the state in which the agent is located. If a foreign manufacturer fails to designate a registered agent, the Act prohibits their products from being imported to the United States.

The other bill we are examining today, the Clean Energy Technology Manufacturing and Export Assistance Act, addresses the alarming rate with which clean energy jobs are moving overseas. As our nation, and the world, moves toward using more diverse sources of energy, it is critical that we seize this opportunity to spur domestic job creation. We must pursue increasing our domestic manufacturing capabilities to produce clean energy technologies for use in this country and to export to others.

Currently, there is a staggering imbalance between the level of clean energy technology products and services exported by our country and other countries such as China and Germany. Additionally, few of the leading clean technology companies are based in this country. Without a doubt, this justifies some scrutiny of this issue. And, I believe legislative action is necessary to help our clean technology sector grow and create jobs in Texas and across the country. As President Obama correctly noted last night, "countries like China are investing in clean energy jobs and industries that should be here in America."

Ms. Matsui's bill takes necessary steps toward accomplishing this. It creates a fund administered by the International Trade Administration within the Department of Commerce to encourage growth within our domestic manufacturers of clean energy technologies.

I am pleased that these panels of expert witnesses have agreed to testify today. I believe that they all provide valuable perspectives on these bills. As the Committee moves ahead in addressing the issues raised by our witnesses and these bills, I look forward to working with my colleagues to craft legislation that will accomplish the goals that are in the best interests of our constituents, workers, and our economy.

Mr. Chairman, thank you again for your leadership on these issues. I look forward to hearing the testimony of these witnesses.

Statement of the Honorable Joe Barton
Ranking Member, Committee on Energy & Commerce
Subcommittee on Commerce, Trade and Consumer Protection
Hearing on
H.R. 4678, the "Foreign Manufacturer Accountability Act of 2010"
and
H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act"

Thank you, Mr. Chairman.

The first of two bills we will discuss today is H.R. 4678, the "Foreign Manufacturer Accountability Act of 2010." This legislation would mandate that foreign manufacturers consent to jurisdiction under U.S. courts, and establish a registered agent to receive service of process in order to sell their goods in America.

First, let me say I think we can all agree that in a perfect world everyone should be held responsible for their wrongdoing, no matter where they are. Although this bill was written with that goal in mind, I have serious concerns about the practical effect of the bill. I fear it may actually undermine U.S. companies involved in international trade. Consultation with industry has indicated that American importers and customs brokers, not their contacts abroad, will most likely be responsible for meeting the bill's registered agent requirements. . The bill would simply create another layer of bureaucracy and higher compliance costs for U.S. industry and their suppliers.

Aside from increased compliance costs and administrative burdens, I question whether the bill will have any significant impact on foreign manufacturers' compliance with our laws or their availability to our citizens in court. Although the bill would force foreign manufacturers to consent on paper to our laws, our courts could still not force foreign companies abide by the judgments of U.S. courts.

I also think we should examine how this law would affect our exporters if we were to encourage other countries to pass similar laws. Some of our trade partners are less scrupulous than others and we should be prudent in considering whether our trading partners will reciprocate, and what reciprocity would mean for U.S. exports.

Finally Mr. Chairman, I believe we should consider the legality of this measure. After speaking with experts, I understand this legislation could run afoul of WTO regulations for equal treatment of foreign and domestic goods.

The second bill we will explore today is H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act." As with H.R. 4678, I believe this bill was designed with the best of intentions – narrowing our trade deficit in the clean energy technology arena – but this measure, also like H.R. 4678, misses the mark.

Mr. Chairman, there are three primary reasons we have a trade deficit in this area and none of them would be impacted by this allocation of $75 million in taxpayer funds. We have a trade deficit because of the cost of labor in other countries versus ours, because we lack access to the necessary natural resources - such as rare earth minerals - in the U.S., and because other markets have erected barriers or are simply closed to our energy products.

I think it's a fair observation that the dramatic gap in labor costs is the chief reason companies move their work overseas. This bill, however, simply ignores the fact of life that workers in China make less than a $1 per hour and U.S. workers make $30 an hour. As that isn't likely to change soon, spending $75 million we don't have for something we can't get just doesn't seem like a sound idea.

This fund also cannot create natural resources in the U.S. that are used in these products. And nothing in the bill makes it easier to open a new mine and extract the resources we do have. If we do not increase access to those domestic materials we can find here, this fund will only serve to subsidize our competitors by forcing domestic vendors to purchase materials and components from international firms. In the end, this scheme could actually widen our trade deficit rather than narrowing it.

Fundamentally, Mr. Chairman, I believe in our market and the capitalist system on which it is based. I don't believe we need to create a government program to replace what private firms now capably do on their own. I agree the government has a role in increasing exports, but it is the job of the Federal government to fight against protectionist barriers and to pry open foreign markets to our products. Unfortunately, the Obama administration seems markedly unenthusiastic about any of the pending trade agreements.

The unhappy truth is that this fund cannot make up for the absence of a serious trade policy. . Unless we actually open markets through successful trade

negotiations, we will have fewer and fewer places outside the U.S. where our companies can sell their products and services. For markets that may be open to U.S. companies, our government must eliminate tariffs and other trade barriers or we can't expect to be competitive market participants.

I look forward to hearing from our two panels of witnesses today and exploring these questions further.

Thank you, Mr. Chairman. I yield back.

"Legislative Hearing on H.R. 4678, the Foreign Manufacturers Legal Accountability Act"
Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection
June 16, 2010

Responses of Mr. Jeremy Baskin to Questions for the Record from Ranking Member Joe Barton[1]

1. **Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?**

   Response: Yes, if there is reciprocity. CPSC defers to the work of the Office of the U.S. Trade Representative, the Department of State, the Department of Commerce, and other responsible agencies in negotiating agreements with foreign governments on this issue.

2. **You mention a number of cases where the CPSC was requesting information from Chinese drywall manufacturers, and the requests were returned denied and unopened. Would this bill allow the CPSC to force foreign companies to comply with information requests?**

   Response: The proposed legislation would provide CPSC with a mechanism to put pressure on a domestic party to seek this information from the foreign manufacturer.

3. **Do you have a ballpark estimate for how many foreign manufacturers of consumer products this bill would apply to? What other means does the CPSC have available to ensure only compliant products are sold in the U.S.?**

   Response: CPSC does not currently maintain a registry of foreign manufacturers of consumer products. Therefore, CPSC is unable to provide a current estimate of how many individual foreign entities would be covered by the proposed legislation.

   CPSC currently has authority to stop noncompliant articles at the ports and require their exportation or destruction. It has recall authority to remove noncompliant products from the supply chain. In addition, the Commission has stringent civil penalty provisions to pursue against parties who would sell or distribute noncompliant products.

4. **Scam artists will evade the law and reconstitute themselves. For smaller fly by night manufacturers in foreign countries, would this legislation stop them from starting a new business with a new name?**

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[1] This is a staff document, and has not been reviewed or approved by, and may not necessarily reflect the views of, individual CPSC Commissioners.

Response: The legislation cannot stop that practice (no legislation can), but it will make those individuals more easily identifiable. Each new foreign manufacturing entity covered by the proposed law would be required to appoint an agent to accept service of process. Otherwise, that business would not be able to import its products into the United States. Furthermore, domestic agents engaging in due diligence could identify these companies and decline to do business with them, thereby making it more difficult for them to import.

a. **You state it is rare sentiment for companies to refuse to pay compensation imposed by a court, despite the legal advice of one Chinese attorney. How big a problem is the lack of a registered agent in the US? Even if the company had a registered agent, is there anything to compel them to pay court ordered fines or penalties?**

Response: Having the registered agent will not serve to compel the company to pay fines or penalties, but *not* having the agent will bar that company from importing. Requiring the agent can serve as an incentive to submit to U.S. legal authorities and come forward and pay legally assessed fines and penalties.

5. **Importers or distributors in the U.S. are considered the manufacturer for purposes of compliance under the Consumer Product Safety Act. What liability attaches to the importer or distributor?**

Response: Importers and distributors can incur civil monetary penalties of up to $15 million under the CPSA. Importers are required to have bonds as a condition to import. If importers distribute noncompliant imported products, they can incur money damages under those bonds in addition to civil monetary penalties that might be assessed and collected. CPSC can ask CBP to seize and forfeit noncompliant imported products.

6. **Do you believe that this bill will have a significant improvement on product safety? Please explain.**

Response: This new powers contained in this legislation would provide an additional tool in the arsenal of CPSC's compliance measures. This, in turn, permits greater oversight over imported products.

7. **Do you have any estimate for what threshold the CPSC might establish for the minimum size requirements in the bill?**

Response: Not at this time. This issue would require careful regulatory consideration by the full Commission and should be resolved in collaboration with other agencies that will have this service of process requirement.

8. **Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?**

    a. **Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?**

    Response: The Department of Homeland Security (DHS) is empowered to promulgate the regulations governing this section. CPSC cannot speculate on how DHS would interpret this provision.

    b. **Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.**

    Response: CPSC is not in a position to speculate on the impact of the legislation on global trade relations.

9. **Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.**

    a. **How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?**

    Response: As noted in the responses to question 4, having the registered agent will not serve to compel the company to pay fines or penalties, but *not* having the agent will bar that company from importing. This will provide an incentive to accede to U.S. legal authorities and come forward and pay legally assessed fines and penalties.

    b. **If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?**

    Response: Currently, service of process against a foreign manufacturer is usually affected under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (commonly called the "Hague Service Convention"). In many cases, service under this convention is a cumbersome and time-consuming process.

    This legislation does not affect the Hague Service Convention. In addition, enforcement of the judgment in a foreign country will not be affected. However, the legislative may provide an incentive for foreign manufacturers to submit to U.S.

jurisdiction by tying designation of an agent and accepting service of process to the continued future ability to import products into the United States.

c. **How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?**

Response: CPSC does not currently attempt to track the number of foreign consumer product manufacturers that seek to avoid service of process in domestic civil litigation.

10. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

Response: Depending on how the legislation is implemented, it could include companies that have no or little U.S. presence.

a. **The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a US judgment if they want to continue business in this country? If that is the case do you need to require an agent for service of process?**

Response: Yes. Requiring the designation of an agent to accept service of process will act as incentive for those companies with little or no presence in the U.S. to submit to jurisdiction so that they will be able to legally import products in the future.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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July 13, 2010

Ami Gadhia
Policy Counsel
Consumers Union
1101 17th Street, NW, Suite 500
Washington, DC 20036

Dear Ms. Gadhia:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

Consumers Union/Consumer Federation of America Responses to Questions for the Record from the Honorable Joe Barton, re: H.R. 4678, The Foreign Manufacturers Legal Accountability Act

1. Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?

If they are availing themselves of the foreign market, yes.

2. Given that there is no method to enforce U.S. court judgments; to what degree will this bill increase the ability of consumers to be compensated if they still only have access to the assets of U.S. based companies?

Depending upon the relationship of the U.S-based company to the foreign manufacturer, it is possible that a consumer may be able to enforce a judgment against the U.S.-based entity. The U.S.-based entity, again depending upon its legal relationship with the foreign company, could then be reimbursed for the judgment by the foreign company. The foreign country may also help enforce the judgment.

3. You testified that the inability of consumers to obtain compensation from foreign manufacturers hurts industry, because liability factors into their cost of business for U.S. companies, but not for foreign ones. Will this bill change this situation, considering that consumers will still only have enforcement power to obtain compensation from American companies?

This bill will change this situation. Currently, foreign manufacturers are, in many cases, completely "scot-free" from any responsibility to our civil justice and regulatory system. The knowledge that they cannot be hailed into court, or brought before a U.S. agency, factors into their business plans – they can use toxic materials, or take other dangerous shortcuts, all to cut costs because they know they do not have to submit to U.S. jurisdiction. By requiring foreign manufacturers to submit to such jurisdiction in the U.S., you are ensuring that U.S. manufacturers who do not cut corners to save money do no lose out to foreign companies that sell their potentially dangerous products at lower prices. American companies will actually have a fighting chance to compete with foreign manufacturers.

4. You stated in your testimony that it is untenable to have a system of accountability that relies upon altruistic and rare behavior. Isn't that similar to the system for enforcement of U.S. judgments if this bill passed, given that there is no mechanism for enforcing U.S. judgments abroad?

Enforcing a U.S. judgment would not simply be a case of relying on altruistic and rare behavior. Sometimes, the foreign country may help enforce the judgment. The U.S. assets of a foreign company doing business in the U.S. may also be subject to seizure in order to satisfy a judgment. But regardless of how enforcement occurs, the fact that a judgment has been rendered against a foreign manufacturer helps put the company on notice to make safer products. The U.S. legal system is also put on notice, so that future imports from that company may trigger restrictions of

future unsafe products reaching U.S. consumers. This legislation does not directly touch enforcement of judgments (doing so may be a WTO violation), but does lessen some of the jurisdictional and bureaucratic hurdles a consumer must overcome before he or she can even get a judgment entered against a negligent foreign manufacturer.

5. It's my understanding that the U.S. importers who purchase foreign goods and brings them into the U.S. would be the ones capable of and responsible for facilitating a recall. However, you mentioned in your testimony that the bill's provisions mandating registered agents for foreign manufacturers would help the CPSC with recalls. Could you expand on that?

Requiring a foreign manufacturer to register an agent for service of process and for regulatory issues, such as safety recalls, will ensure that the right entity is contacted by the agency for a recall. In some cases, the importer may be the entity in the best position to facilitate a recall of a foreign-made product, but in other cases, the importer may not be the best party. The importer may also be a "fly-by-night" operator, who may have changed names in the weeks, months, or years between the importation of a product and the need for a safety recall. Tracking this importer might therefore prove difficult. A registered agent for service of process, on the other hand, would have more up-to-date information about how best to contact a foreign manufacturer for the purposes of a recall.

6. You mentioned that this bill could act as a deterrent against irresponsible foreign manufacturers. However, if a foreign manufacturer is going to willingly or recklessly make a defective product, and thereby do significant damage to their business reputation, what is the likelihood that they will be deterred by a court with no real power over them?

Right now, our courts have absolutely no power over foreign manufacturers, because the manufacturers are not subject to jurisdiction here in the U.S. Therefore, under current law, a consumer injured by a defective or dangerous product has no chance at holding the foreign manufacturer responsible. But the bill will change this, and give courts – and injured consumers – a chance to hold these companies responsible, because consumers and federal agencies will at least be able to hail these companies into court. Even after a verdict against them, it is possible for a foreign – *or a domestic* – manufacturer to flagrantly violate our laws, and to try and evade paying a judgment against them. But this legislation would at least give injured consumers the ability to bring suit against these manufacturers, so they have a chance at obtaining a judgment to enforce – a step further than is available today.

7. Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?

    a. Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?

The intent of the legislation as we understand it is a basic principle of fairness: if a company is going to avail themselves of the U.S. consumer market, then they should play by the same rules that American companies play by. That means being a part of our civil justice and regulatory systems if their products injure people. If a consumer is injured by a finished product, or if a federal agency is recalling a finished product, but the finished product manufacturer disavows all responsibility for the defective product and claim that a raw material or component manufacturer is responsible, it would be a perverse outcome if the consumer or the federal agency could not hold the right party responsible simply because component parts were not covered by the legislation.

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

We believe that this legislation will positively impact American manufacturers, because they will be able to complete on a level playing field with foreign manufacturers. American companies will not lose out, e.g., on selling drywall to contractors because theirs is more expensive than foreign-made drywall because the American manufacturers refused to take safety shortcuts. Stronger American companies could conceivably be better able to take part in export markets around the globe.

Some concerns have been raised about whether this bill violates World Trade Organization (WTO) agreements. WTO violations occur when foreign entities are treated differently than domestic ones under U.S. laws. This legislation seeks to do the opposite. This legislation actually creates an equal playing field by holding all manufacturers, no matter where there are based, responsible for the safety of the products they sell in the United States. Manufacturers as well as the products produced and sold in the U.S. would be treated equally under this legislation.

8. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

We do not believe that current applicable laws make foreign companies more accountable in the U.S. As foreign companies are not subject to jurisdiction here in the U.S., it is primarily their good will that currently makes them accountable to U.S. consumers.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

Sometimes, the foreign country may help enforce the judgment. The U.S. assets of a foreign company doing business in the U.S. may also be subject to seizure in order to satisfy a judgment. But regardless of how enforcement occurs, the fact that a judgment has been rendered against a foreign manufacturer helps put the company on notice to make safer products. The U.S. legal system is also put on notice, so that future imports from that company may trigger restrictions of

future unsafe products reaching U.S. consumers. This legislation does not directly touch enforcement of judgments (doing so may be a WTO violation), but does lessen some of the jurisdictional and bureaucratic hurdles a consumer must overcome before he or she can even get a judgment entered against a negligent foreign manufacturer.

e. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

Some large foreign companies with a U.S. presence delay and make legal proceedings unnecessarily expensive for harmed U.S. consumers by claiming that their parent company - located overseas - was responsible for the design or manufacturing defect of a product. For example, we have heard of many instances of well-known foreign car manufacturers forcing U.S. consumers to serve process through the Hague Convention (spending tens of thousands of dollars extra) to be able to reach their overseas parent company, and then having to litigate further that there is appropriate jurisdiction over that company before these consumers even get their day in court. Though these companies have well-established U.S. subsidiaries, their ability to evade liability and make injured or harmed consumers jump through procedural hoops allows them to continue profiting off of U.S. consumers while at the same time skirting the very U.S. laws by which their U.S. counterparts must abide.

9. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

a. The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a U.S. judgment if they want to continue business in this country? If that is the case do you need to require an agent for service of process?

You do still need to require an agent for service of process, because foreign companies may still attempt to take shortcuts on safety if they know there will never be consequences – i.e., being brought into our civil justice and regulatory systems – for their actions. Even if a company is availing itself of the U.S. market, as you describe, they will never be legally reachable if they do not have an agent for service of process here in the U.S. An agent for service of process is a simple but vital prerequisite for being held responsible for following U.S. laws.

Consumers Union

[illegible]

June 21, 2010

Honorable Bart Stupak
2268 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Stupak:

This letter is in response to your inquiry during a hearing before the House Energy & Commerce Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010 regarding H.R. 4678, The Foreign Manufacturers Legal Accountability Act. During the hearing, you asked whether, in addition to requiring foreign manufacturers to have a U.S.-based agent for service of process, it would also make sense for foreign manufacturers to have an entity in the U.S. who had substantive knowledge of its products in order to aid U.S. agencies in the event of a recall of a product covered by H.R. 4678.

Consumers Union believes that such entities could in fact assist the federal agencies whose products are the subject to the bill's requirements to more effectively and efficiently conduct recalls. We further believe that Committee report language accompanying H.R. 4678 could address this point; we would be happy to assist however we can regarding the drafting of such report language.

Sincerely,

Ami V. Gadhia

Ami V. Gadhia
Policy Counsel
Consumers Union

Cc: Honorable Henry Waxman, Chair Honorable Joe Barton, Ranking Member
House Energy & Commerce Committee

Honorable Bobby Rush, Chair Honorable Ed Whitfield, Ranking Member
Subcommittee on Commerce, Trade, & Consumer Protection
House Energy & Commerce Committee

Honorable Betty Sutton

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
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July 13, 2010

Andrew F. Popper
Professor of Law
Washington College of Law
American University
4801 Massachusetts Avenue
Washington DC. 20016

Dear Professor Popper:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

1. **Yes or No please. Do you believe American companies that sell their products abroad should submit to the legal authority of foreign courts?**

Since you requested a yes/no response, the answer is "yes." Obviously, there are great variations in foreign legal systems and a one-word answer does not encourage a discussion of those factors.

As noted in several answers below, principles of comity are of consequence in all foreign affairs – especially trade – and outright rejection of all non-U.S. legal systems (or a "no" response to your question) by all companies doing business abroad does not seems a wise approach – nor a safe generalization.

In a number of counties where U.S. products are sold, U.S. companies are already subject to the domestic legal system of the place the injury occurs. In that sense, H.R. 4678 would close a loophole in the U.S. legal system by creating accountability obligations consistent with those that exist abroad.

For example, consider the new Chinese tort law which is modeled, in part, on the law of several U.S. states. Articles 43, 45, and 47 establish both punitive damages and strict liability which, commentators report, will have "significant ramifications for companies doing business in China. . . ." Roy Zou and Xi Liao, "China Enacts Systematical Tort Law."
http://www.lexology.com/library/detail.aspx?g=4f49b26b-c799-461b-b1ce-e15223eefe53 (site visited July 19, 2010);
See: "Psst, China Has Tort Laws. Oh, And They Are Relevant For Foreigners." China Law Blog - China Law For Businesses
http://www.chinalawblog.com/2010/03/psst_china_has_tort_laws_oh_an.html
(site visited July 19, 2010).

U.S. firms are already advising their clients about this reality:

> China's new Tort Liability Law, another step in the Chinese government's strategy for dealing with China's legacy of environmental damage, represents a shift toward a tougher Western-style tort system. The law is in fact harder on defendants than laws inmost places around the globe, including the U.S. and Europe. *Those doing business in China will need to understand the potential for increased liability and the potential need to expand coverage* by the time the law goes into effect July 1. "China Introduces Tough New Tort Laws."
> http://www.willis.com/documents/publications/Services/International/2010/Intl_Alert_China_New_TORT_Law.pdf (Site visited July 19, 2010) (emphasis added)
>
> The Tort Liability Law is a new development in China's environmental laws and *will have significant ramification on companies doing business in China*,

> Companies should be aware that they may face heightened exposure to environmental tort claims notwithstanding full compliance with China's environmental laws and regulations, and defending against such claims can be costly. How Chinese courts will interpret and enforce the Tort Liability Law remains to be seen, but an increase in environmental tort claims in the future can be expected. Kaichen Xu, "China Adopts Environmental Tort Law," http://www.omm.com/newsroom/publication.aspx?pub=921 (Site visted July 19, 2010). (emphasis added)
>
> [T]he stated purpose of the law is "protecting the lawful rights and interests of civil law parties, explicitly defining tort liability, preventing and punishing torts, and promoting social harmony and stability." *Companies active in the China market and their insurers should revisit insurance policies and other risk management measures in light of this important development.* "China Passes Tort Law: A Brave New World of Punitive Damages?" http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=132305 (Site visited July 19, 2010) (emphasis added)

For the Paul Weiss advisory, see, "New Tort Law in China." http://www.paulweiss.com/files/Publication/092ddc34-a1c8-4d59-9a8b-db68bed8f433/Presentation/PublicationAttachment/10944494-5b87-4230-98bc-dd1d9052b110/PW-ALB10-5.pdf (Site visited July 19, 2010)

For the Taylor Wessing advisory (which has an elaborate discussion of the law and encourages foreign companies doing business in China to secure in-country product liability insurance), see, Ingo Vinck & Yimin Chen, "Milestones: China's New Law on Tort Liability." http://www.taylorwessing.com/newsletter/china/archive/china-alerter-april-2010/milestones-chinas-new-law-on-tort-liability.html (Site Visited July 19, 2010)

European countries following Article 5(3) of the Brussels I apply tort law constructs to U.S. companies.

In Japan (pursuant to Article 15(I) of the Code of Civil Procedure), there is an in-country jurisdictional base for persons injured by products manufactured abroad.

Thus, H.R. 4678 is in-step with our major trading partners and does not impose legal obligations on foreign manufacturers any more than (a) are imposed on domestic sellers, and (b) any more than are imposed on U.S. companies doing business abroad.

2. It is my understanding that there is currently no method to enforce U.S. judgments abroad other than 'good will'. Keeping that in mind, how much accountability do you believe this bill will assign to foreign manufacturers considering that it cannot be enforced?

I do not agree with the premise of the question; there is more to enforcement than a "good will hope" of compliance. Thus, I believe that H.R. 4678 will generate a meaningful measure of accountability – *which strikes me as the main reason foreign manufacturers are fighting this legislation.*

Moreover, it makes perfect sense that this bill is not focused on enforcement of judgments against foreign manufacturers - the first step is to get them into court. Thus far, foreign manufacturers have evaded the U.S. legal system. It's time to put that to a stop.

After this bill becomes law, a number of things are likely to happen, all of which benefit U.S residents.

First, foreign companies will have to give thought to making their products safer – which is, in the end, the driving force behind the tort system. The current system gives foreign manufacturers a free pass – and the results speak for themselves: freed of any obligations under our system of civil liability, there have been a consistent and dangerous flow of unsafe foreign products.

Second, injured U.S. consumers or business who seek to hold accountable a foreign manufacturer will not have to waste time and resources serving process through the Hague Convention. The potential for reasonable access to court *at a reasonable cost* has a great incentive value in terms of the quality of goods and services.

Third, as jurisdiction is secured and judgments are entered under the terms of this bill, the premise of this question will be tested. Enforcement of judgments *may* require cooperation with foreign legal systems – but I would not assume such cooperation will be denied.

Well-established principles of comity essential to the entire diplomatic process actually suggest the opposite result. Moreover, large entities doing business in the U.S. often have assets in the U.S. - and those assets can be seized to enforce an unpaid judgment. This is a powerful incentive to comply with the terms of a judgment.

Finally, one interpretation of this question presupposes that if a judgment is unfulfilled, it has no value. That is a false assumption. A judgment is a public record and can have powerful consequences for the foreign provider. Market perception and market value are sensitive: a finding against a manufacturer and entry of a judgment affects public perception of the value and safety of a product. This is powerful tool in creating incentives for safer, more efficient, and more reliable products.

3. You testified that there are "tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets." If true that is an alarming figure. What time scale is that production figure over, and what studies are you referencing?

I began research on the question of the range and nature of the problem of defective goods in 2008. I referenced in my testimony my article in the *Product Safety and Liability Reporter* from 2009 which lists some of the defective products. If anything, "tens of millions" is an understatement. FORBES MAGAZINE, not exactly a forum for the consumer voice – and not given to hyperbole – has called the number of defective products *colossal*.

President George W. Bush's Interagency Working Group on Import Safety, established in 2007, reported there are $2 trillion worth of products imported into the U.S. and that there is a need to raise safety standards for foreign products and for establishing identification and enforcement mechanisms for foreign products.

The number of foreign manufactured defective products sold in the U.S. is, I suppose, subject to debate. However, the notion that it is less than "tens of millions" simply is not true. It is more – far more. To give a sense of the magnitude of the problem, I have listed below a very small number of online pieces from detailing certain defective goods.

> http://www.hktdc.com/info/vp/a/ctdc/en/1/2/1/1X06ZQ6O/China-Trade/CPSC-Recalls-Various-Products-Made-in-Mainland-China.htm
>
> 9 July 2010
> CPSC Recalls Various Products Made in Mainland China
>
> The CPSC has announced the following recalls of products made in mainland China.
>
> Baby Walkers. Suntech Enterprises Inc. has recalled about 8,400 baby walkers because they can fit through a standard doorway and fail to have sufficient protection to prevent falls downstairs. The recalled baby walkers have a plastic frame supported by four wheels and eight brake pads. They were sold in blue, pink and green with a white activity tray and a patterned vinyl seat. Item number WK110 or WK112 is printed on the side of the packaging. These baby walkers were sold at small juvenile product stores in California, Illinois, New York and Texas from January 2007 through December 2009.
> http://www.cpsc.gov/cpscpub/prerel/prhtml10/10269.html
>
> Cribs. Seven manufacturers (Child Craft Industries Inc., Delta Enterprise, Evenflo, Jardine Enterprises, LaJobi, Million Dollar Baby and Simmons Juvenile Products Inc.) have issued separate recalls affecting some 2.2 million cribs to address drop-side hazards and other hazards that affect the safety of young children. Details on the recalls affecting mainland Chinese merchandise are provided below.

Delta Enterprise has recalled about 747,000 drop-side cribs and an indeterminate number of fixed and drop-side cribs using wooden stabiliser bars. These cribs were made in mainland China, Indonesia, Thailand and Croatia and sold at children's product stores nationwide and on-line from January 2000 through May 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10273.html

Evenflo is recalling some 750,000 Jenny Lind cribs with model numbers 012614, 0126141, 012615, 012616, 012617, 014614, 014615, 014616, 014617, 015614, 015615, 015616, 015617, 0161614, 0161615 and 0161617. These cribs were made in mainland China and Mexico and sold by children's product stores and various other retailers nationwide from January 2000 through November 2007.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10274.html

Jardine Enterprise Ltd. has recalled about 103,000 drop-side cribs with model numbers 0102B00 (Natural Olympia Single), 0102P00 (Black Olympia Single), 0108C00WP (White Capri Single), 0108L00WP (Antique Walnut Capri Single), 0115S00 (Rubbed Black Claremont Single), BC-33 (Dark Pine 3-1 Convertible), BC-66 (White 3-1 Convertible), DA0930B (Walnut Single), DA333BC (Natural Madison Single), DA616BC (Dark Pine Siera 2 in 1), DA616BN (Natural Siera 2 in 1), DA618BC (Natural Hampton), DA833BC (Natural Madison Single), DV601BC (Dark Pine Windsor Single), DV623BC (Cherry Windsor Single) and DV628BC (White Windsor Single). These cribs were manufactured in mainland China and Vietnam and sold at Babies "R" Us, Toys "R" Us, Geoffrey Stores and KidsWorld stores nationwide from January 2002 through June 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10275.html

LaJobi has announced a recall for approximately 306,000 Bonavita, Babi Italia and ISSI drop-side cribs. The cribs have drop-side hardware that contains metal or plastic pegs that are recessed into either the drop side or the headboard and footboard of the crib. A label on the headboard of the crib identifies the manufacturer as LaJobi. These cribs were made in mainland China, Italy, Vietnam, Thailand and the United States and sold at children's product stores and by various other retailers nationwide from May 1999 through May 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10276.html

Million Dollar Baby has recalled about 156,000 drop-side cribs under the brand names Million Dollar Baby, Baby Mod and Da Vinci. The model names included in this recall are Alexandria, Alpha, Bailey, Caleb, Jenny Lind, Lauren, Naomi, Oxford, Pine Canopy, Sleigh, Twinkle, Anastasia, Annabelle, Kendall, Kirsten, Leonardo, Michelangelo, Robin, Roxanne and Serena. These cribs were made in mainland China and Taiwan and sold by

children's product stores and other retailers nationwide from January 2000 through March 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10277.html

Simmons Juvenile Products has issued a recall for about 50,000 drop-side cribs with model numbers 011641, 011671, 011941, 015341, 016061, 016771, 016821, 016831, 017201, 017211, 017351, 018500, 018501, 018502, 018510, 018511, 018512, 026261, 028061, 028081, 028180, 029061, 29062, 029071, 029180, 029561, 029562, 029571, 034060, 034560, 039180, 044091, 053091, 065071, 068261, 068271, 068561, 201060, 202060, 202080, 202180, 202181, 203060, 204060, 204180, 205060, 206060, 207060, 209560, 211060, 211080, 212060, 214060, 214080, 215060, 216060, 216070, 216080, 216180, 216180, 216570, 218060, 219560, 220180, 220181, 221060, 221070, 221070, 221077, 222060, 222070, 224060, 225060, 225070, 225080, 227560, 228060, 229060, 230060, 231070, 236180, 236187, 236188, 236189, 238060, 238069, 239180, 239187, 239189, 240060, 248069, 251060, 251069, 257060, 261060, 053091A and 251060M. These cribs were manufactured in mainland China, the United States, Indonesia, Croatia and Canada and sold by children's product stores and other retailers nationwide and on-line from January 2002 through February 2007.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10278.html

Youth Tiaras. Wilton Industries Inc. has announced a recall for about 7,300 children's tiaras because they contain high lead levels. This recall involves the Wilton Youth Tiara with a SKU number of 120-228. The tiara is silver-coloured with clear crystals. They were sold by Party City, Jo-Ann Fabrics, Ben Franklin Stores, Amazon.com and other retailers nationwide from June 2009 through April 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10279.html

Fireworks. Big Fireworks has recalled about 4,700 Super Lighting Rockets because they are overloaded with pyrotechnic composition, violating the federal regulatory standard for this product. This recall involves stick-type rockets with a 1.5-wide engine that is mounted on a 32-inch wood stick. The engine is wrapped in black paper with a background of the solar system and the writing "Super Rocket" in assorted colours. The recalled rockets were sold in packs of four and have item number GCR3150 printed on the front of the package and on the rocket engine. They were sold at fireworks stands and stores in Florida, Indiana, Pennsylvania and Michigan from November 2009 through June 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10281.html

Power Adapters. Radio Systems Corporation is recalling about 20,000 power adapters for heated pet beds because they can cause arcing between the coil spring and the metal connector when the connector is removed from

the bed. This recall involves the Class 2 transformers that were sold with PetSafe Heated Wellness Sleepers. The adapters are identified by the markings "PLUG IN CLASS 2 TRANSFORMER," "MODEL NO: K12-800" and have a spring coil covering the length of the electrical wire that goes from the sleeper. Power adapters without spring coils are not affected by this recall. The recalled adapters were sold at pet specialty stores and by catalogue and on-line retailers nationwide from September 2006 through April 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10283.html

Notebook Computers. Sony Electronics Inc. is recalling about 233,000 Sony VAIO notebook computers because they can overheat and pose a burn hazard to consumers. The recalled products are VPCF11 series and VPCCW2 series notebook computers. These computers are available in many colours and have "VAIO" on the front outside panel. They were made in mainland China and the United States and sold at Best Buy, Costco, Frys, Amazon.com and Sony Style retail stores and sonystyle.com as well as by other electronics retailers and business suppliers nationwide. The recalled computers were shipped to consumers and resellers between January and April 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10284.html

Children's Jewellery. SmileMakers Inc. has issued a recall for about 66,200 charm bracelets and 2,200 rings because the metal substrate in this jewellery contains high levels of cadmium. This recall involves "Happy" charm bracelets and football rings. The "Happy" charm bracelet is composed of colourful beads on a small elastic band to which a metal charm in the shape of a butterfly, moon or sun is attached. The football ring is a small adjustable metal band to which a metal football charm is attached. These items were distributed at doctor and dentist offices nationwide from June 2005 through March 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10287.html

Drill Presses. Southern Technologies has recalled about 500 Powertec drill presses because wires in the motor housing can be pinched, posing a risk of electrical shock to consumers. This recall involves Powertec eight-inch drill presses with an AC powered laser. The model number is DP800 and can be found on the product specification label located above the handle on the right side of the machine. The recalled drill presses were sold exclusively at Blain's Farm and Fleet stores nationwide from November 2009 through February 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10288.html

Bicycles. Felt Bicycles has recalled approximately 2,100 bicycles because the bicycle's fork steer tube can break, causing the rider to lose control, fall and suffer injuries. The recall includes all 2009 Felt model B12, B16 and

S32 road bicycles. B12 bicycles are gloss silver/carbon and have carbon fibre frames with carbon fibre forks and aluminium steer tubes. B16 bicycles are matte black/red and have carbon fibre frames with carbon fibre forks and aluminium steer tubes. S32 bicycles are available in gloss white/red and have aluminium frames with carbon fibre forks and aluminium steer tubes. The recalled bicycles were sold at bicycle specialty stores nationwide from October 2008 through May 2010.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10290.html

Laptop Batteries. Tekkeon Inc. has issued a recall for about 500 external laptop batteries because the battery cell can short-circuit and overheat, posing a fire hazard to consumers. The myPower ALL Plus External Laptop Battery is a universal rechargeable battery used to power laptop computers, MP3 players, mobile phones, DVD players and other portable devices. It is black with "Tekkeon" printed on the front and model number MP3750 printed on a label on the back. These batteries were sold by Amazon.com and other on-line retailers from September through December 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10744.html

Coin Purses and Jewellery. Daiso California LLC has recalled approximately 190 children's coin purses and jewellery because surface paint on the zippers of the coin purses and the clasps of the jewellery contain high lead levels. This recall involves coin purses with rainbow stripes and earrings and necklaces that have blue, pink, red, white and yellow coloured droplets. "The Coin Purse" and "Mobile Case Coin Purse" are printed on the tag attached to the purse. "Colorful Drop Accessory Bracelet" is printed on the front of the necklace packages and "Colorful Drop Accessory Pierce" is printed on the front of the earring packages. The tag and packaging have "Produced for Daiso Japan" on either the front or back. These items were made in mainland China and South Korea and sold at Daiso stores in California and Washington from May through December 2009.
http://www.cpsc.gov/cpscpub/prerel/prhtml10/10292.html

Here is a CPSC circular with more information pertaining to defective foreign goods:

http://www.cpsc.gov/cpscpub/prerel/prhtml10/10115.html

U.S. Consumer Product Safety Commission - January 20, 2010

Graco Recalls Strollers Due to Fingertip Amputation and Laceration Hazards

Name of Product: Graco's Passage™, Alano™ and Spree™ Strollers and Travel Systems

Units: About 1.5 million. . . .

Manufactured in: China. . . .

Here is some additional online information on the volume of defective goods flowing in to the U.S.:

- On the recall of 900,000 Simplicity Cribs from China

http://www.reuters.com/article/idUSSP36172920080917

- On lead paint:

http://www.reuters.com/article/idUSWEN191320071025
"U.S. Recalls More China-made Products for Lead in Paint"

"NEW YORK (Reuters) - A slew of products made in China ranging from children's jewelry to cake decorations were recalled on Thursday because they contain excessive amounts of lead. . . .The recall of roughly 665,000 items announced by the Consumer Product Safety Commission (CPSC) includes about 38,000 Go Diego Go Animal Rescue Boats from Mattel Inc's Fisher-Price division. . . ."

- On children's jewlery:

http://www.fox8.com/news/wjw-news-teen-jewelry-recall,0,1228102.story
"About 137,000 pieces of imported children's jewelry sold at two stores popular with preteen girls — Justice and Limited Too — were recalled Tuesday for high levels of cadmium, the latest in a series of recalls involving the toxic metal.
The voluntary recall, announced by the U.S. Consumer Product Safety Commission, was the sixth callback since The Associated Press first released findings of an investigation into cadmium in children's jewelry."

- Here is the FORBES piece mentioned earlier:

http://www.forbes.com/2007/10/10/starbucks-china-recalls-markets-equity-cx_ml_1010markets29.html
"The U.S. Consumer Product Safety Commission has a new beef with China.
The CPSC released a statement on Tuesday announcing a voluntary recall of Starbucks (nasdaq: SBUX - news - people) children's plastic cups. The cups reportedly fracture easily, leaving sharp edges and broken pieces that pose a choking or laceration hazard to children.

Starbucks has received seven reports of the cups breaking, and in two instances children began to choke on the broken pieces. Though no injuries have been reported, Starbucks has asked that the products be taken away from tots, and will offer a complimentary beverage as an incentive to return the faulty products.

The Seattle-based coffee company's stock has dripped .8%, or 22 cents, to $26.55 in Wednesday trading. . . . The Starbucks incident is just one of a ***colossal group*** of CPSC recalls over the past few months due to more detection of defective and contaminated products manufactured in China. On September 11, the U.S. and Chinese Product Safety Agencies announced an agreement to improve the quality and safety of imported consumer goods, but since then many more recalls have been made. (See: Nothing Abstract About Big Bird) Chinese-made products ranging from Cub Scout badges, light fixtures, glitter candles, air purifiers, aluminum water bottles, key chains and baby cribs have all been recalled by the CPSC in recent weeks. (emphasis added). . . ."

- On massive quantities of dangerous and defective drywall:

http://www.manufacturing.net/News-Defective-Chinese-Drywall-Hits-Homeowners-Insurance-101509.aspx

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The websites above are from a very brief search on this topic conducted on July 15, 2010. These sites, as well as my research leading to the article cited I my testimony, confirm the statements made in the hearing.

4. As I understand it, this legislation subjects foreign companies to the jurisdiction of U.S. courts, but lacks any associated enforcement power. Given that it doesn't increase liability for the assets of any foreign company, won't plaintiffs still go after U.S. companies, i.e. those with the accessible deep pockets?

This question is answered in part in my response to Question 2.

Currently, product liability cases can and do result in liability of domestic companies – if the bill becomes law, that liability would either be transferred to or shared with foreign manufacturers and not borne solely by the U.S. company.

The question presumes that no foreign company will respect the jurisdiction of U.S. courts and that every foreign country will refuse to assist in the implementation of U.S. law. I do not believe that is a correct assumption. At the most basic level, U.S. assets of a foreign company doing business in the U.S. would be subject to seizure to satisfy a judgment.

Even if enforcement of judgments becomes an issue, I believe that the passage of this bill will force foreign entities to give thought to making their products safer – which is (as mentioned earlier) the driving force behind the tort system.

Finally, as noted in response 2, a judgment is a public record and can have powerful consequences for the foreign provider. Market perception and market value are sensitive: a finding against a manufacturer and entry of a judgment affects public perception of the value and safety of a product. This is powerful tool in creating incentives for safer, more efficient, and more reliable products – and will relieve pressure on U.S. manufacturers.

5. How can U.S. judgments against foreign companies be enforced if this bill passes?

See responses to questions 2 and 4.

In addition to the potent force of seizing domestic assets of foreign companies, the profound impact of a judgment on the market value or reputation of a product, and the well-established principles of comity that suggest that judgments will be enforced, there are other factors to consider. Once a judgment is entered, the whole of the U.S. legal system is on notice – and that includes regulation of imports. An unsatisfied judgment – coupled with a finding of defect -- may well trigger restrictions that would limit or prohibit the import of a presumptively unsafe product.

In dealing with the very real problem of unsafe foreign goods coming into the U.S., President Bush's 20007 Interagency Working Group on Import Safety recommended the increased use of electronic track and trace technologies to identify the product source and points of distribution. (Report to the President page 39) Couple notice of defects with notice of unpaid judgments and the incentive on foreign manufacturers increases to become accountable and to avoid selling dangerous products (again, a primary feature of the tort system).

If there is an enforcement mechanism, does it worry you how similar provisions passed by foreign countries might affect U.S. importers?

That does not seem a dominant consideration. U.S. companies are already subject to foreign laws in a number of countries (see answer to question 1).

I do not see U.S. importers affected meaningfully by this bill – but I do see U.S. consumers finally having their day in court. The capacity to hold accountable the seller of a defective and dangerous product is the real consequence of this bill – not the conjectural impact on U.S. companies selling goods abroad.

6. **Industry has informed us that U.S. importers will likely have to shoulder the compliance burden for establishing registered agents on behalf of their foreign counterparts. Keeping that in mind, wouldn't this bill hurt U.S. importers, instead of leveling the playing field as you stated in your testimony? Additionally, if foreign countries reciprocate, won't that place an additional compliance cost on U.S. exporters?**

As to the first question, "no." This has been answered in 2, 4, and 5.

In addition, domestic importers will be able to require foreign manufacturers to designate a foreign agent in the United States. The U.S. companies will be relieved of liability – not have it increased.

As to the second question involving reciprocity or retaliation, please see answers to 1, 2, 4, and 5.

2. **In your testimony you illustrated a scenario where a foreign producer cannot be sued or "haled" into court. My understanding is that once service of process requirements are met a court is authorized to move forward with a suit. It is also my understanding that the Hague convention on Service of Process, and failing that, Letters Rogatory can be used to serve process to generally all our major trading partners. Considering this, how prevalent currently is the scenario you described?**

I would characterize the scenario from my testimony as common and troubling.

The problems with the Hague Convention and Letters Rogatory include inefficiency, time-consumption, and expense. Designation of a U.S. agent is simple and a regular part of doing business for all domestic companies. Today, foreign companies often use the Hague rules as a delaying strategy, even where they have sufficient presence here and could have been served with process.

HR 4678 allows consumers and businesses to bypass these obstacles. Requiring foreign entities to register their appropriate corporate identity together with the

products shipped to this country and to consent to jurisdiction in the U.S. would give injured consumers their right to their day in court and would short circuit complexity and inefficiency in the Hague model.

7. Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?

The legislation requires federal agency findings of volume and product designation. That is the process that will be used to determine which products or finished, processed, and/or assembled component parts are within the reach of the bill, should it become law. Component part liability is a regular and important part of tort law in the U.S. -- there are instances where the component part provider is found liable and those where the entity assembling the product bears full responsibility and the component part provider is indemnified. It is safe to assume that body of law will be used (in conjunction with agency designation) to determine "[h]ow far down the supply chain this requirement would stretch."

a. Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?

No. I do not think that is the purpose of the bill (assuming "raw product" means unfinished, unprocessed, and unassembled and not a final product intended for sale "as is" to a user/consumer in the U.S.)

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

I do not believe there would be a discernible effect on U.S. companies engaged in import and export other than relieving U.S. domestic sellers of responsibility properly borne by their foreign suppliers.

The registered agent requirement is designed to hold foreign manufacturers accountable for the products they sell in this extremely lucrative market without having an array of expensive and unnecessary procedural defenses which complicate, limit, and in some instances block the protection of American consumers. The likelihood that many foreign manufacturers would forego sales in a $2 trillion market because of the need to have a registered agent seems remote.

8. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

The substantive law would be applied to foreign manufacturers on the same basis it is applied to American manufacturers. The difference would be that this legislation would make the foreign firms more identifiable and more accessible to jurisdiction in American courts. It would merely deprive them of costly and protracted procedural defenses without depriving them of any defenses that are available to domestic manufacturers under American law.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

See answers to 2.4. and 5.

c. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

In my article in the *Product Safety and Liability Reporter*, I detailed dozens of cases where foreign entities were able to resist the jurisdiction of U.S. courts – and that is a small sample.

Large foreign companies that sell products in the U.S. avoid legal proceedings regularly. I looked through many, many reports and articles on Chinese companies selling defective goods in the U.S. and I think it is safe to say that this is not a debatable point.

Those companies that *are* the subject of lawsuits today delay the process and force U.S. consumers and businesses to go through substantial procedural bureaucracy – requiring translation of papers and a foreign government to serve process – before they will admit that process has been served, often with no consequences for the harm they caused.

The bill changes that inequity. It does not prohibit sales – it makes sellers accountable and creates incentives for limiting and eliminating the great range and nature of dangerous or defective products currently in the stream of commerce.

9. Is it fair to say this legislation is targeted at the companies with no U.S. presence?

This legislation is targeted at any company that benefits from the lucrative U.S. market and is (today) able to delay and avoid litigation and accountability. If the companies have a substantial in-state U.S. presence, they are already subject to the jurisdiction of the courts. The problem (noted in my testimony and in my *Product Safety and Liability Reporter* article) is that the "minimum contacts" requirement is difficult to meet – and is not satisfied by high profits, significant impact, or even the uncontested assertion that the product was intended for sale in the U.S.

a. The more a company depends on the U.S. market for its business, isn't it more likely they will need to respond to a U.S. judgment if they want to continue business in this country?

Yes. See answers to questions 2-5.

b. If that is the case do you need to require an agent for service of process?

Absolutely. As noted in my testimony and my article, the problem of securing *in personam* jurisdiction over foreign companies is widespread. It frustrates just and fair results, limits accountability, and denies persons in the U.S. access to the courts. In the absence of an agent, these problems will continue.

Moreover, this bill does more than require designation of an agent – it gives clear and understandable notice to all that doing business in the U.S. means being subject to U.S. law. This is required of every domestic company – and it should be required of every foreign entity doing business here as well. Consent to jurisdiction (mandated in the bill) is not an undue advantage - it is the law for every U.S. business.

The potential to serve a foreign company that benefits from U.S. sales and from the U.S. legal system at many level (in terms of banking, currency, credit, etc.) and the U.S. infrastructure (broadly defined) is fair, just and reasonable. Injured consumers should not be tormented by our legal system – they should be served by it. An agent in the U.S. makes that possible. U.S. consumers injured in their home states by products on which they rely justifiably should not be met with massive expenses and no reasonable assurance that the wrongs they sustained will be redressed.

This bill is a chance to give consumers and businesses the basic and straightforward opportunity to resolve peacefully disputes in a court of law and to secure remedies where they have been wronged. Designation of an agent is a remarkably simple, elegant, and wise step forward.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

July 13, 2010

Marianne Rowden
President and CEO
American Association of Exporters and Importers (AAEI)
1050 17th Street, NW, Suite 810
Washington, DC 20036

Dear Ms. Rowden:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

The Voice of the International Trade Community Since 1921

July 27, 2010

Via E-Mail: Earley.Green@mail.house.gov
Rep. Joe Barton
Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
U.S. House of Representatives
2125 Rayburn House Office Building
Washington D.C. 20515

ATTN: Earley Green, Chief Clerk

Re: Hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act" – June 16, 2010

Dear Congressman Barton:

Thank you for the opportunity to testify on behalf of the American Association of Exporters and Importers (AAEI) concerning H.R. 4678. I respectfully submit the answers below in response to your written Questions for the Record (QFR).

1. **Section 4 of the bill requires foreign manufacturers who make "any part" of a covered product or "any part" of a component part of a covered product to have a registered agent in the United States before said covered product or component part can be legally imported. How far down the supply chain would this requirement stretch?**

   We understand section 4 of H.R. 4678 would require the U.S. importer to review its list of imported components (called a "bill of materials") to determine two things: 1) whether the component will be incorporated into a finished product covered by the law; and 2) whether the foreign manufacturer or producer of that component has a current registered agent on file as of the date of importation. It is unclear to us whether, for example, section 4 requires the U.S. importer of a finished engine from a foreign manufacturer to obtain the name of the producers of the components of that engine (and the name of their registered agents) in order to satisfy the requirements of section 4.

   a. **Could companies producing the raw materials that a covered product is made from be required to have a registered agent in the U.S. before the covered product can be imported?**

      Because such a wide variety of products are covered by H.R. 4678, we do not know the degree to which Congress intends to have producers of raw materials appoint registered agents. For example, an automobile covered under NHTSA, we believe that the legislation could very well cover the rubber in the tires being covered by the statute. In the case of chemicals, we do not know whether the legislation would require the producers of polymers used to make a final chemical product appoint a registered agent. Additionally, AAEI could easily envision active pharmaceutical

ingredients ("APIs") which give drugs their medicinal properties being covered by the legislation, but we are unsure about whether molecules utilized to develop biologics (covered in section 2(3)(B)) necessitate a company appointing a registered agent. The broader the scope of this legislation, the more expensive products are ultimately going to be for the American consumer, without corresponding increase in safety, security, functionality or even legal recourse.

b. Please describe how the breadth of the registered agent requirement could affect the U.S. export and import industries as well as global trade relations.

The breadth of the registered agent requirements does four very damaging things to U.S. export and import industries:

First, it moves the United States closer to a general import license regime in that importers would, for all intents and purposes, be required to seek government permission to import goods from "registered" suppliers limiting their sourcing ability.

Second, it destroys the U.S. position as a "value added" economy whereby low value components are sourced outside the United States and brought into the country for the high-value processing that can justify U.S. labor costs. The chemical and pharmaceutical industries are among the most heavily regulated and highly compliant companies who are net exporters for the U.S. regardless of where their headquarters reside. As a result, many of these high-paying jobs currently in the U.S. will simply move overseas as companies will avoid the "hassle factor" that this legislation imposes on U.S. manufacturing. This requirement exacerbates our trade relations because it adds another "U.S. centric" requirement while companies are seeking raise and standardize manufacturing processes across the globe. Also, this requirement punishes highly compliant and complex multinational companies by casting aside all of the infrastructure they have put in place in the United States to manage this marketplace by reaching through the corporate structure to pull the umbrella company into the United States' legal system. Many of the companies that this legislation seeks to reach are in countries that have at least partial state ownership of a significant percentage of all businesses. These businesses may not be subject to these rules because of the sovereign immunity of foreign governments.

Thirdly, the registered agent requirement adds another layer of enforcement at the time of entry and release from CBP custody, which can easily impede the flow of commerce.

Fourth, this legislation may very well lead to retaliatory mirror legislation being enacted by some of our trading partners. Not only will this directly harm US companies, but it could lead to trade wars with our current trade allies. Finally, even if the United States were to enact this damaging legislation, it would do little more than provide a false sense of peace for

wronged American consumers, because we are not party to any treaty that would allow for enforcement of any judgments that may or may not arise out of this legislation.

2. Holding manufacturers accountable – whether they are domestic or foreign – is a worthy goal.

a. How does the legislation change the current applicable laws that make the foreign company more accountable in the U.S.?

Because many U.S. state have tort laws with "joint and several liability" (i.e., each entity may be liable for the full amount of the liability), AAEI does not believe that this legislation will make the foreign company more accountable (or liable) in the U.S. nor does it reduce the liability of the U.S. importer.

b. If a judgment is rendered against a foreign manufacturer, what does it take to enforce the judgment? Can a judgment against a company be enforced more easily because of this legislation or will it still require a company to be a responsible party?

AAEI does not believe that HR. 4678 will advance a U.S. citizen's ability to collect on a judgment for money damages rendered by a U.S. court. Based on our preliminary review of the Hague Convention on Foreign Judgments in Civil and Commercial Matters, AAEI believes that two necessary prerequisites would need to be in place before judgment can be rendered against a foreign manufacturer: 1) the country in which the manufacturer resides would need to be a signatory to the Hague Convention or by some other legal instrument recognize a judgment from a U.S. court; and 2) a foreign court must exercise its authority over the foreign manufacturer by requiring the payment of money damages in the judgment or seizing the assets of the foreign manufacturer in satisfaction of the U.S. judgment. It is important to note that the United States is not a signatory to this particular treaty, and we are unaware of any effort to sign on.

c. How often do large foreign companies that sell products in the U.S. avoid legal proceedings? Can they continue to sell in the U.S.?

It is AAEI's experience that large foreign corporations generally do not avoid legal proceedings in the U.S. for several important business reasons: 1) to protect the company's brand and goodwill which are important business assets in the United States and abroad; 2) to continue its access to the U.S. market which remains among the most lucrative in the world; 3) reputable world-class companies want to be good corporate citizens because it is in the best long-term financial interest of the company. Because the industries covered by H.R. 4678 are so heavily regulated now by the federal government, U.S. regulatory agencies already possess the regulatory tools to block a foreign company's access to the U.S. market.

3. What would you recommend as the best method to hold foreign manufacturers accountable in the U.S.?

If the United States wants a long-term solution to ensure that U.S. citizens harmed by defective products manufactured by foreign corporations can get redress for their injuries, the United States must pursue a "holistic approach" comprised of three components: 1) commercial; 2) regulatory; and 3) legal.

The commercial component would comprise of working with our trading partners to set high international standards for product safety through standards-setting bodies such as the International Standards Organization (ISO). These standards would be uniform on a multi-lateral basis to ensure that companies can meet a single standard rather than a patchwork of standards. The commercial incentive for companies to comply with one international standard is that it lowers costs whereas a national standard which drives up the cost of producing goods for markets with different standards.

Second, the United States must continue to develop a robust regulatory regime that can handle globalization since most of our safety laws were developed at the turn of the 20th Century for goods produced and consumed in the U.S. market only. An important aspect of the regulatory component is sharing of data between regulatory agencies to oversee and audit corporate quality control, and take immediate action when defective products are detected before they get into the global supply chain.

Third, the legal component would be used as the system of last resort when corporate quality control and regulatory surveillance fails. If the United States became the leader in supporting international quality standards and promoted regulatory dialog as part of international trade agreements (e.g., the Doha Round at the World Trade Organization or through bilateral and regional free trade agreements), then more countries would probably become signatories to the Hague Convention on Foreign Judgments in Civil and Commercial Matters or other instruments recognizing and enforcing U.S. judgments because they will be looked upon as anomalies rather than simply a hazard of the U.S. legal system.

a. Does our current system have any accountability built into it?

Yes, the U.S. regulatory regime imposing all legal and regulatory responsibilities on the U.S. importer, which is typically a U.S. company with assets in the United States, currently makes that entity as accountable as if the produce was made in the United States by a U.S. corporation. Thus, U.S. importers are legally responsible today for liability of imported products and additional financial guarantees (e.g., bonds) can be added to address concerns about financial solvency.

4. What benefits – if any - do you see from this legislation? Do you have any concerns about how U.S. companies might be affected by similar laws in foreign countries, especially if those countries have less scrupulous legal systems than ours?

AAEI sees no benefit to this legislation – it neither compensates past victims of defective products nor does it provide a realistic avenue for relief to future victims of defective products made by foreign corporations. Moreover, we suspect that other countries will develop similar requirements to block U.S. corporations from accessing their markets. Other countries may also be encouraged to take arbitrary regulatory actions or justify taking legal actions against U.S. companies to harass them enough so that they exit the foreign market or force a U.S. corporation to sell its product through a foreign "middleman."

5. Could this bill complicate the ability of U.S. importers and exporters to conduct business globally?

Yes, this legislation will impact global traders in an extremely negative way. H.R. 4678 has the effect of "micromanaging" business decisions better left to corporate managers. This legislation will limit the sourcing options of globally competitive businesses which have manufacturing facilities in the United States and will reduce the attractiveness of the United States as a place where these companies can make products either for the U.S. or North American markets from globally sourced components.

6. You mentioned that there is no method by which a U.S. court judgment against a foreign manufacturer for money damages could be enforced abroad. If this bill passed and hypothetically could be <u>enforced</u> abroad, how would that affect your members and U.S. trade relations?

The enforcement of a U.S. court judgment requires, at a minimum, legality and practicality. Quite often, enforcement also entails considerable legal expense and a protracted period of enforcement. For legality, the United States needs some instrument (either international treaty or bilateral arrangement) whereby the U.S. judgment is viewed as valid as if it were a judgment rendered in that country. More importantly, satisfying a judgment requires practicality of getting that foreign corporation to either pay the judgment or finding property (e.g., real estate, inventory, bank accounts, etc.) which can either be sold or liquidated to satisfy the judgment by order of a court in the foreign country. Unfortunately, all of these things are reactions to an incident relating to an unsafe product. AAEI recommends that U.S. efforts are better focused on preventing the entry of unsafe products, rather than improving our reaction to what may happen after they enter the commerce of the United States.

For large multi-national corporations which have large-scale business operations in the United States and other countries around the world, AAEI is concerned that unintended consequences of H.R. 4678 may result in states seeking tax revenue from non-resident foreign corporations who have "consented" to jurisdiction of the state complicating the relationship between parent and subsidiary (or related) corporations). However, for small-medium size businesses (SMEs) which do not have market leverage with foreign suppliers, we anticipate that they will increase prices due to a smaller pool of foreign suppliers willing to appoint a registered agent in the United States. Moreover, we could envision a scenario whereby a

foreign supplier could require the small-medium size U.S. importer to contractually obligate itself to pay the legal fees of the foreign supplier or even to "hold harmless" the foreign manufacturer for the payment of any U.S. judgment enforced abroad against the foreign manufacturer. (In an extreme case, the U.S. company could be forced to pay the judgment twice if a U.S. court finds the U.S. importer and the foreign manufacturer severally liable, and the U.S. importer pays the judgment by authority of the U.S. court and the foreign manufacturer requiring the U.S. importer to pay its share of the judgment by contract.) Since we already have a legal regime that holds the importer of record liable for the products they import, this bill would do nothing but needlessly complicate trade for the most vulnerable members of the trading community - SMEs.

7. In your testimony you touched on the progress U.S. regulators are making with foreign countries to enhance the safety of our imports. How would this bill affect those relationships?

AAEI believes that some foreign countries may cease cooperation with U.S. regulatory agencies out of fear that any information they provide could become subject to discovery proceedings in U.S. litigation as a way of determining which foreign manufacturer may have made a defective product or component which resulted in an injury to a U.S. plaintiff. We believe that a reduction in this information sharing among U.S. and foreign regulatory agencies will result in the government "flying blind" where they will not have sufficient information to pinpoint anomalies so that they can prevent defective product from coming into the United States and recalling defective product that is already in the U.S. Market. In addition to this lack of cooperation harming current business relationships, the United States Customs and Border Protection's data requirements (ISF, the 24 hour rule, etc.) already MANDATE that U.S. companies work with their foreign suppliers to produce the data required for entry. This legislation may *de facto* bar imports from some uncooperative suppliers and irreparably harm small businesses in America.

8. Some have testified that foreign manufacturers need the incentive of tort liability in order to make safe products? Would you say that is true, and if not, what other incentives and systems are already in place to help ensure imported products are safe for Americans?

While tort liability has worked in some areas in making products safer in the United States, we must recognize that countries have different business cultures. Nonetheless, all companies must make a profit (with the exception state owned or heavily subsidized companies), and thus the most effective and efficient method to get companies to make safe products is a financial incentive – that is, making quality products is good business. A good example is supply chain security. After 9/11, companies feared that the U.S. government would shut down ports of entry through which goods are imported. U.S. Customs and Border Protection (CBP) worked with U.S. importers to develop the Customs-Trade Partnership Against Terrorism (C-TPAT), a voluntary program whereby CBP provided commercial incentives (e.g., fewer inspections) if member companies assessed and improved their global supply chain and also requested that members get their business partners (including foreign corporations) to adopt

good supply chain security practices. As a result, belonging to C-TPAT and adopting security procedures became an important commercial credential in the global trading system. Such practices have been adopted worldwide in the form of Authorized Economic Operator (AEO) programs. C-TPAT alone has over 9,800 members, but security procedures have been adopted by thousands of foreign companies, many of whom belong to their national AEO program.

CBP is working with the U.S. Consumer Product Safety Commission (CPSC) to develop a Product Safety Importer Self-Assessment Program whereby U.S. importers do an assessment of their internal controls for quality and safety in exchange for certain benefits from CBP and CPSC. This program is in the pilot stage, but could be ramped up if Congress gave its imprimatur in statute. (Many companies were reluctant to join C-TPAT because they feared that investments in a voluntary regulatory program could be either eliminated or diluted by subsequent statute or regulation. Thus, Congress recognized C-TPAT as a voluntary program in the SAFE Port Act, and enrollment in C-TPAT has nearly doubled since enactment of the statute.) It is extremely important to note that with any voluntary program, benefits must be guaranteed, well-defined and relative to the time, effort and resources companies are asked to spend on the set up and maintenance of the program.

9. Some have talked about the issue of the "tort tax". If this bill is passed, could U.S. businesses be exposed to a similar new "registered-agent" tax in other countries where they do business?

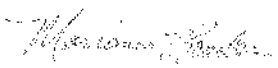
Yes, we believe that it is highly likely that other countries will adopt a similar measure aimed at U.S. corporations, which would harm our ability to meet the President's export initiative to double exports in five years.

10. The issue of the "tort tax" is a concern to some, where U.S. businesses are liable for foreign products, but foreign manufacturers themselves are not held accountable. Considering that there is no method to enforce U.S. judgments abroad, would this bill actually address that issue?

AAEI believes that because the United States' legal system operates on a territorial basis whereby a court has authority over a company with some physical property in its jurisdiction or an intentional presence in that jurisdiction via the stream of commerce, this legislation simply does not address the inability of U.S. courts to enforce judgments by demanding that money judgments be paid in cash or through a judicial lien on real property or tangible assets of the foreign corporation to be held accountable for harm to U.S. consumers. Therefore, we believe that U.S. importers will continue to bear sole responsibility for damages resulting from defective goods even if H.R. 4678 is enacted into law. Furthermore, we feel that the result of this legislation will be to lull U.S. consumers into a false sense of security about the liability of foreign manufacturers.

I hope that these QFR responses are helpful to you and the Subcommittee in considering H.R. 4678.

Sincerely,



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ONE HUNDRED ELEVENTH CONGRESS

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July 13, 2010

Mary Saunders
Deputy Assistant Secretary for Manufacturing and Services
International Trade Administration
1401 Constitution Ave., NW, Room 3832
Washington, DC 20230

Dear Ms. Saunders:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Larley Green, Chief Clerk, via e-mail to Larley.Green@mail.house.gov. Please contact Larley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

The Honorable Joe Barton

1. Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to Act?

Commerce's support for the National Export Initiative will help create and sustain jobs by increasing U.S. exports across a number of important sectors, including in clean energy technology. This effort, combined with implementation of pending U.S. FTAs that offer significant immediate tariff reduction, would help support and position the United States for growth in a sector with enormous export potential going forward.

2. ITA's website states that the Manufacturing and Services unit strives to "work with industry and government agencies to reduce costs of regulation and other government policies".

a. What policies or regulations have you worked on to reduce costs to U.S. manufacturers?

The Manufacturing and Services (MAS) Regulatory Affairs program has participated in interagency discussions for almost three dozen rules since the program started in 2006, including rules from the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Department of Homeland Security. A list of rules we have worked on can be found online at http://www.trade.gov/mas/ian/industryregulationmasinput/index.asp. Our most significant contributions include work OSHA's Worker Exposure to Hexavalent Chromium Rule and DHS's Importer Security Filing Rule.

b. If the legislation we considered regarding U.S. based registered agents for service of process were replicated by other countries and imposed on our exporters, would you work to reduce the costs of those regulations?

The Administration has not yet issued an official position on this legislation. Further, DAS Saunders did not testify on that particular piece of legislation and thus cannot appropriately address this question.

c. Would such regulations on U.S. companies help their prospects of increasing exports?

The Administration has not yet issued an official position on this legislation. Further, DAS Saunders did not testify on that particular piece of legislation and thus cannot appropriately address this question.

3. According to the Overseas Private Investment Corporation (OPIC) website, "Investment prospects for renewable energy sectors are indeed massive. A 2009 report

by the Renewable Energy Policy Network, between 2004 and 2008, stated that solar photovoltaic capacity increased sixfold, wind power capacity increased 250 percent, and total power capacity from new renewables increased 75 percent. Global revenues for solar photovoltaics, wind power, and biofuels expanded from $76 billion in 2007 to $115 billion in 2008."

a. If the industry is burgeoning and capital is flowing to it, why do we need the government involved to subsidize their processes?

Despite the flood of news about fast-growing clean energy technology opportunities in foreign markets, U.S. clean energy technology exports cannot increase if protectionist rules and policies prevent open competition.

The connection between clean energy technologies and green jobs has led many countries, developing and developed alike, to adopt policies that make it more difficult for foreign firms to compete in their markets. Many countries – either implicitly or explicitly – favor their domestic industry through preferential tendering criteria (China) and burdensome certification requirements (Korea, Japan). In addition, concerns regarding adequate protection of intellectual property rights also hamper some firms from entering foreign markets. This is an area particularly critical to new, small- and medium-sized clean energy companies whose survival might depend on a small number of critical patents.

b. If these businesses are capable enough to develop their products, shouldn't they also be capable of expanding their own prospects or hiring consultants to help them identify and navigate new export opportunities?

The majority of U.S. clean energy companies are small companies that often find it difficult to finance their own expansion in foreign markets. U.S. government resources that assist in identifying and navigating new export opportunities are provided, in part because comparable private sector services are often beyond the means of many new clean energy companies.

c. Isn't subsidizing efforts for only a few select companies harmful to the U.S. competitors who have already labored to become successful exporters and developed their own expertise?

Export assistance is offered to exporters across industries. A few select programs target the clean energy sector because standard business models do not fit the industry. For example, clean energy, such as renewable energy and nuclear power, requires high up front capital investment, while the energy savings accrue over the lifetime of the project. To compensate, the OECD has authorized export credit agencies, such as the U.S. Export-Import Bank, to extend loan repayment periods to eighteen years.

4. Rather than a general appropriation contained in H.R. 5156 to fund the program, shouldn't exporters have to pay user fees to compensate the government for the cost of

services they use? Otherwise isn't the program simply socializing the costs while privatize the gains?

Although, the Administration has not yet issued an official position on this legislation, current Export promotion programs offered by the U.S. Commercial Service operate on a cost recovery approach. Companies pay a user fee to cover up to the full cost of services provided.

5. **DOE recently announced a request for information (RFI) on rare earth metals and other materials used in the energy sector - specifically those materials used in clean energy technologies such as wind turbines, hybrid vehicles, solar panels, and energy efficient light bulbs. Recognizing domestic supply and demand may not be equal, the purpose of the RFI is to help develop a "clean energy future" plan. The responses were due on June 7.**

    a. **How important is the acquisition cost of these minerals to the ability to manufacture products here in the U.S.?**

The percentage of the cost of these materials relative to the cost of the final product usually is small. The issue is that for many of these end use applications, there is not an adequate mineral substitute for the rare earth elements. Therefore rare earth mineral access and availability are concerns for non-China based manufacturing of clean energy technologies, including the magnets used in batteries and in wind turbines.

    b. **If China possesses many of the minerals we need, then aren't U.S. manufacturers subject to China's willingness to sell us those minerals? Would it be more efficient for US companies to manufacture their products in close proximity to where the minerals are located –such as in China?**

Rare earth metals are found in many countries, including the United States, Canada and Australia. The United States was the leading producer of these metals as recently as 20 years ago. However at present, China produces over 90 percent of the global supply of rare earth elements but the U.S. has very little current downstream capability. Therefore, even material (in the oxide form) produced in the U.S. must get exported to China for processing, manufacturing of components, and initial assembly. Yet, if the U.S. were to build a much larger domestic manufacturing capacity in applications using magnets (e.g. wind energy) than in the near term, the U.S. manufacturers would be reliant on Chinese supply.

In the interim, China continues to reduce export quotas for rare earth elements, thereby reducing the quantities of rare earth elements available for users outside of China, including U.S. manufacturers. The U.S. Government continues to urge China to eliminate these rare earth export restraints in order to ensure that there is a level playing field for all competitors in this important sector and that China lives up to its international trade commitments.

China's strategy in doing so is to attract the value-added downstream industries to mainland China. However, the Obama Administration continues to promote growth in the manufacturing

sector and in doing this, more opportunities for American companies to grow here in the U.S. have become available, such as the DOE new Battery grant for hybrid technology and wind turbine manufacturing. Whether or not it would be more efficient for U.S. companies to manufacture in China depends on their business models. But, there is evidence that favorable feedstock prices, established supply chains, and low cost of capital is attracting multi-nationals to locate manufacturing in China.

c. How does our export of clean energy products affect our trade balance when many of the raw materials need to be imported?

As one of the most innovative and competitive sectors of the U.S. economy, renewable energy and energy efficiency technologies and services are expected to be among the major export markets over the course of the President's National Export Initiative. While restricted access to timely and cost-competitive raw materials could impede the growth in U.S. manufacturing and export of some clean energy products, the U.S. Government is committed to helping U.S. companies meet these challenges by address foreign government practices that impede trade in rare earths. Again, as market demand for rare earths increases, we expect to see the reopening of some U.S. rare earths mines, and new mining development in third countries that could reduce the tightness in global supply of these materials.

6. Energy trade has always been a difficult sector to negotiate free trade and open access.

a. How open are developing countries to our exports?

Average tariff data on products related to energy for the developing world as a whole is currently unavailable, and the data that are available for key markets are mixed. For energy subsectors (coal, petroleum, renewables, etc.) in key developing country U.S. export markets, such as China, India and Brazil, average tariffs are fairly low (between 0 and 12 percent) but the tariff range is wide. For example, China has tariffs that range from 0-35 percent and Brazil has a range of 0-20 percent on products related to renewable energy.

In addition, recently, a number of countries have been considering putting in place local content requirements in the energy sector. These could effectively create new barriers to U.S. exports by mandating the use of local goods and services. The Administration is working with foreign governments to address these potential barriers.

b. What is the Administration doing to open foreign markets and reduce barriers?

On the global level, the Administration continues to seek broad tariff cuts in agriculture and industrial goods through the WTO Doha Round negotiations. These negotiations are also addressing services liberalization, as well as elimination of relevant non-tariff barriers in the WTO Non-Agricultural Market Access (NAMA) negotiations. The Administration will also continue to press for a robust outcome in liberalizing trade in environmental goods and services, including goods and services related to renewable energy. On a regional level, the Trans-Pacific Partnership (TPP) also presents significant opportunities for increased market access in the energy sector, and negotiations with TPP countries are currently underway.

7. Some industry participants complain foreign markets uses domestic preferences for their government projects. Do you agree?

Domestic preferences arise in both government procurement requirements and in other government programs. Such domestic preferences are well documented in the clean energy sector. Until recently, China required that large wind farms in China use wind turbines that met a 70% local content requirement. China agreed to remove this requirement at the November 2009 U.S.-China Joint Commission on Commerce and Trade high level meeting, co-chaired on the U.S. side by the Department of Commerce and the Office of the U.S. Trade Representative. Canada's Ontario Province has imposed local content requirements that companies must meet to take advantage of new renewable energy feed-in tariffs which will impact U.S. renewable energy suppliers' market access. Brazil levies a 14% tariff on imported wind turbines.

India has placed far reaching local content requirements on implementation of its Jawaharlal Nehru National Solar Mission (NSM) which targets the installation of 20 gigawatts of solar energy by 2022. The NSM will be conducted in three phases. During the first phase it will be mandatory for projects based on crystalline silicon technology to use modules manufactured in India. During the second phase, it will be mandatory for all projects to use cells and modules manufactured in India. These restrictions will significantly limit U.S. export potential.

The United States is a party to the plurilateral WTO Agreement on Government Procurement (GPA) and bilateral and regional Free Trade Agreements. These agreements require the 52 countries that are parties to one of the agreements to to not apply buy local preferences with respect to the parties and procurement covered under the agreements. The parties are also required to apply to fair transparent and competitive procurement procedures for purchases subject to those agreements. Countries that are not party to either a U.S. FTA or to the GPA have made no commitments to the United States to not enact domestic preferences to meet specific economic objectives. U.S. Buy American provisions apply to U.S. procurements that are not subject to GPA or an FTA. Among our top priorities is expanding government procurement opportunities in foreign markets for U.S. businesses and their workers by expanding the countries that are party to the GPA and including similar commitments in future FTAs.

8. Are there any concerns that U.S. energy markets need to be opened to further competition as a reciprocal trade negotiation?

The fair and reciprocal opening of market access between two countries has generally had a net positive impact on the economies of both countries, regardless of the sector.

a. If our markets open to competing energy products, such as ethanol, how will that affect our net trade balance and jobs in the energy sector?

Any impact on the U.S. energy sector would reflect the reciprocal nature of trade negotiations, not just the further opening of the U.S. market, and can only be assessed in that context. Speculating on the specific impact of a hypothetical trade policy change is difficult, particularly

with respect to a specific product. However, bear mind that the ultimate goal in any trade negotiation is to increase productivity, worker compensation and living standards in the United States, and, in times of high unemployment, contribute to job recovery with growth in export-supported jobs.

b. Are jobs in the "clean technology" additive or substitute of existing jobs?

It is unclear what the question assumes is "clean technology". While it is difficult to draw a direct correlation between the addition of jobs in one sector and the reduction in a different sector, in general investments in clean energy technologies are a net positive job creator due to the fact that clean energy technologies have a higher labor intensity than traditional energy sources. To determine the degree would require an in depth study on the specific clean energy technology and its role in the broader production and consumption of energy.

c. At what point do clean technology jobs eliminate existing energy jobs and fail to be a net positive job creator?

To answer this question would require evaluating a specific investment in clean energy. In general, investments in clean energy technologies are a net positive job creator due to the fact that clean energy technologies have a higher labor intensity than traditional energy sources.

d. If clean technology exports increase to $40 billion and generate up to 750,000 jobs by 2020 as you state the Department of Energy estimates, what will be the loss of existing jobs cannibalized by the clean technology companies?

It is not clear how the expansion of exports would lead to a cannibalization of existing domestic jobs.

9. Of the $36.7 billion in Federal funds used from the American Recovery and Reinvestment Act directed towards clean energy technologies, how many new jobs were created? How many of the new jobs can continue without continued taxpayer support?

The Department of Energy administers the dispersal of ARRA funds directed towards clean energy. We would have to defer this question to the Department of Energy.

10. Your unit works to enhance the global competitiveness of U.S. firms. What are the biggest barriers to our firms being globally competitive? (e.g., regulatory, tax, labor costs, intellectual property rights/protection, etc.?) What domestic rulemakings most affect our companies' global competitiveness?

The barriers to competitiveness vary by industry, so it's difficult to cite one or a few barriers whose removal would help all U.S. firms become more competitive. One of the ways the government can improve competitiveness in any industry is to address market failures where they occur so that markets function the way they should. However, addressing market failures (for

example, through regulations) can have unanticipated side effects. MAS' Regulatory Affairs program works within the interagency process to ensure that the goals of such regulations are met without unnecessarily burdening U.S. competitiveness.

With respect to the U.S. clean energy industry in particular, barriers to competitiveness include lack of consistent domestic policy incentives to deploy clean energy technologies, lack of intellectual property protection in key markets, foreign incentives to manufacturers locating abroad, and generous government support for foreign exporters. As an example of the impact of this, the early lead that the United States held in renewable energy innovation in the 1970s and 1980s was lost to European and Japanese companies that benefitted from strong domestic markets.

11. Are our clean energy technology markets open to foreign competition and WTO-consistent?

Commerce works hard to help ensure that U.S. clean energy policies and programs are structured and implemented in a manner consistent with U.S. law and U.S. obligations under the WTO.

a. Do any foreign governments have energy related policies that are potentially countervailable or that have WTO-inconsistent subsidies? If so, which countries? What is the Administration doing about it?

As part of the National Export Initiative, Commerce has redoubled its commitment to utilize the tools at its disposal under U.S. law to confront unfair and illegal trade practices, including foreign subsidies practices that injure U.S. workers and companies. Commerce's Import Administration (IA) investigates potentially countervailable subsidies, including those that relate to a foreign government's energy policies, when it receives a properly alleged and supported allegation of such subsidies, consistent with U.S. law, by a US petitioning industry in the context of a countervailing duty (CVD) petition or investigation.

IA has received and investigated such allegations in CVD cases. Some recent examples, involving investigations of subsidized products from China, include the government provision of subsidized electricity to manufacturers, and the provision of loans and R&D assistance to promote energy-efficient manufacturing processes. In addition, IA has a Subsidies Enforcement staff dedicated to identifying and monitoring foreign subsidy practices, including those related to energy policies, to determine whether such practices are WTO-inconsistent or otherwise adversely impact the interests of U.S. companies and workers.

IA is currently tracking clean energy technology-related initiatives in various countries, including India, Canada, China and the EU. Working closely with the U.S. Trade Representative's Office, IA pursues resolution of such foreign practices, as appropriate, through a number of informal and formal means including, for example, bilateral government-to-government discussions, more formal engagement under the WTO's subsidy notification and monitoring process, or through a formal complaint under the WTO dispute settlement mechanism.

12. To qualify for an ITA-led trade mission, does a business need to be of a certain size and maintain existing exports to other countries? If so, does that indicate that the businesses has the competency to navigate foreign markets on their own?

The criteria for participation vary by trade mission. The trade mission statement always specifies the applicable criteria. The primary criteria for participation in Department of Commerce trade missions are suitability of the U.S. exporter's product or service to the mission's goals; their potential for business in the target market, including likelihood of exports resulting from the trade mission; and consistency of the applicant's goals and objectives with the stated scope of the trade mission. Generally, a U.S. company need not be of any specific size to be eligible to apply. Export experience requirements may vary. For some missions, based on the targeted sectors and markets, prior export experience has been required. Other missions have specifically encouraged participation by new-to-export companies. Prior experience in one market does not necessarily translate to ability to enter a new export market easily and independently.

13. You have stated that many firms face complex domestic regulatory requirements. What are these requirements and how can we reduce these burdens?

U.S. businesses must comply with a number of regulations promulgated by agencies in the executive branch, including those related to health, environment, safety, and security. MAS' Regulatory Affairs program works within the interagency process to ensure that the goals of such regulations are met without unnecessarily burdening U.S. competitiveness.

Renewable energy firms in particular face an array of federal, state and local regulations concerning siting, permitting, and electricity interconnection requirements. Creating standardized incentives, streamlined permitting requirements, and interconnection requirements would speed the deployment of clean energy technologies.

The Honorable Deborah Wince-Smith
President & CEO
Council on Competitiveness
Questions for the Record
Clean Energy Technology Manufacturing and Export Assistance Act

The Honorable Joe Barton

1. **Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?**

   The clean tech export fund proposed in H.R. 5156 offers significant job growth potential, however it cannot work in isolation. To maximize clean tech job growth, U.S. manufacturers must gain greater access to foreign markets. FTAs are a key way to penetrate these markets, and broaden American manufacturers' consumer base beyond our own borders. The clean tech export fund must be understood in the greater context of U.S. trade agreements and the geopolitical realities governing international trade. Job growth will occur as a result of the combined efforts of passing FTAs and advancing ideas like the clean tech export fund.

2. **You discuss in your testimony the importance of creating the right environment to manufacture at scale. But we all know that the United States has lost manufacturing jobs to foreign competitors in sectors ranging from textiles to consumer electronics. What makes you believe we can be competitive in the clean technology sector and that we will not lose jobs to countries with cheaper labor?**

   Production line manufacturing has been vanishing for decades from the American employment landscape for a numbers of reasons including greater efficiency and technology deployment. However, the clean tech sector demands a well-educated and highly skilled workforce, the type which will not be easily exported. In the recent Council-Deloitte Global Manufacturing Competitiveness Index, CEOs around the world identified talent driven innovation as the number one competitiveness driver. Though off-shoring may be tempting for low-wage low skilled manufacturing positions, world class firms cannot easily export high-skill clean tech jobs.

3. **You've stressed the need to capitalize on our position as a leader in high performance computing. How long will it be before competition threatens our leadership position in this area?**

   U.S. leadership in HPC is being challenges now. As of June, China possesses one of the most powerful supercomputers in the world, second only to the Cray Jaguar at Oak Ridge National Lab in Tennessee. Failure to not only retain, but actively expand our HPC capacity, both in

terms of development and deployment, will significantly inhibit America's ability to take advantage of the most advanced modeling, simulation and computing capacity.

4. **You have testified that we need to have the infrastructure in place to reap the value from our investments. Can you explain what you mean and your recommendations for capturing that value?**

Infrastructure affects the ability of firms of all sizes to compete and drives "site-ing" decisions from the smallest start-ups to the largest multi-national enterprises. A world class infrastructure must be a part of the American competitiveness equation. Specifically, increased electrical capacity and deployment of smart-grid technology are essential to the long-term competitiveness outlook for the U.S. With energy demands on the rise annually, we must take the steps now to ensure our electrical capacity is able to meet our nation's increasing needs.

Transportation and telecommunication infrastructures are equally important to our competitive outlook, as they are essential to move our nation's citizens, products and ideas.

We must have the best roads, railways and telecommunication networks to meet the needs of the professional and private sectors, and to attract the best and brightest workers, firms and industries. Our global competitors are aggressively developing world-class infrastructures, and we face the very real risk of losing talent and industry to countries who can simply offer a better set of tools with which to operate.

5. **You have stated that we need to incorporate manufacturing design into our considerations upfront in the innovation process. Do our labor and environmental regulations permit such new manufacturing capabilities?**

Favorable regulatory environments are key drivers of innovation, and contribute to the innovation ecosystem which must be in place to foster the most advanced, cutting edge technologies and goods. Incorporating manufacturing design is more a function of recognizing the evolving nature of what manufacturing is, rather than the need for any specific regulatory change.

6. **Your testimony quotes that "U.S. manufacturing of clean energy technologies lags behind its international competitors on almost all fronts." The quote goes on to reference that we have no capacity in high speed rail manufacturing. However, isn't that just one example of a technology we have been unable to fully utilize for a number of reasons that has left it as an unviable means of transportation?**

Yes. And there are a number of similar examples.

7. **Why have we fallen from first to fifth among top solar manufacturing countries and now import solar cells from Europe and Asia?**

Our country does not foster manufacturing solar cells at scale, nor does it incentivize the deployment of solar technology into our existing electrical infrastructure. The barriers are too great, and the costs are to high to move solar cells from development to production.

8. If revenue is expected to triple within the decade for wind, solar, and biofuels, why do we need to subsidize it in the U.S.?

To capitalize on the apparent boon from alternative energies, we must cultivate an environment that allows them to be developed and manufactured domestically. Scaling costs for any of the aforementioned technologies make unilateral private-sector action cost prohibitive.

More alarming, however, is the fact that other nations are embracing these technologies with increasing frequency and intensity. Through subsidies and favorable regulatory policies, nations like China are attracting the companies and scientists capable of driving the advancement of these technologies. The nations who lay the groundwork for widespread manufacturing of alternative energies in 2010 will be the ones reaping the economic benefits in 2020.

9. To what extent does the lack of strong IP protection threaten our ability to grow our exports?

As the global leader in innovation, strong IP protection means protecting one of our greatest assets. IP forms the foundations upon which products, and in turn firms and industries are built. Failure to protect this knowledge leaves our innovators and entrepreneurs vulnerable to foreign competition; competition which seeks to capitalize on the significant intellectual and financial resources we have invested at home.

10. You support the continuation of the Doha Round while simultaneously working to remove tariffs and non-tariff barriers without creating a dual track of trade liberalization. How do you suggest we do this and what hope do you have for the Doha round to be revived?

Advancing greater trade liberalization through the Doha talks is imperative for long-term economic growth in the United States. To compete with China, India and other population giants, we must have access to foreign consumers. A revival of the Doha round and removal of existing trade barriers, even in the absence of dual-track trade liberalization, are relatively straightforward means to reach this end, and are not mutually exclusive. My hopes for a revival of the Doha round are pinned to the increasing realization in the America and around the world, that trade liberalization is essential to reinvigorating the 21st century global economy in a significant and meaningful way.

11. You have advocated for financing support derived from 30% of carbon taxes. Wouldn't such a policy simply be shifting wealth from current to potential future manufacturers?

A price on carbon would be a dual innovation stimulant, by encouraging current manufacturers to seek new carbon mitigating technologies and providing funding for start-up enterprises who wish to enter the manufacturing space.

HENRY A. WAXMAN, CALIFORNIA
CHAIRMAN

JOE BARTON, TEXAS
RANKING MEMBER

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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July 13, 2010

Owen E. Herrnstadt
Director of Trade and Globalization
International Association of Machinists & Aerospace Workers
9000 Machinists Place
Upper Marlboro, MD 20772

Dear Mr. Herrnstadt:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on June 16, 2010, at the legislative hearing on H.R. 4678, the "Foreign Manufacturers Legal Accountability Act," and H.R. 5156, the "Clean Energy Technology Manufacturing and Export Assistance Act."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by July 27, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

1. Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?

> *A careful and comprehensive analysis should be conducted by government with respect to HR 5156 and all FTAs, including those that are proposed like KORUS and those that are already in force. The analysis should include careful attention to determining the number and kind of domestic jobs that will be (and have been) directly and indirectly impacted, as well as their location and duration.*

2. You raised several good points in your testimony, many of which you heard touched upon during opening statements. For instance, you highlighted the unlevel playing field on which our domestic firms play in other countries.

   a. You testified that the government must work to remove trade barriers in foreign markets. Could you expand on this point and make recommendations on how this can be accomplished?

> *Other governments have sophisticated offset policies that require the transfer of production and/or technology in return for a sale. The U.S. should be working multilaterally and bilaterally to curtail the use of these market distorting mechanisms.*

   b. If foreign markets remain closed to our products, then will this $75 million fund provide any benefit as we'll have no place to sell our goods? Is this an example of putting the cart before the horse?

> *Working toward opening markets and the goals outlined in HR 5156 can be undertaken at the same time.*

3. We've heard from several experts that many of the raw materials necessary for clean-tech manufacturing are either limited or non-existent here in the U.S. For instance, we have only one rare earth mine in the U.S. and it sat idle or under-produced for many years pending government approval to restart operations. We also have little to no domestic sources of heavy rare earth minerals. In your testimony, you raised a concern which I share—that unless we have access to domestic sources of these materials, we may simply subsidize our foreign competitors.

   a. If this is the case, how do we avoid using these taxpayer dollars to "facilitate this off-shoring of work," as you phrased the problem in your testimony?

> *The key is to use taxpayer money to create incentives for production of manufactured goods here at home. We should also examine our current policies to make certain that we are not using taxpayer money to encourage offshoring.*

b. Again, if our natural resources are either nonexistent or limited (due to either natural occurrence or administrative barriers), how would we determine what domestic content requirements should be as you have advocate in your testimony?

As reflected in my testimony, the definition and implementation of domestic content requirements throughout government are not transparent and not uniform. We should begin by making certain that domestic content as applied is strictly defined so that variables that are relatively easy to manipulate, such as marketing costs, are not included in domestic content calculations.

4. In your testimony you urged U.S. companies to make use of the assistance of the Ex-Im Bank. What value-added will this new fund/program have over and above what the Ex-Im Bank and the ITA provide?

The answer depends on how the fund is set up and implemented.

5. You suggest that "if enacted, the Bill would assist U.S. companies in exporting clean energy products and services." Yet, if natural resources are limited or non-existent and foreign markets are closed to us, how will this bill increase our exports?

I am not certain that I understand the question. My testimony focused on domestic manufacturing. The question may be best directed to the Bill's sponsors.

6. Recent reports indicate China intends to restrict exports of the vital rare earth elements. In doing so, it will reduce supply while demand climbs, thus pushing costs higher. Even if the Federal government begins to break down trade barriers to foreign markets, do you have thoughts on how domestic firms can become and maintain competitive pricing given rising component costs, particularly combined with the significant labor cost differential?

U.S. companies should be working to support the Federal government in eliminating trade barriers that have been created by other countries and in cooperating with trade enforcement. U.S. companies should also be exerting their influence to make certain that national laws reflect and enforce the ILO's core labor standards.

Jack Crawford Jr. Jadoo Power

The Honorable Joe Barton

1. Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?

   Crawford: I cannot say which have a greater economic impact or impact on job creation. However, in terms of specific affect upon small businesses producing clean energy products, I believe that the clean tech export fund will likely have a greater economic impact because it is focused specifically on this sector. Even with free trade agreements, we will not have leveraged the innovations and products of our small businesses effectively to take advantage of those FTAs. I believe a focus on clean tech entrepreneurship is a priority and must come first for us to be successful with exporting.

2. You testified that this bill will provide companies with export assistance to find new markets for clean energy products and services. Many trade experts identify trade barriers to foreign market access as one of the chief underlying causes of the trade deficit in this arena.

   a. If there is little to no access to open markets, and there are few to no level playing fields in markets that may be open to us, will the provisions of this bill create any significant benefits? Could taxpayer money be better spent?

      Crawford: I agree that trade barriers to foreign markets are an impediment, but export assistance is a benefit to small companies without the resources to identify specific foreign markets as a first step.

   b. Are we putting the cart ahead of the horse if we do not address market access first?

      Crawford: No because we need assistance to transform innovation into products before we can formulate a global go-to-market strategy.

   c. How will this bill address the problem of trade barriers?

      Crawford: It will not directly address the problem of trade barriers. However, having small companies well positioned to enter foreign markets will provide them with direction and focus to address the trade barrier issue. If we have domestic companies that are not equipped to address foreign markets, we have little to gain from removing trade barriers.

3. You testified that the bill will provide US firms with assistance to find new ways to reduce production costs, and promote innovation, investment and greater productivity. Yet, you also testified about your own success in these areas as a small alternative energy company.

a. Why should we spend taxpayer dollars on companies that do not possess the creative talents that are the keystone of success, those talents that companies such as yours possess?

Crawford: By assisting small businesses to reduce production costs, promote innovation, increase investment, and improve productivity, there will be additional motivation and momentum behind efforts to overcome the typical challenges of new market opportunities. Using the Internet as an example, taxpayer dollars supported the early years of innovation and now the US leads the world with products and services in this new market. It's clear to me that the US has this same opportunity with clean tech –and that the leadership will come from small companies that grow into big companies. It was venture-backed innovators like Google, Yahoo, and Facebook that led the way with "new media" in the Internet sector – not the large established media companies. I believe there could be global leaders created in the US focused on residential energy storage, commercially distributed wind generation, portable solar, and fuel-cell powered "green" generators in the coming years.

b. Are we simply subsidizing companies that are not the fittest in a survival of the fittest market?

Crawford: Many American companies have products that could be globally competitive, but do not have the ability to identify and address foreign market opportunities. In my opinion, the lack of access and resources to address foreign markets does not equate to lacking "fitness to survive". The stimulus funding has provided tremendous support to clean tech innovation – and this bill will help with productizing and sales in the global economy.

c. You testified that foreign suppliers may have inferior products but have subsidies and other government support, creating an unlevel playing field for your products. Along those lines, won't this fund just end up subsidizing your domestic competitors that do not possess the innovative spirit your company has demonstrated?

Crawford: Domestic competitors need to not only have access to foreign markets but they must also possess superior products. This fund will not help companies with inferior products compete in foreign markets – it will have a filtering process that enables the identification of the best products and companies in the US.

4. We have heard much about access to natural resources being a speed bump on this clean energy road. If we do not increase access to those domestic sources that exist, aren't we essentially subsidizing your competitors by forcing foreign sourcing?

Crawford: I believe that certain natural resources such as neodymium which is used to create high performance electric motors and generators are most abundant in certain foreign countries, and economically viable domestic

alternatives are presently not known to exist. Expanding domestic exploration for unknown deposits of such materials might be a more useful objective.

5. From your written testimony, it sounds like your chief concern is a lack of understanding on how the export process works. What would this new program do to educate firms such as yours that ITA does not already do?

Crawford: Our chief concern is creating a level playing field so that US companies have the same advantages in creating manufacturing capabilities as do our foreign competitors. While education is about the export process is important, we do not see it as the primary benefit of the new legislation. However, we are hopeful that a portion of the new legislation will direct some educational resources to small clean tech companies.

6. You and many industry observers have expressed concern over the state of intellectual property rights (IPR) and protections in other countries. At the same time, a number of advocates suggest this type of technology should simply be transferred to developing countries.

   a. Do you have any thoughts on how technology transfer could impact domestic clean energy producers?

Crawford: The simple transfer of our technology to foreign companies would not help domestic clean energy producers. Innovation protected by intellectual property rights is often the foundation and justification that attracts seed capital to new companies. As domestic companies explore selling their products internationally, a recurring concern is the lack of protection against a foreign company reverse engineering and replicating their product. We are strongly in favor of measures that would help to strengthen IPR in other countries.

   b. Do you have any thoughts on how we can address the concerns over IPR?

Crawford: We need to create agreements with foreign countries that require them to not only enact stronger IP protection laws but also require proper enforcement of those IP protection laws. In some way, we need to motivate foreign companies who ship products to the U.S. to encourage their own governments to strengthen their IP laws and enforcement procedures.

Anthony Kim, Policy Analyst, The Heritage Foundation

Follow-Up Responses Concerning
June 16 Hearing on *Clean Energy Technology Manufacturing and Export Assistance Act*

The Honorable Joe Barton

1. **Increased exports promise more jobs here at home. Given that, which will have greater economic impact and generate more jobs: the clean tech export fund proposed in H.R. 5156 or the FTAs on which this Congress has failed to act?**

   Free trade agreements will be far more effective in creating more dynamic and meaningful jobs in America than the proposed Clean Tech Export Fund. Our trade engagement with different parts of the world via three pending FTAs (with Panama, Colombia, and South Korea) ensures that American companies compete in the vivacious global market and expand their market shares.

   The Clean Tech Export Fund proposed in H.R. 5156 ignores and suppresses more practical trade policies that will transform solid economic opportunities into real gain. The bill seems to be rather short-sighted and wishful, only adding more government meddling into the private energy sector. Perhaps, a few jobs would be created in Sacramento CA, the "clean energy capitol of the U.S.," but the buck is likely to stop there, not able to spur more sustainable economic growth that would generate vibrant job creation.

2. **Would the $75 million dedicated in this bill be better served on trade missions devoted to opening foreign markets?**

   Absolutely. The bill's vague and ambiguous language does not specify where the money will actually end up and will possibly waste the taxpayers' money. Furthermore, the bill will likely have minimal effect on the creation of American jobs. By contrast, if the money were to be spent on trade missions devoted to opening foreign markets via freer trade, it lends itself to a much broader effects. Free trade leads to economic growth. This economic growth will spur job creation and its effects are not limited.

   The proposed bill may only create $75 million of jobs, products, etc. The end result could be $75 million dollars spent and probably little profit or economic growth will incur as a result of the bill. On the other hand, opening foreign markets via ratifying the currently pending FTAs will have much more extensive and dynamic effects. The possibility of economic growth and job creation will exceed far more than $75 million. The long term, positive effects of sustained economic growth through trade will far outweigh the minimal short term gains in job growth in a particular sector.

3. **You testified that "our strategy must be driven by real market conditions, not by government financial assistance."**

   a. **Can you please expand on what you mean by "real market conditions?"**

Anthony Kim, Policy Analyst, The Heritage Foundation

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A strategy driven by "real market conditions" harnesses the power of free markets so that buyers and sellers may make deals without government interference. Real market conditions encompass a free market system in which decision makings regarding production, consumption, resource allocation, and price levels are conducted by natural market interactions based on supply and demand.

This spurs competition, innovation and new products. Additionally, the system naturally identifies markets that consumers want and could be tapped into. Minimal government intervention encourages competition and greater innovation, benefitting both producers and consumers. History shows us that free market systems are highly effective in promoting vibrant economic growth.

b. **Please explain why this new fund is not compatible with either "real market conditions."**

The proposed Clean Tech Export Fund is not compatible with these real market conditions because it does not encompass many aspects listed above. Government allocation of funds interferes with the full realization of the power of free markets. Subsidies, which would inevitably be the focus of the funds, often lower incentives to increase the subsidized firm's competitiveness (i.e. become more innovative and lower prices), making them more dependent on subsidies. Choosing to award certain companies with government funds discriminates against potentially more innovative firms that would otherwise have been effective sources of economic growth and job creation.

4. **You referenced existing government resources for investment, technology development, and exports. What are those existing resources and who offers them?**

A variety of agencies help companies in the private sector to increase technological developments, investments, and exports. For example, some effective government resources already exist in the Department of Commerce. Various technical assistance programs on the promotion of export and investment is available in the department. The U.S. Commercial Service gives American companies a state-by-state and city-by-city Export Assistance Center. This sector of the Department of Commerce is solely for the purpose of helping U.S. companies to export. They provide consulting, market research, trade finance, advocacy, and help companies find potential customers and partners.

5. **What value-add will this new fund have over and above what the Ex-Im Bank and the ITA provide?**

The Ex-Im Bank provides financing to support U.S. exports, and its support for environmentally beneficial exports has been of long-standing congressional interest.

Anthony Kim, Policy Analyst, The Heritage Foundation

Follow-Up Responses Concerning
June 16 Hearing on *Clean Energy Technology Manufacturing and Export Assistance Act*

Currently, Congress directs the Ex-Im Bank to allocate 10 percent of its annual financing to renewable energy, energy efficient end-use technologies, and other environmentally beneficial exports.

The ITA is committed to helping U.S. industries and firms enhance their competitiveness in exporting green technologies. From working with US manufacturers to improve the energy efficiency of their operations to hosting industry events on low carbon energy sources, The ITA is actively involved in assisting U.S. interests aspiring to take advantage of the green energy market.

The proposed Clean Tech Export Fund seems to be redundant in the sense that both the Ex-Im Bank and the ITA address relatively the same interest that the fund aims to focus on. Without adding any meaningful values, the fund intends to offer financial assistance to American clean energy firms, perhaps more specially than the Ex-Im Bank or the ITA. However, it cannot be denied that the similar assistance is also reflected and implied in the functions of both the Ex-Im Bank and the ITA.

6. **You testified that liberalization of trade is one of the keys to decreasing our trade deficit in this arena.**

   a. **What are the most common trade barriers?**

      The most common trade barriers include basic tariffs and nontariff barriers that include quotas, import licensing, export subsidies, and other numerous customs/administrative impediments to free trade.

   b. **What is our government currently doing to address such barriers?**

      Through various trade pacts over the years, the U.S. has been trying to dismantle various trade barriers. At the same time, the U.S., like other countries, utilizes other mechanisms in the World Trade Organization in order to address trade impediments.

   c. **Do you have any recommendations on what we should do to address those barriers?**

      The U.S. needs to be more proactively involved in dismantling trade barriers by demonstrating leadership in global free trade. Getting rid of price-distortive subsidies is certainly a right step towards ensuring freer trade.

7. **In addition to closed foreign markets, we have heard the two other primary stumbling blocks to increased exports are diminished or no access to domestic natural resources and the significant trade differential between the U.S. and foreign competitors. Could you please expand on those points?**

Anthony Kim, Policy Analyst, The Heritage Foundation

Follow-Up Responses Concerning
June 16 Hearing on *Clean Energy Technology Manufacturing and Export Assistance Act*

The government has imposed many onerous regulations that restrict our ability to tap into our own natural resources. Because of the restrictions imposed by the government, domestic production that requires those natural resources has become more costly. The United States, though blessed with enormous supplies of natural gas, oil, and other energy sources, suffers from high prices because of government imposed restrictions. When these prices become too high, American firms turn to a cheaper source: foreign resources. Since we cannot use our own resources cheaply, we import them from other countries and force ourselves to become more dependent on them. This not only increases imports, but has also undermined future economic growth, ultimately creating domestic job loss.

8. **If we do not increase access to domestic sources of natural resources – at least those that exist in the U.S. – required by so many of the clean energy technologies, do we risk essentially subsidizing our foreign competitors by forcing foreign sourcing? What is the likely net effect of this scenario on the trade deficit in this arena?**

If we do not increase access to domestic sources of natural resources required by so many of the clean energy technologies, we absolutely risk subsidizing our foreign competitors by forcing foreign outsourcing. If government restrictions result in outsourcing to foreign competitors, our trade deficit will grow. A clean energy technology company requires natural resources in order to function. They must get them somewhere. Government restrictions inhibit domestic resource procurement, causing prices to increase. U.S. companies import foreign resources because they are the cheapest option. Even if clean energy companies will be able to export their products eventually, they will have to import the resources necessary to create the final products. Because energies such as oil and natural gas are more efficient than current clean energy, the current trend of importing natural resources will continue until the value of clean energy is greater than traditional fossil fuels. Only the free market can signal this relationship through prices, and subsidizing green energy interferes with these market forces.

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S. HRG. 111–1106

OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION: PRODUCT SAFETY IN THE HOLIDAY SEASON

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

DECEMBER 2, 2010

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OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION: PRODUCT SAFETY IN THE HOLIDAY SEASON

THURSDAY, DECEMBER 2, 2010

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washingtan, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m. in room SR–253, Russell Senate Office Building, Hon. Mark Pryor, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS

Senator PRYOR. I will go ahead and call our hearing to order here, in the Consumer Protection, Product Safety, and Insurance Subcommittee, on the oversight of the Consumer Product Safety Commission.

I want to join my—I want to thank my fellow Senators for joining us today—and I want to join all my fellow Senators in thanking the Commission and the other witnesses for being here today. We really appreciate your time and your attention to these very important issues.

This is a timely discussion, in light of the current holiday shopping season, a time when the safety of products on store shelves is paramount.

I'd like to express my gratitude to Chairman Rockefeller for allowing me to hold this hearing, and to his excellent staff for all the great things that they've done in preparation of this, and also, of course, of the minority staff, because they've been great to work with, as well.

Each year, billions of toys are purchased by consumers and end up in the hands of children. Unfortunately, not all these toys are safe. Last year, 12 children died as a result of injuries related to toys, and thousands ended up in emergency rooms. While it's difficult to prevent all such injuries, it is the mission of the Consumer Product Safety Commission to protect the general public against unreasonable risk of injury and death associated with toys and other consumer products, and to assist consumers in evaluating the comparative safety of those products.

Each year, on average, over 28,000 deaths related to consumer products under the agency's jurisdiction occur. Researchers esti-

mate the cost of deaths, injuries, and property damage associated with consumer products totals more than $800 billion annually in the United States. Consequently, the importance of this agency and the efforts to reduce these statistics while building safer communities and a safer marketplace cannot be overstated.

I welcome the new leadership of the Consumer Product Safety Commission. Chairman Tenenbaum took the helm in June 2009, and, since then, she's demonstrated impressive initiative and energy in implementing the law and addressing product safety problems. I look forward to hearing her testimony and exploring activities under her direction.

Just last week, the Commission voted to adopt a final rule establishing the CPSC's publicly available product safety information database, as mandated by Congress. A repository of consumer complaints and incident reports, the database is designed to grant all of us timely access to critical product safety information, allowing us to scan for trends or patterns of potentially hazardous product in the marketplace.

As one of the lead authors of the database revision and the law, I support the Commission's final rule, and I'm pleased that the Commission has crafted the rule in a manner that will make this information available widely to the general public. In particular, I endorse the Commission's effort to empower all consumers who have verified information regarding a product safety hazard to report that incident.

I applaud Chairman Tenenbaum's leadership in this area, which is in keeping with congressional intent behind the provision to maximize reporting of product safety incidents and to make this information accessible to the general public as quickly as possible. And I look forward to its official launch in March 2011.

Just as a reminder: Before the Congressional overhaul, the CPSC was an agency in distress. Its staffing levels and funding levels had been choked, over time. On numerous occasions, it lacked a full quorum of commissioners, inhibiting its ability to conduct important official business. Public notification of public hazards was inadequate. The marketplace was replete with dangerous and, in many instances, toxic products that were compromising the safety of American families, not least of all our children. By 2007, news reports were exposing millions of defective toys in the stream of commerce: lead-tainted children's jewelry; tiny magnets posing ingestion hazards; Aquadots that converted to the date-rape drug, once ingested. The CPSC was slow to act to protect Americans, and it was only after newspapers shown a spotlight on infant deaths and injuries that the Commission chose to take action.

Congress, and in particular this committee, responded to the crisis in product safety by overhauling the agency, granting it essential new tools and authorities to enable it to properly execute its mission and protect members of the public. The Consumer Product Safety Improvement Act was the first significant overhaul of the federal Consumer Product Safety laws since the CPSC's inception.

I'd like to now turn it over to the Ranking Member, my neighbor and friend from Mississippi, and say that we look forward to revisiting the CPSIA over the course of this next Congress. And we always have open doors to listen to industry and advocacy groups, to

talk about some of the—maybe some of the things we got right and some of the things maybe we didn't get so right when we passed the legislation.

But, Ranking Member Wicker, thank you for being here. Look forward to your opening statement.

STATEMENT OF HON. ROGER F. WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Thank you, Mr. Chairman. And thank you for that concluding statement, which I think is very valuable and helpful. And I do look forward to revisiting this issue during the next Congress, should you and I be allowed to continue in this capacity. And thank you for holding this hearing.

The CPSC is a small agency with a large but important mission: to regulate more than 15,000 consumer products, keeping the public safe from preventable injuries and deaths caused by unsafe and defective products. As the title of our hearing suggests, we are especially reminded of the importance of this charge during the increased consumer buying that comes with the Christmas season. I thank the Chairman for taking this opportunity to provide oversight and for his commitment to consumer safety.

The CPSC is currently involved in many areas that affect American consumers. From its efforts looking into dangers in certain types of cribs to the continuing investigation into tainted drywall that has significantly impacted many of my constituents, there are many Commission activities which deserve our attention. However, for the last 2 years nothing has dominated the Commission more than the implementation of the CPSIA. The CPSIA was enacted in August 2008, largely in response to concerns over numerous toy recalls for violations of existing lead limits in paint. It represents the most significant changes to the Commission's regulatory environment since it was first created.

The intention was a noble one that I think we all support efforts to improve safety. The law attempts to do so by tightening the regulations over children's products, focused primarily on reducing the content of lead and phthalates. Unfortunately, despite the hard work that was put into the law and the Commission's efforts to implement it, the result has not been what was intended.

The last 2 years have seen this law increase costs and create uncertainty for businesses, requiring significantly increased compliance requirements and unnecessary testing of "safe" products. Some affected businesses report that, prior to the CPSIA, they were responsible for complying with less than 200 pages of rules, but now that number has grown to nearly 3,000 pages. From 200 to 3,000. This will continue to increase as more rules are implemented and rewritten.

For many small businesses, the burden is overwhelming and the cost of trying to comply is simply too much to bear. During a time when unemployment, nationally, hovers near 10 percent, our government should be doing everything possible to promote job creation along with safety. This law has had the exact opposite effect, particularly on small business. The CPSIA has reduced the ability of many businesses to make a profit and create new jobs.

Our second panel today includes Jill Chuckas, who will testify on behalf of the Handmade Toys Alliance, the HTA, about the impact on their members. The HTA provided us with a document called CPSIA Business Casualties, which lists 24 small businesses that cited CPSIA as their reason for closing down, and 11 others that cited the CPSIA as one of the factors in their decision to close.

We will also hear about the numerous other businesses that have barely been able to continue operating under the bill's requirements, many of whom will be forced to close in the next year as different provisions of the law come into effect. Further, the CPSIA has reduced the incentive to innovate and invest in new markets, because it increased the cost of doing business through burdensome and expensive testing requirements.

Another list, compiled by one business feeling the burden of this law, shows 22 different small businesses that have dropped children's product lines because of this Act, limiting computer—consumer options and eliminating jobs.

Neither of these lists includes every business that has been affected. They are simply a small representation of the negative effect of the CPSIA on businesses. These numbers are particularly troubling because the impact has mostly been felt by businesses and products that are not, and have never been, a threat to child safety.

One of the primary concerns with the bill remains its removal of the Commission's ability to use risk assessment in their determinations. Even if the Commission determines that a product is not harmful, no exemption for a product that could result in the absorption of "any" lead, can be used.

I'm concerned with the upcoming end to the stay on third-party testing and the next reduction and retroactive application of the lead standard. Both of these will have significant impacts on small businesses.

I also hope to discuss, with Chairman Tenenbaum and Commissioner Northup, certain decisions that the Commission has made in implementing the law. In some places, where the law actually does allow flexibility to provide needed relief, the Commission has instead chosen to expand the law's reach and requirements, further complicating an already confusing set of rules and regulations. The application of third-party testing under certain general product safety rules the definition of a "children's product," and last week's implementation of the database are three such examples.

While concentrating on the Act, it is easy to forget that, along with these mandates, CPSC must still fulfill the rest of its charges and address other defective products that appear in the marketplace. We need to make sure that the Commission's resources are being used appropriately and are not being forced to focus solely on implementing this law, to the exclusion or detriment of the Commission's other important work. I'm very interested to hear how the CPSC is coping with this challenge.

So, thank you all.

And thanks, to our witnesses, for agreeing to appear tnday and sharing their expertise with us.

I look forward to a productive hearing.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.
Senator Udall.

STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Pryor. And thank you very much for holding this hearing today, and for your leadership in consumer protection.

I think all of us remember the notorious "summer of recalls" and all the problems with imported toys. And, thanks to your efforts, and especially the landmark 2008 Consumer Product Safety Improvement Act, parents can have more confidence, this holiday season, that their children's toys are safe.

While we still had plenty of other recalls this summer, I'm pleased that there is a new emphasis on consumer protection and new leadership at the CPSC.

It's good to see CPSC Chairman Tenenbaum here, and Commissioner Northup, who I served in the House of Representatives with. I think they're both here for the first time since Senate confirmation. And it's good to have you here today with us.

I look forward to hearing about the implementation of the 2008 consumer safety legislation.

There is one issue, though, that I would like to focus on, and I'll be more indepth on it in my questioning, but I wanted to raise a pressing safety issue affecting millions of young athletes. And that's the issue of football helmet safety. It's an area where I think the CPSC could help improve children's safety. And I'll get—as I said, I'll get into more detail of that in my questioning.

But, I want to thank our witnesses today, and thank Senator Pryor once again for this hearing.

Senator PRYOR. Thank you, Senator Udall.

Both of our witnesses on the first panel have long and very impressive resumes. But, what I'd like to do, with the Committee's indulgence, is dispense with the reading of those resumes and just stipulate that they're very well qualified and we're very honored to have them here today. But, we have chairman of the Consumer Product Safety Commission, Inez Tenenbaum; and then we have one of the newer commissioners, Anne Northup.

So, Chairman Tenenbaum, would you mind leading off?

Thank you.

STATEMENT OF HON. INEZ M. TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Ms. TENENBAUM. Good morning, Chairman Pryor and Ranking Member Wicker, members of the Subcommittee on Consumer Protection, Product Safety, and Insurance.

I'm pleased to have the opportunity to testify before the Committee and share with you what the CPSC has done over the past year to make this holiday shopping season safe for families and safe for children. I will provide more details later in my remarks, but parents and consumers should know that there are new safeguards in place that give them more confidence in the children's products for sale, and that they have fewer hazards than in the past.

Since becoming the Chairman of the CPSC in June 2009, I have focused on specific goals that I want to share with you:

The CPSC has focused on fair and effective implementation of the CPSIA. In less than 2 years, the Commission has published more than 50 rules and interpretive policy statements implementing the CPSIA.

Strategic planning. We recently released the Commission's new 5-year strategic plan, which lays out nur goals and objectives that will allow the CPSC to establish itself as the global leader in consumer product safety.

The Commission has created a new Office of Education, Global Outreach, and Small Business Ombudsman to provide various stakeholders, domestic and international, including manufacturers, retailers, resellers, small business, and foreign government, more information. We will have a full- time small-business ombudsman, who will be dedicated to serving the nation's many smaller manufacturer, in the area of product safety.

The Commission's import surveillance division is working more closely with Customs and Border Protection to keep dangerous products out of the United States. The CPSC has increased the number of employees at the ports of entry from 5 to 19, located in 15 different ports.

In addition to these efforts to expand the overall capabilities of the CPSC, we have also focused substantial resources on several specific hazards.

One of the most important is addressing hazards in the infant sleep environment. By the end of this year we will have a new cribs safety rule that will prohibit dangerous drop-side cribs from ever being sold again in the United States. The new standard requires higher quality wood and hardware.

We also have continued our efforts to implement and enforce the Virginia Graeme Baker Pool and Spa Safety Act. Earlier this year, the CPSC kicked off its Pool Safely education campaign, as part of a national effort to reduce child drownings and entrapment in pools and spas. During this past year alone, there have been more than 100 million views of broadcasts and print materials relating to the Pool Safety campaign.

The CPSC is also aggressively continuing efforts to provide relief to homeowners impacted by contaminated drywall. Since becoming the chairman, I have personally visited impacted homes in Florida and Virginia and know the frustration these homeowners are facing. To deal with this, the Commission has conducted the most extensive investigation in history. And I look forward to sharing that with you later on in our question and answer period.

Finally, we have redoubled our efforts to provide rapid response to new and emerging hazards; we have taken aggressive action to police the market for children's products that may contain harmful levels of cadmium. And we will also be glad to share that in detail with you later.

IT modernization. In March 2011, we will also unveil our new public database on the safety of consumer products, which was mandated by the CPSIA. The database will provide a powerful source of information for consumers, allowing them to quickly de-

termine whether the products they already own or are considering purchasing are associated with safety hazards or recalls.

In this holiday season, the true measure of our success at the CPSC is how we can help a young mother or father, who's out shopping for toys, a crib, or a highchair, find safe, reliable consumer products. Here's what the CPSC can promise them: that the toys they buy are now covered by mandatory safety standards; that the lead content and lead paint limits for toys and children's products are among the lowest in the world now; that children's products are now required to be tested for lead by an independent, third-party laboratory; that the infant bath seats and baby walkers they buy are now covered by mandatory safety standards; that the most durable in infant/toddler products, such as cribs, strollers, and play yards, now have to have postage-paid registration cards so that the consumers can fill out and return to be automatically notified for future recalls involving these products; that all children's products, to the extent practical, now have to have tracking labels that make it easier for parents to determine if a product is subject to a recall, even long after the packaging is thrown away.

And, Mr. Chairman, in the past 18 months, we have made the CPSC into a regulatory agency that consumers can trust. We are putting the interest of families first in making sure that the public knows that the CPSC stands for safety.

Thank you again for allowing me to provide this testimony today. I now look forward to answering any questions that you or members of the Subcommittee may have.

[The prepared statement of Ms. Tenenbaum follows:]

PREPARED STATEMENT OF HON. INEZ M. TENENBAUM, CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Good morning, Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee on Consumer Protection, Product Safety, and Insurance. I am pleased to be here today to provide an update to the Subcommittee on the specific actions the U.S. Consumer Product Safety Commission (CPSC) has taken over the past 18 months and the progress we have made to protect American children and families from both existing and emerging product safety hazards.

In August 2008, Congress passed the Consumer Product Safety Improvement Act of 2008 (CPSIA) by overwhelming bipartisan majorities. Passage of the CPSIA sent a strong message to both the Commission and the consumer product manufacturing community: the old, reactive approach to consumer product safety was not working. Instead, CPSIA directed the Commission to pursue a new proactive approach focused on keeping harmful products out of this country and—most importantly—out of the hands of infants and children.

Chairman Pryor, I know you and many other members of this Subcommittee spent untold hours working on this landmark legislation. Since assuming the Chairmanship of the Commission in July 2009, I have worked diligently to implement the CPSIA and use that Act's new authorities in a manner that is both highly protective of consumers and fair to industry stakeholders. In addition, I have focused on changing the CPSC's internal business processes, so that the ageucy is more assertive and more capable of addressing safety challenges presented by thousands of types of consumer products imported from all over the world.

Here are some specific examples of these efforts:

CPSIA Implementation: In less than 2 years, the Commissiou has published more than 50 rules and interpretive policy statements implementing the CPSIA. These rules included the implementation of several significant provisions of the CPSIA, such as uew durable infant and toddler product standards, uew product registration cards that accompany many juvenile products, and implementation of new mandatory toy safety standards. As part of this process, the Commission has also issued several policy statemeuts designed to provide additioual infor-

mation on CPSIA requirements to the regulated community, including small businesses.

New CPSC Strategic Plan: During my confirmation hearing last summer, I noted that one of my key goals for the Commission was to align its priorities to the challenges we face in the global economy. To address this, the CPSC launched a comprehensive strategic planning initiative earlier this year to npdate the Commission's ontdated 2003 Strategic Plan. Ont of this effort, we recently released the Commission's new 2011–2016 Strategic Plan, which lays ont five key goals and also details programmatic objectives that will allow the CPSC to establish itself as the global leader in consumer product safety.

New Office of Education, Global Outreach and Small Business Ombudsman: As Chairman, I have heard from many small businesses and crafters who have asked for additional ontreach and snpport from the Commission as they work to produce safe prodncts and comply with the reqnirements of the CPSIA. I take these concerns very serionsly, and have made providing snpport and ontreach to small business entities and other industry stakeholders a key priority.

On September 22, 2010, the Commission voted to create a new office to coordinate and provide outreach to varions domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, and foreign governments. Within this office, we have a full-time Small Business Ombudsman who is dedicated to serving the nation's many smaller manufacturers in the area of prodnct safety. In particnlar, special attention will be given to developing information tailored to small businesses and small batch manufacturers so that they can understand and comply with new standards.

Hazards in the Infant Sleep Environment: The overall safety of cribs and the infant and toddler sleep environment is a critical concern of the CPSC and a personal priority of mine. Parents across the country expect cribs to be a sanctuary for their children, regardless of price or size. Unfortunately, that is not always the case. In the past 9 years, there have been at least 32 deaths attributed to drop-side crib failures. That, in and of itself, is a tragic number. However, the majority of crib deaths are still directly linked to the use of snft bedding in the crib.

To address this, I directed Commission staff to embark on a two-prong action strategy. The first prong was to recall old, dangerous drop-side cribs in the marketplace and promulgate new mandatory crib safety rules that will prohibit dangerous drop-side cribs from ever being sold again in the United States. I am pleased to say that the Commission is cnrrently in the final process of reviewing a new mandatory crib safety rule, and it should be approved by the end of the year. This is a promise I bave made to parents across the country.

The second prong of this initiative is education: teaching parents and caregivers how to keep the inside of cribs free from suffocation risks like stnffed animals, comforters, and pillows. In partnership with the American Academy of Pediatrics and a child advocacy gronp called Keeping Babies Safe, we have a wonderful new Safe Sleep video that we are working to have shown in maternity wards and pediatrician's offices aronnd the country. This video is currently available on the CPSC's website, and I urge Members of the Subcommittee to view the video and see its powerful message.

Import Surveillance: Traditionally, the Commission has spent the bulk of its resources investigating harmful products in the marketplace. This will always form a substantial part of the CPSC's activities, but I believe the more effective approach is ensuring that harmful products never even enter the country.

To that end, I have taken a number of steps to add additional technological and human resources to the Commission's Import Surveillauce Divisiou. This Division works directly with the Department of Homeland Security (DHS) aud Customs and Border Protectiou (CBP) to keep dangerous products out of the Uuited States.

Ou the technological side, the CPSC recently executed two interagency Memorandums of Understanding (MOUs) with CBP that allow us to access additional "real time" importer information, and target the most dangerous incoming shipments. The first of these MOUs, signed in April, allows CPSC personnel to work at CBP's Commercial Targeting and Analysis Center (CTAC) in Washington, D.C., and access manifest entry data collected by CBP. This, in turn, allows Import Surveillance Division personnel at the ports to target high-risk shipments prior to their entry into the domestic stream of commerce.

The second MOU, signed with CBP this past August, gives the CPSC access to information in the Treasury Enforcement Communications System (TECS). This will assist CPSC Import Surveillance staff at the ports by providing them with additional information to improve local targeting and interdiction of dangerous products.

The CPSC is also actively involved in supporting the Importer Self Assessment—Product Safety (ISA–PS) initiative that is currently being piloted by CBP. The ISA–PS is intended as a partnership between CBP, CPSC, and importers to ensure product safety compliance. It is based on a voluntary approach that provides meaningful benefits for importers who demonstrate readiness to assume additional responsibility for managing and monitoring their own product safety compliance.

We have also taken steps to increase CPSC's physical presence at ports of entry. In Fiscal Year (FY) 2008, the Import Surveillance Division only had five full-time employees (FTEs), and of those only three FTEs were actually stationed at ports of entry. During FY 2010, we expanded staffing in the Division to 18 FTEs, with 14 FTEs actually stationed at ports of entry. I am very pleased to announce that, as of November 11, 2010, the Division now has 25 FTEs, with 19 FTEs collocated at 15 different ports of entry. Subject to appropriations, we hope to put CPSC staff at even more ports of entry in the future.

Putting more "cops on the beat" has already yielded substantial positive results. In FY 2010, we performed 6,953 screenings at ports, collected 1,776 samples for testing, and of those found 987 that violated CPSC standards. At the same time, we have also seen the number of recalls start to drop—from 563 in FY 2008 to 428 in FY 2010. Maintaining those positive trends is a key goal for the upcoming year.

Pool and Spa Safety: Earlier this year, the CPSC kicked off its "Pool Safely" education campaign as part of a national effort to reduce child drownings and entrapments in pools and spas. As part of this campaign, we partnered with families who lost their children in pool and spa accidents and Members of Congress at events in Florida, Texas, Minnesota, and Washington, D.C. to spread the word that simple safety steps can save lives in and around the water. We also unveiled a new website, *PoolSafely.gov,* as well as new public service announcements to provide the public with information aimed at preventing child drownings and entrapments, as well as educating public pool and spa operators about the requirements of the Virginia Graeme Baker Pool and Spa Safety Act (Pool and Spa Safety Act). During this past year alone, there were more than 100 million views of broadcast and print materials related to the Pool Safely campaign.

In addition to education and outreach, we have also conducted an extensive series of inspections to verify compliance with the Pool and Spa Safety Act. In 2010, the CPSC entered into contracts with local health departments in a number of states, including Florida, Missouri, Kentucky, and Washington, to conduct public pool inspections. Under these contracts, 2,440 pools, spas, wading pools, and water activities at 1,557 sites were inspected. I am pleased to announce that the compliance rate observed was approximately 89 percent, which is higher than the rate observed last year. It also demonstrates that the Commission's outreach, education, and enforcement efforts are having a meaningful effect in the overall effort to prevent pool and spa deaths and injuries.

Contaminated Drywall Investigation: The Commission is aggressively continuing its efforts to provide relief to homeowners impacted by contaminated drywall. Since becoming Chairman, I have personally visited impacted homes in Florida and Virginia and know the frustration that these homeowners are facing.

To deal with this issue, the Commission has conducted the most extensive investigation in its history. As a result of the science produced by this investigation, the Commission, working in conjunction with the Department of Housing and Urban Development, released impacted home identification guidelines in January as well as interim remediation guidance this April. These guidelines have allowed some of the impacted homeowners to start repairing their homes and rebuilding their lives.

To assist in those efforts, the Commission worked with the Internal Revenue Service on a recent Revenue Ruling declaring that contaminated drywall is eligible for a casualty loss. The CPSC's scientific data was also used as part of a recent partial settlement agreement in the Drywall Multi-District Litigation (MDL) in New Orleans, Louisiana. Under the terms of the partial settlement,

a demonstration remediation program has been established that will remediate problem drywall for np to 300 homes in Alabama, Florida, Lonisiana, and Mississippi that contain drywall prodnced solely by Knauf Plasterboard Tianjin.

At the same time, however, I know that these initiatives will not help all of the impacted homeowners. For that to happen, we need the foreign manufacturers involved to come to the table and do the right thing to assist homeowners. On October 26, I personally discussed this issue with Zhu Shuping, Minister of China's General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) during the Second Triennial United States—European Union—China Product Safety Summit in Shanghai, and remain optimistic that Chinese manufacturers will come to the table to resolve this matter. I also appreciate the efforts of several members of this Subcommittee, including Senators Nelson, Warner, Wicker, and Vitter, to provide assistance on this issue.

Rapid Response to New and Emerging Hazards: The Commission has increased its efforts to provide a rapid response to new and emerging hazards. One example of this response is the CPSC's efforts to stop the use of toxic metals in children's products. Earlier this year, it came to our attention that some foreign manufacturers might be using cadmium or other toxic metals as an effort to get around the lead limits for children's prodncts. I sent a strong message to Asian manufacturers and regulators that this was unacceptable and that we would not allow there to be an influx of prodncts with cadmium like we saw a few years ago with lead. The Chinese government sent out a directive a few weeks later on cadminm that used language similar to mine. It appears that we have stayed ahead of this issue.

Despite this early success, however, the Commission will remain vigilant in this area. In response to the possible threat, the CPSC has taken aggressive action to police the market for children's products that may contain harmful levels of cadmium. In addition, Commission staff recently released a guidance document providing Acceptable Daily Intake (ADI) limits for cadmium. We also sent this document to several standards setting bodies—including the Committee that oversees the ASTM F963 toy safety standard—with instructions to take action on this issue. In the coming year, we will also look at the use of other toxic metals such as barium and antimony, and the CPSC will not hesitate to take further action in this area if voluntary efforts prove insufficient.

The year 2010 has been extremely busy for the Commission, but we are not done with our work. As we enter the heart of the boliday shopping season this year, we will remain vigilant to identify hazardous products in the marketplace. In December, we also hope to roll out the first part of our new and improved *CPSC.gov* home page, which will make it easier than ever for consumers to find information on product recalls and common sense tips to keep their families safe.

In March 2011, we will also unveil our new publicly available database on the safety of consumer products, which was mandated by section 212 of the CPSIA. This database will provide a powerful source of information for consumers, allowing them to quickly determine whether prodncts they already own, or are considering purchasing, are associated with safety hazards or recalls. It will also allow consumers to play a critical role in safety by empowering them to report potential product hazards directly into the database.

I recognize that the rollout of this database has caused concern among some in the manufacturing community who believe that it will present "unfiltered" information that will be harmful to the business community. I want to assure this Subcommittee that CPSC staff has worked tirelessly to address these concerns and to ensure that the database is fair to all stakeholders while also fulfilling the intentions of Congress.

First, the database will not include reports of harm submitted anonymously. Any reports filed must include contact information for the CPSC's internal use. Second, the CPSC will give the product manufacturer 10 business days to respond to a report of harm, to provide comment on the report, and to let the Commission know if the submission contains confidential or materially inaccurate information. The rule also requires the Commission to remove or correct information in the database it has determined to be materially inaccurate within 7 business days. Manufacturers also have the right to comment on the reports and to have those comments as part of the publicly accessible record.

At the same time, however, I think it is important to provide a reminder of just how critical a resource this database will be for consumers. Rather than use my words, I would like to repeat the words of Lisa Olney, whose daughter died in a defective portable crib just after her first birthday in 2002. Ms. Olney posted the following on the *Kids in Danger* web blog:

> On December 19, 2002, my daughter Elizabeth, just 13 months old, died in a poorly designed play yard. I live my life often looking back through "what ifs" and "should haves," but I've learned to give most of that up in order to save myself from being a horribly miserable individual. Instead, I realize the importance of focusing on efforts to protect our children so that no parent has to suffer what I have, along with too many other victims of unsafe children's products. The CPSC database is going to protect millions of children, because it provides a place to go when considering the choices parents make when purchasing products, especially those products intended to be beueficial to our childreu's safety.

This database will prevent injuries and save lives. Congress recognized this when it added section 212 to the CPSIA, and I look forward to seeing this important tool implemented next March.

Finally, I realize that a lot of the issues I just discussed are fairly technical and involve internal Commission operations. In the end, I know the true measure of success is how each of these items will help the young mother or father find safe, reliable consumer products as they are out shopping this holiday season for a crib, high chair, or toys.

Here's what the CPSC promises them:

- the toys they buy are now covered by mandatory safety standards;
- children's products are now required to be tested for lead by an independent, third-party laboratory;
- the infant bath seats and baby walkers they buy are now covered by mandatory safety standards;
- most durable and infant toddler products, such as cribs, strollers, and play yards, now have postage paid registration cards that consumers can fill out and return so they can be automatically notified of any future recall involving these products;
- all children's products, to the extent practicable, now have tracking labels that make it easier for parents to determine if a product is subject to a recall—even long after the packaging is thrown away; and
- our inspectors will be hard at work in the ports and at retailers, looking for hazards like high levels of lead paint on toys or small parts that can break off and pose a choking hazard.

Mr. Chairman, thank yon again for allowing me to provide this testimony today. I now look forward to answering any questions you or other members of the Subcommittee may have.

Senator PRYOR. Thank you.

Commissioner Northup.

STATEMENT OF HON. ANNE M. NORTHUP, COMMISSIONER, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Ms. NORTHUP. Thank you, Mr. Chairman Pryor and Ranking Member Senator Wicker. I'm delighted to be with you today.

This is, of course, my first visit since I had the confirmation hearing, about a year and a half ago, and I have learned a lot and have been very impressed with the work of the CPSC. It certainly is incredibly important. And our Chair has, just, managed and juggled a lot of responsibilities, assessing emerging hazards and setting up a customs program that—Customs and Border Patrol—that intercepts, before they ever get to our shelves, products that might be hazardous to families and children.

But, today I feel like I would be remiss if I didn't focus most of my comments on what is preoccupying the overwhelming amount of money and time at the Consumer Product Safety Commission—and that is the implementation of the Consumer Product Safety Improvement Act—and to share with you some of the unintended consequences that we have been asked about, both by Members of

the Senate and by Members of the House, certainly by the public, and give you an idea of, sort of, the challenges that we face.

Let me start with the question of lead. We all know that lead is dangerous if it is absorbed by a child. That means in paint, that means in dirt that was—that gasoline—lead-based gasoline got into the dirt, tracked into a house, a child can absorb that lead. We know that it's dangerous if it is a lead charm that is small enough that a child can swallow; and, in fact, it can be fatal.

But, we can't treat all lead alike. And that's the problem with the CPSIA. It treats every component that contains lead exactly the same. It is not dangerous for a child to have lead in their handlebars. It is not dangerous for a child to have lead in a screw that provides strength and machinability and it makes that a more secure product. And so, what we have done in this law, by establishing a lead limit in every single component of every single child's product, is to equate lead in paint with lead in things that are not dangerous.

This has caused a huge disruption of the marketplace. First of all, it has cost jobs. Senator Wicker mentioned some of those, but I would be happy to submit for the record a list of businesses that have closed entirely, businesses that have left the children's product market, and businesses that tell us that, when we lift the stay, in February, for third-party testing and tracking, that—and labeling—that they will be closing their doors.

Senator PRYOR. Without objection.

Ms. NORTHUP. Thank you.

The—it has also caused a huge disruption in choice.

Parents cannot go into stores they went into before and see all the items, many that have been on our shelves for years and are not—have not been dangerous to children, but have not either been able to be remade with lead-free components or the people that make them have just decided to sell them in stores all around the world, including the EU, which has very high standards, but just not endure the expense of complying with our limitations. And let me just say that none of these—many of these companies that have left, have left because they ever had a risky product on the market.

When I was confirmed, Mr. Chairman and all the members of this committee, when I spoke with you, you talked about flexibility and looking for flexibility in the law. But, I can tell you that, in many parts of this law, there simply is no flexibility. And even in the areas where there is some flexibility, usually by a 3-to-2 vote, the Commission has chosen not to exercise that flexibility, out of caution. And so, without changes by the Congress, this law is going to continue to be—to cost jobs, choice, and raise the cost to consumers.

When I was confirmed, I promised you that I would work every day at the Consumer Product Safety Commission as if I were protecting my own six children. And today I have four grandchildren that I'm also thinking of every day. And, while many of the initiatives that our Chairman just delineated for you will make an important difference in our children's and our grandchildren's safety, the—many of the provisions in the CPSIA that are so costly, so complicated, and that are costing jobs, would not be things that I would have welcomed for the sake of my children. And if my hus-

band or I had lost our job because of a business that closed their doors for no—without any regard to safety, I would be heartsick.

Thank you very much.

[The prepared statement of Ms. Northup follows:]

PREPARED STATEMENT OF HON. ANNE M. NORTHUP, COMMISSIONER, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Chairman Pryor and Ranking Member Wicker, thank you for the opportunity to provide testimony to this Subcommittee regarding oversight of the Consumer Product Safety Commission (CPSC). This Commission has a proud history of assessing risk and providing leadership in consumer product safety issues across a variety of industries.

As a Commissioner since August of 2009, I now have a tremendous appreciation for the work that goes on in an agency, including the time and effort that agencies expend implementing the laws Congress passes. It is not a simple task, and my colleague, Chairman Tenenbaum, has put in countless hours to ensure that the Commission meets its deadlines and fulfills the difficult tasks it has been given.

Chairman Tenenbaum has been a strong advocate in working with onr partners in China to elevate the priority of product safety and to ensure that manufacturers can implement safety measures as far back in the manufacturing process as possible. She has made progress in our import safety objectives, including an agreement with Customs and Border Protection to allow our staff to view shipment documents earlier in the process before potentially hazardous shipments enter the United States. The Chairman's staff also continues to find creative, useful ways to nse social media outlets to advertise product safety messages for families and parents. These achievements are impressive.

CPSIA

Despite areas of progress, I would be remiss as a Commissioner if I failed to mention that the central focus of the agency's time and resonrces in both 2009 and 2010 has been on implementing a law that has almost nothing to do with improving safety—the Consumer Product Safety Improvement Act of 2008, or CPSIA. Although the Commission is a relatively small agency (FY 2010 funding of $118 million), its budget has grown by *nearly 48 percent* since the law's passage in 2008, with both old and new resources shifted away from more risk-based priorities to implement the arbitrary, non risk-based priorities of the CPSIA, including the leadin-substrate ban, phthalates ban, consumer database, and third-party testing, certification and labeling requirements. Today's hearing provides an excellent opportunity to shed light on many of the unintended consequences of this law, its impact on our agency and, more importantly, the economy.

As a bit of background, while we know the context in which the CPSIA was passed in 2008, Members of Congress on both sides of the aisle today acknowledge the need for the law's reform. Both Democrat and Republican Members of Congress have introduced bills to fix the CPSIA. The House Energy and Commerce Committee held a hearing earlier this year on potential CPSIA amendments, and the Appropriations Committees of the House and Senate requested a Report from the five Commissioners back in January on ways to amend the CPSIA to avoid its many unintended consequences. (*See the following link for the Report to Congress and the Commissioners' five statements: www.cpsc.gov/about/cpsia/cpsiareport01152010 .pdf*). Thus, to say that the law enjoys the broad support it held in 2008 is simply untrue.

The Commission continues to hear from manufacturers, retailers, and Members of Congress that the CPSIA has impacted products that no one anticipated would be affected and which this Commission would not consider unsafe. For example, the law impacts furniture, bikes, recreational equipment, books, rugs, nuts and bolts used to make these products, clothing, school equipment and supplies—and a host of other categories that fall under the rubric of "children's products.". The law has caused companies to have to reengineer products to be lead-free (with no measurable benefit to safety) to leave the children's market, or to close altogether. I have brought with me a list of such businesses which I will submit for the record.

Risks Associated with Lead

It is important to clarify the risks associated with lead. Some advocates, including witnesses in your second panel today, will say that "there is no safe level of lead" which implies that none of ns can ever spend enongh time and money to reduce or eliminate lead everywhere. However, an important fact to follow up this statement

would be that there exists an *unsafe* level of lead, which has been established by our leadiug scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. The fact is, lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable, at least not in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.[1] The Safe Drinking Water Act declares "zero lead" to be the objective for the amount of lead in water, but the pipes themselves are permitted to be 80,000 parts per million (8 percent) lead—allowing for negligible, trace amounts to exist in the water we drink.[2] California Proposition 65[3] as well as the European Union[4] allow for a negligible amount of absorbable (or solnble) lead in children's products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)[5] is then taken into the hody every day through just the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at significant levels. The experts at the CDC and NIH have found that lead paint in old honses as well as lead in dirt[6] near old gas stations can be very dangerous for small children (*http://www.cdc.gov/nceh/lead/*.) In other words, the *risk of absorbability* with lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. In the same vein, a lead-laden metal charm or piece of jewelry that can be swallowed presents a danger since such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument, touching a vinyl lunchhox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Now let us look at the CPSIA's lead requirements in comparison to these known lead hazards in the environment today. The CPSIA's arbitrary lead content limits (currently 300 ppm, and moving to 100 ppm by next August) remove the ability of the Commission to assess risk, or the *absorbability* that exists for a particular product. In other words, the law's lead content levels dictate that the metal handle bars of a bike that pose *no health risk* to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children's jewelry that is dangerous.

The effect of the CPSIA has been to outlaw children's books published hefore 1985 that are likely to have lead in the inks, for example, which both the Commission and Congress now feel was an overreach because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens may be outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

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[1] "Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children," Food and Drug Administration, November 2006: *http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Metals/Lead/ucm172050.htm*.

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

[3] California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65—*http://www.oehha.org/prop65.html, Children's Health at OEHHA—http://oehha.ca.gov/public info/public/kids/schools041707.html*.

[4] European Committee for Standardization (CEN), EN 71–3 Safety of Toys—Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994: *http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonisedstandards-legislation/list-references/toys/*.

[5] Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: *http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22*.

[6] Although lead in dirt is a proven hazard for small children nearby to old gas stations that used leaded gasoline or certain pesticides, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. *http://www.epa.gov/lead/*. This standard for safety is less strict than the current lead content standard provided in the CPSIA for children's products, which is 300 ppm and scheduled to fall to 100 ppm in August of 2011.

Finally, children do not live cooped up inside of their rooms surrounded only by "children's products." Children live throughout the house, run aronnd outside, and are exposed to lead in their everyday environment. In fact, they are surrounded by it: in the car (adult seat belts, window cranks) and in their homes (pots, pans, furniture knobs, door handles, appliances, lamps). These prodncts do not threaten a child's health because the lead in them is not absorbable. Hence, it makes little sense that the CPSIA bans products with higher than 300 ppm lead content in such products as *children's* furniture, *children's* rugs, toys and *children's* clothing—while children themselves are likely to spend more time outside their room handling the TV remote (an adult product), playing on their parents' furniture, or playing with just about anything else.

The Costs to the Economy

While there have been no tangible benefits resnlting from the CPSIA's arbitrary lead limits, the costs to businesses have been tremendous—and continue to pile up. In March 2009, the Commission estimated that the economic costs associated with the law would be "in the billions of dollars range."[7] Industry associations from furniture and mattress manufacturers to handmade toy makers have told us how they will be saddled with enormous costs since every component of every product they make (down to the screws in the furniture) will have to be sent to a third-party lab to be tested for lead and all other applicable standards. We have heard from businesses that have had to cut jobs to be able to afford the new testing and compliance costs, reduce product lines, leave the children's market completely, or close—all of this, when the full effects of the law (and I would argue, the most costly mandates) have yet to be felt.[8]

The entire process companies must go through to produce a toy or children's product has drastically changed. Take, for instance, a child's doll. To be compliant with the law, a company must pay to have the doll's body, hair, each color of paint on the lips or eyes, and the doll's clothing tested in an independent lab for lead content—and soon will have to do the same for phthalates and to every applicable component of the ASTM F–963 toy standard. According to a brief small business analysis by our agency, the cost to test one toy could range from $3,712 to $7,348—not taking into account that the toy will likely change to stay competitive for the next Christmas season, or sooner, and every material change triggers a whole new set of tests.[9] These costs also do not include the cost to add a tracking label, to certify to these third-party tests, and to maintain the data and paperwork to be able to trace each and every component and material back to its specific test and lot number. All of these steps are required by the CPSIA without any regard for the actual risk of a product.

In fact, while the costs to companies to reengineer products to meet the lead limits has been steep, many tell us that the ongoing costs to third party test, label and track every component have been much higher—and without any measurable benefit. For example, one furniture manufacturing company informed us they spent upwards of $13 million putting together a testing, tracking, and labeling system for their children's furniture while discovering that not one of their components was in violation of the new lead limits and needed to be replaced. There was clearly no safety benefit, yet they have faced enormous costs. Large aud small companies alike have to hire a lawyer or other outside expert just to ensure they understand the extent to which their products may or may not be impacted by various provisinns of the law.[10] This is what happens when regulations do not have to be cost-benefit justified.

The CPSIA fails to make any distinction between large and small businesses, nr foreign and domestic mauufacturing, thus giving au obvious competitive advantage to large manufacturers who produce items overseas, where manufacturing and test-

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

[8] Currently, the Commission has put in place a stay on the lead content testing requirements until February of 2011. A stay was first enacted in February of 2009 following the confusion that ensued after the law's passage. The Commission voted 5–0 in December of 2009 to continue the stay for another year (until February of 2011). Additionally, the Commission has yet to accredit labs for testing to the phthalates ban or the toy standard, which will impose even greater testing burdens. While these three major testing requirements have not even kicked in, many businesses have heen forced to plan ahead for the new costs and have already determined they cannot maintain their business and also comply with the CPSIA.

[9] Regulatory Flexibility Analysis: Testing and Labeling Pertaining to Product Certification, 16 CFR Part 1107, Notice of Proposed Rulemaking, CPSC Docket No. CPSC–2010–0038. May 20, 2010.

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

ing costs are cheaper. As a result, large toy manufacturers have turned a corner to become supportive of the new regulations and clearly see the competitive advantage that the law gives them over their smaller competitors. Meanwhile, the backbone of our economy, small businesses—from screen printers to manufacturers of chemistry sets for schools—are being forced to cnt jobs or take other drastic measures due to the cost of compliance. Given the urgency of our economic situation, this Commission would benefit today from hearing from Members of this Committee on whether these results are what you expected.

Role of the Commission

While the Commission has the authority to provide flexibility regarding the *frequency* of third-party testing requirements under the law, it does not have the ability to exempt companies altogether from burdensome testing requirements that do not improve safety. More specifically, the Commission lacks the authority to exempt manufacturers of otherwise safe products from the following: (1) the initial, third-party test of every product or component to the law's lead, phthalates and other mandatory standards; (2) a new, third-party test of any product or component after any "material change" in the product; or (3) the cost to certify, provide tracking labels, and maintain the data to trace each and every component. *Without changes to the statute, the Commission's hands are tied in addressing these arduous requirements, the main CPSIA costs burdening small businesses.*

When I was confirmed, every Senator with whom I met asked me to look for flexibility in the CPSIA in order to reduce the impact of the law where safety was not compromised. I have taken those conversations to heart. However, given that the majority of Commissioners so far has interpreted this law in an even more sweeping manner than required, I now believe that our ability to reduce the law's economic impact has waned. It is imperative that we inform you of these challenges and encourage the Congress to alleviate any unnecessary economic impacts on small businesses and families.

Thus, in this Committee's consideration of reforms to the CPSIA, I would recommend various ways to give the Commission authority to provide needed flexibility, including: (1) allowing for *de minimis*, absorbable lead in children's products, which, as mentioned previously, would by itself remove harmless products from most all of the burdensome requirements of the law (and would allow us to harmonize our standards with the European standards); (2) allowing small businesses the option of a "reasonable testing program" rather than a third-party test; (3) providing discretion to the Commission to determine the need for any third-party testing or tracking label requirements at all for various product categories; and (4) lower the age range for the types of products impacted by the law to focus on age groups (*e.g.*, under age 6) at risk of meaningful lead exposure. Any of these reforms would improve the existing law and allow the Commission to focus its energy where we know the risks lie.

Costs to the Commission

Not only has the implementation of the CPSIA continued to burden small businesses and derail job growth, bnt the law clearly has taken us away from our core mission of safety. As a result, this Commission is spending millions in limited resources in implementing and enforcing a law that is not helping consumers—a worrisome situation given the state of our economy and the need for all of us to find ways to reduce Federal spending.

A prime example of wasted taxpayer resources—$29 million worth in fact—will be the consumer database that the Commission is tasked with implemeuting early next year. The CPSIA requires that the Commission establish and maintain a database on the safety of consumer products that is publicly available and searchable ou the Commission's website. Unfortunately, the majority of the Commissiou adopted a rule just last week that will make the database useless or worse. Among other problems, the rule defines consumers to include just about everyone, so that reports of harm can be submitted by people with ulterior motives rather than just the actual consumers who suffered harm and have firsthand information about the consumer product. In addition, the rule has interpreted a 10-day deadline in the statute to require agency staff to post reports of harm even though the agency has received credible claims of material inaccuracy, even if the staff has not had time to resolve those claims yet. Finally, since groups with ulterior motives (trial lawyers, competitors, groups wanting to sell a "remedial" product, or an association wanting to lobby Congress for a new mandate) can submit reports into this database without providing the consumer's name, it is unlikely that the Commission will be able to ascertain critical facts related to a product. Such blatant disregard for accurate data will undermine the whole purpose of the database—to assist consumers trying to pur-

chase safe products. It will also raise prices, kill jobs, and damage the reputations of safe and responsible manufacturers indiscriminately.

Chairman Henry Waxman's Proposal to Add a "Functional Purpose" Exemption

It is important to note that Chairman Waxman of the House Energy and Commerce Committee has proposed a very limited "fix" to the problems of the CPSIA, known as a "functional purpose" exemption. Specifically, the proposal would entail giving the Commission authority to exempt a company's products from the CPSIA's lead limits if the company can show that the lead in the product serves a "functional purpose." Unfortunately, this "fix" would do more harm than good.

Adding a "functional purpose" exemption to the Commission's authorities would not provide the kind of broad exclusion flexibility that the Commission unanimously sought in our January Report to Congress. The concept is too narrow, expensive, and uncertain to provide much relief, particularly for small businesses that are unlikely to have the resonrces available to determine available lead substitutes or even to pnt together as successful petition to a Federal agency. Most companies will not have the in-house expertise (metallurgic, etc.) to make the kind of showings that would be required to meet the burden of proof for an exception. So just as the exorbitant testing costs of the CPSIA favor large companies (who manufacture overseas) over small ones, so too will the exemption process favor the large companies with greater ability to spread their costs. Furthermore, forcing a component-by-component review of exceptions to the law does nothing to enhance safety, and it converts the Commission from a safety oversight agency (like the FAA) iuto a product approval agency (like the FDA). That will slow the pace of innovation and dramatically increase the cost and lead time for bringing new products to market.

Conclusion

Today, Americans still enjoy a marketplace that is brimming with new products and a variety of choices in color, cost and complexity—but we are steadily diminishing these opportunities. As a Commissioner, I strive to maintain and expand the type of marketplace that Americans consumers want—vibrancy, choice, and the confidence that consumer products are safe. All of this is possible in a successful market, where consumers demand ever more innovative products from a variety of sources and businesses look for opportunities to meet those demands. However, the CPSIA has and will continue to drastically reduce the number of inherently safe products available in our country. I hope the Congress will restore the responsibility of assessing risk to the experts at the CPSC and allow us to keep our markets both safe and dynamic.

Thank you, Mr. Chairman and members of the Committee for calling this oversight hearing and for inviting me to testify today.

Senator PRYOR. Thank you.

Chairman Tenenbaum, let me start with you, if I may. And I know you've really had your hand full—hands full with the implementation of the CPSIA, and it's just been more than a full-time job for you and the Commission and all of your staffs, and I would say, overall, I think people understand the effort that you put into this, and you guys have done a great job. Not that everybody always agrees on everything, but you guys have worked very, very hard to implement the law.

But, I would like to ask you, Madam Chairman, about your Safe Sleep campaign. And I'm curious about what prompted that, and how it's going, and what kind of results you're seeing around the country.

Ms. TENENBAUM. Thank you, Mr. Chairman.

The Safe Sleep campaign was an effort that we created because of the numerous cribs that were recalled because of the drop-sides. And, getting further into the data, it wasn't just the drop-side cribs where children were being suffocated. The number-one reason why children are suffocated is because of soft bedding, not having anything to do with the product. People fill up a baby bed with com-

forters, toys, and pillows, and the child can roll into these items and suffocate.

So, what we wanted to do was to create this Safe Sleep campaign along with having a new crib standard.

We created a new Safe Sleep team, at the Commission, in the wake of all of the recalls, because the drop-side problems were going back years, even before I came into the Commission. And what this Safe Sleep campaign did was notify the public of 32 deaths reported to the CPSC in the past 10 years attributable to the drop-side. In less than 9 months we negotiated the crib manufacturer and retailers to bring about 18 voluntary crib recalls across all kinds of companies.

So, this month, in December, we will have a new crib standard. We have not had a new one in 20 years. There will be no more traditional drop-sides, those are banned now; we will have new wood strength; mattress support requirements, so the mattress won't fall down; and stronger hardware requirements.

We also joined with the American Academy of Pediatrics and Keeping Babies Safe, a nonprofit organization, and we made a video. Joan Lunden, who used tn be on the Good Morning America, hosted the video. The video discusses how to keep your own child safe, not only from a defective product, but also safe bedding. We launched this video last month in New York at one of the hospitals. We'd like to continue to seek private funding so we can have this video in physicians' offices, pediatricians, anyplace—in airports, where you have video playing constantly—so people will know how to keep their own baby safe.

Senator PRYOR. Commissioner Northup, you mentioned, in your testimony a few moments ago, that many parts of the law, of this CPSIA law—many parts of the law have no flexibility in there. Now, you spent some time on lead. What else, in your opinion, has no flexibility with it?

Ms. NORTHUP. Well, let me get to, specifically, one of the questions that I believe you asked me, and also questions that the other members of the Committee asked. And that is about absorbability; it goes to lead. But, you provided exclusions in the law for products that could contain lead. And one of them was lead that was in products where the—where lead could not be absorbed. This would be handlebars; this would be ATVs for example.

Senator PRYOR. Right.

Ms. NORTHUP. And what the Commission has decided is that there's not one single product that would benefit from that exclusion; that the fact that you could rub your hands on a handlebar and get one molecule on your—and that one-tenth of a percent—of 1 percent of that molecule is lead, then you could put it—your hand in your mouth—that that would be absorbability. And so, absolutely no component would qualify for that flexibility.

Now, I guess I presume that, when you write—when you wrote that exclusion into the law, you meant for it to actually mean something, that there actually would be components that would qualify for that exclusion. But, the majority has decided that not one single component does qualify. And that's why every snap, every spoke of a bicycle, every hinge on a dresser, every——

And let me just carry that a little further and point out that a child doesn't stay in a bubble in—with children's products. They get in a car and—for millions of dollars, they refashioned the car seat so that the buckle no longer has lead in it. It provided strength and protection, so reengineering it was very expensive. But, the child can reach right down on the seat and pick up the adult seatbelt and play with it, and it's loaded with lead. And a child is going to crawl right out of their room into the—onto the carpet of the house, into the kitchen, open the drawer, with door handles that have lead on them. And none of this raises our concern, because when lead, in very small amounts, is embedded in metal, it's not going to be absorbable at any measurable level. So, that would be one of the areas.

Senator PRYOR. Right. Well—but, my question was——

Ms. NORTHUP. Yes. Let me give you——

Senator PRYOR. You covered lead——

Ms. NORTHUP.—another one.

Senator PRYOR. You covered——

Ms. NORTHUP. Definition of a "child's product"——

Senator PRYOR. OK.

Ms. NORTHUP.—would be another one. All of the requirements of the CPSIA are extremely expensive; not just that you have to comply with the lead, but also that you have to third-party test, that you have to certify to those third-party tests, that you have to provide tracking labels that make sure—that show every single test that was relevant. So, when it comes to carpet and all these other things, the question is, are you going to put a fence around children's products that capture as many products as you can, including lamps, including, say, something that spins on the ceiling the child could never touch, or are you going to put a fence around fewer products that would be determined to be children's products?

And I guess I felt that we should—if there was no risk involved, that we should have put that fence around the definition of a "children's product" more narrowly so that things like—beyond the tests that are required in the CPSIA—tests for flammability of rugs, tests for other components—now not only are people that make children's products going to have to test them to all the lead/phthalate standards—coating standards—they're now also going to have to do third-party tests for any other applicable standard, that wasn't really clearly mandated in the law. And now we have captured as many of these products as we possibly can in this trap by setting a very broad fence instead of a more narrow fence that might have just focused on risky products.

Senator PRYOR. All right. Let me ask one more thing about your testimony. And I'm—I've overstayed my time, here, but I would like to ask one more question and——

In your written testimony, on page 2, you said that, "It's a law that has almost nothing to do with improving safety." And, to me, that's an astounding statement, because when we've added staff there—don't you agree that that has to do with improving safety?

Ms. NORTHUP. Let me say that I think that the CPSC has done a fabulous job in——

Senator PRYOR. Now, answer——

Ms. NORTHUP.—improving safety.

Senator PRYOR.—my question.

Ms. NORTHUP. The CPSIA——

Senator PRYOR. Answer—OK, yes.

Ms. NORTHUP.—in particular, what we are working on, which is—we haven't even gotten to phthalates—which is lead, it has not been focused on risk. There's no focus on risk.

Senator PRYOR. Well, that's not what you said here. You said, "a law that has almost nothing to do with improving safety." And my point is that part of the CPSIA was to increase the staff level so that the Consumer Product Safety Commission staff could do more research——

Ms. NORTHUP. Yes.

Senator PRYOR.—to improve your facilities. I would think that you would agree with me that that improves safety. To do all the things that the CPSC is now authorized under the CPSIA to deal with imports—we were—we've been flooded with imports in this country, and many of those have not been safe. And the Commission has taken the lead role in the world to go and make sure that those products coming into the U.S. are safe. And I know you may disagree with some of the lead issues, but, still, those are designed to improve safety. In fact, part of the CPSIA is the ATV rule, which probably predates you being on the Commission, I know, but to get some of these cheap imported ATVs off the market that didn't meet any safety standards that the other ATVs met. I think all of that has to do with improving safety. But, in your statement, you said this law has almost nothing to do with improving safety.

Ms. NORTHUP. I probably should have clarified that. I agree, that is not a well worded statement.

And let me just say that almost every provision in the law was meant to address a real risk, and I recognize that. And I think that the agency has done a good job at addressing risks. But, when it comes to technically implementing the components of this law because of some of the very narrow language or the narrow interpretation, what we're doing has less to do with safety than complying with very regimented requirements that gets away from risk, gets away from an agency that is—has such a proud history. I mean, every night, we get the overnight incident reports of children that have died. And you do see trends and you do see ways of spending our resources in intervening. And the chair, with the Safe Sleep, has been very creative in this. But, that's not what the CPSIA primarily is focused on. It's focused on very regimented requirements that——

You know, I'll give you one other example with the Safe Sleep. The drop-side cribs is—has been masterfully handled, in my opinion. It did risk children's lives. And we did recalls. It's been a very step-by-step implementation. Unfortunately, when we did recalls of drop-side cribs, every single daycare center had to replace, immediately, their cribs that they used that were drop-side cribs. So, they have brand new cribs. Sixty days after we pass this new standard, or if we give them an extension in a year—up to a year, which we possibly might do—they're going to have to carry those brand new cribs out the door and throw them in the trash, because—even though there's no determination that any of them are unsafe—because the bill has an immediate effect rather than say-

ing "just what's purchased in the market or what has been determined to be risky." I sort of wonder if that's what you intended. That is hundreds of thousands of cribs that will be obsolete the day it goes into effect.

Senator PRYOR. Well, I don't know how that's going to play out, but what—I've overstayed my time—but, we—the CPSI did have a—CPSIA did have a mandatory rulemaking on cribs, and I appreciate you all doing it. But, we need to probably talk about this, you and I, offline at some point. And I know the Ranking Member and I have talked about this before, and we mentioned it a few moments ago, about—we recognize that, you know, this law on the books probably needs to be looked at again. And there are probably some areas that, you know, maybe we should give some more flexibility to CPSC. And the Chairman and I have talked about that a few times. And I know that she's had discussions on the House side. And I actually talked to Joe Barton yesterday about a little bit of this as well, assuming he's the Chairman over there. It's something that, you know, we will work through.

But, anyway, I've over——

Ms. NORTHUP. Thank you.

Senator PRYOR.—overstayed my time. So, Senator Wicker.

Senator WICKER. I actually don't mind at all that the Chair overstayed his time, because I thought it was a very interesting and informative line of questioning.

I want to talk about the budget, the "appropriations" level that you've requested over time, and see what we can do about that, in light of the federal government's deficit, during the past fiscal year of $1.3 trillion. In 2 short fiscal years, this government has added over $3 trillion to the national debt. There is a hue and cry from the public for us to do something about that. And I think every agency's going to have to be involved in that. There was a Debt Commission report yesterday that should trouble every American and every policymaker.

During the last 2 years, the appropriation for CPSC has increased 47 percent. And I know the Chairman and Ms. Northup talked about personnel; I assume that was a large part of that. But, the Fiscal Year 2008 appropriation was $80 million. That increased some $25.4 million, to $105 million, in 2009. The figure reached $118.2 million Fiscal Year 2010. And there is a request for another $400,000 more.

With that thought in mind, I'd like to ask both of you what suggestions you can give us of ways the CPSC can actually reduce its budget and be a part of the solution of reducing our federal deficit.

Ms. TENENBAUM. Thank you——

Senator WICKER. Ms. Tenenbaum?

Ms. TENENBAUM.—Senator Wicker. One of the things that was brought about when the Congress passed the CPSIA was the fact that the CPSC was cut so many times that it was unable to fulfill its statutory duties. And so, rather than just have three commissioners, it was decided that five commissioners would be funded, and that we would have a higher authorization, and we would also be encouraged to hire more people.

In fact, our FTE goal this year—and every time I have testified in front of Congress, people want to know, "Where are you?"—was

to be at 530. We are now at 520 FTEs and we have 19 conditional hires. That is because we had the new law, the CPSIA. Not only were we required to pass all these new rules, we also are required to enforce them.

We also needed a new laboratory, and we are opening that new laboratory in April. And we'd love for you and your staff to come tour the new laboratory.

Senator WICKER. I'll certainly do that.

Ms. TENENBAUM. OK, please. Thank you.

We also need more outreach into China. The FDA has put people in China because so much of our food is coming from China. We just opened our office at the U.S. Embassy in China, and have two staff members working with the Chinese on products.

We've asked to be held harmless, in terms of budget cuts, because of the fact that we are just now implementing this very complex law. And we are now seeing a reduction in the number of recalls. Our presence in the ports has gone from 5 people at the ports to 19 people at the ports.

But, all that said and done, we realize that we're a small agency and that we have to contain our budget. And so, what we've done is be much more creative in working with other agencies. Our relationship with Customs and Border Patrol is closer than ever before. We work with them to stop products from coming into the United States.

We also are reaching out to colleges and universities. I've made visits to one university—we're going to another one—to ask them if they could work with us on research, and providing professors to train manufacturers in foreign countries so that they will know what the rules are for products coming into the United States.

We have identified certain line items that could be cut if we need to be cut, and we'll be glad to provide that to you—for you and your staff. We can send it——

Senator WICKER. Could I——

Ms. TENENBAUM.—after——

Senator WICKER.—ask that you provide it for the record?

Ms. TENENBAUM. Sure. We will provide it for the record. We have already sent it——

Senator WICKER. When——

Ms. TENENBAUM.—to OMB.

[The information referred to follows:]

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION
Bethesda, MD, December 2, 2010

Hon. ROGER F. WICKER,
Ranking Member,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
U.S. Senate,
Washington, DC.

Dear Ranking Member Wicker:

Thank you for your questions at today's hearing regarding the U.S. Consumer Product Safety Commission's (CPSC) budget priorities, implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA), and ongoing activities to reduce injuries and deaths caused by defective or unsafe consumer products. 1 appreciated the opportunity to discuss these issues with you, and the progress we have made strengthening the Commission over the past year.

As discussed at the hearing, I believe that any reduction in the amounts proposed in our Fiscal Year (FY) 2011 budget request would be detrimental to the agency's

mission, and that the CPSC should he "held harmless" in this year's budgetary process. Actual full time employee (FTE) staffing levels at the Commission dropped from a high of 978 in 1980 to a low of 396 FTE equivalents in 2008. This decline in staffing, combined with annual funding, was devastating to the agency's overall effectiveness—as was illustrated by the "Summer of Recalls" in 2008.

In the last 2 years, the agency has made great strides rebuilding and working to ensure that the consumer products used by American families are safe. We are extremely grateful for the funding increases provided by the appropriators and have used this funding wisely and judiciously. While our proposed FY 2011 funding level is still almost 30 percent below the 1980 level (adjusted for inflation), I believe the cnrrent level positions the agency for snccess in the futnre.

Although we have exercised fiscal restraint, 1 am keenly aware that Congress may consider across-the-board cuts for agencies. Therefore, pursuant to your reqnest. attached please find a list of preliminary FY 2011 bndget items that Commission staff have identified should any across-the-board cuts be implemented by Congress. I would note that these items were identified by staff, and have not been approved by the fnll Commission.

Thank you in advance for your support of the CPSC. Shonld you or your staff have any questions, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations.

Very truly yours,

INEZ M. TENENBAUM,
Chairman.

FY 2011 CPSC Budget Request Summary
Adjusted to Reflect Potential Mandatory Across the Board Cuts
[Dollars in Thousands]

2011 Request		*$118,600*
Reductions in 2011 Current Services Changes:		
Federal Pay Increase with Related Benefits	($937)	
Consumer Hotline	($266)	
IT Help Desk	($266)	
Reductions From Base		
Operating Expense	($225)	
Total Potential Mandatory Across the Board Cuts		($1,694)
Total Potential Revised Requirements		*$116,906*

Senator WICKER.—do we normally get those, Mr. Chairman?

Senator PRYOR. We can hold the record open for as long as we want. But, if we want to try to get something——

Senator WICKER. How soon could you provide that——

Ms. TENENBAUM. We could——

Senator WICKER.—list, Ms. Tenenbaum?

Ms. TENENBAUM.—this today.

Senator WICKER. OK.

Ms. TENENBAUM. We can provide——

Senator WICKER. Wonderful.

Ms. TENENBAUM.—it today.

Senator WICKER. Ms. Northup, I wonder this: What if every agency asked to be held harmless? We wouldn't be able to do anything about the budget deficit, would we?

Ms. NORTHUP. Well, I'm reminded that you and I sat next to each other on appropriations committees for years, so I'm not surprised I got this question.

Let me make a creative suggestion. I would—if—here's sort of an off-the-wall suggestion: Go from five commissioners to one administrator. I have so much faith in Inez Tenenbaum's ability to chair this agency. I'm probably the only person who will come before you

and suggest putting me out of a job. But, each one of us have a staff. And it is—the rulemaking is very, very complicated. But, what happens is that we find ourselves, you know, investing greats amount of time and effort and research, and our staffs are involved in how to research, say, this rulemaking. On the other side, the Democrats are involved in the same way. And so, rather than the chair being able to just work with the general counsel and the professionals that are at the agency, she is pulled by the Democrat mayor—members to one side; we pull to the side of flexibility. And so, there's great polarization.

And I actually think that her ability to balance the initiatives, all the ones that she has brought up, are probably the things that have had the—made the most difference in safety. They are the things that she is able to do individually, as opposed to the rulemaking. And I think the rulemaking would go smoother; and, quite honestly, I think it would have been more balanced, had it not been five commissioners.

So, I would just say that you have a chance to debate the pros and cons of every single bill. You have people that—on both side of the aisle, that have different opinions, and people that come from different perspectives. Once you write the bill, I'm not sure it's so helpful to have four more commissioners that are debating these same things for hours and hours and hours, hiring their own staff, taking up a lot of office space, keeping the office of the general counsel and the professional staff busy answering all of our questions, when maybe the Administrator should be charged with that responsibility.

Senator WICKER. How large is your staff, Ms. Northup?

Ms. NORTHUP. I have three people to—one that's paid $150,000 a year, one that's paid $100,000 a year, and one that's paid $50,000 a year.

Senator WICKER. Well, I've followed the Chair's example and overstayed my time. Let me just say this. We hear a lot of talk about moving the appropriation level back to the 2008 level of expenditure. What the Chair, Chairman Tenenbaum, has suggested is that this agency be exempted from that. Ms. Northup has suggested what I think would probably amount to modest savings.

I just have to say this. If we're going to be serious about this, and if there are ways that we can provide flexibility, keep people employed in the private sector, and quit talking about products that have never been unsafe and toys that have never caused a problem and lead-containing handlebars that have never harmed one single human being in the history of their manufacture, then we need to think about those solutions. And, if we don't, we're going to have a real problem with doing the simple things of cutting back on discretionary expenditures, much less the excruciating and much more difficult issue of the entitlements.

And I thank you, Mr. Chairman.

I thank these witnesses.

Senator PRYOR. Thank you.

Senator Udall, I believe, has to leave here——

Senator UDALL. Thank you.

Senator PRYOR.—in a few minutes. So——

Senator UDALL. Thank you. Well, thank you, Chairman Pryor.

And it was a very good exchange. But, I think one of the important things, Ranking Member Wicker—when we talk about safety and talk about budgets at the same time, I think it is very important that we give the agency the budget they need in order to protect consumers and to protect safety. And I think that's what the Chairwoman is talking about.

Let me thank you, Chairman Tenenbaum, for your testimony today, and CPSC's work to protect consumers from unsafe products. And I have some additional questions for the record, but I'd like to focus on the safety issue that I brought up in my opening statement.

Senator UDALL. You know, fall is football time in America. And every year, more than a million high school kids put on their gear and take to the gridiron, including about 8,000 in my home state of New Mexico. This weekend, in fact, teams from our larger high schools will compete for the State Championship.

Football is a uniquely American tradition. But, football is a contact sport, and thousands of student athletes are injured every year. Many of those injuries are concussions. For young people between the age of 15 and 24 years old, playing sports is the second leading cause of traumatic brain injury, second only to motor vehicle crashes.

New Mexico actually has one of the nation's best school sports concussion laws. We require athletes—and it was authored by a fine young state senator, named Senator Michael Sanchez—we require athletes who suffer a concussion to sit on the sidelines for one week and until a medical professional approves their return to play.

But, I'm concerned that our young athletes may not be using the best safety equipment. Traditional football helmets—I had a couple here, but I don't want to bring—first, I was just going to bring one up, and then my staff said, "Well, you"—this is our—two-college football——

[Laughter.]

Senator UDALL.—and you can imagine, they compete with each other. And so, they—and I said, "Well, we just need one." And they said, "No, you can't put up one without putting the other." New Mexico—University of New Mexico and New Mexico State. So, anyway——

Senator KLOBUCHAR. And where's the Gopher?

Senator UDALL.—these helmets——

Senator KLOBUCHAR. The Gopher.

Senator UDALL. Where's the——

Senator KLOBUCHAR. Minnesota Gophers.

Senator UDALL. Well, these are Lobos. These——

Senator KLOBUCHAR. Yes.

Senator UDALL. You got a——

Senator KLOBUCHAR. Yes, I know. But——

Senator UDALL.—Lobo and an Aggie——

Senator KLOBUCHAR. Yes, well——

Senator UDALL.—right here. So, yes.

Senator KLOBUCHAR.—you know——

Senator UDALL. OK.

Senator KLOBUCHAR.—we should expand.

Senator UDALL. You can bring your helmets in——
Senator KLOBUCHAR. OK.
Senator UDALL.—if you want.
Senator KLOBUCHAR. Thank you.
[Laughter.]

Senator UDALL. These helmets are primarily designed to prevent serious injury from a severe direct blow that can crack one's head open. However, football helmets are designed to a safety standard that specifically addresses the dangers from less severe impacts and indirect hits that can cause a concussion. More advanced football helmet designs are available, but the voluntary industry standard has not kept up with the latest technology. The current helmet standard is also a one-size-fits-all approach, from kids playing Pop Warner, the youngest kids, to the pros in the NFL. So, one size fits all.

I believe that the CPSC has a responsibility to ensure that football helmets meet safety standards that address concussion hazards and reflect the state-of-the-art helmet technology. And there's a lot of discussion out there with neurosurgeons and other experts.

And really my question to you—I guess I have two questions: Will you review whether the voluntary football helmet standard and certification practices adequately protect high school and younger athletes from concussion? And will you follow up with the football helmet standards organization, NOCSAE, to make sure they address these safety concerns, especially complaints that the standard is out of date?

Please, go ahead.

Ms. TENENBAUM. Thank you, Senator Udall. I completely share your concerns. And I want to provide you and the rest of the members of this subcommittee with some specifics on what we are going to do on this issue going forward.

First of all, in keeping with this mission of protecting consumers from unreasonable risk of serious injury or death from consumer products, including sports equipment such as football helmets, CPSC is committed to working within the standards development community to improve helmet safety standards and testing. More specifically, I felt that it was vital for the CPSC staff to establish contact with the personnel of NOCSAE, the standards-setting body. And we've already made contact with them, and we will continue working with them.

So, based on this initial outreach, the CPSC technical staff will be joining NOCSAE's standards development process in January in order to monitor and help accelerate their efforts to update the appropriate standards. So, we have already started that.

In addition, we continue to consider other avenues to augment this effort. I will use the bully pulpit as Chairman of the Consumer Product Safety Commission, and we will do all that we can to make sure that the standards-making organization is looking at all the best engineering and science.

Every man in my family played football. I still have pictures of my father, in high school and college, wearing his leather football helmet. And we are great football fans. We're looking forward to University of South Carolina playing Auburn for the SEC Championship on Saturday.

But, I'm very concerned, as you are, about the safety of people and the number of concussions. I've followed the news stories about how many people are hurt, and particularly high school students who are just learning how to tackle and can get hurt more seriously. So, we are with you on this and want you to know that we will keep you updated periodically on our progress.

Senator UDALL. Thank you very much. And I went over, a little bit, in my time——

Ms. TENENBAUM. I did, too.

Senator UDALL.—so, I appreciate the courtesies from the Chairman.

But, I really appreciate you moving ahead aggressively, and doing what you've done already, and really look forward to working with you and all of the people, out there across the country, that I think have a great concern about these serious safety issues.

Thank you. Thank you very much.

Ms. TENENBAUM. Thank you.

Senator PRYOR. Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you very much.

Thank you, to both of you, for your service.

I just remember, back in the early days, when I got here, which is not that long ago, and the issues, as I know Chairman Pryor remembers, with the CPSC, and our frustrations with a lot of the toys that were coming in from China. We had everything from the Aquadots, that were making kids go into a coma, to the little charm that was swallowed by a little boy in Minneapolis; a 4-year-old boy, whose mom had gotten a pair of tennis shoes, swallows the charm and dies. And when they tested the charm, it was 99 percent lead. That kid didn't ask for that charm. The mom didn't ask for that charm. It was given free with a pair of tennis shoes.

And so, we realized, at that point, that we need to update our statutes. And I think, at the same time, with legislation as detailed and sweeping as the CPSIA, it should come as no surprise that certain clarifications and adjustments need to be made, especially as many small manufacturers, retailers, secondhand stores, as well as ATV/bicycle enthusiasts, have been trying to comply with the law, and that there are issues that need to be handled in a pragmatic way.

I know that the Commission granted a one-year stay of enforcement of the testing requirements, and a two-year stay of enforcement for the lead-content limits on youth-model ATVs, snowmobiles, and motorcycles. And so, that is where some of my questinns are.

I guess the first one would just be a general question for you, Chairman Tenenbaum. How would you compare the safety of toys today versus in 2007, before the bill was passed? And what kind of information do you think parents should now have available as they go into the holiday season?

Ms. TENENBAUM. Well, thank you, Senator Klobuchar.

We have worked very hard to impress upon manufacturers that they need to get lead out of children's products. And we are seeing

the number of recalls decline; we've seen the number of recall products with lead decline. And that is why we think that given the resources and the renewed vigor that you've provided in the CPSIA, you're going to see even more improvements over time.

I'll focus on just your question and not the issue of lead content. In my earlier statement, I said consumers are safer. One, we have third-party testing. It is onerous for people to have to third-party test. But, you have products coming in from China; 80 percent of all the toys that we sell in the United States are manufactured in China. I have toured factories in China, with American brand names—and they said, "We need the third-party testing because we have a complex supply chain, and it protects us and removes our risk."

Two, we now have tracking labels. We didn't have a one-size-fits-all approach. We took into account small manufacturers. But, tracking labels will help a consumer, a parent, know where that product was manufactured, if there are problems with them.

We also have worked very hard with small businesses, we've provided seminars, we've had outreach. I have an open-door policy. The first year of my tenure, I had meeting after meeting with all kinds of industry to hear their concerns.

Senator KLOBUCHAR. You know, and—could I just follow up on that a bit? Because, again, I appreciate the work that has been done is—there were a lot of businesses involved in getting this law done, including the ATV industry, which is major in my state. And they actually, as Chairman Pryor mentioned, were very concerned about some of the imports that were coming in from other countries that didn't meet our safety standards. But, what they didn't expect, because of some provisions added at the last minute, that this bill was going to cover, like, thinking kids were going to, like, suck on brake pedals or something. So, I just want to get to some of those concerns——

Ms. TENENBAUM. OK.

Senator KLOBUCHAR.—as well—as you know, I was supportive of this bill, in general. But, I'll start—maybe I'll start with some of the ATV issues. And I do appreciate the stay, with regard to enforcing the CPSIA, against ATVs built for the youth market, until this April. But, what has happened now is, four out of eight major manufacturers have, nonetheless, removed themselves from the youth market. And maybe some people think that's good, but the problem is that I'm afraid that kids are going to ride adult ATVs now. And even the CPSC's own studies show that 90 percent of ATV-related injuries to children occur while riding the larger ATVs.

And so, what do you think we can do to get a permanent solution, here? I know the electronics industry got itself exempted out of this. ATV was supportive of this bill, because of the import issue, and it's ironic, indeed, that there isn't some way to resolve this. And do you think we need legislation? Or what do you think we need to do to fix this?

Ms. TENENBAUM. Well, on a temporary basis, we've asked the ATV industry to provide us with information, because the stay for testing does lift in May for ATVs and bicycles. And we asked them to provide us information on how they intend to comply. If these

manufacturers believe they're not going to be able to comply with the requirements, then they can submit a petition to the Commission asking us to extend the stay. But in meeting several times with the ATV industry, they need a permanent solution.

And so, what—when we all work together—and Commissioner Northup and I disagree on this approach, on a functional-purpose exemption. Under the Federal Hazardous Substance Act, we had a functional purpose exemption. So, if you came with a chemistry set, you had to have types of chemicals in the set in order to make it a functional purpose. So, you were given an exemption by the CPSC, under the FHSA.

We want a functional-purpose exemption. Instead of just wholesale gutting the CPSIA, let's do some surgery on it. Under the functional-purpose exemption, if you came in with an ATV and said, "Look, we need lead in this machine to make it stronger. Children are not going to mouth or swallow any of these components. And it's not going to pose a risk to the health of anyone who rides it, in terms of lead exposure." We could give you an exemption, a blanket exemption for the whole industry, a blanket exemption for bicycles. However, we do not want—to make it more complicated—and Commissioner Northup has pointed this out—you don't need regulations on this. If we have to write rules to have a functional purpose, it will bog us down, and we'll have to go through all this extensive rulemaking.

Just let us give the exemption. We don't have to make it overly burdensome. We don't want people to have to spend thousands of dollars coming up with this petition and proving to us that it's too costly to have something else in the market. Just file the petition, we'll look at it, we'll make a determination.

And that's how we thought we could get ATVs and bicycles and products that are not a high risk out of the lead requirements. But, if you make us do the rulemaking and make it overly burdensome, it's going to be too expensive for industry to comply with the CPSIA.

Senator KLOBUCHAR. OK.

I know Ms. Northup wants to respond. And were we going to have a second round here? Because I have——

Senator PRYOR. I wasn't going to——

Senator KLOBUCHAR. OK.

Senator PRYOR.—but why don't we let her respond——

Senator KLOBUCHAR. OK. All right. Northup.

Ms. NORTHUP. Let me say that I think our goal is the same here, some sort of realistic—allowing the lead content to be whatever it is that's necessary to hold the ATV or the bike or whatever together. But functional- purposes, as it has been proposed, any proposal I have seen for it, has said, "if there is another—no alternative material that'll provide this same thing, if there's no harm to the children."

Well, first of all, I'd just say, if there's no harm to the child, why would there be any other reason anyway to outlaw this screw, nut, bolt, whatever. But, it means that big industries, like ATV—and I respect how important it is to you, particularly—they can summon the money and the metallurgical studies to show that there's nothing that meets that standard, or whatever. But, small businesses

or businesses like—that make school science kits, they don't have the number of products and the price range in order to spread out the cost of a petition, and especially for toys or for science kits that may evolve.

You know, the ATV may get an exemption across the industry, but, so many other companies, this would be far too complicated, far too expensive for them to file a petition, to wait until we can act on it. The petitions we've acted on so far have taken months, and we've turned every one of them down.

So, I would just say, there are people that believe you should never give an exemption, if there is any possibility you don't have to, regardless of risk and—because of the precedent-setting. And you're going to continue that debate if it's just a functional-purpose exemption.

Senator KLOBUCHAR. And I know the Chairman wants to respond, but I am heartened somewhat; you both have the same intent to try——

Ms. TENENBAUM. We do.

Senator KLOBUCHAR.—to be pragmatic about how to respond to this. OK.

Ms. TENENBAUM. We do. And Commissioner Northup gets into, "If it's not a risk, then just exempt it." You can also exempt it. If you want to exempt ATVs out of a piece of legislation—or bicycles—you have the power to do that. If you ask the Commission to go back and look at risk of every product to determine whether or not there's any lead absorbed and whether it changes the blood lead level, we will be back where we were before the CPSIA.

You decided, in Congress, that you would go with a content standard—300 parts per million, it's going to be reduced to 100 parts per million. You did not do a solubility standard, because there were so many variables and there are no known safe levels of lead. An article in this morning's *Washington Post,* was about the lead pipes here in Washington D.C. There is no blood lead level that is considerable safe for children. And so, that's where we are. We go back and forth about, "Well, this isn't a risk." Well, if it's not a risk, and manufacturers have to have it in their product, then we will give them a functional-purpose exemption. We don't have to make it expensive or complicated.

But, you chose the total lead limit instead of solubility, for several reasons. One, bioavailability, which Commissioner Northup talked about, on how much lead you can get by rubbing a bicycle depends on the child. Every child is different. If you're a young child, you're going to absorb more lead. If you're a——

Senator KLOBUCHAR. OK.

Ms. TENENBAUM.—malnutritioned child—I'm sorry, I'm using your time.

Senator KLOBUCHAR. No——

Ms. TENENBAUM. It also depends on the product. Vinyl degrades with age and produces more lead, and also the viability tests are diverse. And so, there——

Senator KLOBUCHAR. OK. Now——

Ms. TENENBAUM.—were so many variables.

Senator KLOBUCHAR. But——

Ms. TENENBAUM. And that's why you stopped at 300——

Senator KLOBUCHAR. So—right—so, is there some degree of, until we solve this, which approach we want to take here to address these pragmatic concerns? And is another extension a possibility, then? And that's what we'll——

Ms. TENENBAUM. It is a number—a strong possibility——

Senator KLOBUCHAR. OK.

Ms. TENENBAUM.—if we can start this conversation in Congress about making these changes to the law.

Senator KLOBUCHAR. OK——

Ms. NORTHUP. Let me——

Ms. TENENBAUM. It is a strong

Senator KLOBUCHAR. OK——

Ms. TENENBAUM.—possibility.

Senator KLOBUCHAR. Why don't we—do you want to—what I'll do is put some questions in writing, so that we can continue this discussion, and maybe in my office as well, because I know we have another panel waiting. And then I also had some follow-ups, which I can do in writing, of the—Dan Marshall, from my state, is the owner of Pea Pods Natural Toys and Baby Care store, in Saint Paul. They obviously have some concerns with the third-party testing and how that applies to small businesses. And I will raise those in writing, as well.

Senator KLOBUCHAR. And then, the last thing that I wanted to follow up on was, again, to thank the Commission for its work on the Graeme Baker Pool and Spa Safety Act, something I worked very hard on, Senator Pryor worked hard on.

And I know that we're seeing some good compliance rates with the Pool Safety Act, and I wanted to thank you for that, both of you and the Commission, and the work that's going on. It's a very important thing. We had a little girl die in Minnesota, and that bill has meant a lot to the people of our state and that family.

So, thank you.

Ms. TENENBAUM. Thank you.

Senator PRYOR. Thank you, Senator Klobuchar. Thank you for being here.

And our time for this panel is up, so what we will do is, we will leave the record open, because I have some follow-up questions as well, and I know Senator Klobuchar does, and, I want to say, Senator Wicker and a few others that couldn't be here because there's a lot going on today in the Senate. They have the Armed Services Committee hearing, but lots of other things, as well.

So, we'll leave the record open, and we will send you written questions and—how long will we leave it open—we'll leave it open for 2 weeks, but we'd love to get those responses as quickly as possible.

Senator PRYOR. And, as we alluded to before, there'll probably be some other dialogue that happens here, not just in the next couple of weeks, but over the next few months, I'm sure.

But, anyway, thank you all for being here.

I'm going to go ahead and introduce our second panel, but——

Ms. TENENBAUM. Thank you, Senator——

Senator PRYOR.—thank you both——

Ms. NORTHUP. Thank you——

Senator PRYOR.—very much——

Ms. TENENBAUM.—Mr. Chairman.

Senator PRYOR.—for your time and your service.

The second panel, I'm going to go ahead and just read their names and give a super-short introduction for them.

Like the first panel, they all come with great credentials and a great background. But, what I will do, as the staff is rearranging here, and as the folks are coming and going here——

Our first panelist will be Ms. Rachel Weintraub. She's Director of Product Safety and Senior Counsel at the Consumer Federation of America. Second is Mr. Steve Lamar. He's Executive Vice President of American Apparel and Footwear Association. Third is Dr. Garry Gardner, American Academy of Pediatrics Chair, Committee on Injury Violence and Poison Prevention. And, fourth, Ms. Jill Chuckas, Board Member, Handmade Toy Alliance and, I believe, the Owner of Crafty Baby, LLC.

So, what I'd like to do is just do a 5-minute introduction for each one of you all. Then we'll have questions.

So, Ms. Weintraub, you want to lead off, here?

Thank you.

STATEMENT OF RACHEL WEINTRAUB, DIRECTOR OF PRODUCT SAFETY AND SENIOR COUNSEL, CONSUMER FEDERATION OF AMERICA

Ms. WEINTRAUB. OK. Thank you.

Thank you, Chairman Pryor.

I'm Rachel Weintraub, Director of Product Safety and Senior Counsel with Consumer Federation nf America. CFA is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interests through research, advocacy, and education.

I offer this testimony on behalf of CFA as well as Consumers Union, Kids in Danger, and the U.S. Public Interest Research Group.

Thank you very much for inviting me to testify before you today.

Today is the first day of Chanukah, Christmas is just 23 days away, and the holiday buying season has officially begun. Our country's tradition of gift-giving provides a useful perspective through which to comment on the Consumer Product Safety Improvement Act in particular, and the Consumer Product Safety Commission in general.

While consumers should think about how the child interacts with the product, if there are other children in the house, or whether the product has been previously recalled, before a product is purchased, there are some issues that no amount of planning or thought can detect. It is this realm of hidden hazards that the CPSIA and the CPSC have sought to detect and to prevent.

Before passage of the CPSIA, Congress undertook a year-long process to consider the implications of this Act, and the leadership of this subcommittee was an essential and important part of that process. The CPSIA's passage followed a period of a record number of recalls of hazardous products that injured, sickened, or killed vulnerable consumers and sought to repair a weakened oversight agency that failed in its meager efforts to protect public health and safety.

In response, Congress passed the CPSIA, which makes consumer products safer by banning lead and phthalates in toys, creating a publicly accessible consumer incident database, giving the CPSC more resources, increasing civil penalties, and requiring that toys and infant products be tested for safety to strong standards before they are sold and in our children's hands. This proactive approach will benefit the public as well as manufacturers by avoiding costly recalls.

There have been numerous successes in implementing the CPSIA. The mandatory crib standard, close to being finalized, that's required by Section 104, is an important example. We applaud the CPSC for prioritizing the safety of infant sleep environments, in light of the deaths of many children due to poorly designed cribs, bassinets, and cradles, which have led to the recall of more than 7 million cribs over the past 2 years. Only since passage of the CPSA—CPSIA—has an effort been made to strengthen crib standards.

Another success of the CPSIA is last week's passage of the final rule implementing the Consumer Product Safety Information Database. As a result of the CPSC staff's leadership and commitment, consumers will have access to lifesaving information. And the agency will more nimbly be able to identify and act upon safety hazards. The final rule is consistent with Congressional intent, responsive to the public-interest need for disclosure, and protective of a manufacturer's effort to protect their brand and confidential business information.

When consumers purchase toys for children online this year, the same choking-hazard warnings that appear on toy packaging will also appear online. That's an important consumer protection, considering today's shopping trends. The CPSIA requires that infant-durable products, such as cribs, strollers, and highchairs, include a product registration card in their packaging and provide an opportunity to register online. This will give manufacturers information necessary to directly communicate with consumers, the consumers who bought the product, in the event of a recall or other product safety. And this will greatly increase recall effectiveness.

Since passage of the CPSIA there have been challenges: a CPSC that initially moved slowly and gave out confusing information, an economic downturn that has affected businesses, the realization that lead and other heavy metals, such as cadmium, are more pervasive in consumer products than had been expected, as well as concern about the laws implementation consistently raised by manufacturers, small businesses, crafters, and thrift stores.

CPSC has been managing these challenges. They've held numerous public meetings and hearings. CPSC has provided clear information to stakeholders, through numerous publications. In addition, CPSC is establishing a new Office of Education Global Outreach and Small Business Ombudsman to carryout education/outreach activities to stakeholders. The CPSC also issued an interim enforcement policy, related to component testing, that should be finalized soon.

But, some efforts in response to these challenges go too far and would open a series of gaping loopholes in the CPSIA that would allow more lead into a host of children's products.

First, some have argued, or some will argue, that the CPSIA's scope should be limited to children under 6, from what it—it's now 12 years and younger. The reality is that children of younger ages play with their older siblings' toys all the time, and the voluntary standard goes up to 14. Many companies are already applying with those voluntary safety standards.

Second, some have proposed that risk analysis be applied for regulating lead in products. Requiring a piecemeal approach for lead, which is a known toxin, would be wasteful of taxpayer money and government resources. It would reverse the presumption for safety of products and allow all products to be sold and be exempt from testing for lead unless CPSC finds otherwise. This would be a return to the state of the law before CPSIA was passed. CPSC would not act until a child had been harmed by a lead-laden product. This would result in an unreasonable risk to children.

Cadmium has been another challenge. And there is now a voluntary standard that is moving, that hopefully will be proactive. And if that is not proactive enough, CPSC should move on a mandatory standard for cadmium.

We thank you, Chairman Pryor, for your important leadership on product safety issues. We look forward to working together to protect the public from harms posed by hazardous products. And I wish everyone a happy and safe holiday season.

[The prepared statement of Ms. Weintraub follows:]

PREPARED STATEMENT OF RACHEL WEINTRAUB, DIRECTOR OF PRODUCT SAFETY AND SENIOR COUNSEL, CONSUMER FEDERATION OF AMERICA

Chairman Pryor and members of the Subcommittee on Consumer Protection, Product Safety and Insurance, I am Rachel Weintraub, Director of Product Safety and Senior Counsel at Consnmer Federation of America (CFA). CFA is an association of nearly 300 nonprofit consnmer organizations that was established in 1968 to advance the consnmer interest through research, advocacy and edncation. I offer this testimony on behalf of Consumer Federation of America as well as Consumers Union, Kids in Danger, and the U.S. Public Interest Research Group. Thank you for inviting me to testify before you today.

Today is the first day of Chanukah, Christmas is just 23 days away, and the holiday buying season officially began last Friday. The holiday season, with our country's tradition of gift giving, provides a useful perspective through which to observe and comment on the Consumer Product Safety Improvement Act of 2008 (CPSIA) in particular and the Consumer Product Safety Commission in general. Whenever we make a purchase for our family and friends, most people assnme that the product they are considering is safe. While purchasers think about what the person would like, what they want or need or what they requested, an underlying assumption is that the product we are choosing will not cause harm. While consumers do need to think about how the child interacts with the product, if there are other children in the house who may play with the product, or whether the product has been previously recalled, there are some issues that no amount of thought or planning can detect. It is the realm of hidden hazards that the CPSIA and CPSC have sought to detect and prevent.

The bipartisan Consumer Product Safety Improvement Act passed overwhelmingly in the House on July 30, 2008 by a vote of 424–1, in the Senate on July 31, 2008, by a vote of 89–3 and was signed into law by President Bush on August 14, 2008. Before this law passed, Congress undertook a year-long deliberative process to consider the implications of this act: there were approximately 15 hearings and markups in the House and Senate covering issues and products related to the CPSIA, and once each chamber passed its version of the bill, there was a conference in regular order between both Houses of Cougress. The leadership of this subcommittee was significant and much needed as this law was moving through Congress. This law institutes the most significant improvements to the Consumer Product Safety Commission (CPSC) since the ageucy was established in the 1970s.

CPSIA's Significance, New Requirements and Implementation

The CPSIA's passage followed a period of a record number of recalls of hazardous products from the market that injured, sickened, or killed vulnerable consumers. The bill's passage was also in response to a weakened Federal oversight agency that failed in its meager efforts to protect the public's health and safety.

Before the CPSIA was passed, CPSC's past as well as its future was bleak. In 1972, when CPSC was created, the agency was appropriated $34.7 million and 786 full time employees (FTEs). Before the CPSIA passed, the agency's budget had not kept up with inflation, had not kept up with its deteriorating infrastructure, had not kept up with increasing data collection needs, had not kept up with the fast-paced changes occurring in consumer product development, and had not kept pace with the vast increase in the number of different types of consumer products on the market. CPSC's staff had suffered severe and repeated cuts during the last two decades, falling from a high of 978 employees in 1980 to just 401 in 2007—a loss of almost 60 percent.

For example, CPSC's 2008 Performance Budget document painted a grim picture of the CPSC's future work. The budget document was full of statements such as, "while the CPSC has thus far been successful at facing these new and evolving challenges with diminishing resources, the 2008 funding level will challenge the Commission's ability to maintain its existing level of standards development, enforcement, public information, and international activities."[1] The 2008 Performance Budget document was replete with staffing cuts, limitations to programmatic goals and the absence of previous goals and projects. CPSC's efforts to reduce product hazards to children and families were hindered by the forced reductions in FTEs.

In response to this dismal picture, Congress infused the CPSC with new authority and more resources. It has been over 2 years since the CPSIA was passed. This relatively new law will make consumer products safer by requiring that toys and infant products be tested for safety before they are sold, and by banning lead and phthalates in toys (although implementation of the testing requirement has been twice delayed by the CPSC). The law also authorizes the first comprehensive publicly accessible consumer complaint database due to be launched next March; gives the CPSC the resources it needs to protect the public, such as enabling it to hire additional staff; increases civil penalties that the CPSC can assess against violators of consumer product safety laws; and protects whistleblowers who report product safety defects.

Many consumers believed that products were tested before they were sold—that some entity issued stamps of approval for products before they were sold in the store. However, that was never true. Before passage of the CPSIA, the CPSC for the most part had authority only over products after they were sold. If a problem was identified as posing a risk of harm to consumers, the CPSC could recall the product, but that was only *after* the hazardous product was already in consumers' homes and in their children's hands. The CPSIA significantly changes the reactive nature of the CPSC by requiring that children's products subject to mandatory standards be tested for safety before they are sold. A proactive safety system should benefit the public as well as manufacturers by avoiding costly recalls.

CPSC and CPSIA Successes

Mandatory Crib Standard

While there have been challenges there have also been successes in implementing the CPSIA. One of the most notable examples is the mandatory crib standard that is required by section 104 of the CPSIA. The CPSC is close to finalizing the final rule for cribs. We applaud the CPSC for prioritizing the safety of infant sleep environments in light of the deaths of many children due to poorly designed cribs, bassinets, and play yards. Pervasive design flaws have lead to the recall of more than 7 million cribs over the past 2 years. It was essential that the CPSC place safe sleep environments at the top of their mandatory standards-setting list as part of that initiative.

Recalls and corrective actions for cribs have been issued for non-compliance with safety standards; strangulation hazards; risk of head entrapment when side rails, spindles, and slats in side rails become loose; risk of suffocation; choking hazards;

[1]&& U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page vii. On the web at *http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf.*

risk of falling; and danger of laceration when fingers become trapped in folding drop gates.[2]

While the current voluntary crib standards ban the drop-side design in new cribs, only since passage of the CPSIA has there been an effort made to strengthen the voluntary and mandatory standards and require testing and verification of new cribs. The final CPSC crib standard incorporates many provisions that consumer advocates have been supporting for years that replicate the real world use of cribs, such as durability tests, mattress support tests, and tests for the effectiveness of hardware. The resulting proposed CPSC standard is a strong one and is a successful consequence of the CPSIA. In addition, Chairman Tenenbaum and her staff have been successfully reaching out to consumers through the Safe Sleep Campaign and have made it clear to all stakeholders that creating safe cribs and sleep environments is an imperative.

Section 104(c) of the CPSIA seeks to address hazards posed by older model cribs by removing them from the market. This section applies to cribs sold new and used, cribs used in child care facilities, and cribs used in public accommodations such as hotels and motels. The application of this provision means that older cribs that pose significant risks to children will be taken out of the stream of commerce. This provision is based upon laws already in existence in numerous states including: Arizona, Arkansas, California, Colorado, Illinois, Louisiana, Michigan, Minnesota, Oregon, Pennsylvania, Vermont and Washington. This provision extends the protections previously offered in just these states to the entire nation to ensure that children sleep in cribs that meet the most recent and most protective crib safety standards.

We support the CPSC's current language in its proposed crib rule[3] regarding a six-month effective date as it applies to manufacturers. The customary 6 months gives manufacturers adequate time to comply with the new crib standards. In addition, we will support an additional 6-month compliance period for child care facilities, allowing them to phase in replacement of non-compliant cribs over the course of 1 year following the publication of the final rule.

Database

Another success of the CPSIA is last week's passage of the final rule implementing the consumer product safety information database. CPSC is required by Section 212 of the CPSIA to establish the database. As a result of the CPSC staff's leadership and commitment to the effectiveness of the database, consumers will have access to lifesaving information and the agency will more nimbly be able to identify and act upon safety hazards. CPSC staff worked hard to formulate CPSC's final rnle in a manner that is consistent with Congress' intent, responsive to the public interest need for disclosure, and protective of a manufacturer's effort to protect their brand and confidential business information. The database includes more checks on the information and more opportunities for a mannfacturer to comment than other similar databases.

Consumers have been in the dark abont the dangers of products regulated by CPSC. CPSC currently collects incident data from consumers in a manner similar to how it will be collected as part of the new database. However, the difference is that now, when consumers go to CPSC's website to look for information, it is not available. All that they can nsnally find relates to a previons recall. If the Commission has been alerted to the dangers of a product but has not conducted a recall, the prodnct's hazard may never be known to the public.

The database will help change that. Public access to information is vital to safety. Simply allowing consumers access to the safety record of products will increase safety and encourage the speedy removal or redesign of unsafe products. Making it simple for consnmers to report into a single database the problems they encounter with products will also help the Commission to do its job of protecting the public from unsafe products more efficiently, which can help save Commission resonrces.

Online Toy Hazard Warnings

When consnmers purchase toys for children online this year, becanse of the CPSIA, the same choking hazard warnings that appear on the toy packaging will also appear online. This is an important consnmer protection considering today's shopping trends. For years, consnmers who purchased toys online were at a safety disadvantage because they did not receive all the information they would have received, had they made the purchase in a store. This concern has been solved by the CPSIA.

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[2] Kids in Danger, *http://www.kidsindanger.org/prodhazards/recalls/cribs.asp*.

[3] Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs; Notice of Proposed Rulemaking; Proposed Rule," *Federal Register* Vol. 75, No. 141, July 23, 2010.

Product Registration

The CPSIA requires that infant durable products, such as cribs, strollers and high chairs, include a product registration card in their packaging and provide an opportunity to register onliue. This will give manufacturers iuformation necessary to directly contact consumers in the event of a recall or other product safety issue.

The requirements for the product registration cards and au online registration program are contained in Section 104 of the CPSIA, which incorporates the Danny Keysar Child Safety Notification Act. Danny, whose parents founded Kids In Danger, died in 1998 when the portable crib he slept in at a child care center collapsed and strangled him. The crib had been recalled 5 years earlier, but no oue at the child care ceuter, including the mom who donated the crib, had heard of the recall. Too mauy consumers uever hear about a recall of a product that they have iu their home. Registering products is an important step that will increase the number of consumers who hear about a recall.

7Mandatory Toy Standards

Despite the fact that mauy couformity assessment bodies have uot yet received accreditation to conduct full-scale testing, with the expectation of tighter enforcemeut down the road, many manufacturers are already adoptiug robust testing procedures and the safety of toys has been enhanced. The CPSC continues to work on ways to help small mannfacturers who have raised concerns about the costs associated with such testing ensure that their toys are just as safe.

Reviewing Past Data

CPSC has also been reviewing old records and taking long-overdue action. Earlier this year, CPSC announced the recall of two million Graco strollers: the Quattro™ and MetroLite™ because of entrapment and strangulation risks. CPSC and Graco had "received four reports of infant strangulations that occurred in these strollers between 2003 and 2005. In addition, CPSC was aware of five reports of infants becoming entrapped, resulting in cuts and bruises, and one report of an infant having difficulty breathing."[4] While these strollers should have been recalled years ago, we applaud CPSC for taking the right action now to remove these potentially hazardous products from the market.

CPSC and CPSIA Challenges

Since passage of the CPSIA, there have been many challenges to implementation: a CPSC that initially moved slowly and gave out confusing information; an economic downturn that has affected bnsinesses; the realization that lead and other heavy metals such as cadmium are more pervasive in consumer products than had been expected; and concerns about the law's implementation consistently raised by manufacturers, small businesses, crafters and thrift stores.

The current CPSC has been managing these challenges. The CPSC has held numerous public meetings and hearings about issues such as the consumer product safety information database and product testing. CPSC has sought to provide clear information to various stakeholders through publications such as the Guide to the CPSIA for Small Businesses, Resellers, Crafters and Charities and the Handbook for Resale Stores and Product Resellers. In addition, CPSC is establishing a new Office of Education, Global Outreach, and Small Business Ombudsman to "coordinate and carry out education and outreach activities to domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, foreign governments, and consumers."[5]

The CPSC also issued an Interim Enforcement Policy related to component testing for lead content and lead in paint last December and is working on finalizing the "component part" rule as part of the Testing and Certification Rule that should be finalized next year. The components part rule would especially benefit small manufacturers by allowing the use of certified component parts. In Chairman Tenenbaum's statement on the Proposed Rules for Testing and Labeling Pertaining to Product Certification and Component Part Testing, she stated that "the Commission is unanimous in its desire to see this rule provide significant relief from testing reqnirements for both small and large manufacturers while simultaneously moving safety npstream in the manufacturing process. By allowing testing to be performed

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[4] U.S. Consumer Product Safety Commission Press Release, "Graco Recalls Quattro™ and MetroLite™ Strollers Due to Risk of Entrapment and Strangulation, *Four Infant Strangulation Deaths Reported*," October 20, 2010, available on the web at *http://www.cpsc.gov/cpscpub/prerel/prhtml11/11015.html*.

[5] CPSC Press Release, "CPSC Creates New Office of Education, Global Outreach, and Small Business Ombudsman," September 23, 2010, available on the web at *http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10352.html*.

by component part suppliers and designating component part certificates as certificates issued under section 14 of the CPSA, the Commission has provided great incentive for manufacturers to start utilizing component part testing. At the same time, the Commission has established safeguards such as requiring all component parts to be traceable to their original manufacturers aud expressly requiring that manufacturers exercise due care when relying on component part testing certificates."[6]

The CPSC has been responding to the concerns raised by stakeholders.

Responses to CPSIA Challenges

Some responses to these challenges, however, go much too far and include two proposals that if implemented, would serve to considerably weaken public health. They would open a series of gaping loopholes in the CPSIA that would allow more lead into a host of toys and other products meant for children. We reject these efforts to weaken the CPSIA.

Protections Must Remain for Children 12 and Younger

First, some have argued that the CPSIA should not apply to children's products for children 12 years and younger but rather should cover only those products for children 6 and younger. This approach was rejected by Congress when it passed the CPSIA. Congress embraced the belief that there is a "shared toy box" in many families' homes. We agree with this view, as it reflects the reality of what we know to he true in many homes across the United States. Children of younger ages play with the toys of their older siblings. Youngor children mouth their older siblings' toys with frequency. Further, the voluntary standard for toys—ASTM F 963—includes an even broader scope to cover toys intended for children 14 and younger. This means that many companies are already complying with voluntary safety standards that encompass toys intended for children 14 and younger. Thus, the reality that children's toys and products are often shared by children within a family, plus the fact that many within the industry are already complying with a higher age standard, requires the scope of the CPSIA to remain as it is.

No Known Safe Level of Lead

Second, some have proposed that a risk analysis be applied for regulating lead in products. Requiring the CPSC to conduct risk analysis for lead is not acceptable. In this era of criticism over "government waste," requiring a piecemeal risk analysis for lead, a knowu toxin, would be a wasteful and inefficient use of taxpayer money and government resources.

Significantly, a risk analysis would reverse the presumption for the safety of products and allow all products to be sold and be exempt from testiug for lead unless the CPSC finds otherwise. This would mean a return to the state of the law before the CPSIA was passed—*i.e.*, CPSC wouldn't act until a child had been harmed by a lead-laden product. As we witnessed in the years before the CPSIA, the record number of lead-laden products that were recalled from the market proves that this approach resulted in an unreasonable risk of injury to consumers. It will amount to a waste of Commission resources, has been rejected by Congress previously as not being sufficiently protective of public health, and far exceeds the flexibility that the CPSC requested to regulate lead.

The Americau public demands that children's products not pose risks for the children who will play with or sleep iu those products. Lead is a well-documeuted ueurotoxin that has a wide range of effects on a child's development, includiug delayed growth and permaneut brain damage. There is no known safe level of exposure. As a society, we have spent years trying to reduce lead levels in our air, soil and homes. We must continue to work to reduce lead in other products where it is not necessary. While some might argue that we should seek to remove lead from all household products, Congress in the CPSIA focused on the products most likely to be in contact with children. Nearly all toys and infant durable products do not require lead, should nut contain lead and can be made effectively withuut lead. Iu the rare instance that children's products require lead, the CPSIA provides for a targeted exemption for functional purpose. This exemption is drafted tightly to eusure that children remaiu protected from harms of lead exposure. We would have grave concerus if auy of the limiting factors were removed.

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[6] Statement of Chairman Inez M. Tenenbaum on the Proposed Rules for Testing and Labeling Pertaining to Product Certification and Component Part Testing, May 5, 2010, available on the web at *http://www.cpsc.gov/PR/tenenbaum05052010.pdf*.

Cadmium

Cadmium has been recently identified in numerous children's products beginning in January 2010. CPSC has issued five recalls and one warning about six products that contained high levels of cadmium.[7] Five of these recalls/warnings involved children's jewelry while one involved a drinking glass.

According to the Agency for Toxic Substances and Disease Registry, cadmium affects the following organ systems: Cardiovascular (Heart and Blood Vessels), Developmental (effects during periods when organs are developing), Gastrointestinal (Digestive), Neurological (Nervous System), Renal (Urinary System or Kidneys), Reproductive (Producing Children), and Respiratory (From the Nose to the Lungs).[8]

Toxic materials like cadmium should not be present in children's products and children should not be exposed to dangerous heavy metals when they play with toys, drink from a glass or engage in dress up play.

Earlier this year, CPSC issued a guidance report on cadmium and urged ASTM to issue a voluntary standard for cadmium beyond paints and surface coating. By relying on ASTM to develop appropriate standards to address cadmium hazards in toys and children's jewelry, it allows many stakeholders to participate in the standards-development process.

CPSC should be involved in the voluntary standard-setting process and should issue a mandatory standard limiting the cadmium conteut iu children's products if the voluntary standard fails to be adequately protective of children's health. A mandatory standard enables CPSC to use enforcement tools to ensure compliance with the standard. Finally, mandatory standards provide clear rules for industry to follow as they seek to comply with CPSC rules.

The scope of CPSC's efforts to ban the use of cadmium should be focused on children's products as defined iu the CPSIA. Initially, as CPSC begins to limit cadmium in consumer products, CPSC should focus on product categories that are known to be of risk to children: children's jewelry, children's diunerware, and children's toys.

In addition, the ban on cadmium should be based upon a total cadmium level (not solubility), which, similar to the lead regulations, offers clarity and consistency to mannfacturers, CPSC, and testing bodies and offers pnblic health protections to consumers.

CPSC should examine efforts in states snch as California, Washington, Connecticut, Illinois, and Minnesota that have restricted cadmium in children's jewelry. While these laws tend to focus on solubility standards rather than total cadmium content and also focus on children's jewelry rather than children's products, they serve as a useful guide. Since laws have passed in five states and with bills pending in at least five other states, it is clear that consumers are asking for mandatory rnles to limit cadmium in children's products.

Finally, we nrge CPSC to utilize the work it is undertaking to ban cadminm to address bans of other toxic heavy metals in children's products. We hope CPSC efforts effectively stem the tide of substituting one heavy metal for another and curb the use of heavy metals in the manufacturing of children's products.

Congress Must Support CPSC's Mission

CPSC plays an incredibly crucial role in ensuring that consumer products are safe and is responsible for implementing the critical protections of the CPSIA. It is imperative that the agency be appropriately funded at all times to do its job properly. Diminishing CPSC's budget or its authority at this time would hamper the agency from carrying out its primary mission to protect consumers from unreasonable risk of injury cansed by hazardons products.

We thank Chairman Pryor for the important leadership role he has played on product safety issues and we look forward to continuing to work together to protect the pnblic from harms posed by hazardons prodncts.

I wish everyone a happy and safe holiday season.

Senator PRYOR. Thank you.

Mr. Lamar.

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[7] See, CPSC Press Releases announcing recalls of products with excessive levels of cadmium: *http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10162.html; http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10297.html; http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10287.html; http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10227.html; http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10257.html;* and *http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10127.html.*

[8] Agency for Toxic Substances and Disease Registry, toxic substances—cadmium, available on the web at *http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=15.*

STATEMENT OF STEPHEN LAMAR, EXECUTIVE VICE PRESIDENT, AMERICAN APPAREL & FOOTWEAR ASSOCIATION

Mr. LAMAR. Hi. Good morning.

My name is Steve Lamar. I'm Executive Vice President of the American Apparel & Footwear Association. We're the national trade association of the apparel and footwear industry and its suppliers.

Thank you, Chairman Pryor, for providing us this opportunity to appear before you on this important topic.

At the outset, let me state our very strong support for a product safety regulatory system that ensures that only safe and compliant products are designed, produced, marketed, and sold. At AAFA, we take our role in product safety education and advocacy efforts seriously. We view this obligation as key to the success of the industry, not only because such an approach is the right thing to do, but because we're also consumers and parents and grandparents ourselves.

I'd like to focus my remarks on the Consumer Product Safety Improvement Act and offer several recommendations for the Subcommittee to consider in the weeks and months ahead.

The CPSIA was a dramatic overhaul to the nation's product safety regulatory regime. While this had a positive impact through increased funding and awareness, it has also led to many unintended consequences that have caused confusion, created compliance burdens, and adversely impacted the business community. Tight deadlines, rigid definitions, retroactively applied standards, requirements that do not reflect risk, and a one-size-fits-all approach are among the many problems that have made CPSIA implementation challenging.

AAFA, as with others in the regulated community, has actively worked the regulatory process to make sure the rules can be understood and implemented. We've had some success in working with the CPSC to use the limited regulatory flexibility that the CPSIA does permit to make some important determinations. In my written testimony, I detailed one such example—the determination that there is no lead in textiles—but, I also pointed out how the fix is still incomplete, and it came at considerable expense to prove what everybody already knew.

The more common experience is that relief is either denied or that the regulatory process proves too burdensome to achieve a truly commonsense result. The stays of enforcement on testing and certification have provided some relief. And we would strongly encourage that they be continued while the rules and a path forward are still being worked out. But, it is becoming clearer every day that Congress needs to step in and make some legislative fixes to address the many concerns that have been raised from all across the private sector. And, because the timetables mandated by the CPSIA are unforgiving, Congressional action is needed immediately.

A number of legislative fixes have been proposed over the past 2 years by stakeholders across the business community, by Members of Congress from both parties and both chambers, and even by commissioners and CPSC staff alike. They include changes to the lead and phthalate rules, the definition of "children's product,"

more flexible testing and certification provisions, stronger preemption to prevent proliferation of contradictory rules at the state level, and clearer mandates for the public database. I could go on. It's our hope that Congress can immediately begin work with all stakeholders to fully identify and implement these fixes.

With a nod toward Chanukah, which began last night, I would like to make eight recommendations for the Subcommittee to consider going forward:

Number one, ensure that all product safety decisions are based on risk and supported by data.

Number two, give the CPSC more flexibility to interpret the CPSIA.

Number three, ensure that new regulations do not contradict existing ones.

Number four, ensure prospective application of all rules.

Number five, establish deadlines that permit and encourage compliance.

Number six, publicize all pending regulatory developments.

Number seven, avoid one-size-fits-all approaches.

And, finally, number eight, remember that there is more to the CPSC than CPSIA.

The most effective product safety system we can have is one that recognizes that the regulated companies are active partners of the CPSC. But, if these companies are constantly subjected to burdensome, costly, and, in some cases, silly requirements, that partnership is severely strained and the public's interests are not served. Ultimately, product safety takes a blackeye.

Mr. Chairman, the CPSC and the regulated community have come a long way since Congress passed the CPSIA. Thanks to your leadership, we now have five commissioners and an agency that is more fully funded. The CPSIA was, indeed, a wake-up call for the agency and for many in the business community to tighten their own product safety regimes. But, the CPSIA also created extraordinary problems for companies who were already doing the right thing in ensuring product safety. In many cases, those problems came with little gain for public safety.

With an eye to maximizing public health and safety, it is our hope that, with a legislative amendment, continued Congressional oversight, and continued dialogue between the agency, industry and other product safety stakeholders, we can create a stable, predictable, risk-based regulatory environment.

Thank you again for providing us this opportunity to testify. I'm available to take any questions.

[The prepared statement of Mr. Lamar follows:]

PREPARED STATEMENT OF STEPHEN LAMAR, EXECUTIVE VICE PRESIDENT, AMERICAN APPAREL & FOOTWEAR ASSOCIATION

Good morning.

My name is Steve Lamar and I'm Executive Vice President of American Apparel & Footwear Association (AAFA)—the national trade association of the apparel and footwear industry, and its suppliers. Thank you for providing us this opportunity to appear before you this morning on this important topic.

At the outset, let me state our very strong support for a product safety regulatory system that ensures that only safe and compliant products are designed, produced, marketed, and sold. At AAFA, we take our role in product safety education and advocacy efforts seriously. We view this obligation as key to the success of the indus-

try, not only because such an approach is the right thing to do, but because we are also consumers, parents, and grandparents ourselves. We believe very strongly that we should only wear safe and compliant clothes, shoes, and other products. At the end of my testimony I included additional information about AAFA and some of our product safety initiatives, including our extensive global education efforts.

Although product safety is a year-ronnd job, it is appropriate to have this oversight hearing as we enter the holiday season. The focus on consumer spending during the holidays is a natural time to reflect ou product safety and compliance. Fnrthermore, as Congress begins to think through its agenda for the next 2 years, this is a good opportunity to identify what changes can be made to ensure that our Nation's product safety regulatory system is operating effectively. As this is the first oversight Subcommittee hearing on the Consumer Safety Product Commission (CPSC) since passage of the Consumer Product Safety Improvement Act (CPSIA) in 2008—and with more than 2 years of industry experience with implementation of this important law—I'd like to focus my remarks on the CPSIA and offer several recommendations for the Subcommittee to consider in the weeks and months ahead.

The CPSIA was a dramatic overhaul of the Nation's product safety regulatory regime. Its passage put a spotlight on product safety concerns, propelling consumers, regulators and businesses to refocus on making product safety a top priority. Among other things, the legislation provided the CPSC—long an underfunded agency—with much-needed resources to carry out product safety enforcement and educational efforts. It mandated the CPSC to work with other agencies like Customs and Border Protection (CBP) to develop risk assessment methodologies to efficiently target and block potentially unsafe imports. It also ensured that all five CPSC leadership positions were filled—for the first time in years—in an effort to secure a renewed dialogue and healthy debate on how to effectively and efficiently approach and enforce safety regulations. Finally, new content and testing requirements have helped companies better nnderstand the chemicals used in children's products aud evalnate and improve their qnality control processes to ensure that only safe products are sold. It goes withont saying that industry, consnmer advocacy groups, bloggers, the media, and various other stakeholders across the spectrum have become more engaged than ever in product safety.

Regrettably, the legislation also mandated a series of controversial changes to the Nation's product safety rules that have created endless confusion, extensive burdens, huge costs, job losses, and irreparable damage to the business community. In many cases, these adverse consequences have come without improvements in prodnct safety or public health. Among other things, the law mandated very strict lead and phthalate content restrictions. It required certifications of compliance for all consnmer products for all safety standards, mandating third-party testing for those standards involving children's prodncts (defined as 12 and under). It created a pnblic database of prodnct safety incidents. It authorized enforcement by state attorneys general and created whistleblower provisions. While many of these provisions reflect good intentions, the language of the CPSIA makes many of them difficult, if not impossible, to implement and enforce. Tight deadlines, rigid definitions, retroactively applied standards, requirements that do not reflect risk, and a "one-size-fits-all approach" are all among the many problems that have made CPSIA implementation challenging.

AAFA, as with others in the regulated community, have actively worked the regulatory process to make snre the rules can be nnderstood and implemented. We have had some sncccss in working with the CPSC to use the limited regulatory flexibility that the CPSIA does permit to make some important determinations and offer some clarifying opinions. And while we commend the Commissioners and the staff who have worked tirelessly for more than 28 months to craft regulations that reflect "common sense," many problems either have not or cannot be fixed through the regnlatory process. The surrogate for some of these fixes has come in the form of a series of stays of enforcement. And while these stays have provided welcome relief, and should remain in force, they cannot provide a long term solution.

Let me offer one experience—related to the lead substrate standard—to illustrate these points.

Per the CPSIA, the lead restriction applies equally to *any* component of a children's prodnct. Initially, this was interpreted to include all the fabrics, yarns, threads, accessories, and trimmings even though it was commonly understood, and has been known for decades, that there is no lead in textiles and only isolated occurrences of lead in other components, snch as buttons, snaps, and zippers. Eventnally, and after input from the industry and other stakeholders, the CPSC issned a determination that indeed there is no lead in textiles, regardless of whether the fabric is dyed. And while we were pleased with this determination, please consider the following:

- The determination required the submission of thousands of test results costing hnndreds of thonsands of dollars. Including the tests that were not snbmitted, but which companies had to perform because their customers were insisting upon them as a result of their understanding of the CPSIA, the cost rises into the millions.
- The determination was not made until more than 6 months after the initial retroactive lead standard took effect and several weeks after the second (and current) lead standard took effect.
- Since most garments are not made entirely of just fabric, most garments still have to undergo testing for possible lead in most trimmings, even though tests from pre-CPSIA inventories showed that lead occurred in these components in only 3–5 percent of the time. Moreover, in many of these cases, the positive lead tests occurred with components that present no risk, but which are nonetheless covered. The example often cited is the zipper stop at the bottom of the fly in a child's pair of trousers.
- The determination is not complete. Even though the determination applies to dyed fabrics, it does not apply to certain kinds of after treatment processes, such as prints. Yet some of the print processes exclnded by this determination have the same non risk of lead as dyes.
- The determination depends on a component part testing rule to operate effectively. That rule, while proposed, has not yet been finalized.
- Testing relief that companies are currently nsing to navigate through these rules goes away once the stay of testing and certification has been lifted because a company's own reasonable testing efforts—such as the use of XRF style machines—will be insufficient to meet third party requirements.
- These requirements exist along side other rules that were created by the CPSIA or which were strengthened by the CPSIA. So while the fabric in a child's pajama may not have to meet lead testing rules for fabric, it does have to meet requirements for flammability, lead substrate testing in zippers, lead in paint testing for any coatings, and possibly phthalate testing for the non-stick surfaces on the pads of the feet.
- State rules impose a myriad of additional, and contradictury, requirements that are not preempted by these determinations.

It is for this reason that we have been strong supporters of Congressional initiatives to amend the CPSIA and to ensure the proper implementation of the CPSIA. And because the timetables mandated by the CPSIA are unforgiving, Congressionul action is needed immediately.

Many throughout the stakeholder community have identified a number of provisions in the CPSIA that need to be amended through either a "tweaking" or through "major surgery." It would appear that many in Congress, the Commissioners, and the CPSC professional staff also share this view to different degrees. During the 111th Congress, several hundred Senators and Representatives from both parties and both Chambers have written letters or sponsored legislation that seek amendments to the CPSIA. A provision in last year's omnibus spending bill asked the Commission for its advice on legislative changes. Commissioner Nord, during her tenure as Acting Chair, forwarded to Congress a list of professional CPSC staff recommendations for CPSIA changes.

Some proposed changes have focused on specific industries—such as books or ATVs or small batch manufacturers. Others have sought to provide broader industry relief, such as provisions that would apply next year's tighter lead restriction in a prospective manner or which would permit inaccessible components to be exempt from phthalate limits. An incomplete list of other changes needed involve revisiting the definition of children's product, more flexible testing and certification provisions, stronger preemption to prevent proliferation of contradictory rules at the state level, and clearer mandates for the public database.

This is not an exhaustive list. But it is important to note that, with more than 2 years of CPSIA implementation and experience, the regulated community and the regulators have both found significant problems with the law. There appears to be a growing consensus that the CPSIA created many unintended consequences that, if left unaddressed, will continue to do damage to the very entities that bear the burden for compliance. Our hope is that Congress can immediately begin work with all stakeholders to fully identify and implement these fixes.

Goiug forward, I would like to make 8 recommendations. Many of these will require specific legislative changes or clear direction from Congress that the CPSC shall interpret the CPSIA, using its existing authorities, with more flexibility. All these suggestions are intended to streugtheu product safety and public health.

1. Ensure that all product safety decisions are based on risk and supported by data

The CPSIA makes a number of product safety mandates that simply do not reflect risk. Prohibitions against lead in the spokes of a child's bicycle is just one obvious example. Not only does this contradict common sense but it undermines an effective product safety regime and creates confusion among the regulated community and consumers alike. If all prodncts, regardless of the risk, are deemed equally hazardous, valuable resources and time will be spent validating and regulating already safe products. Businesses will not understand which hazards they are trying to prevent if the regulations appear arbitrary, as they currently do under the CPSIA. Moreover, consumers will become so overwhelmed by product safety warnings that they will tune out when real and legitimate coucerns do appear. A better approach would be to focus time and energy on those products, components, and materials that do present risk of injnry, harm, or death. Then, based on the fact pattern behind that risk, we can construct a regulatory regime to erase or mitigate the hazard. In this vein, the public database scheduled to go live in only a few months raises significant problems because it will inundate the public with erroneous and unsubstantiated claims instead of legitimate product safety problems.

2. Give the CPSC more flexibility to interpret CPSIA

At numerous points during the past 2 years, the regulated community has heard that the CPSIA ties the Cask's hands. In these cases, the professional staff, and even Commissioners, agreed that a particular outcome is not correct but pointed to the law as the source of their helplessness to address the issue. In some cases, the agency has resorted to contorted opinions or guidance that, although well intended, have often complicated the business community's understanding of the law. The CPSC should be able to respond, quickly, to imminent threats and respond smartly and appropriately to longer term and fact based concerns. In all cases, the rules should be easy to understand so they can be effortlessly implemented and communicated up and down the supply chain. Currently, CPSIA, as interpreted by many at the CPSC and others, does not allow this flexibility.

3. Ensure that new regulations do not contradict existing ones

The CPSIA mandates new testing and certification requirements that alter existing regulations that pre-date the CPSIA, that have worked extremely well and which the industry understands. For many of these standards (including those addressing flammability, small parts, and sharp points and edges), pre-existing quality control programs and regulations were crafted in such a way that they did not hinder the ability of companies to make safe and compliant products. But because the new CPSIA mandates do not efficiently plug into the existing regulatory requirements, considerable confusion has been created with regard to these regulations. This will only be exacerbated as the now delayed 15-month rule and the new third-party testing requirements begin to take effect. On a similar note, incomplete preemption language in the CPSIA means that Federal rules and state rules often work at cross purposes.

4. Ensure prospective application of all rules

The CPSIA imposed new lead and phthalate requirements in a retroactive manner. This caused untold chaos, confnsion, and costs as companies were forced to cancel orders, reformulate products, and destroy inventory. Regrettably, the CPSIA's retroactive mandates continue to create chaos. For example, some products lawfully produced today under the CPSIA 300 ppm standard will become banned hazardous substances if they are sold after August 14, 2011, when the standard drops to 100 ppm (and is applied retroactively). Regulations should take effect prospectively, and implemented only after the Commission publishes clear and comprehensive regulatory guidance. The retroactive application of regulations unfairly punishes businesses for making products in good faith, especially when they were made in compliance with a previous product safety standard. It also goes against sound business practices which build product safety requirements into the design at the beginning of the production process rather than treat them as an afterthought at the end.

5. Establish deadlines that permit and encourage compliance

The CPSIA's mandate to the CPSC to undertake dozens of rnlemakings in a short period of time has been challenging for both the agency and industry. In many cases, the changes were tied to specific deadlines that have proved hopelessly unrealistic. A proposed 15-month rule, which was supposed to provide some relief in the form of component part testing, is now more than a year late and has been delayed indefinitely. Other deadlines have had to be delayed or stayed. Rather than rely on strict deadlines, the CPSIA should recognize that well thought out and implementable product safety rules take time. A single garment can take nearly a

year to travel down the supply chain. New regulations must give industry enough time to adapt these long supply chains so all parties can understand and clearly communicate changes to all their partners involved in production. Furthermore, time is necessary so the regulatory agency can work with the affected industry to properly develop and implement the regulations.

6. Publicize all pending regulatory developments

The regulated community continues to have a difficult time understanding when various rules and regulations are due to be developed under the CPSIA. The agency is currently in the process of lifting of the stay of enforcement of testing and certification for the children's product safety standards. Yet this is being done in a manner that is catching many by surprise. Product safety standards that work best are those that are created through a transparent and predictable process, especially when they involved technical testing and certification protocols. The product safety community involves a range of stakeholders, all of whom need to participate. If one group appears shut out, the final result may not be credible or accepted by all. This, in the long run, leads to a product safety regime that is not sustainable.

7. Avoid "One-Size-Fits-All Approaches"

One major problem is that the CPSIA treats all products, components, and companies equally, even though there are different risks involved. Product safety rules that were in effect before the CPSIA recognized these differences by tailoring the rules to those products and consumers where the risk of injury or death are greatest. Similarly, while all companies, regardless of size, should be subject to product safety rules, different sized companies can demonstrate compliance using different methods. Not recognizing these differences continues to be one of the major flaws of the CPSIA.

8. There is more to the CPSC than CPSIA

The CPSC should be commended for the enormous amount of work they are doing in implementing the CPSIA. But we are concerned that the resources and time spent on implementing the CPSIA has detracted from other important product safety initiatives, including enforcement of existing standards. Giving the CPSC flexibility to properly implement product safety priorities in the CPSIA will inevitably free up time for the agency to focus resources on the rest of its product safety mission.

Conclusion

Over the past 2 years, AAFA and others have worked closely with the CPSC to implement the CPSIA and we applaud the agency's efforts to work with and educate industry during the rulemaking process.

The most effective product safety system we can have is one that recognizes that the regulated companies are active partners of the CPSC. But if these companies are constantly subjected to burdensome, costly, and, in some cases, silly requirements, that partnership is severely strained and the public's interests are not served. Ultimately, product safety takes a black eye.

Mr. Chairman, the CPSC and the regulated community have come a long way since Congress passed the CPSIA. Thanks to your leadership we now have five Commissioners and an agency that is more fully funded. The CPSIA was indeed a "wake-up" call for the agency and for many in the business community to tighten their own product safety regimes. But the CPSIA also created extraordinary problems for companies who were already doing the right thing in ensuring product safety. In many cases, those problems came with little gain for public safety.

With an eye to maximizing public health and safety, it is our hope that with a legislative amendment, Congressional oversight and continued dialogue between the agency, industry and other product safety stakeholders, we can create a stable, predictable, risk-based regulatory environment.

Thank you again for providing us this opportunity to testify. I am available to take questions.

APPENDIX

Background on AAFA Product Safety Initiatives

AAFA is the national trade association for the apparel and footwear industries, and their suppliers. Our members own, produce for, or market hundreds and hundreds of brands of clothing and footwear. AAFA has about 400 member companies who own, produce for, or market more than 700 brands of clothing, footwear, and other fashion products. Nearly all stakeholders in the industry supply chain are represented in our membership, including large, medium, small, and micro businesses;

retailers of all sizes; designers; manufacturers; importers; wholesalers; private label; brand owners; and suppliers of inputs and services. AAFA members produce and sell in virtually every country in the world.

Educating the apparel and footwear industry supply chain on product safety compliance initiatives has been a top priority for AAFA for decades. The AAFA Product Safety Council, which addresses specifically with product safety issues, is one of our more active Committees. It now boasts over 400 members. AAFA uses the Product Safety Council to distribute information, develop industry positions, create best practices, and keep members up to date on the ever changing product safety landscape.

AAFA is an active participant in legislative and regulatory initiatives involving product safety. Since the passage of the CPSIA, AAFA has participated in numerous regulatory proceedings focused on the apparel and footwear industries, or affecting the broader regulated community.

Over the past 2 years alone, AAFA has conducted nearly a hundred webinars, briefings, conferences and trainings, throughout the United States and on four continents on the CPSIA, restricted substances, and other product safety topics. Just last month, AAFA conducted a CPSIA training session with over 200 factory and compliance personnel in Ho Chi Minh City, Vietnam. AAFA will be returning to China in April of 2011 for our 6th compliance program in that country.

Since 2007 AAFA has published a free, publicly available, peer-reviewed, industry-wide Restricted Substances List (RSL) that helps companies understand international product safety standards and implement a chemical management program. The RSL is updated once every 6 months to ensure the most current information is available for companies in a manner that is digestible and easy to implement. The 7th release of the RSL was most recently published in Vietnamese to coincide with the recent product safety seminar held in Vietnam. Future editions will be published in other languages, including Spanish and Chinese. The RSL is available on the AAFA website—*www.apparelandfootwear.org*—where AAFA staff also post extensive product safety compliance information on the CPSIA and other product safety initiatives, such as REACH and individual state laws, including California Proposition 65. Keeping this information updated is a never ending challenge, particularly in the past several years in light of the rapidly changing regulatory environment.

Senator PRYOR. Thank you.

Mr. LAMAR. Thanks.

Senator PRYOR. Dr. Gardner.

STATEMENT OF H. GARRY GARDNER, MD FAAP, ON BEHALF OF THE AMERICAN ACADEMY OF PEDIATRICS

Dr. GARDNER. Good morning.

My name is Dr. Garry Gardner, and I am proud to represent the American Academy of Pediatrics at this hearing today.

The AAP was pleased to work closely with members and staff of this committee and subcommittee over the course of the development and passage of the Consumer Product Safety Improvement Act. Over a period of close to 2 years, the AAP provided expertise and input on a range of child health and safety issues, including the proposed limitations on lead content and the definition of a children's product. As passed, the CPSIA ultimately rejuvenated a flagging CPSC, gave it additional tools and authority to achieve its mission, and helped improve the safety of consumer products for children.

Let us take a moment to reflect back upon the state of product safety and the CPSC during the 2007 holiday season. Our nation had just experienced a flood of product recalls, including several involving some of the best known and most loved brands and toys. Many Americans were shocked to learn that the majority of toy safety standards were voluntary and not mandatory, with few or no consequences for violations of those voluntary standards. The

CPSC was struggling to perform its mission with limited statutory authority and atrophied staff and a budget of only $62 million—less than one-quarter of what Congress had allocated for the Hubble Space Telescope, and slightly less than what was spent on Pacific coastal salmon habitat restoration.

Three years later, the state of consumer product safety is very different. The CPSIA has already created a range of new safety standards for toys and other children's products, including strict limits on lead content in all materials. The CPSC has increased its staff, and its budget has almost doubled. Manufacturers will soon be required to test for, and document compliance with, a range of safety standards, giving retailers and consumers a high degree of confidence in the safety of these products. Unsafe cribs have been recalled and dangerous drop-side cribs will soon be banned.

These new safety standards are having a meaningful impact on the lives of children and families, though sometimes in all but invisible ways. We cannot readily see that a toy is now lead-free or that a dangerous feature on a stroller has been reengineered to be safe. It may seem, perhaps, that these are unimportant changes that cause only minor or incremental improvements in safety, but it would be a mistake to fall into the trap of believing that these small changes cannot also be significant. These changes save lives and prevent life-altering injuries. The loss of a few IQ points across the child population has marked impacts on educational spending and future potential.

Over my 37 years in practice, I have seen a dramatic change in the injuries suffered by my patients due to unsafe products. Many of the injuries that used to be relatively common simply do not occur anymore. As a pediatrician, I am grateful to Congress and the CPSC for your ongoing work to make products safer for our children.

I'd like to offer some very brief comments on the subjects of lead, Safe Sleep, cadmium, and emerging hazards.

The AAP has been supportive of CPSC's efforts to implement Section 101 of the CPSIA, which set the first-ever comprehensive limits on lead in children's products. The new lead limits are being phased in over 3 years to allow manufacturers and retailers sufficient time to ensure that their products comply with the new rules. The AAP looks forward to the completion of the standard's implementation when the total lead limit drops to 100 parts per million in August 2011. The CPSIA, and Section 101 in particular, is truly a significant step in protecting children from the real hazards of lead.

Safe Sleep. The AAP is pleased to have partnered with Chairman Tenenbaum and the CPSC on its Safe Sleep initiative, a multifaceted campaign aimed at reducing deaths and injuries associated with unsafe sleep environments. As part of this campaign, the CPSC collaborated with the AAP, Keeping Babies Safe, and journalist Joan Lunden to produce a video, to be aired in hospital and physician waiting rooms, providing recommendations and information to parents and families on safe sleep practices. AAP supports and has submitted extensive comments on rulemaking processes to establish new mandatory safety standards for bunkbeds, cradles, bassinets, and full-size and non-full-size cribs.

Finally, the AAP has consistently recommended that parents not use sleep positioners. And we fully support CPSC and FDA's recent warning to parents about the dangers of these products.

Cadmium. Recent press reports have brought to light the potential danger of another heavy metal in consumer products: cadmium. It appears that some manufacturers have begun adding cadmium to children's products because the CPSIA limited the use of lead. This is clearly a case of abiding by the letter, but not the spirit, of the law. Congress hardly intended for companies to substitute one poison for another.

The AAP urges the establishment of a systematic, transparent process by which CPSC should review the literature and data, consult with experts, and update each of the heavy-metal standards found in the ASTM F 963 toy standard. This process should not be delegated to nongovernmental entities or be inaccessible to the public or stakeholders. Moreover, the standards established should apply to all children's products, and not just toys. The AAP looks forward to engaging with the CPSC throughout such a process and making our members' expertise available to the agency.

And finally, emerging product safety hazards. Ensuring the safety of consumer products requires constant vigilance as the marketplace changes and new products, and sometimes new hazards, are created. Small powerful magnets continue to be a concern, as they can cause serious injuries if more than one is swallowed. The AAP's Committee on Injury is also learning of increasing numbers of reported injuries caused by children's ingestion of so-called "button batteries." The AAP is interested in working with the CPSC and industry to require secure closures on devices that require button batteries, as well as appropriate packaging.

In conclusion, the AAP appreciates the opportunity to offer testimony today. We commend you, Chairman Pryor and the subcommittee, for your leadership on consumer product safety issues. And we look forward to working with you to ensure the health and safety for all children. I'll be pleased to answer any questions you may have.

[The prepared statement of Dr. Gardner follows:]

PREPARED STATEMENT OF H. GARRY GARDNER, MD FAAP, ON BEHALF OF THE AMERICAN ACADEMY OF PEDIATRICS

Good morning. I appreciate this opportunity to testify today before the Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance at this hearing, "Oversight of the Consumer Product Safety Commission: Product Safety in the Holiday Season." My name is H. Garry Gardner, MD, FAAP, and I am proud to represent the American Academy of Pediatrics (AAP), a non-profit professional organization of more than 60,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. I chair the AAP's Committee on Injury, Violence and Poison Prevention, which is responsible for advising the Academy and drafting its policies on a wide range of injury prevention issues, including consumer product safety. I have been in private pediatric practice since 1973 and am a Professor of Clinical Pediatrics at Northwestern University Feinberg School of Medicine.

Creating Safe, Healthy Products for Children

The AAP was pleased to work closely with the Members and staff of this committee and subcommittee over the course of the development and passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Over a period of close to 2 years, the AAP provided expertise and input on a range of child health and

safety issues, including the proposed limitations on lead content and the definition of a children's product. As passed, the CPSIA ultimately rejuvenated a flagging Consumer Product Safety Commission (CPSC), gave it additional tools and authority to achieve its mission, and helped improve the safety of consumer products for children.

Today's hearing provides a valuable opportuuity to discuss the CPSIA 2 years after its signature into law. Many of the directives uuder the law have already been implemented, either in whole or in part, while others remain to come. The AAP appreciates this opportunity to reflect on the successes of the CPSIA to date and opportunities for improvements in the coming months and years.

Let us take a moment to reflect back upon the state of product safety and the CPSC during the 2007 holiday season. Our nation had just experienced a flood of product recalls, including several involving some of the best-known and most-loved brauds and toys. Many Americaus were shocked to learu that the majority of toy safety standards were voluutary, uot maudatory, with few or no cousequeuces for violation of those voluntary standards. Even for a highly toxic substance like lead, the Federal limit was an unacceptably high 600 parts per million, and applied only to paint on children's products. The CPSC was struggling to perform its mission with limited statutory authority, an atrophied staff, and a budget of $62 million—less one-quarter of what Congress allocated for the Hubble Space Telescope that year, aud slightly less than was spent ou Pacific coastal salmou habitat restoration.

Three years later, the state of consumer product safety is very differeut. The CPSIA has already created a range of new safety standards for toys aud other children's products, including strict limits on lead content in all materials. The CPSC has increased its staff, and its budget has almost doubled. Manufacturers will soon be required both to test for and doenment compliance with a range of safety standards, giving retailers and consumers a high degree of confidence in the safety of these products. Unsafe cribs have been recalled, and dangerous drop-side cribs will soon be banned.

These new safety standards are having a meaningful impact on the lives of children and families, though sometimes in all-but-invisible ways. We cannot readily see that a toy is lead-free, or that a dangerous feature on a stroller has been reengineered to be safe. It may seem perhaps that these are unimportant changes that cause only minor or incremental improvements in safety. But it would be a mistake to fall into the trap of believing that small changes cannot also be significant. These changes save lives and prevent life-altering injuries. The loss of a few IQ points or a small increase in the proportion of children with behavioral problems in the population of U.S. children has marked impacts on educational spending and future potential.[1] Over my 37 years in practice, I have seen a dramatic change in the injuries suffered by my patients due to unsafe products. Many of the injuries that used to he relatively common simply do not occur any more. As a pediatrician, I am grateful to Congress and the CPSC for your ongoing work to make products safer for our children.

The CPSIA has allowed the CPSC to make strides in two particular areas I would like to highlight: lead and Safe Sleep. Additional work remains to be done with regard to cadmium and other heavy metals, as well as emergiug hazards. The American Academy of Pediatrics would like offer the following comments on each of these subjects.

Limiting Children's Exposure to Lead

Lead is well-established as a potent neurotoxin aud a particular threat to the developing brain of the fetus, infant, and young child, with documented negative effects on behavior and permanent loss of IQ points. Studies have shown that lead has no normal fuuction iu the humau body, aud that a "uormal" blood lead level is zero. There is no "safe" level of lead exposure; no threshold for the toxic effects of lead has been identified. When lead accumulates in the body, it is tightly bound to bones and then released slowly over years or decades. Therefore, exposures that may be separated by significant gaps in time have an additive effect on the body's burden of lead.

Damage done by small amounts of lead may be hard to measure and even harder to understand. Children who accumulate lead in their body may not have any physical symptoms, but low lead levels cause a wide array of negative effects, including cognitive, motor, behavioral, and physical harm.[2] The vulnerability of children to

[1] Bellinger DC. What is an adverse effect? A possible resolution of clinical and epidemiological perspectives on neurobehavioral toxicity. *Environ Res.* 2004; 95(3):394–405.

[2] Bellinger D. Lead. *Pediatrics.* 2004; 113(4 (Supplement)):1016–1022.

lead poisoning during development of their brain and nervous system has been amply demonstrated, and the literature is very consistent. On average, children whose blood lead levels (BLLs) rise from 10 to 20 micrograms per deciliter (mcg/dL) lose two to three IQ points. More recent studies have shown an even greater impact on IQ of BLLs under 10 mcg/dL. The effects of lead on health do not stop once the child's brain and nervous system mature or the BLL falls. A recent study found that in a group of 7-year-old children exposed to lead before the age of 3 years, IQ continued to fall even after the BLL had declined.[3]

The AAP has been supportive of CPSC's efforts to implement Section 101 of the CPSIA, which set the first-ever comprehensive limits on lead in children's products. The new lead limits are being phased in over 3 years to allow manufacturers and retailers sufficient time to ensure that their products comply with the new rules. As of Febrnary 2009, prodncts designed or intended primarily for children age 12 years and younger could contain no more than 600 parts per million (ppm) of lead. This standard was then lowered to 300 ppm in August 2009. The AAP looks forward to the completion of the standard's implementation when the total lead limit drops to 100 ppm in August 2011. Any children's product on the market that does not comply with the new lead standards will be considered a banned hazardous substance. The CPSIA, and Section 101 in particular, is a truly significant step forward in protecting children from the hazard of lead in toys and other products designed for children.

Creating Safe Sleep Environments for Infants and Children

Cribs, cradles, bassinets, and other infant sleep environments are designed for a parent or caregiver to leave a baby unattended safely for hours at a time. Unfortunately some sleep environments may pose a serious threat to a child's health and safety, thereby negating their intended purpose. Between November 2007 and April 2010, almost 150 fatalities and 1,675 injuries associated with full-size cribs and 6 fatalities and 28 injuries associated with non-full-size cribs were reported to CPSC. Since 2007, CPSC has issued 40 separate crib recalls involving more than 11 million products. Parents deserve the confidence of knowing the crib they purchase is held to the highest safety standards possible. The AAP has worked strenuously to reduce injuries and deaths from unsafe sleep environments by establishing guidelines for parents to use in evalnating these products and we fully support CPSC's efforts to establish strong, mandatory safety standards for cribs.

The AAP is pleased to have partnered with Chairman Tenenbaum and the CPSC on its Safe Sleep Initiative, a multi-faceted campaign aimed at reducing deaths and injuries associated with unsafe sleep environments. As part of this campaign, CPSC collaborated with AAP, Keeping Babies Safe, and journalist Joan Lunden to produce a video to be aired in hospital and physician waiting rooms providing recommendations and information to parents and families on safe sleep practices. In the video, AAP President O. Marion Burton, MD FAAP shared AAP's strong recommendation that all babies be put to sleep on their backs, which has helped reduce the rate of Sudden Infant Death Syndrome (SIDS) by 50 percent over the last 20 years. In addition, Dr. Burton highlighted the importance of never placing pillows, bumpers, sleep positioners, blankets or other fluffy items in cribs, and the need for cribs to have firm mattresses with tightly fitted sheets.[4]

Over the past year, CPSC has undertaken rulemaking processes to establish new mandatory safety standards for bunk beds, cradles, bassinets, full-size and non-fnll-size cribs, among many other categories of children's products as part of the Safe Sleep Initiative and as directed by Section 104(b) of the CPSIA. AAP strongly supports CPSC's efforts to establish mandatory safety standards for infant and children's sleep environments and has submitted extensive comments on each of these proposed rules.

The AAP has encouraged CSPC to make mandatory the new voluntary ASTM standard for full-size and non-full size cribs, which includes a requirement that sides of a crib be fixed in place, effectively banning drop-side cribs, (a crib design where the side of the crib can be raised and lowered). The AAP is extremely pleased that CPSC has proposed adopting this standard, as failures in this product design have resulted in numerous infant injuries and fatalities. If this proposed rule is made final, it will be unlawfnl to sell, lease, or otherwise provide a full-size or non-full-size crib that does not meet mandatory CPSC standards. As a result, many es-

[3] Chen A, Dietrich KN, Ware JH, Radcliffe J, Rogan WJ. IQ and blood lead from 2 to 7 years of age: are the effects in older children the residual of high blood lead concentrations in 2-year-olds? *Environ Health Perspect*. 2005; 113(5):597–601.

[4] Video available online at *http://www.healthychildren.org/English/news/pages/A-Safe-Sleep-for-Babies.aspx*.

tablishments will be required to purchase new cribs and/or eliminate their inventory of noncompliant cribs, including child care centers (inclnding family child care homes), hotels, motels and inns, resale and consignment shops, and crib retailers. While the AAP recognizes the demands the new safety standards may place on child care centers, retailers, and others, these considerations must be balanced against the cost to children, families, and society when preventable injnries and deaths occur in these cribs. The AAP supports CPSC in implementing the new mandatory safety standards in an expeditious, but sensible, timeframe.

Finally, the AAP was pleased that CPSC and the Food and Drng Administration (FDA) recently issued a warning to consumers urging parents not to use infant sleep positioners.[5] Infant sleep positioners are flat mats with side bolsters or inclined (wedge) mats with side bolsters used to prevent an infant from rolling or turning while asleep. Over the past 13 years, CPSC and FDA received 12 reports of infants who died when they suffocated in sleep positioners or became trapped between a sleep positioner and the side of a crib or bassinet. These products represent a serions risk to the health and safety of sleeping babies. Sleep positioners do not prevent SIDS and in fact can increase the risk of infant suffocation. Manufacturers typically claim these prodncts aid in food digestion to ease colic or the symptoms of gastroesphageal reflux disease and prevent flat head syndrome; however, these claims have not been reviewed and approved by the FDA. AAP has consistently recommended parents not to nse these products and we fully support CPSC and FDA's efforts to prevent further deaths or injuries as a result of using infant sleep positioners.

Limiting Cadmium and Other Heavy Metals

Recent press reports have brought to light the potential danger of another heavy metal in consumer products: cadmium. Cadmium is a soft heavy metal used in a variety of industrial and consumer applications. Like lead, with which it shares certain properties, cadmium causes a range of well-documented adverse human health effects. Oral exposure to cadmium is associated with effects on the kidney, liver, bones, immnne system, blood and nervous system. Acute cadmium exposure can lead to vomiting, diarrhea and other effects. Long-term exposure to cadmium can cause kidney disease, developmental and neurological deficits, and bone fragility. Cadmium is a known carcinogen.

It appears that some manufacturers have begun addiug cadmium to children's products because the CPSIA limited the use of lead. The presence of cadmium at high levels has been found in a range of children's products, most notably toy jewelry and drinking glasses. This is clearly a case of abiding by the letter but uot the spirit of the law—Congress hardly inteuded for companies to substitute one poison for another.

The ASTM's F–963 toy safety standard currently contains voluntary standards for eight heavy metals known to be highly toxic: antimony, arsenic, barium, cadmium, chromium, lead, mercury and selenium. As part of the CPSC's review of the adoptiou of the F–963 staudard as a mandatory standard, each of these standards* should undergo rigorous review, along with the associated testing protocols. The AAP urges the establishment of a systematic, transparent process by which the agency should review the literature and data, consult with experts, and update each of the heavy metal standards. This process should not be delegated to non-governmental entities or be inaccessible to the public or stakeholders. Moreover, the standards established should apply to all children's products, not solely toys. The AAP looks forward to engaging with the CPSC throughout such a process and making our members' expertise available to the agency.

Emerging Product Safety Hazards

As Americaus prepare to exchauge gifts this holiday season, we should all be able to have confidence in the safety of toys and children's products. As a pediatrician and injury expert, however, I also find myself anxiously awaiting the next emerging product safety hazard. Ensuriug the safety of consumer products requires onr constant vigilauce as the marketplace chauges aud uew products—and sometimes, uew hazards—are created.

Small, powerful magnets continue to be a coucern, as they cau cause serious injuries if more thau one is swallowed. These abdomiual iujuries tend to mimic stomach ailments or other minor illnesses, and can he difficult to properly diagnose. The CPSC is aware of this hazard and has recalled numerous sets of maguetic toys.

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[5] Announcement available online at *http://www.cpsc.gov/cpscpub/prerel/prhtml10/10358.html*.

* Not including lead, which is already covered by the CPSIA.

Given that these magnets are being used in increasing numbers of children's products, however, continned attention to this problem is necessary.

AAP's Committee on Injury is also learning of increasing numbers of reported injuries caused by children's ingestion of so-called "button batteries." Roughly the size of a dime or nickel, these batteries closely resemble a coin when seen on scans. Unlike a swallowed coin, however, a battery must be removed from the body immediately to prevent serious harm. If lodged in the esophagus, severe tissue damage can ocenr in as little as 2 hours. Bntton batteries have been identified as the cause of 13 deaths. Between 1990 and 2008, 8,648 battery ingestion cases were reported, of which 62 percent were button batteries swallowed by children under the age of 6 years. Among children in this age group, 12 percent of those who ingest a 20 to 25mm battery can be expected to experience serious complications or death.[6] The AAP is interested in working with the CPSC and industry to require secure closures for devices that require button batteries as well as appropriate packaging.

In conclusion, the AAP deeply appreciates the opportunity to offer testimony today on the implementation of the Consumer Product Safety Improvement Act of 2008. We commend you, Chairman Pryor, and the subcommittee for yonr leadership on consumer product safety issues, and we look forward to working with yon to ensure the health and safety of all children.

Senator PRYOR. Thank you.

Ms. Chuckas.

STATEMENT OF JILL CHUCKAS ON BEHALF OF THE HANDMADE TOY ALLIANCE

Ms. CHUCKAS. Good morning.

Thank you, Chairman Pryor, for having me before this committee today. It's an honor.

My name is Jill Chuckas, and I own a small handcrafted children's accessory business, located in Stamford, Connecticut, called Crafty Baby.

For the last 12 years, I've heen crafting children's products from my home-based studio. When Congress first spoke of toy safety legislation, I applauded your efforts. In December 2008, though, I began to read the fine print. I became acutely aware that this law, meant to regulate large multi-billion dollar companies that had betrayed the country's trust, could effectively put me out of business. Not because my products are unsafe, but because I simply cannot afford the mandatory third-party testing and labeling requirements, which disproportionately affect small-batch manufacturers and specialty retailers. I quickly joined a rising grassroots effort to amend the CPSIA and took on a leadership role within the newly formed Handmade Toy Alliance.

So, today I come before you to speak, not just for myself, but as a board member of the Handmade Toy Alliance, an organization that owes its very existence to the CPSIA. The HTA now represents 592 member businesses, including specialty retail stores, toymakers, and children's product manufacturers from across the country. I'm here today with fellow board members Kate Glynn of a Child's Garden and Impish, in Massachusetts, and Randy Hertzler of euroSource, in Pennsylvania.

The deadline for third-party testing is February 10, 2011, just 10 weeks from now. After that point, our member businesses face extinction. Although many of us have already paid for XRF testing of our products, we simply cannot afford to pay for the services of

[6] Litovitz, et al. "Preventing Battery Ingestions: An Analysis of 8648 Cases." *Pediatrics* 2010; 125:1178–1183.

a CPSC-certified lab. Throughout the last 2 years, we have slowly witnessed many of our members close their businesses or change their business models as to not include children's products.

I have with me today a few examples of these businesses:

First, you see a wooden toy airplane. This toy, made by our member, John Greco, in New Jersey, is made solely from wood. The coming requirement for ASTM testing, in the CPSIA, makes it economically impossible to produce items like this in small batches. Rather than continue to make children's products, Mr. Greco decided to close that aspect of his business this past September. As he shared with me, "I was never looking to get rich making wooden toys. I did it because I enjoyed making toys that made kids happy."

Second, you see an award-winning, custom-designed fabric toy monster created by Stephanie and Michael Estrin, owners of Curly Q Cuties, in Texas. Children and their parents can go online and design their own personal monster. After much research, Curly Q Cuties found that they could never afford to test each unique design to ASTM standards, and decided to close their business at the end of this year. Ms. Estrin cites the reason for the company's closing due, "a law that does not address our particular manufacturing scenario." Put simply, the CPSIA makes no allowances for one-of-a-kind items.

Third, my fellow board member, Randy Hertzler's family business focuses on often hard to find toys, primarily imported from the European Union. These toys, that represented 44 percent of his sales in 2006 to 2007, have disappeared from the U.S. market altogether, because of the CPSIA's lack of alignment with European standards. Many quality European toy companies will no longer sell to companies—to American retailers, like Randy. He fears that he will have to liquidate and close in 2011.

We find it hard to believe that it was Congress's intent, with the CPSIA, to remove products and businesses like these from the marketplace.

While the HTA has worked closely with the CPSC, submitting comments on pending rules, attending CPSC-sponsored workshops, regular e-mail and phone contact with CPSC staff, we feel strongly that the current legislation does not grant the CPSC the flexibility to address our members' needs.

We have offered a number of suggestions that we feel will ensure the safety of children's products, yet amend the CPSIA to be more workable for the businesses we represent. We are more than happy to further discuss these suggestions throughout the day, today.

Two needed changes I'd like to bring up at this time include granting the CPSC the authority to use risk analysis to allow enforcement flexibility of third-party testing and hazardous content limits. High-risk items, like paint or metal jewelry, should be held to higher verification standards than low-risk products, like bike valve stems and brass zippers on children's garments. And, just as the Senate included language in the new food safety bill to exempt small farmers making under 500,000 per year, we ask that Congress make similar allowances for manufacturers who produce in small batches, exempting them from the third-party testing requirements. It's important to point out that these manufacturers

would not be exempted from the standards themselves, only from the third-party testing protocol.

Over the last 2 years, we've been told countless times that the CPSIA was never meant to adversely affect our businesses. We have worked tirelessly, along with many others, to enact common-sense changes within this legislation, always holding onto the fact that the products we create are safe.

On behalf of our members, I thank this committee for addressing this important issue, and urge you to quickly pass meaningful reform of the CPSIA, correcting these unintended consequences.

Thank you.

[The prepared statement of Ms. Chuckas follows:]

PREPARED STATEMENT OF JILL CHUCKAS ON BEHALF OF THE HANDMADE TOY ALLIANCE

Hello. My name is Jill Chuckas and I own a small hand crafted children's accessories business called Crafty Baby. For the last 12 years, I have been crafting children's products from my home based studio in Stamford, CT. When Congress first spoke of toy safety legislation, I applauded your efforts. In December of 2008, though, I began to read the fine print. I became acutely aware that this law, meant to regulate large, multi billion dollar companies that had betrayed the countries trust, could effectively put me out of business. Not because my products are unsafe, but because I simply could not afford the mandatory third-party testing and labeling requirements, which disproportionately affect small batch manufacturers and specialty retailers. I quickly joined a rising grass roots effort to amend the CPSIA and took on a leadership role within the newly formed Handmade Toy Alliance.

So today I come before you to speak, not just for myself, but as a Board member of the Handmade Toy Alliance, an organization that owes it very existence to the CPSIA. The HTA now represents 592 member businesses, including specialty retail stores, toymakers and children's product manufacturers from across the United States. I am here today with fellow Board members Kate Glynn of A Child's Garden and Impish in Massachusetts and Randy Hertzler of euroSource in Pennsylvania.

The deadline for third-party testing is February 10 of next year—just 10 weeks from now. After that point, our member businesses face extinction. Although many of us have already paid for XRF testing of our products, we simply cannot afford to pay for the services of a CPSC-certified lab. Throughout the last 2 years, we have slowly witnessed many of onr members who manufacture products close their businesses, or change their business models as to not include children's products. These equate to lost jobs, not because the company couldn't make safe product, but because the companies couldn't navigate the costly and burdensome regulations the CPSIA puts forth to prove that their products are safe. I have brought with me today a few examples of these businesses.

First, you see before you a wooden toy airplane. This toy, made by our member John Greco in New Jersey, sold for $110 and is made from Cedar, Oak, Poplar, Birch, and Maple. It is unfinished, so it doesn't need to be tested for lead, but quotes from labs to perform ASTM F963 Use & Abuse testing makes it too costly to continue making. Just one round of testing requires 12 toys to be sent to the lab for destructive testing, resulting in $1,320 in lost gross sales—and this does not include shipping and lab fees. Rather than continue to make children's products, Mr. Greco decided to close that aspect of his business this past September. As he shared with me, "I was never looking to get rich making wooden toys—I did it because I enjoyed making toys that made kids happy."

Second, you see before you an award winning custom designed fabric toy monster created by Stephanie and Michael Estrin, owners of Curly Q Cuties in Texas. Children and their parents can go on line and design their own personal monster. After much research, Curly Q Cuties found that they could never afford to test each unique design to ASTM standards and decided to close their business at the end of this year. Mrs. Estrin cites the reason for the company's closing due to "a law that does not address our particular manufacturing scenario." Put simply, the fact that this is a one of a kind item, makes it impossible to adhere to all the stipulations within the CPSIA.

Third, my fellow board member Randy Hertzler's family business focuses on often hard to find toys, primarily imported from the European Union. These toys, that represented 44 percent of his sales iu 2006–2007, have disappeared from the U.S.

market because of the CPSIA's lack of alignment with European standards. Many quality European toy companies will no longer sell to American retailers like Randy. He fears that he will have to liquidate and close in 2011.

While the HTA has worked closely with the CPSC—submitting comments on pending rules, attending CPSC sponsored workshops, regular e-mail and phone contact with CPSC staff—we feel strongly that the current legislation does not grant the CPSC the flexibility to address our members' specific needs. This was most recently shown by the CPSC definition of a children's product. The final rule was issued in 63 pages of text that we now understand to mean "if it can be construed as a children's product, it is." Our view was that the CPSC could have offered relief to countless small businesses, but the ambiguity of their definition, rather than exempting product categories and providing guidance, has only served to create additional market confusion.

We have offered a number of suggestions that we feel will ensure the safety of children's products, yet amend the CPSIA to be more workable for the businesses we represent. The majority of these ideas were outlined in our January 2010 letter to the CPSC. We are more than happy to further discuss these suggestions throughout this hearing.

Most importantly, Congress should grant the CPSC the authority to use risk analysis to allow flexibility of third-party testing requirements and hazardous content limits. High risk items like paint or metal jewelry should be held to higher verification standards than low-risk products like bicycle valve stems and brass zippers on children's garments.

Second, the definition of what is a children's product should be changed to items intended for children 6 years or younger, except where the CPSC identifies a product requiring a higher age limit based on risk analysis.

Third, educational products intended for use in a classroom environment should be excluded from the definition of a children's product.

Fourth, harmonize CPSIA standards with the European Union's EN–71 standards to remove the regulatory trade barrier which the CPSIA created between the U.S. and the EU. This would include changing the lead content standard from an untenable total lead standard to an absorbable lead standard.

Fifth, exempt manufacturers who make less than 10,000 units per year from all third-party testing requirements and allow them to comply instead with the 'reasonable testing program' requirements which apply to manufacturers of non-children's products under the CPSA. This would protect small batch manufacturers and specialty product manufacturers, including companies that make adaptive products for children with disabilities. These manufacturers would not be exempted from the standards themselves, only from the third party verification reqnirements.

Sixth, tracking labels should be voluntary except for durable nursery items and products which are most likely to be passed down to younger siblings or resold where the CPSC's risk analysis determines that tracking labels would be most likely to prevent harm. Manufacturers who choose to implement tracking labels would benefit from a lesser burden in the event of a recall.

Seventh, instruct the CPSC to not lower the lead content limit from 300 parts per million to 100 parts per million, a standard so low that it multiplies the difficulties of compliance.

Over the last 2 years, we have been told countless times that the CPSIA was never meant to adversely affect my business or the member businesses the HTA represents. We have worked tirelessly, along with many others, to enact common sense change within this legislation, always holding on to the fact that the products we create are safe. On behalf of our members, I thank this committee for addressing this important issue and urge you to quickly pass meaningful reform of the CPSIA, correcting these unintended consequences. Thank you.

A full list of our 592 member businesses can be found at *http://www.handmadetoyalliance.org*.

Senator PRYOR. Thank you.

Ms. Weintraub, let me start with you, if I may.

On our first panel, we had some discussion about budgets. And folks pointed out some of the concerns with the CPSIA and, you know, some of the bumps in the road on how we drafted it or how it's trying to be implemented. But, you know, one thing, I think, that was missing from that discussion was a context of what life was like before two things happened: before we passed the CPSIA and before Chairman Tenenbaum came on board.

Could—do you mind, sort of, painting—just very briefly, kind of painting a landscape for us of what it looked like before those two things happened?

Ms. WEINTRAUB. Sure, I'd be happy to.

I described what CPSC had suffered as "death by a thousand cuts." The CPSC's budget had been decimated and had never been restored. In 1972, when the CPSC was first created, the agency was appropriated $34.7 million; they had a staff of 786 full-time employees. The agency's budget, since that time, did not keep up with inflation, did not keep up with its deteriorating infrastructure, did not keep up with the changes in consumer products, and did not keep up with the increasing data-collection needs. The agency suffered repeated and severe cuts during the last 2 decades, falling from a high of 970 employees, in 1980, to just 401, in 2007, a loss of almost 60 percent.

So, what we were all faced with as we were looking to make CPSC more robust was a beleaguered agency that was starved of resources, of legislative authority, and appropriate resources to do what it needed to do to protect the American public. And it's only with CPSIA that the Commission has been given a boost of all of these things.

Senator PRYOR. Let me ask about one of the things, in the CPSIA, that they're still in the process of doing. They're getting closer on it. But, it's the database. What is your perception of how that has gone? And what the—how useful the database might be, come, what is it, March of next year?

Ms. WEINTRAUB. Yes. The database, thanks to your leadership and the leadership of your staff and this committee—subcommittee and full Committee—will be implemented in March 2011. It is a very important resource for consumers, because—again, looking at the state of the product safety world before CPSIA passed, consumers were, and right now are, in the dark. Because of Section 6(b) of the Consumer Product Safety Act, which is still in effect, CPSC, unlike any other government agency, has to basically ask permission from the manufacturer of a particular product before they can disclose information about that product to the public. That has hampered the agency. That has kept critical safety information, that affects life and death, out of the hands of consumers. And it has really put consumers under a veil of ignorance.

What this database will do, because it is out of Section 6(b), will provide a very useful resource that—consumers, when they have a problem, they can report it, as they do now. However, they can report it online, and it will be public.

Importantly, as was prescribed by this committee and by Congress generally, there's very specific criteria that is required before a posting can be made. So, the concerns that have been raised about the definition of a "consumer" being broad, all of that is narrowed very much by the fact that, if there is not essential information about the product, about the harm, then the posting will not be available.

So, I think that the impact of this database will be profound.

Senator PRYOR. I must say that yesterday I went on the NHTSA website to look up—I have a 19—I mean—excuse me—I have a 2003 Ford Taurus. And I had looked it up on the NHTSA database,

on their website, because I was having a problem with it, and I wanted to see if others were having the same problem, and if they could give me some direction. So, I found that very helpful.

Dr. Gardner, let me ask you something that—follow up on something that you said in your testimony. You talk about how, you know, you've been a physician, I think you said, for 37 years——

Dr. GARDNER. Yes.

Senator PRYOR.—Correct?—and that you're seeing different types of injuries today. Or, I guess what you're saying is, there were injuries that you used to see in children that you just don't see much anymore. Could you elaborate on that?

Dr. GARDNER. Yes, let me give you a specific example, and that's the issue of walkers. A while back, walkers had wheels, they were small in size, they were mobile. Children loved them, because it made them mobile. Parents loved them, because it was hands-free—they could turn their back on the kids for a minute. The problem was that toddlers are drawn like magnets to stairs. An open stairway is a magnet and pulls them forward. And, unfortunately, when they're in a walker, they'll just go down the stairs in their walker, and often land on their head.

It was very common for me to see significant head injuries, not just concussions, but skull fractures, intracranial bleeds. And the most common cause of head injuries in toddlers—this was several years ago—was, clearly, walkers. And we were forever warning parents that the walkers were dangerous and that they should always supervise, and preferably just never have their child in a walker.

So, that's one example where now walkers are no longer either mobile. They're a stationary object that the child can bounce and play in, but it's not going to move anywhere, or they're so wide that they won't fit through a doorway and allow them to go down the stairs. We still would prefer children not to be in walkers, but they don't create the risk of head injury that they did several years ago.

Senator PRYOR. Right. So, based on, you know, your area of practice, are you seeing fewer injuries to children, based on children's products? Or, can you say that?

Dr. GARDNER. It keeps changing. And I referred to that, a little bit, with emerging hazards. I think we see new risks, and we need to be aware of that. For example, the button battery. There's this new generation of lithium button batteries——

Senator PRYOR. Right.

Dr. GARDNER.—that children perceive as toys or—they swallow coins, and they are very easy to confuse on an X-ray, with a coin. If this lithium button battery is entrapped in the esophagus for a minimum of 2 hours, it causes irreversible damage to the esophagus, can perforate the esophagus or cause bleeding, and that's difficult to recognize. The leading source of those batteries is the TV remote. The TV remote is dropped, pops open, and the battery falls out. That's the leading source of ingestion for children. That's an injury I never saw before. And that's just an example of a new emerging hazard.

Senator PRYOR. Thank you.

Ms. Chuckas, I'm really interested in what you said a few moments ago. And it may be hard to believe, but we did try to, you

know, draft legislation in a way that—we were trying to find the balance of—just because a small company, a craftsman, maybe one person, maybe makes one toy at time and just sells them at, you know, crafts fairs, et cetera, or maybe they sell them in retail stores—but, just because it has made by one person in a—his or her shop, doesn't mean that it's automatically safe. I mean, that toy can injure a kid, just like something made by, you know, one of the big companies.

So, we're trying to find that balance of, you know, How do we provide a safe marketplace and children's safety, but also understand that—you know, we try not to make this too burdensome on smaller companies. And I'm not sure that we got that balance exactly right, but we have tried to do that. And your testimony has been very important.

Also, I was going to ask you—and you may not know, there may not be any way to answer this question—but, I understand, in this very difficult recession, some of these small companies are going to go out of business anyway. Do you have a sense of how many are going out of business because of the economy, versus the changes in the consumer protection laws? Can you gauge that?

Ms. CHUCKAS. It is a hard thing to gauge, because certainly the economy of everything has been a factor within these businesses, as well. But, I think what has happened is that the drive to continue to try to do what one loves has left, because the overwhelming sense of this legislation is something people can't get past. So, it becomes the "straw that broke the camel's back" kind of thing.

Senator PRYOR. Yes.

Ms. CHUCKAS. It was just one more thing they couldn't deal with.

Senator PRYOR. Now, the CPSC has a list of, you know, products that say—they know don't contain lead. And it's—my understanding is that you don't have to do any third-party testing. And wood, I think, is one of those. You—am I wrong on that?

Ms. CHUCKAS. For the lead content, you're correct.

Senator PRYOR. OK.

Ms. CHUCKAS. The issue with the toy is the ASTM safety standards. I submitted, within my written testimony, some quotes from—this wooden toy, for example, sells for $110. When John contacted a CPSC-approved lab, which—it was difficult for him to find a lab, actually, that he could work with, to begin with, in the United States. He found one. He had to send 12 of this toy. He made 20 of them. So, 12 of them had to be sent, in order to comply with the toy safety standard aspect. And so, that was roughly around $1,300 worth of inventory he wasn't going to get back, in addition to the shipping, in addition to the lab fees, which—he didn't even get that far with them, what the actual lab costs would be for the multitude of tests that would have to be done on this wooden toy airplane.

Senator PRYOR. When you and your members contact the CPSC about this issue, is it your perception that they're listening, that they're trying to work with you? Or, maybe do they give you a sense that their hands are tied because of the law? I mean, how's the—how responsive has the——

Ms. CHUCKAS. Extremely responsive. We've spoken directly with four out of five of the commissioners. Chair Tenenbaum, Commissioner Northup, Commissioner Nord, and Commissioner Adler have made them all—have made themselves readily available. Their staffs have been readily available. And, within a week after they appointed the new small business ombudsman, we had a conference call with him. Very readily available. They've been great working with us.

Senator PRYOR. Has it translated into action, though? Or relief?

Ms. CHUCKAS. To some extent. We're waiting, still, on the component safety certification rules to come down. We had really hoped that that would have been done a long time ago, but we recognize the massive rulemaking undertaking that is.

So, we feel that they are listening to our concerns. It hasn't always articulated itself into a ruling that was going to be helpful. But, we do feel that they're listening. They're trying.

Senator PRYOR. Yes. OK, good.

Mr. Lamar, let me ask you, if I may—kind of follow up on that same question. I know that your industry has had a lot of contact with the CPSC. And I'm curious about, you know, if your perception is that they've been receptive and willing to listen. And, even if they have, do they, kind of, come back and say that their hands are tied? So, it's the same question.

Mr. LAMAR. I think they've been extraordinarily responsive. I would agree with Jill, we've had conversations—multiple conversations with commissioners or staff. Several of the commissioners have come and presented at training workshops that we've held throughout the United States and around the world. They've been very eager to help out when they can. Many times the reaction we get is, "You raise some good points, we don't know if we can go that far," or, "You've raised some good points, the legislation doesn't allow us to accommodate it the way you might request so you have to recalculate your proposal."

Sometimes, even when they want to be responsive, they're not able to be as responsive, because there are a lot of other industries asking the same question. Behind me, there are a ton of industry representatives, representing everybody from books to ATVs to science kits to, you name it, and they're all asking the exact same questions; many times, on the same kinds of issues. And there are only so many people at the agency, and I think their ability to respond to all of these questions coming in makes it difficult for them to be as responsive to everybody as quickly as they probably could be.

Senator PRYOR. Right.

Let me ask—you said—one reason I wanted to ask you that question is, you said—in your written testimony, you said, "Product safety standards that work best are those that are created through a transparent and predictable process. If one group appears shut out, the final result may not be credible or accepted by all." And, from that, I guess I was inferring that you guys felt like you'd been shut out or had not been listened to.

Mr. LAMAR. No. I think what I'm trying to describe there is sort of their Nirvana. I think that you want to have a situation where everybody has an opportunity to comment. I think Chair

Tenenbaum mentioned, when she was discussing the cadmium approach—is that they were going to work with the voluntary standards-setting community, so that everybody would have an opportunity to participate, that would focus on the products and the specific risk, rather than trying to create something that's out there. I think that kind of goes back to the comments I made before in some of those eight points.

Senator PRYOR. And one of the things I think you've talked about is zipper testing. Have there been problems with zippers having high lead content? Has that been an issue, either now or in the past?

Mr. LAMAR. Yes. I'm glad you asked that question. There's a lot of confusion. We presented a lot of data to the agency—5- or 6,000 test results, I think it was—it came out to. This was when we did our determination that there was no—or, were seeking the determination that there was no lead in textiles. And, in addition to proving that there was no lead in textiles, we found—and this was pre-CPSIA inventory, so this was inventory that had been produced before people knew what the new lead rules were going to be, even before they even knew that they were being discussed—and the incidents of lead in things like zippers, buttons, snaps, other kinds of accessories on clothing, was about 3 to 5 percent. So, what we found was that it's not in textiles. It may be, in a very, very small, isolated, rare set of circumstances, in some kinds of components. Moreover, what we found is, if it were, like, in a zipper, it might be in the stop at the bottom of the zipper; it wasn't in the pull, the slider, the teeth, all these other aspects of the zipper machinery or equipment. So, you found these very isolated, rare circumstances.

The problem is, this translated, as implementation began—is that the zipper stop, for example—and I brought a pair of pants that illustrates it—might be violative. If that was above the 600 parts per million, then that meant the entire zipper was above 600 parts per million, which meant the entire pair of pants was above 600 parts per million, which meant a whole shipment might be above it. So, it's kind of in a—in a reference to the old children's parable, you know, "For want of a nail, the kingdom was lost"—for want of the zipper stop that was compliant, the entire shipment and the order was lost. And so, a lot of inventory had to get destroyed, because you might find that, in one zipper stop, there was a problem. And that was a significant problem that we had in our industry.

I think, as people knew these rules, they've now started to produce zippers that are compliant. They're going through making sure that the metal used, the processes used, in the future and for future shipments, is going to be compliant with that limit—with the 100 parts per million now, because you're looking down the road.

Senator PRYOR. We actually saw that as we were working on the CPSIA through the process. Some of the companies—manufacturers, retailers—were already making changes, in anticipation of the—you know, the law taking effect. And, you know, hopefully what it does is—in Dr. Gardner's world, it helps create a safer place for everybody.

But, Dr. Gardner, let me ask you about something that was touched on more in the previous panel, but a little bit here, about lead. There was a lot of discussion, in the first panel, about lead. And I assume that you would say that there is no safe level of lead. I mean, we've kind of talked about that before. But, is the real issue with lead solubility or, you know, what—if we're looking at some modification of the existing CPSIA, when it comes to lead, and maybe giving a little more flexibility or a little more direction on this—you know, I guess I—from your standpoint, what are the two, three things we need to know about lead?

Dr. GARDNER. Yes. I think the most important thing for people to realize about lead, in very simple terms, is that it's a neurotoxin that, in simple language, causes brain damage that's permanent and irreversible. The other important medical aspect of lead is that it's accumulative.

Senator PRYOR. It's—does that mean children are more susceptible to it?

Dr. GARDNER. Yes. Particularly younger children, as their brain is developing and they're acquiring their skills, and early brain development. There's a long-lasting impact on their subsequent development and behavior and IQ and function.

Senator PRYOR. Right. So, tell us about the cumulative aspect of——

Dr. GARDNER. Part of the issue is that lead stays in your body for many years, if not decades. And it accumulates. So, one of the difficult issues is that an exposure to a small amount of lead, in and of itself, may not be harmful, but as that adds on, and it's additive, and it continues over a period of time, you can easily reach levels that are harmful, even though those individual exposures are small.

The other thing that's hard to monitor and measure is the starting point of a child's lead exposure. If they're starting with a blood lead level of 8, and they're exposed to small amounts that, over a period of time, take them over 10—as opposed to the child that starts with a blood lead level of 1 and goes to 3. Bioavailability or the absorption is a moving target, in terms of how much is being absorbed and stored over time, and what the vulnerability is of that child or adolescent, or even adult, absorbing that lead.

Lead is a poison. And it's very difficult to talk about safe levels when there, essentially, isn't one.

Senator PRYOR. Right. It has been a difficult topic within the CPSIA and the CPSC, trying to implement this, because, you know, there's a lot of lead in products out there. And, you know, some products, it's just a necessary ingredient, and it's been used for different things at different times. And, you know, some of these parts are not accessible at all. And the CPSC has really been struggling with this and working through a lot of these issues, over time. So, we'll continue that discussion with all of you all——

Dr. GARDNER. There's background lead——

Senator PRYOR. Yes.

Dr. GARDNER.—as well.

Senator PRYOR. Right.

Dr. GARDNER. And you can't eliminate all of the background lead——

Senator PRYOR. Right.

Dr. GARDNER.—so that's adding just the "lead load," if you will.

Senator PRYOR. But, I guess the idea would be, if you can lessen the load, especially in children's products——

Dr. GARDNER. Yes.

Senator PRYOR.—that's a good thing to do, because they do have this other——

Dr. GARDNER. It's essential.

Senator PRYOR. Yes.

Well, listen, you guys have been great. I want to thank all the panelists.

We're going to leave the record open for 2 weeks. We, I'm sure, will have lots of follow-up questions, because I have several more pages. I just don't want to keep you all day. But, I'm sure we'll have some follow-up questions and other questions from the Committee members who couldn't be here today.

So, I want to thank all of you all for everything that you do. And, like we said before, as we go through 2011, we will continue this dialogue, whether it be here in the Subcommittee or in, you know, our offices or just informally, or whatever. But, your input is very important.

We appreciate all of you for being here, and thank you. And have a great holiday season.

[Whereupon, at 12 p.m., the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF THE PRINTING INDUSTRIES OF AMERICA, BOOK MANUFACTURERS' INSTITUTE, INC., AND THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.

PETITION
December 16, 2010

Office of the Secretary,
U.S. Consumer Product Safety Commission,
Bethesda, MD.

Re: Request to Extend the Current Stay of Enforcement for Certain CPSIA Testing and Certification Requirements for Books and Other Printed Material Children's Products

Dear Mr. Stevenson:

The Printing Indnstries of America,[1] the Book Manufacturers' Institute, Inc.,[2] and the Association of American Pnblishers[3] (hereinafter "Joint Reqnesters") hereby request the Consumer Prodnct Safety Commission to extend its current stay of enforcement for certain provisions of Subsection 14(a) of the Consumer Product Safety Improvement Act ("CPSIA") for books and other printed material children's products for an additional 12 months from the Febrnary 10, 2011 expiration date of the current stay.

An extended stay is necessary because the Commission to date has not completed several pending rulemaking proceedings, specifically the Testing and Labeling Pertaining to Prodnct Certification (75 FR 28336) and Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208) rules, that are reqnired for implementation of and compliance with Sections 101, 102, and 108 of the Consnmer Prodnct Safety Improvement Act of 2008 ("CPSIA") before the current stay expires. Even if the Commission were to publish the final rules today, the effective dates of the rnles would not allow for sufficient time for companies to implement these provisions properly.

Over the course of the prior and current stays, the Commission has worked in a determined manner to implement CPSIA, including the pnblication of more than 50 rules and interpretive policy statements implementing the law. The Commission has also issued several policy statements designed to provide guidance to industry. However, serious implementation problems still exist, particularly in the application of CPSIA to books and other printed children's material, even as the clock ticks down to the current stay's expiration date.

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[1] Printing Industries of America (PIA) is the world's largest graphic arts trade association, representing an industry with approximately one million employees. It serves the interests of more than 10,000 member companies involved in every stage of the printing industry from materials to equipment to production to fulfillment. Over 80 percent of the printing operations in Printing Industries of America's membership have less than 20 employees, which makes printing a prime example of small business involved in manufacturing.

[2] The Book Manufacturers' Institute, Inc. (BMI) is the leading nationally recognized trade association of the book manufacturing industry. Our membership is comprised of 80 companies ranging in size of those with less than a hundred employees to those employing thousands. BMI member companies annually produce the great majority of books ordered by the U.S. and Canadian book publishing industries. While our members produce the majority of books used in all publishing markets, our members do manufacture over 95 percent of the books used in the elementary school market.

[3] The Association of American Publishers (AAP) is the principal national trade association for the U.S. book industry, representing some 300 member companies and organizations that include most major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses and scholarly societies. AAP members include large and small publishers of children's books in the consumer marketplace, as well as publishers of instructional and assessment materials for students at all levels of education.

For more than 2 years, the Joint Requesters have been engaged in meetings, discussions and other communications with the Commission aud its staff in an effort to clarify the applicability of the requirements in the various sections of CPSIA to books and other printed material children's products. These efforts have iuvolved the exchange of letters, development and provision of online access to a test results database, aud multiple in-persou meetiugs with the Commission's techuical, legal, and enforcement staff.

The Joint Responders' iuteraction with the Commission has been productive iu a number of ways, including an August 26, 2009 final rule announcing determinations (74 FR 43031) that certain component materials, such as paper, animal-based glues, and any product printed with four color process inks (CMYK) and others, used in books and other printed material children's products are not required to be tested for lead content under Subsection 102 of the CPSIA.

However, to date many other component materials included in the initial request for determinations made by the Joint Requesters have not received determinations for exclusion by the Commission. These include spot inks, saddle stitching wires, and laminates, among other components.

The Joint Requesters understand the significance of such determinations and deeply appreciate the efforts of the Commission staff to work with us on our additional exclusion determination requests. However, since the typical components of most books and other printed material children's products are comprised of the materials that did *not* receive exclusion determinations from the Commission, the practical result is that *any* of these children's products that includes a component of non-excluded material will have to be tested for certification under the statutory requirements. As a result, the needed relief from the accredited third-party laboratory testing requirement is unavailable for virtually *all* such products.

Other aspects of CPSIA, such as the stringent conditions that must be met in order to demonstrate the "non-accessibility" of certain component materials as a basis for their exclusion from the Section 102 testing requirement, as described by the Commission in its final rule issued on August 7, 2009 (74 FR 39535) have proven too restrictive for virtually *any* books with covers to avoid the testing requirement and remain problematic.

Yet another example of the practical limitation of the current exclusion determinations for component materials involves textbooks. Almost every textbook cover is laminated to maintain product quality and longevity. Since laminates are not included in the list of component materials determined to not have lead contents that could ever exceed the statutory limit, every textbook must be tested for lead content to support the required certification. Considering the millions of textbooks printed each year and the lead-time required to test and deliver them to students in a timely manner, this presents an unrealistic situation for the companies represented by the Joint Requesters. In addition, a large percentage of soft-cover books, which includes the testing books that are required under the No Child Left Behind Act, are printed with spot inks. All of these would also require testing to support the required certification.

Certainly, all stakeholders are aware of these and other examples that have proven challenging in the implementation of CPSIA. In its January 2010 "Report to Congress," the Commission stated it believed it could "more effectively fulfill its mandate under section 101(a) if it were allowed greater flexibility in granting exclusions from the section 101(a) lead limits," particularly as the regulation related to "ordinary books." The report also highlighted the Congressional statement of managers attached to the FY 2010 omnibus bill, in which the Conferees noted their belief that CPSIA may not have been intended to subject ordinary children's books to certain provisions of the law.

Congress has also taken action to address the implementation and compliance challenges surrounding CPSIA. In the 110th Congress, legislation to amend CPSIA was introduced by both Democrat and Republican Members of Congress. The House Energy & Commerce Committee held a hearing on potential revisions to CPSIA April 29, 2010 and the Appropriation Committees of the House and Senate requested the "Report to Congress" referenced above, which was designed to solicit suggestions from Commissioners on possible ways to amend CPSIA to avoid unintended consequences and make the law work in a practical way.

The most recent Congressional examination of CPSIA was on December 2 in a Senate hearing held by the Committee on Commerce, Science, and Transportation. At this hearing, Chairman Reckefeller acknowledged that the Commission "continues to grapple with a few outstanding issues" and stated that the Senate is "taking a hard look at those concerns and recommendations." The Joint Responders are encouraged by this statement, but realize that such action is not reasonably likely to occur until after the 112th Congress convenes next month.

Industry, too, continues to develop for submission additional information supporting further exclusiou determinatious for compouent materials used iu books and other printed material children's products. For those component materials that will ultimately require testiug, exteusiou of the stay would allow the uecessary time to develop and implement a sampling and testing program, based on the yet to be issued final regulations, that would minimize product delays and burdensome costs.

With this in mind, we are asking the Commission to extend the stay on enforcement of the testing and certification provisions for books and other printed material children's products, until February 10, 2012. Taking such an action now will provide the Commission, Congress, and industry time to work together to develop additional revisions, policies, and interpretations that maximize the prospects for a useful and cost-effective solution for all stakeholders. During the period of the extended stay, the prohibition against commerce in children's products coutaining total lead content exceeding the prescribed statutory limits will, of course, remain fully in force. Extendiug the stay with respect to ordiuary paper-based children's books and other printed material children's products will in no way endanger the health and safety of children, as the total lead content of such children's products currently is well below the most stringent statutory limits and publishers and printers will continue to ensure that it remains so.

During the extended stay of enforcement, the book printing, manufacturing, and publishing industries—represented by the Joint Requesters—will continue to work with the Commission and its technical staff on additional exclusion determinations for certain component materials that are used to manufacture books and other printed material children's products, and with Congress as it seeks to remedy unintended consequences of CPSIA.

We would be happy to respond to any questions that the Commission or its staff may have about this request.

Respectfully submitted,

LISBETH A. LYONS,
Vice President of Government Affairs,
Printing Industries of America.

DANIEL N. BACH,
Executive Vice President,
Book Manufacturers' Institute, Inc.

ALLAN ROBERT ADLER,
Vice President for Legal and Government Affairs,
Association of American Publishers.

RETAIL INDUSTRY LEADERS ASSOCIATION,
Arlington, VA, December 2, 2010

Hon. MARK PRYOR, Chairman,
Hon. ROGER WICKER, Ranking Member,
Senate Commerce Committee,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
Washington, DC.

Dear Chairman Pryor and Senator Wicker:

The Retail Industry Leaders Association (RILA) welcomes the Committee's hearing on oversight of the Consumer Product Safety Commission (CPSC) and product safety in the holiday season, and we appreciate this opportunity to showcase the steps that our members are taking to ensure product safety and integrity all along the supply chain—during the holiday season and throughout the year. RILA members place the highest priority on the safety and quality of the products they sell to their customers, particularly toys and other children's products. RILA also supported the sweeping Consumer Product Safety Improvement Act (CPSIA) when it was enacted in 2008, and our members have worked aggressively to implement the law's many new requirements. While implementing the CPSIA, it has become apparent that there are some provisions in the law which that do not coincide with best practices and have resulted in unintended consequences. As Congress begins to consider its agenda for 2011, RILA hopes the Senate Commerce Committee will make it a priority to advance legislation to facilitate better implementation of the CPSIA.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the

largest and fastest growing companies in the retail industry which together provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA/British Retail Consortium Consumer Product Standard

Retailers have vigorous quality assurance programs and enforcement mechanisms for their suppliers. In addition to these efforts and implementation of the CPSIA, RILA is seeking to advance product safety efforts by partnering with the British Retail Consortium (BRC) to implement a factory capability assessment of suppliers of consumer products sold in North America. This effort will create a harmonized standard that will be consistently evaluated by a third party-assessed scored audit. RILA believes the RILA/BRC standard will effectively promote global product safety by seeking to ensure that suppliers receive a detailed measurement of their quality mauagemeut systems.

Improvements to the CPSIA

While RILA recognizes that the CPSIA has had a profound impact in reinvigorating the Consumer Product Safety Commission (CPSC) and euhancing consumer product safety, RILA also believes the 2008 law could be improved. Most importantly, RILA strongly supports the unauimous preference of the CPSC Commissioners to prospectively apply the August 2011 100 ppm lead limit. As currently interpreted by the CPSC, the CPSIA will make it uulawful to sell products that exceed a 100 ppm limit after August 2011, regardless of wheu the products were manufactured, uuless the CPSC determines that the lower limit is not technologically feasible. The retroactive application of this provision creates substantial problems for manufacturers and retailers with large inventories of children's products, as well as for resellers such as charitable tbrift stores, and leads to wasteful destruction of safe products because confirmation of compliance for products already on retail shelves often cannot be done in a cost effective manner. Retailers will incorporate new safety standards into their guidance to suppliers so as to ensure compliant products, but it is very difficult to implement new staudards on the basis of a sell-by date, particularly when there is uncertainty ou whether the CPSC could make a determination that 100 ppm is not technologically feasible. There is siguificaut historical precedent to implement new safety standards on a prospective basis, and RILA has urged the CPSC to implement the August 2011 lead limit on a prospective basis. Nevertheless, Congressional action to clarify its intent for a prospective application would be very helpful for smooth implementation of the law.

RILA also believes the CPSIA should be modified to clarify that iuaccessible component parts are excluded from the law's phthalate restrictions. Section 101(b)(2)(A) of the CPSIA clarifies that the lead limits do not apply to any component part of a children's product that is not accessible to a child through normal aud reasouably foreseeable use and abuse of such product. Section 108 of the CPSIA does not currently make a similar exception for inaccessibility for phthalates, and RILA understands this omission was inadvertent. RILA helieves the prohibition on phthalates should only apply to accessible parts similar to the lead policy. As an example of the problem, phthalates are used in the plasticized coating of internal wiring in electronic toys, such as remote controlled helicopters. The phthalates help to keep the plastic coating soft and pliable to better encase and protect the wires, but does not present a risk of exposure to a child playing with the helicopter because the wires are inaccessible. An clarification that inaccessible component parts are excluded from the phthalates limits would prevent the need for costly and unnecessary testing, and confirm that the remote-controlled helicopter would he CPSIA compliant.

RILA also believes the CPSC should be granted expanded authority to except certain products or materials from the CPSIA's lead limits based on functional purpose of the lead in the product or component whenever the CPSC can also determine that the presence of lead will not affect pnblic health and safety.

In conclusion, retailers work tirelessly to ensure the safety and quality of the products they sell, and to fully implement all the new requirements under the CPSIA. We also hope the Congress will advance legislation in early 2011 to improve the effectiveness of the CPSIA and reduce unnecessary costs for businesses that do not provide additional product safety benefits. We look forward to continuing to work with you on this and other important product safety issues. If you have any questions or concerns, please contact Stephanie Lester, Vice President, International Trade.

Sincerely,

STEPHANIE LESTER,
Vice President, International Trade.

PREPARED STATEMENT OF RICHARD M. WOLDENBERG,
CHAIRMAN, LEARNING RESOURCES, INC.

As an operator of a small business making educational products and educational toys, I have had a front row seat for the implementation of the Consnmer Product Safety Improvement Act of 2008 (CPSIA) by the Consumer Product Safety Commission (CPSC). On the occasion of your CPSC oversight hearing, I want to highlight the economic damage wrought by the CPSIA without achieving any material improvement in safety statistics. I also want to bring to your attention the open hostility of the CPSC toward the corporate community in the implementation and enforcement of the CPSIA, and conclude with my recommendations for legal reforms to restore common sense to safety administration without reducing children's safety.

Children are our business. As educators, as parents and as members of our community, we have always placed the highest priority on safety. We would not be in the business of helping children learn if we didn't care deeply about children and their safety. The CPSIA has dramatically impacted our business model, reduced our ability to make a profit and create jobs, pared our incentive to invest in new products and new markets, and generally made it difficult to grow our business. We would gladly accept these burdens if the law made our products safer, but the fact is that it hasn't. Our company, Learning Resources, Inc., has recalled a grand total of 130 pieces since our founding in June 1984 (all recovered from the market). Our management of safety risks was highly effective long before the government intervened in our safety processes in 2008.

The precautionary approach of the CPSIA attempted to fill perceived "gaps" in regulation by making it illegal to sell children's products unless proven safe prior to sale. Yet the law has yielded *few quantifiable safety benefits* other than a reduction in recent recall rates for lead-in-paint (already illegal in children's products for decades). Ironically, this progress in reducing recalls has taken place in a 27-month period in which, like the time before the CPSIA, testing of children's products prior to sale was not mandatory. Consumer confidence wasn't dented by the lack of mandatory testing. The justifications for the over-arching and excessively expensive CPSIA regulatory scheme just don't hold water.

In any event, the reduction in recall rates is only a minor triumph and was not due to mandatory testing or harsh new lead standards, but most likely a (hyper) energized regulator and a great deal of publicity. Recall statistics can be highly misleading because the rate and number of recalls depend on many factors and do not generally correlate to injuries to children. In other words, product recalls are not tantamount to childhood injuries. The purpose of the CPSIA is to *reduce injuries, not product recalls*—yet CPSC recall statistics show that there have been almost no reported injuries from lead or phthalates in children's products in the last decade (one death and three unverified injuries from 1999–2010, all from lead or lead-in-paint). The billions of dollars now being spent by the corporate community annually on testing and other compliance activities have not reduced injuries—there weren't any to reduce. Whatever peace of mind has been generated by lower recall rates comes at a very high price.

The CPSIA significantly broadened the reach of Federal safety regulation well beyond what was needed to deal with the lead-in-paint toy violations of 2007 and 2008. Under the CPSIA, the definition of a "Children's Product" subject to regulation now encompasses ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. §2052(a)(2)). This definition ensures that virtually anything marketed to children will be subject to the restrictions of the Consumer Prodnct Safety Act (CPSA), irrespective of known or quantifiable risk of injury. Put another way, this definition ensures that many product categories *with a long tradition of safety* are now subject to the withering requirements of this law for the first time simply because they fall within the overly broad definition of a Children's Product. The affected safe products span the U.S. economy books, t-shirts and shoes, ATVs, bicycles, donated or resale goods, musical instruments, pens and educational products. The CPSC declined to use its discretion to narrow this definition in its recent "final rule" interpreting "Children's Product," thus ensuring continued market chaos and economic waste.

The consequences of the chauge in the consnmer safety laws to a precautionary posture has had notable negative impacts and promises to create further problems, namely:

a. *Increased Costs.* The new law creates a heavy burden for testing costs. From 2006 to 2009, our compauy's testing costs aloue jumped more than eight-fold. We estimate that our testing costs will triple again after the CPSC (as anticipated) lifts its testing stay in 2011, and could multiply again if the CPSC enacts (as anticipated) its draft "15 Month Rnle" on testing frequency and "reasonable

testing programs." Testing costs are often thousands of dollars per product. Having employed one person to manage safety testing and quality control for many years, we now have a department of five, including me, plus an outside lawyer on retainer. These jobs are funded by discontinuing sales, marketing and prodnct development jobs—the CPSIA is NOT an ersatz stimulns program. *Personnel, legal and other out-of-pocket safety expenses (besides testing) have more than quadrupled in the last 3 years—all without any change in our super-low recall rates or injury statistics.*

b. *Increased Administrative Expenses.* The CPSIA requires that all products include tracking labels on both the packaging and the product itself. Rationalized as "analogous" to date labels on cartons of milk, tracking labels are in reality nothing but pure economic waste as applied to the vast array of "Children's Products" under the CPSIA. As noted, our company has a virtually unblemished 26-year track record of safety so tracking labels promise to add little value in the event of recalls that are nnlikely to occur. Ironically, with the strict new rules governing product safety, we believe the already low chance of a product recall has been reduced further. As noted above, the money to pay for all this administrative busy work comes from foregone business opportunities. *We are being forced to shrink our company to apply tracking labels that no one will use.*

An equally frustrating bureaucracy has sprung up around recordkeeping under this law. Burdensome requirements spawned by the government's new involvement in our quality control processes forced us to make large new investments in information technology with no return on our investment. In addition, the pending CPSC draft policy on component testing promises to convert the simple task of obtaining a complete suite of safety test reports into a major recordkeeping chore. We will now be forced to manage each component separately, tracking test reports on each component one-by-one. This promises to multiply our recordkeeping responsibilities—and the related risk of liability for failing to comply—by more than an order of magnitude.

c. *Reduced Incentive to Innovate.* The increased cost to bring a product to market under the CPSIA will make many viable—and valuable—prodncts uneconomic. To cover the cost of developing, testing and safety-managing new products, the prospective sales of any new item ("hurdle rate") is now much higher than nnder prior law. This means that low volume "specialty market" items are less likely to come to market and many new small business entrants may find themselves priced out of the market. The CPSIA makes it much harder to start a new bnsiness serving the children's market because the rules so heavily favor big business. Because of CPSIA transactional costs, high volume items now have a huge cost advantage over low volume items. This will hurt many small but important markets like educational products for disabled children. Our company, with its 1,500 catalog items, is probably now a dinosanr under the CPSIA -the law provides a strong economic incentive to restructure our business around 50–150 items and to foens on high volume markets only. Schools would suffer from the loss of niche educational products.

d. *Crippled by Regulatory Complexity.* Our problems don't end with testing costs or increased staffing. We are being crippled by regulatory complexity. Almost 28 months after passage of the CPSIA, we still don't have a comprehensive set of regulations. Please consider how mindboggling the rules have become. There were fewer than 200 pages of safety law and CPSC rules that pertained to our business until 2008. These rules clearly defined our responsibilities and conld be taught to our staff (in fact, many were rarely applicable to us). Today, the applicable laws, rules and interpretative documents exceed 3,000 pages. As a practical matter, it is simply not possible to master all of these docnments—and yet it's potentially a felony to break any of these rules. Sadly for us, the rules and CPSC staff commentary keep changing, are still being written and are rarely if ever conformed. How can we master and re-master these rules and teach them to our staff while still doing the full-time job of running our business? Ironically, the recalls of 2007 and 2008 were never a "rules" problem—those famons recalls were clearly a compliance problem. Imagine what will happen now with an unmanageable fifteen-fold increase in rules. No small business "ombudsman" can make that problem go away.

e. *Small Business Will Certainly Suffer.* The CPSIA was written in response to failings of big companies, but hammers small and medium-sized companies with particular vengeance. Our small business has already lost customers for our entire category on the grounds that selling toys is too confnsing or too much of a "hassle." This is our new reality. The highly-technical rules and requirements

are beyond the capability of all but the most highly-trained quality managers or lawyers to comprehend. Small businesses simply don't have the skills, resources or business scale to manage compliance with the CPSIA. For this reason, small businesses bear the greatest risk of liability under the law, despite being responsihle for almost no injuries from lead in the last decade. The double whammy of massive new regulatory obligations and the prospect of devastating liability are driving small businesses out of our market.

In implementing and administering the CPSIA, the CPSC created a harsh regulatory environment for the business community over the past 28 months. Consider the following:

1. *Unjustified Recalls.* In June, in response to an inquiry by a Congressman and followed up hy media inquiries, the CPSC pressed McDonalds to recall 12 million Shrek glasses for "high" cadmium content, despite the agency's admission on Twitter that the glasses were not toxic. The recall effort was justified as being done "out of an abundance of caution", a frightening regulatory standard when applied to products acknowledged to be safe by the regulator itself. McDonalds lost millions of dollars as a result, not to mention suffering from widespread and persistent bad publicity.

2. *Unjustified Penalties and Coercive Tactics.* The CPSC assessed a $2.05 million penalty against a hapless Japanese dollar store chain (Daiso) for five separate tiny recalls involving 698 units and 19 items. These items sold for between $1 and $4 each. There were no reported injuries from sales of the Daiso trinkets. Ms. Teneubaum bragged about this extraordiuarily excessive prosecution in a speech in March 2010 to the Consumer Federation of America: "We secured an injunctiou that completely stops Daiso from importing childreu's products into the country. . . . Daiso has a very high hurdle to jump over to ever get back in the import business again." Regulated companies take stunning examples like Daiso as a warning that outsized and disproportionate force may be used by this agency with little provocation. The regulated community has also expressed alarm over the threatened use by the agency of unilateral press releases "to warn the public" about alleged dangers iu specific products as a way to coerce "voluntary" recalls. Such threats have been used where facts may be in dispute to justify a recall. Under the law, the CPSC may only implement mandatory recalls subject to a court order, a slow process perhaps but also expensive and labor-intensive. "Voluntary" recalls can be much quicker and cheaper, ouly requiring "agreement" between the agency and the subject compauy. In more than oue case, CPSC has threatened unilateral releases to try to "convince" a firm to undertake a "voluntary" recall but after the firm took the risk of standing up to the staff and the staff conducted further investigation, the CPSC decided that recalls were not even necessary. Not all firms can bear the expense of such a process or take the risk of calling the staff's bluff because issuance of a release would likely damage the firm and their brand, possibly irrevocably. Many supposedly "voluntary" recalls have resulted. Abusive tactics of this nature have severely damaged trust between the CPSC and the regulated community.

3. *Disregard of Public Comments.* The agency has garnered considerable criticism for overlooking or disregarding comments from the corporate community solicited in its public rulemaking processes. Ignoring or disregarding inconvenient public comments coutrary to the agenda of the coutrolling party makes a mockery of the legally-mandated public comment process. Notable instances include the recent approval of interpretative rule on "Children's Products" and the rules implemeutiug the public database of safety incidents. The database debate was so fouled by the majority's refusal to entertain the legitimate concerns of industry that the two minority Commissioners proposed their own draft rule—which the CPSC at first refused to post on its website.

4. *Unjustified Hostile Rulemakings.* The CPSC has implemented rules governing the public database that adversely affect the Constitutionally-guaranteed due process rights of our businesses. There is no adequate public policy justification for the erosion of the remarkable civil rights that distinguish the American legal system among all international legal systems—yet the Commission voted 3–2 to allow falsehoods to be posted without recourse in a database the CPSC will maintain. In other cases, the agency has published draft rules (yet to be acted on) which could force companies like ours to spend as much as $10,000 per item per year to meet *arbitrary* rules on

testing frequency or "reasonable testing programs"—notwithstanding strong evidence that these rules are wasteful, unnecessary and financially irresponsible. The pendency of rules like this creates destabilizing market uncertainty and forces business decisions that have no basis other than fear of future regulation. For instance, Wal-Mart has already instituted a 100 ppm lead standard months ahead of the *possible* implementation of the standard by the CPSC—simply because the CPSC has been so slow to act.

The CPSIA went off track by taking away the CPSC's authority to assess risk. If the CPSC were again required to regulate based on risk, safety rules conld focus on those few risks with the real potential to canse harm to children. All risks were not created equal.

I recommend several steps to reduce cost, liability risk and complexity all without sacrificing children's prodnct safety:

A. Mandate that the CPSC base its safety decisions, resource allocation and rules on risk assessment. Restore to the Commission the discretion to set age and product definition criteria for the 300 ppm lead standard and phthalate ban. Freeze the lead standard and lead-in-paint standard at their current levels unless the CPSC determines that a change is necessary to preserve public health and safety.

B. The definition of "Children's Product" shonld not include anything primarily sold into or intended for use in schools or which is used primarily under the supervision of adnlts. Other explicit exceptions should include apparel, shoes, pens, ATVs, bicycles, rhinestones, books and other print materials, brass and connectors. Exclnsions from the definition should take these products entirely outside the coverage of the CPSIA (including mandatory tracking labels).

C. Lead-in-substrate and phthalate testing should be based on a "reasonable testing program," not mandated outside testing. *The tenets of a reasonable testing program should be set by the reasonable business judgment of the manufacturer.* Resellers should be entitled by rule to rely on the representations of manufacturers. Phthalate testing requirements shonld explicitly exempt inaccessible components, metals, minerals, hard plastics, natural fibers and wood.

D. Definition of "Children's Product" should he limited to children 6 years old or younger and should eliminate the difficult-to-apply "common recognition" factor of Section 3(a)(2)(c) of the CPSA. Definition of "Toy" (for phthalates purposes) should be limited to children 3 years old or younger and should explicitly refer only to products in the form used in play.

E. Eliminate CPSC certification of laboratories (rely on the market to provide good resources). Fraud has only very rarely been a problem with test labs and is already illegal.

F. Impose procedural limits to insure fairness in penalty assessment by the CPSC under the CPSIA. Completely reformnlate penalties to restrict them to egregious conduct (including patterns of violations), reckless endangerment or conduct resulting in serious injnry.

G. Rewrite the penalty provision applicable to resale of used product so that violations are only subject to penalty if intentional (actual knowledge or reckless endangerment) and only if the violation led to an actual injury. Eliminate the "knowing" standard with its imputed knowledge of a reasonahle man exercising due care.

H. Mandatory tracking labels should be explicitly limited to cribs, bassinets, play pens, all long-life "heirloom" prodncts with a known history of injuring the most vulnerable children (babies or toddlers).

I. Public injury/incident database should be restricted to recalls or properly investigated incidents only. Manufacturers must be given full access to all posted incident data, including contact information. The "due process" civil liberty interests of the corporate community *must be protected.*

I urge your committee to address the fundamental flaws in the CPSIA to restore order to the children's product market and to protect small businesses from further damage. I appreciate the opportunity to share my views on this important topic.

PREPARED STATEMENT OF PAUL C. VITRANO, GENERAL COUNSEL, MOTORCYCLE INDUSTRY COUNCIL

Chairman Pryor, Ranking Member Wicker and distinguished members of the Subcommittee on Consumer Protection, Product Safety and Insurance, thank you for the opportunity to submit this testimony on the need for amendments to the Consumer Product Safety Improvement Act (CPSIA). My name is Panl Vitrano. I am the General Counsel of the Motorcycle Industry Council. MIC is a not-for-profit, national industry association representing nearly 300 manufacturers and distributors of motorcycles and all-terrain vehicles; motorcycle, ATV and recreational off-highway vehicle parts and accessories; and members of allied trades such as insurance, finance and investment companies, media companies and consultants.

The CPSIA was intended to protect children from ingesting lead from toys. However, the lead provision has had unintended consequences and we are pleased to submit testimony about one of those unintended consequences. The CPSIA has effectively banned the sale of many age-appropriate youth ATVs and motorcycles because of the lead content of certain components. As a resnlt of its broad reach, the Act has inadvertently crippled an industry unrelated to the toy manufacturers that were the intended target of the lead provision. In addition, the unintended ban has resulted in unsafe situations for youth off-highway enthusiasts.

It is estimated that over 13.7 million Americans enjoy riding off-highway motorcycles and over 35 million enjoy riding ATVs. Safety of our riders—particularly our youngest riders—is a top priority of the powersports industry. Vehicles, helmets and other gear and accessories are specially designed for youth riders to allow them to safely enjoy this family-friendly form of outdoor recreation.

In February 2009, however, ATVs and motorcycles designed and primarily intended for youth riders aged 6 to 12 became banned hazardous substances under the CPSIA because small amounts of lead—that pose no risk to youth—that are imbedded in metal parts of those vehicles to enhance the functionality of those components.

As you know, the CPSC concluded that the language of the CPSIA prevented it from making common-sense decisions and resulted in the CPSC denying the powersports industry's petitions for exclusion from the lead content provision. The exclusion was denied despite the fact that the CPSC's own staff acknowledged that there was no measnrable risk to children resulting from lead exposure from these products.

The CPSC tried to temporarily address the ban by issuing a stay of enforcement of the CPSIA's new lead content limits in May 2009. Unfortunately, this stay of euforcement has proven unworkable. Due to the risks of selling under the stay, many manufacturers and dealers are no longer selling youth model off-highway vehicles, and there is now a limited availability of these products for consumers. Half of the major ATV manufacturers are no longer selling youth models despite the stay.

The CPSC has acknowledged that the ban on youth off-highway vehicles creates a compelling safety issue because it likely will result in children 12 years of age and younger riding larger and faster adult-size vehicles. For example, CPSC studies show almost 90 percent of youth ATV injuries and fatalities occur on adult-size ATVs. Again, the CPSC's staff scientists acknowledge that the presence of lead in metal alloys in these youth models—needed for functionality, durability and other reasons that are safety critical to the components—does not present a health hazard to children. The Commission also acknowledges that children riding these vehicles only interact with a limited number of metal component parts that might contain small amounts of lead, like brake and clutch levers, throttle controls, and tire valve stems.

As a result, for over 18 months, MIC, its members, their dealers and many of the millions of Americans who safely and responsibly ride their off-highway motorcycles and ATVs with their children have urged Congress to amend the CPSIA to stop this unintended ban on youth motorized recreational vehicles. Off-highway vehicle stakeholders have sent over one million electronic messages aud thousands of hand signed letters and made numerous calls and personal visits to Capitol Hill to advocate for a legislative solution to the ban.

Since the CPSIA ban took effect on Fehruary 10, 2009, we collectively have urged Congress to act for three important reasons:

First, the lead content in metal parts of ATVs and motorcycles poses no risk to kids. Experts estimate that the lead intake from kids' interaction with metal parts is less than the lead intake from driuking a glass of water.

Second, everyone agrees that the key to keeping youth safe on ATVs and motorcycles is having them ride the right sized vehicle. The CPSIA has unintention-

ally put kids at risk because youth ATV and motorcycle availability is limited. Unavailability of yonth models resnlts in what CPSC has described as a "more serious and immediate risk of injury or death" than any risk from lead exposure from these products—youth riders operating larger and faster vehicles designed for adults.

Finally, the CPSIA is unnecessarily hurting the economy and jobs when everyone should be trying to grow the economy and create jobs. MIC estimates that a complete ban on youth model vehicles would result in about $1 billion in lost economic value in the retail marketplace every year.

In recognition of the need to end the unintended ban on youth ATVs and motorcycles, CPSC Chairman Tenenbaum and the other Commissioners unanimously asked Congress to provide the Commission with flexibility to grant exclusions from the CPSIA lead content provisions, specifically noting the need to address youth ATVs and motorcycles.

As a bipartisan group of 15 Senators wrote to the CPSC in 2009, "[CPSIA] has created a well-documented safety hazard for children, severe and nnwarranted disruption to families who recreate together, and a deletorious effect on youth amateur racing. Additionally, the inclusion of OHVs has created an economic disaster for an industry which is already reeling from the recession, is facing countless lay-offs and is estimated to be losing three million dollars per day due to the Act."

Senator Jon Tester introduced the "Common Sense in Consumer Prodnct Safety Act" (S. 608) in 2009 that would end the ban by amending the CPSIA so that vehicles designed or intended primarily for children 7 years of age or older are not considered children's products for purposes of the lead content provisions.

We believe that Congress never intended to ban youth model motorized recreational vehicles when it passed the CPSIA. MIC urges the Committee to stop this unintended ban by either granting a categorical exemption for ATVs and youth motorcycles; or passing legislation to limit the parts of the vehicle deemed "accessible" and thus subject to the lead content provision of the CPSIA. In either case, we also nrge the Committee to provide as much clarity as possible so that the CPSC is left with no donbt about Congress' intent to ensnre the continned availability of these yonth model motorized recreational vehicles.

Thank you.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO HON. INEZ M. TENENBAUM

Question 1. Is the marketplace safe for shoppers this holiday season?

Answer. Overall, I believe the consumer prodnct marketplace was safer for consumers this holiday season. This is the second holiday shopping season that manufacturers, importers, and retailers of children's products have had to comply with some of the most stringent lead and phthalates limits in the world and mandatory toy standards. Thanks to yon and your fellow Members of Congress who crafted and passed the Consnmer Prodnct Safety Improvement Act of 2008 (CPSIA), CPSC has more anthorities and inflnence in overseas markets, at the ports, and in the U.S. marketplace. The effect has been increased confidence for parents as they shop for their children.

Question 2. Has the agency seen a dramatic decline in toy recalls since 2008?

Answer. The number of toy recalls has dropped over 70 percent from a high of 172 in FY 2008 to 44 in FY 2010. Toys accounted for 31 percent of all recalls in FY 2008 but only 10 percent of all recalls in FY 2010. The number of toy units recalled declined by over 3.8 million from FY 2008 to FY 2010.

Question 3. Has the agency seen a decline in the number of deaths of children under the age of 15?

Answer. Yes. The numbers of consumer product related deaths for ages 0 to 15 have dropped by over 17 percent, from 3,225 to 2,658, over the period 1985 to 2007 (the latest year of complete death date). Adjusting for changes in the population count, the rate of death for this age gronp, per 100,000 resident population, has dropped from 6.3 deaths per 100,000 to 4.4 deaths per 100,000.

Question 4. What advice can the CPSC offer to parents to help keep their kids safe from any potential product hazards this holiday season?

Answer. During the 2010 holiday shopping season CPSC issued guidance to parents noting that while recalls and deaths have declined, toy-related injuries are increasing. In 2009, there were an estimated 186,000 emergency room-treated injuries related to toys with children yonnger than 15, which is np from 152,000 injuries in 2005. Freqnently these injnries involved lacerations, contnsions, and abrasions that

most often occurred to a child's face and head. Importantly many of the incidents were associated with, but not necessarily caused by, a toy.

To help keep the holiday season happy, safe, and incident-free, CPSC encouraged consumers to adopt a three-prouged safety approach:

1. *Which Toy for Which Child?*—Always choose age appropriate toys.

2. *Gear Up for Safety*—Include safety gear whenever shopping for sports-related gifts or ride-on toys, including bicycles, skates, and scooters.

3. *Location, Location, Location—Be* aware of your child's surroundings during play. Young children should avoid playing with ride-on toys near automobile traffic, pools or ponds. They also should avoid playing in indoor areas associated with hazards such as kitchens and bathrooms and in rooms with corded window blinds.

Some additional safety steps that CPSC advised consumers to follow include:

- *Scooters and Other Riding Toys*—Riding toys, skateboards, and in-line skates go fast, and falls could be deadly. Helmets and safety gear shonld be worn properly at all times and be sized to fit.
- *Small Balls and Other Toys with Small Parts*—For children younger than age three, avoid toys with small parts, which can cause choking.
- *Balloons*—Children can choke or suffocate on deflated or broken balloons. Keep deflated balloons away from children younger than 8 years old. Discard broken balloons at once.
- *Magnets*—For children nnder age six, avoid building or play sets with small magnets. If magnets or pieces with magnets are swallowed, serious injuries and/or death can occur.

Once the gifts are opened, CPSC always advised parents to:

- Immediately discard plastic wrappings or other packaging on toys before they become dangerous play things.
- Keep toys appropriate for older children away from younger siblings.
- Supervise children while charging batteries. Chargers and adapters can pose thermal burn hazards to young children. Pay attention to instructions and warnings on battery chargers. Some chargers lack any mechanism to prevent overcharging.

Question 5. Would you describe to the Committee what spurred this campaign in the first place, progress made to protect children from unsafe cribs, and a status update on the Commission's efforts?

Answer. Between November 2007 and April 2010 there were 36 deaths reported to the Commission associated with crib structural problems. Of those, 25 occurred when crib components (often associated with the drop-side hardware portion of the crib) detached, disengaged, or broke ending in the strangulation death of the infant in the crib.

In the wake of these and other tragic incidents involving children's sleep environments, I directed and the Commission supported the creation of the Safe Sleep Team. This team has worked diligently to prevent consumers from being harmed by cribs and infant sleep products and has also contributed to the creation of new standards and regulations for these types of products. Pursuant to the direction contained in section 104 of the CPSIA, I also announced early in 2010 that the Commission would adopt new, mandatory crib safety standards by the end of that year. On December 15, 2010, the full Commission voted unanimously to adopt new crib safety standards that, among other things, prohibit the use of traditional drop-sides in newly manufactnred cribs.

Under the rules, the sale, resale, lease or other placement in the U.S. stream of commerce of old cribs that do not meet the new safety standard will he prohibited effective June 28, 2011. The rules will also prohibit the use of old, noncompliant cribs "by child care facilities, family child care homes, and places of accommodation affecting commerce." The Commission, however, recognized that child care facilities and places of public accommodation wonld require a period of time to pnrchase new, compliant cribs for use in their facilities. Accordingly the rule gives child care providers and places of public accommodation that use cribs until December 28, 2012, to purchase and start nsing new compliant cribs in those facilities.

Question 6. When do you expect the Commission will issue a final rule on crib safety?

Answer. As noted above the Commission voted unanimonsly to adopt the new crib safety rules on December 15, 2010. The rules were published in the Federal Register

on December 28, 2010. (See Consumer Product Safety Commission, "Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs: Final Rule," 75 Fed. Reg. 81,766 (Dec. 28, 2010)).

Question 7. I'm certain you and your staff spent countless hours working on the final rule that the Commission recently adopted establishing the Publicly Available Product Information Database. Do you believe the publicly searchable database is a victory for American consumers?

Answer. Yes, I believe the rollout of the Database will be one of the most significant steps to advance consumer product safety awareness taken in the history of this agency. First and foremost, the Database will function as an early warning system for dangerous and potentially dangerous products by allowing members of the public to share information about product hazards as quickly as that information becomes known. This is a very positive change from the current system (generally referred to as "section 6(h) procedure"), where the Commission is required to consult with manufacturers and seek their advance approval before warning the public of potentially dangerous items.

The Database will also allow the Commission to use the most modern and effective technology to collect information from consumers and better manage that information internally. This will allow the Commission to monitor the safety of products out in the marketplace in "real time," and also accelerate the issuance of recalls and other corrective actions where necessary. In the end, I think this is a "win-win" for both manufacturers and consumers, because it will alert manufacturers of potential defects much faster than under the current system and get potentially dangerous products out of the hands of consnmers as soon as possible.

Question 8. How will this Database serve to protect the public from dangerous products in the stream of commerce?

Answer. As noted above, the Database will serve as an early warning system for consumers. Product safety incident reports will be available on *SaferProducts.gov* soon after they are filed by consumers who have learned of a dangerous or potentially dangerous product. This represents a very substantial change from current procedure where consumer complaints are often withheld from public access for months or even years due to the "section 6(b) process."

The Database will also use the most modern IT technology to "data mine" the reports for new and emerging patterns of product defect. This should allow Commission staff to react faster to new and emerging hazards—and reduce injuries or deaths that may be caused by those product hazards.

Question 9. Do you think the CPSC's recent final rule establishing the publicly searchable database properly balances timely disclosure of important consumer protection information with the need to address legitimate husiness concerns?

Answer. Yes, I do. Onr implementation of the Database has built-in protections and procedures that will allow a manufacturer to have its perspective included in the Datahase record. In cases where a manufacturer believes a report is either materially inaccurate or contains confidential information, the company can ask that we correct the record or redact the confidential information.

In addition to providing mauufacturers with the right to comment on reports, the Database also requires all reports to carry the following disclaimer: "The Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the Consumer Product Safety Informatiou Database, particularly with respect to the accuracy, completeness, or adequacy of information submitted by persons outside of CPSC."

The result of this is a balanced approach that will allow for the correction of faulty information without requiring the Commission to withhold reports from the public until they are endlessly vetted by outside parties.

Question 10. Is the Database on track to be launched in March 2011?

Answer. Yes, the Database is currently on schedule for a fully functional launch on March 11, 2011.

Question 11. Does the Commission intend to consider extending the stay of enforcement for the third-party testing requirement? Do you think it is necessary to extend the stay of enforcement?

Answer. The Commission is currently considering several petitions and requests, including one from the Handmade Toy Alliance (HTA), for a continuation of the stay of enforcement for third-party testing of lead content. In considering these requests, the Commission will carefully consider the views and concerns of all impacted stakeholders.

Question 12. Within the third-party testing regime, where is the Commission in its efforts to promulgate rules outliuing appropriate testing protocols?

Answer. On December 28, 2009, the Commission issued an interim enforcement policy, "Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits," regarding component testing and certification of children's products and other consumer products to the 90 parts per million (ppm) lead in paint limit and to the 300 ppm lead limit for children's products established in section 101 of the CPSIA.

This interim enforcement policy permits, as part of a domestic manufacturer's or importer's certification of a children's product as being in compliance with the 300 ppm lead content limit, the domestic manufacturer or importer to rely on a test report showing passing test results for one or more components used on the product, based on testing either of them has commissioned from a recognized third-party test lab. The domestic manufacturer or importer may also rely on a certificate from another person certifying that a component complies with the 300 ppm lead limit, provided the component certificate is based on testing of a representative sample of the component(s) by a recognized third-party test lab.

On May 20, 2010, the Commission published a notice of proposed rulemaking, "Conditions and Requirements for Testing Component Parts of Consumer Products," 16 CFR Part 1109. This proposed rule set forth, for Commission consideration, the conditions and requirements under which the Commission will require or accept the results of testing of component parts of consumer products, instead of the entire consumer product, to meet, in whole or in part, the testing requirements of sections 14(a), 14(b), and 14(d) of the CPSA.

On May 20, 2010, the CPSC also issued a proposed rule that would establish requirements for a reasonable testing program aud for compliance aud coutiuuing testing for children's products. The proposal would also address labeling of consumer products to show that the product complies with certification requirements under a reasonable testing program for nonchildren's products or under compliance and continuing testing for children's products. The proposed rule would implement section 14(a) and (d) of the Consumer Product Safety Act (CPSA), as amended by sectiou 102(b) of the Consumer Product Safety Improvemeut Act of 2008 (CPSIA).

CPSC staff are curreutly reviewing and drafting responses to the over 300 commeuts received on these two proposed rules. Based on the commeuts and further staff analyses, the proposed rules will be updated and draft final rules submitted to the Commission for consideration in the first half of calendar 2011.

Question 13. Has the Commission proposed a rule allowing for component part testing?

Answer. Yes. On May 20, 2010, the Commission pnblished a notice of proposed rulemaking, "Conditions and Reqnirements for Testing Component Parts of Consumer Products," 16 CFR Part 1109. This proposed rule set forth, for Commission consideration, the conditions and requirements under which the Commission will require or accept the results of testing of component parts of consumer products, instead of the entire consumer product, to meet, in whole or in part, the testing requirements of sections 14(a), 14(b), and 14(d) of the CPSA.

In advance of the propose rule for component part testing, the Commission issued an interim enforcement policy, "Interim Enforcement Policy on Component Testing and Certification of Children's Prodncts and Other Consumer Products to the August 14, 2009 Lead Limits," regarding component testing and certification of children's products and other consnmer products to the 90 parts per million (ppm) lead in paint limit and to the 300 ppm lead limit for children's products established in section 101 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

This interim enforcement policy, issued on December 28, 2009, permits, as part of a domestic manufacturer's or importer's certification of a children's product as being in compliance with the 300 ppm lead content limit, the domestic mannfacturer or importer to rely on a test report showing passing test results for one or more components used on the product, based on testing either of them has commissioned from a recoguized third-party test lab. The domestic manufacturer or importer may also rely on a certificate from another person certifying that a component complies with the 300 ppm lead limit, provided the component certificate is based on testing of a representative sample of the component(s) by a recognized third-party test lab.

Question 14. As you know, this year's reports of cadmium in children's products are very trouhling. The CPSC has the authority to respond to emerging hazards in the marketplace. Has the Commission reached a final determination as to whether the toxicity of cadmium is sufficient to be considered toxic under the FHSA?

Answer. CPSC staff have concluded that the data concerning the toxicity of cadmium are sufficient for cadmium to be considered toxic under the FHSA due to effects on multiple organ systems and toxic endpoints, including kidney dysfunction.

The conclusion that a substance is toxic is only the first step in the Commission's assessment under the FHSA.

The FHSA is risk-based. To be considered a "hazardous substance" under the FHSA, a consumer product must satisfy a two-part definition. (See 15 U.S.C. § 1262 (f)(1)(A)). First, it must be toxic under the FHSA or present one of the other hazards enumerated in the statute (see statement above). Second, it must have the potential to cause "substantial illness or injury during or as a result of reasonably foreseeable handling or use." Therefore, exposure and risk must be considered in addition to toxicity when assessing potential hazards under the FHSA.

Question 15. You noted in a letter you sent to me earlier this year that you were working with "standards determining organizations" to figure out whether "current standards governing the use of toxic metals in surface coatings or the substrate of toys [were] sufficiently protective of children's health and safety." What has been the outcome of those deliberations?

Answer. The evaluation of the current ASTM F963 toy safety standard, made mandatory by the Consumer Product Safety Improvement Act of 2008, is an ongoing, multifaceted effort by CPSC technical staff, including toxicologists and chemists. Staff has completed toxicity and dose-response analysis of the chemicals regulated by the standard. An external peer review of the analysis is also currently being prepared. In addition, staff is evaluating test methods specified in the standard for their suitability in accurately identifying potentially hazardous products.

Recently the ASTM toy safety subcommittee established a work group to consider aligning the current standard with international standards for accessible soluble heavy metals in toys. The proposed changes in the ASTM standard would expand the requirements for toys, including the scope of the standard, with respect to chemical substances, including cadmium. CPSC staff is actively involved in the discussions and generally supports the expansion of requirements for metals in toys.

Question 16. I was the lead author of the Virginia Graeme Baker Pool and Spa Safety Act here in the Senate, a law that established strict pool safety standards as a response to too many tragic accidents and insufficient safety standards. I understand the CPSC has launched a robust pool safety campaign. Could you update us on the Commission's efforts to protect the public from pool and spa hazards?

Answer. In 2010, CPSC launched the most expansive information and education campaign in its history, which was aimed at preventing child drownings and drain entrapments. Below is a summary of our *Pool Safely: Simple Steps Save Lives* multimedia campaign:

- CPSC awarded a contract to Widmeyer Communications to develop and implement an information and education campaign to fulfill the requirements of Section 1407 of the Virginia Graeme Baker Pool and Spa Safety Act (VGB Act). The comprehensive *Pool Safely* campaign teaches pool and spa safety steps that stress prevention of drowning and entrapment by engaging stakeholders as partners at the national and grassroots levels. Child safety experts work on public and residential drowning prevention programs for parents and children, and industry organizations share VGB Act compliance information with pool and spa owners and operators.
- The *Pool Safely* campaign messages totaled more than 250 million views, which were generated from print articles, online stories, local television broadcasts, and epublications through the CPSC's website. This goal was exceeded due to the exceptional exposure generated by Widmeyer Communications through the production and dissemination of a high-value TV PSA. In addition, numerous print articles, radio stories, and online stories were generated in 2010, which reached millions of readers and listeners. Significant additional views were made via Twitter, Flickr, and YouTube. Metro transit stations in the District of Columbia displayed five illuminated posters, which generated 1.7 million views in September 2010. Billboards with *Pool Safely* campaign messages were placed on streets and highways in Arizona, California, and several other states.
- CPSC staff worked with a contractor on events targeting minorities and high-risk families. These events included focus groups, program announcement press conferences, and events in minority communities in Houston, TX, and Washington, D.C. At these events participating groups included organizations such as Safe Kids, American Red Cross, the YMCA, and local organizations like Bria's Honse, which provides swimming lessons to underprivileged children.
- A professional Web design services company was contracted to redesign and expand *PoolSafety.gov* into a state-of-the-art, interactive Web resource using the campaign name *www.PoolSafely.gov*. The new site was launched on September 27, 2010. This site has interactive links to all content developed as part of the

Information and Education campaign with special sections for families, industry, state and local officials, and the media.

- Finally, CPSC staff developed and awarded six contracts to leading organizations to create and deliver educational and training programs nationally. Contractors representing top national indnstry experts were retained to execute training materials for pool owners and operators, mannfactnrers, and retail ontlets, and local and state regulatory entities. Using a combination of live events, webinars, and prepared edncational training video programs, each contractor will address issues related to drowning and entrapment prevention for their specified audiences.

Question 17. Conld you discuss the issue of the additional layer of protection for pools with only a single main drain?

Answer. CPSC supports the use of layers of protection in and around pools and spas. From fences to door alarms to safer drain covers to suction detection devices, CPSC believes that a system of safety is needed to protect children from drowning and entrapment hazards in and around pnblic and private pools and spas.

As reqnired by Section 1404 of the VGB Act, all pnblic pools and spas that have a blockable drain operating on a single main drain system mnst install a secondary layer of protection. Pool and spa operators can nse one of five options to meet this requirement: a safety vacuum release system, an automatic pump shut off system, a suction-limiting vent system, a gravity drain system, or no drains.

The Commission voted three to two in 2010 to allow for the use of nnblockable drain covers to be placed over blockable sized drains on single main drain systems to exempt pnblic pools and spas from having to comply with the secondary protection system requirement. I voted against this decision becanse I believed that a secondary system was contemplated by the statute for pools with a single main drain and to provide the highest level of protection possible in such pools.

Question 18. Many months ago, an ABC news article reported a pool drain cover safety risk and suggested that despite discontinued manufacturing of certain models of drain covers, consumers were not notified of potentially dangerous drain covers already purchased and installed in pools across the country. Is the Commission aware of this concern?

Answer. Yes, the Commission is aware of this concern.

After learning of possible anomalies in the testing of certain pool drain covers, the Commission took several steps to investigate. On September 3, 2010, the Commission issued subpoenas requesting test data from three independent labs involved in drain cover testing, rating, and certification. This request produced over 17,000 pages of technical documents for staff review, which is currently underway.

CPSC also contracted with a third-party testing laboratory to have the identified suction outlet covers tested (CPSC Contract #. S–10–0108). CPSC laboratory staff witnessed the testing to observe the test facility, the test procedures, and the methodology of different technical staff conducting the tests. The results of testing have been reported by the contractor and staff is reviewing the report.

These results will be used to discuss auy ratings issues with manufacturers of the identified product whose rating is questionable. In the event that testing results for certain covers indicate any substantial product safety hazards, the Commission may pursue a recall or other corrective action agaiust the manufacturer of the specific cover.

In addition, the CPSC laboratory is also conducting its own independent testing of the identified suction outlet covers aud will compare results with those obtained by the contractor as well as those obtained by the original third-party certifying laboratories. These results and review of the procedures will also be used to develop guidauce for future testing aud rating of suction outlet covers by third-party certifying laboratories.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO HON. INEZ M. TENENBAUM

Question 1. The Food aud Drug Administratiou (FDA) has three different product classifications for toothbrushes: (1) toothbrush, ionic, battery-powered; (2) toothbrush, manual; and (3) toothbrush, powered. The FDA classifies all toothbrushes as Class I medical (deutal) devices. My understanding is that such Class I devices are regulated by the FDA. Under current law, does the Consumer Product Safety Commission (CPSC) have any authority to ensure the safety of toothbrushes, even those that are clearly marketed to childreu?

Answer. Section 3(a)(5) of the Consumer Product Safety Act ("CPSA") defines "consumer product" as "any article, or component part thereof, produced or distributed: (i) for sale to a consumer for use in or around a permanent or temporary honsehold or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household residence, a school, in recreation, or otherwise. . ." However, section 3(a)(5)(H) of the CPSA expressly excludes, from the definition of "consumer product," "drngs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act)" ("FFDCA").

Thus, a toothbrush, as a "device" under section 201(h) of the FFDCA, cannot be a "consumer product" and, therefore, is not subject to regulation under the CPSA.

However, the Federal Hazardons Substances Act ("FHSA") does not contain an exception for devices. (It expressly excludes "foods, drugs, and cosmetics subject to the Federal Food, Drug, and Cosmetic Act.") Consequently, CPSC could use its anthority under the FHSA to address hazardous substances in devices.

Question 1a. Do you believe that all toothhrushes shonld be classified as medical devices or should some be classified as a consumer product?

Answer. Because the FHSA permits us to exercise jurisdiction over toothbrnshes under the FHSA regardless of their classification as a medical device, they receive coverage under both FDA's jnrisdiction and the CPSC's with regard to their chemical content.

However, toothhrushes are not subject to the CPSIA's new testing and certification requirements for children's products since they fall outside the definition of "children's product" as described above. As a medical device, toothbrnshes may be subject to the FDA's regulations known as current good manufacturing practices. However, we defer to FDA on whether such regulations would apply to toothbrushes.

Question 2. There are a number of battery-powered toothbrushes in the market that have children's cartoon or live-action characters painted on to the body of toothbrush or attached to the hody of the toothbrush (*i.e.*, the on-off switch in the shape of the cartoon character), and are marketed to children. Does the CPSC consider such toothbrushes to be a "children's product"? Should the CPSC classify these toothbrushes to be a children's product as they are marketed to children 12 years of age and younger?

Answer. As noted in the response to question 1, a "device" cannot be a "consumer product" under the CPSA. Section 3(a)(2) of the CPSA defines "children's product," in relevant part, as "a consumer product designed or intended primarily for childreu 12 years of age or younger." (Emphasis added.) Thus, because a device cannot be a "consumer product" under section 3(a)(5) of the CPSA, neither can it be a "children's product" under section 3(a)(2) of the CPSA.

However, if CPSC staff age grades a toothbrush for use by children, we could assert jurisdiction to regulate the toothbrushes under the FHSA and take appropriate action should they contain a hazardous level of heavy metals in either the surface coating or the substrate.

Question 2a. Does the FDA have any standards for the levels of heavy metals allowed in toothbrushes?

Answer. This question involves interpreting FDA rules and policies, and we must respectfully refer you to that agency for a response to this question.

Question 2b. Hypothetically, if it is reported that lead was found in the colored bristles of a toothbrush with a cartoon character painted on the body of the toothbrush, how wonld the CPSC respond? Wonld the FDA have absolnte jnrisdiction? If the FDA chooses not to investigate the report, does the CPSC have any authority to investigate such a claim independently?

Answer. Under current laws the toothbrush would not be subject to the lead limits in section 101 of the CPSIA because, as stated earlier, the product would be excluded from the definition of "children's product." CPSC might be able to assert authority under the FHSA if the prodnct met the definition of a "hazardous snbstance." CPSC has the authority to investigate and, if after investigation, including the analysis of testing of the toothbrush, the Commission determined the toothbrush contained a "hazardous substance" it could pursue the remedies set forth in the FHSA and take the appropriate action.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO HON. INEZ M. TENENBAUM

Question 1. The Consnmer Product Safety Commission approved a new mandatory crib safety rule on December 15, 2010. Although the new rule acknowledges that "extra bedding in cribs accounted for the majority of infant deaths in cribs or other sleeping products," it claims "there are no performance requirements for cribs that can address this issue." What are your plans for expanding existing education efforts to address the hazards of extra bedding and sleep positioners?

Answer. CPSC is focusing on the influence of video to inform to new parents and change behaviors when it comes to preventing suffocation risks in a baby's sleep environment. In the aftermath of a joint press announcement with FDA in late September urging parents to stop using sleep positioners, CPSC produced an educational video on the dangers associated with these products, which is now posted on the agency's YouTube site, and available at the following link: *www.youtube.com/USCPSC#p/f/0/3xvdPpKJoMc.*

Although the dangers associated with drop-sides have garnered most of the media attention related to cribs in recent years, soft bedding, including pillows, blankets and comforters, cause the most child fatalities. To educate new parents in the recovery room at the hospital or in the waiting room at their pediatrician's office, CPSC teamed up with the American Academy of Pediatrics, *Keeping Babies Safe*, and renowned journalist Joan Lunden to produce a special *Safe Sleep for Babies* video. This video demonstrates visually and informs orally that a crib should be as bare as possible due to the suffocation risk that soft bedding poses to newborns and infants. This video can be viewed at the following site: *www.cpsc.gov/CPSCPUB/PREREL/prhtml11/11021.html.*

Shorter versions of the video directed at minority and other underserved populations are posted on our YouTube channel. All of these videos are being disseminated through our Safe Sleep partners and are being highlighted by the agency when conducting media interviews.

Question 2. Although the crib safety rule will be effective 6 months after publication, child care providers will have a total of 24 months to replace non-compliant, potentially dangerous cribs. What are your plans for protecting the safety of children in child care until dangerous cribs are removed from these facilities in 2 years?

Answer. The safety of cribs used in child care facilities will continue to be carefully monitored by CPSC and state child care licensors. First and foremost, it is important to clarify that child care facilities are prohibited by law from using "recalled" cribs unless a repair (provided by the manufacturer as part of the recall remedy) has been installed. CPSC staff monitors all incoming crib incident reports, including incidents which may have occurred at child care facilities and assigns investigators to conduct in depth investigations of such incidents. In addition, CPSC maintains a comprehensive contact list with state child care licensing departments. CPSC will be providing its state partners with information about the new Federal crib rule, recalls, safety alerts, and other crib safety information.

Question 3. You have indicated that the Consumer Product Safety Commission will work with the National Operating Committee on Standards for Athletic Equipment (NOCSAE) on developing new standards for football helmets. NOCSAE has not made significant changes to its helmet standard in 37 years. What is the timeline for the development of a new standard and what steps will you take to ensure the standard incorporates the latest science on concussion prevention for youth and adults?

Answer. I take the issue of helmet safety very seriously, particularly with regard to helmets used in school and youth athletics. To that end, CPSC staff has fully engaged NOCSAE in furtherance of our monitoring of their voluntary standards process. As part of this effort, I directed one of our CPSC staff engineers with significant experience in helmets standards, as well as a senior counsel from my staff, to attend the publicly-available portions of the January 20–22, 2010, NOCSAE board meeting. Overall, I believe CPSC's oversight has already begun to bear fruit. In particular, I was encouraged by two developments that relate directly to the important issues you raised.

First, Dr. Robert Cantu, NOCSAE's vice president, presented to its board seven recommendations recently made by a group of medical experts (including Dr. Cantu) that met late last year at the request of NOCSAE. Three of the medical experts' recommendations addressed areas of research these experts believe are vital to identifying ways to potentially improve the standard for new football helmets in a meaningful way. An additional recommendation touched on the need for research related to a youth football helmet standard. We not only agree with the need for the research these experts identified, bnt also believe all seven of their recommendations

should be acted on by NOCSAE in a timely fashion. Ensuring NOCSAE moves forward on these fronts is incorporated into our larger oversight effort.

Second, NOCSAE announced at its board meeting that it will be creating a standing scientific advisory committee to direct its concussion-related research. Moreover, NOCSAE invited CPSC to participate in the work of this committee. We are in the process of determining how, and in what way, CPSC can be involved with the Committee in a manner that would further our oversight function of NOCSAE and allow the Commission to be certain that NOCSAE is committed to ensuring the key research occurs as quickly and efficiently as possible.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO HON. INEZ M. TENENBAUM

Question 1. Does the CPSC support adoption of the product standards for carbon monoxide alarms and detectors as mandatory consumer product safety rules, as reflected in S. 1216/H.R. 1796?

Answer. CPSC staff supports the goals of the bills to encourage the use of CO alarms in residences. CO alarms save lives. They do that by warning consumers of the presence of CO before the onset of debilitating effects.

Question 1a. What additional resources, if any, would be required by CPSC to implement the legislation if it were enacted?

Answer. CPSC staff believes that the current edition of UL 2034 is an effective standard. Making UL 2034 a mandatory standard will level the playing field for manufacturers and give CPSC greater authority to enforce compliance with the standard. Staff believes it will also make it easier for states to adopt installation requirements.

The July 29, 2010, revision of H.R. 1796 (from the 111th Congress) would make mandatory both UL 2034 and UL 2075. Thus, the scope of the House bill goes beyond CO alarms intended for residential dwellings. UL 2075 detectors or monitoring devices may be appropriate for locations outside of residential dwellings, such as indoor parking garages, commercial buildings, testing facilities, or furnace rooms. In addition, because the scope of UL 2075 includes gases other than CO, CPSC staff would need to review the performance requirements for each gas within the scope of UL 2075 to ensure that it adequately addresses hazards to consumers. CPSC resonrces would be required to thoroughly review the scope and technical provisions of ANSI/UL 2075 related to applicable consumer products. In addition, CPSC staff would need to compare the standards to ensure the CO alarms test conditions and performance requirements in ANSI/UL 2034 preside and coincide with those in ANSI/UL 2075.

That version of H.R. 1796 also states that both ANSI/UL 2075 and 2034 be published in the Federal Register as mandatory consumer product safety standards and take effect 180 days after Federal Register publication. CPSC staff suggest that first, the ANSI/UL 2034 be reviewed and implemented as the mandatory consumer product safety standards in the Federal Register with the associated timelines. Staff suggests that after the ANSI/UL 2034 FR time frames, staff can begin the work associated with ANSI/UL 2075, as the effort to evaluate and define the scope of relevant consumer product safety portions of ANSI/UL 2075 may require a significant commitment of resources.

S. 1216/HR 1796 includes provisions for a grant program for states that adopt CO alarm installation requirements. Additional resources would be required to administer and support such a grant program.

Question 2. Are you aware of any residential CO alarm products being sold on the market that do not comply with UL 2034? Are yon aware of any manufacturers of CO detectors who manufacturer CO alarm products that may exceed UL 2034?

Answer. CPSC staff is aware that there are low levels CO monitoring devices on the market that claim to exceed the ANSI/UL 2034 alarm criteria and aim to protect the population most sensitive to the lowest levels of CO. As designed, these low-level monitors do meet the "do not alarm" requirements in ANSI/UL 2034 that protect against spurious low-level alarms. The ANSI/UL 2075 standard or registration as a medical device may be appropriate for these low level CO monitors. However, CPSC staff is not aware of these devices being certified to any standards.

Question 3. In previous years, CPSC has identified "Carbon Monoxide" as a strategic initiative. In its 2011–2016 Strategic Plan, carbon monoxide is no longer identified as its own initiative. How do you see CPSC's efforts to raise awareness of carbon monoxide dangers and to promote carbon monoxide detection fitting into the five key goals identified in the Commission's 2011–2016 Strategic Plan?

Answer. While carbon monoxide (CO) is no longer identified as its own initiative, it is still very much a part CPSC's new Strategic Plau through CPSC's work ou safety standards, improved consumer information and hazard identification. In fact, CPSC's activities to reduce CO dangers and to promote CO detection are found for three of the five goals in the Strategic Plan.

CPSC's strategic goal, "Commitment to Prevention" focusing on engaging public and private sector stakeholders to build safety into consumer products, we drive forward our commitment to the prevention of CO-related incidents. The CPSC will work to protect consumers from the dangers of CO poisoning by promoting the production of safe products and the development and implementation of safety standards. This will enable industry compliance with safety standards at various stages of consumer product development and distribution. By encouraging industry leaders and foreign safety agencies to focus on safety early in the global supply chain, the CPSC will help prevent hazards from entering consumer markets.

CPSC's strategic goal, "Raising Awareness" promotes a public understanding of product risks and CPSC capabilities. Under this goal, we seek to gain the attention of consumers throngh increased awareness of the hazards associated with CO and gas-fired appliances and engine-driven tools and generators. Consumers, advocates, industry, and partner government agencies each desire useful and timely information about consumer product safety issues in order to make informed choices. However, these audiences have different information needs, and each responds best to different methods of communicating information. With the rapid increase in the use of social media and Web-based commnnications, the options for conveying consumer product safety information continue to grow.

The CPSC will use a wide array of communication channels and strategies to provide the public with timely and targeted information about CO-related safety issnes. This information will empower consumers to make informed choices about the products they purchase and how to safely use them, to be aware of hazardous products in the market, and to act quickly if they own a recalled product. Additionally, the information will make industry aware of the hazards they must address to maintain safe products.

Finally, CPSC's strategic goal "Rigorous Hazard Identification" focnses on accurate and timely determination of all hazards posing the greatest risk to consumers, including CO-related deaths and injuries. Staff completes two annual reports, one on CO fatalities and one on incidents associated with associated with generators and engine-driven tools. Both reports help identify new or emerging issues within those sub-areas.

Question 4. Please describe the CPSC's experience in managing Federal grant programs.

Answer. The CPSC has not awarded grants in the last 10 years, and currently does not have the staff and resources available to independently award Federal grants. In 2008, however, Congress passed the Virginia Graeme Baker Pool and Spa Safety Act (VGB Act). The VGB Act authorized CPSC to award grants to states and was funded in the Fiscal Year (FY) 2009 Omnibus Appropriations Bill.

In order to comply with the requirements of the VGB Act, CPSC contracted with the Centers for Disease Control (CDC) to develop the required funding announcement, issue the announcement, make the awards, monitor the award performance and finally report on the results, all following Federal grant regnlations. The cost of this service by CDC is estimated at 20 percent of the total grant amount.

Question 4a. To date no grants have been awarded because no states meet the statutory requirements the VGB Act grant program. What unique challenges would S. 1216 pose to the Commission, if any, in administering the proposed grant program under this legislation?

Answer. First, the Commission still does not have grant expertise so we wonld likely contract again with another Federal agency like CDC. Thus, the funding for the 20 percent contract costs must be obtained by reducing the grant amounts ($2 million annnally) or from specific appropriation.

Second, while we are aware that approximately 25 states have CO alarm legislation, we do not know whether the requirements of that legislation match the reqnirements of S. 1216. Therefore, it is not whether any state will be immediately eligible to apply for a grant. Accordingly, it may be necessary to spend funds initially in conducting outreach to the states about the grant program's specific eligibility requirements, and then awarding grants in the latter years of the program.

Third, under the VGB grant program, we learned that if the appropriations language funding the grants does not always mirror the authorization language regarding the return of unexpended and unobligated funds. Additional harmonization between the authorization and appropriations language would be helpful in the future.

Question 5. I understand that implementing effective third-party testing and tracking processes may be difficult, and that after 2 years many companies are still trying to figure out workable solutions. I have talked to very small businesses from Minnesota. They are very concerned about implementing the specific third-party testing and certification requirements. Have you given any thonght as to whether it is really workable to begin enforcing these reqnirements against very small businesses when the stay ends this February?

Answer. The third-party testing requirements of the CPSIA have been commnicated to the business community. Since August 2008, CPSC staff have met with varions industry associations nnmerons times and provided multiple training seminars and webinars on the new requirements of the CPSIA in an attempt to help industry prepare for the changes hrought about by the CPSIA. As one example, on December 10 –11, 2009, the Commission held a two-day workshop to discuss issues relating to the testing, certification, and labeling of certain consumer products pursuant to section 14 of the CPSA (*see* 74 Fed. Reg. 58611 (November 13, 2009)).

As both Ms. Jill Chnckas and Mr. Steve Lamar stated in response to questioning from Senator Pryor at the December 2, 2010 hearing, CPSC Commissioners and staff have been fnlly engaged with industry, providing training workshops aronnd the U.S. and the world, and being responsive to the issues and concerns facing industry as they move forward with meeting the reqnirements of the CPSIA. The Commission is committed to continuing to meet with and edncate manufacturers and importers as the remaining CPSIA regulations are developed and implemented.

Having said that, the Commission continues to be very sensitive to the concerns of the small business community and is cnrrently considering several reqnests, including one from the Handmade Toy Alliance (HTA) for a further continuation of the stay of enforcement.

Question 5a. Have yon considered the possibility of another extension for these bnsinesses?

Answer. As noted above, the Commission is currently considering several reqnests, inclnding one from the HTA for a continnation of the cnrrent stay. The Commission is carefully considering the views of all stakeholders and will rule on the petitions and requests as soon as possible.

Question 5b. Have you considered ways to make it easier for very small businesses to comply with the CPSIA?

Answer. The Commission has always maintained an open door policy to listen to the concerns of industry and small businesses, and the establishment of the new full-time Small Business Ombudsman is the latest way that the Commission has songht to listen to and address the concerns of small businesses. As CPSIA does not distinguish between the sizes of businesses that must comply with the law, the Commission does not have plenary power to take actions that may alleviate the bnrdens of compliance on small businesses specifically.

Nevertheless, the Commission is required to conduct regulatory flexibility analyses on each significant rnle, which assess the potential impacts of the rules on small bnsinesses. The Commission has, and will continue, to look at areas like the limited lead exemptions and the component part enforcement policy rule noted above to assist small businesses and others where possible and discretion allows.

Question 6. There are certain fibers in apparel that are exempted from flammability testing, including polyester and nylon. Spandex was not in widespread use when the flammability regulations were promulgated, but today it is found in innumerable apparel products. Many have claimed that Spandex has the same flammability properties as fibers that are already exempted. Does it not make sense for the CPSC to investigate adding spandex to the list of fibers that are exempt from flammability testing?

Answer. The Commission issned the Standard for the Flammability of Clothing Textiles (16 CFR part 1610) in 1975 under the authority of the Flammable Fabrics Act (FFA), which prohibited the importation, manufacture for sale, or sale in commerce of any article of wearing apparel, which is "so highly flammable as to be dangerous when worn by individnals." The Standard, as originally written, did not include exemptions for any fibers or fabrics.

In 1984, the Commission issned a rnle amending the Standard to inclnde exemptions based on weight and fiber content. The Commission based these exemptions on years of previous industry and government testing (See 40 Fed. Reg. 48,568; Dec. 14, 1984). The exemptions are as follows:

> (1) plain surface fabrics, regardless of fiber content, weighing 2.6 ounces per square yard or more; and

(2) all fabrics, both plain surface and raised-fiber surface textiles, regardless of weight, made entirely from any of the following fibers or entirely from combination of the following fibers: acrylic, modacrylic, nylon, olefin, polyester, wool.

Many plain snrface fabrics containing spandex fiber are already exempted from testing due to fabric weight.

In apparel fabric, spandex fiber usually appears as a small percentage of total fiber and it is typically used in combination with other fibers to add "ease" or form-fitting properties. The extent to which spandex fiber may affect the flammability performance of garments constrncted of otherwise-exempt-fiber fabrics is unknown; the industry has not provided sufficient data from their own flammability testing to jnstify amending the Standard to include spandex in a fiber exemption. The Commission does not have evidence to support the inclnsion of spandex as an "exempt fiber" and would welcome new data if the industry can provide it. If the Commission were to determine that there was a need for a study on the flammability of spandex fiber in combination with the other exempt fibers, it could direct the staff to proceed with such an investigation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO HON. INEZ M. TENENBAUM

Question 1. Ms. Tenenbaum, given that CPSC has fewer than 500 employees and that the agency is charged with ensuring the safety of over 15,000 types of consumer prodncts, I wonld like to know yonr thoughts on how CPSC can leverage its resources. You note in your testimony that the CPSC is working with other agencies such as the Cnstoms and Border Protection on ensnring the safety of imported goods. As a former attorney general, I would like to ask how yon are working with state attorneys general to help ensure compliance with consumer product safety rules. One idea that Commissioner Robert Adler mentioned during his Senate confirmation process was having CPSC potentially host regional conferences of state attorneys general to raise awareness about product safety issues. Are any such conferences or regional meetings planned?

Answer. Shortly after both Commissioner Adler and I joined the Commission, the CPSC hosted in October of 2009 a conference of representatives of the state attorneys general responsible for consumer protection of product safety issues. At that meeting we agreed to hold a monthly conference call to share information and raise awareness regarding Commission product safety priorities. Those conference calls have been successful and will continue in FY 2011. We also recently held a training session for interested state AG offices on investigating children's products for lead and cadmium hazards. There is a second in person follow-up meeting planned for early Spring 2011.

Question 2. Do yon have other ideas abont cooperating in other areas to ensure consumer safety?

Answer. In September 2010, the Commission voted to create the Office of Education, Global Ontreach, and Small Business Ombudsman, an office I envisioned in my first year as Chairman. The office will make the CPSC more accessible to stakebolders and will play a vital role in helping the CPSC fulfill its mission of protecting the public from unnecessary risks of death and injury from consumer products. The principal function of the office will be to coordinate and provide education and outreach activities to various domestic and international stakeholders, including foreign goverunents, manufacturers, retailers, small busiuesses, aud consumers. To carry out this mission, the new office will invite partnerships with colleges and universities, state and local governments, nonprofit organizations, standards making orgauizations, and others to euhance the CPSC's ability to provide research and training for stakeholders on regulatory and safety standards and best practices, which in turn will result in safer products.

The CPSC has been workiug with the states and others to come up with creative ways to raise awareness about product safety issues. For example, we have worked collaboratively with the American Academy of Pediatrics to produce a video on crih safety for use with uew parents in hospitals and pediatricians offices. I would also like to work with the states to ensure that day care licensing codes are revised to require recall checks to ensure products used in those facilities have not been recalled.

Question 3. Chairmau Teneubaum, siuce passage of the laudmark CPSIA legislation, does the CPSC now have the resources, authority, and cooperation from other agencies that it needs to protect our children from harmful and tainted products imported from foreign couutries?

Answer. In the last couple of years the CPSC has received a substantial increase in appropriations, and I am extremely grateful for these additional resources. Since my arrival at the Commission these resources have been pnt to work of a number of critical initiatives, including increasing CPSC Import Surveillance Division staff at ports of entry, a new CPSC testing facility, and investigating several new and emerging areas of potential consumer product safety hazards.

Having said that, it is important to note that the CPSC is still only has half the staffing that is possessed at its peak in 1980. We have made great strides since passage of the CPSIA, but additional resources would be welcomed.

Question 4. Chairman Tenenbaum, thank you for your assurance that the CPSC will carefully review the issue of football helmet safety, particularly for young children and high school athletes.

In addition to the fact that no football helmet standards exist for youth helmets and for addressing concussion risks, I am concerned that some safety warning labels for helmets are not clearly visible and legible. For example, new and used football helmets are sold with warning labels placed underneath padding inside the helmet where they are not fully visible. My understanding is that the CPSC has provided clear guidelines about the content, legibility, and visibility of safety warning labels for other children's products and consumer products. Will you include a review of the adequacy of current warning labels as you look into the issue of football helmet safety?

Answer. As indicated during my oral testimony, CPSC has fully engaged NOCSAE in furtherance of onr monitoring of their voluntary standards process. Labeling is certainly included in the areas we are exploring. We share the desire that labels, both in terms of substance and location, provide meaningful and effective warnings.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KAY BAILEY HUTCHISON TO HON. INEZ M. TENENBAUM

Question 1. As you know, Section 103(a) of the CPSIA requires the placement of tracking labels on all children's products and their packaging, to the extent practicable. In its July 2009 Statement of Policy regarding enforcement of this provision, CPSC staff indicated that products sold through bulk vending machines would not need to be individually marked, though the package or carton the products are shipped in would. The Statement of Policy further noted that "the Conference Report [accompanying the CPSIA] recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No 787, 110th Cong., 2d Sess. 67 (2008)." However, the Commission has not provided any explicit regulatory exclusion from Section 103(a) for bulk vended products. Will the CPSC pursue enforcement actions against bulk vendor suppliers, operators or retail establishments for the absence of tracking labels on bulk vended products? Further, can you please assure the Committee that the CPSC will maintain this position should any state attorney general or other entity seek to enforce Section 103(a) against bulk vended products?

Answer. In the July 2009 Statement of Policy, CPSC staff stated that hulk vended products would not have to be individually marked. The Office of Compliance is following this policy as stated. Staff will consider enforcement action, however, if outer containers were not appropriately marked with the required information.

Question 2. According to an August 2010 ABC news report, the American National Standards Institute (ANSI) found that earlier test results for 4 pool drain covers by 3 brands—Aquastar, Paramouut, and AFRAS—were unreliable and that use of the covers could result in serious injury or death to consumers. In the article, the CPSC commented that it was investigating the matter. Please provide an update on the investigation and what the Commission has found to date.

Answer. After learning of possible anomalies in the testing of certain pool drain covers, the Commission took several steps to investigate. On September 3, 2010, the Commission issued subpoenas requesting test data from three independent labs involved in drain cover testing, rating, and certification. This request produced over 17,000 pages of technical documents for staff review, which is currently underway.

CPSC also contracted with a third-party testing laboratory to have the identified suction outlet covers tested (CPSC Contract # S–10–0108). CPSC laboratory staff witnessed the testing to observe the test facility, the test procedures, and the methodology of different technical staff conducting the tests. The results of testing have been reported by the contractor and staff is reviewing the report.

These results will be used to discuss any ratings issues with manufacturers of the identified product whose rating is questionable. In the event that testing results for

certain covers indicate any substantial product safety hazards, the Commission may pursue a recall or other corrective action against the manufacturer of the specific cover.

In addition, the CPSC laboratory is also conducting its own independent testing of the identified suction outlet covers and will compare results with those obtained by the contractor as well as those obtained by the original third-party certifying laboratories. These results and review of the procedures will also be used to develop guidance for future testing and rating of suction outlet covers by third-party certifying laboratories.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO HON. INEZ M. TENENBAUM

Question 1. What can you tell us about the impact of the CPSIA on small businesses? Even though the CPSIA did not require the Commission to perform cost-benefit analyses of the rules it promnlgates, many of the concerns raised from small businesses and from Members of Congress since the law passed have been based on the need for this very information—specifically, the law's economic impact and unintended consequences. Does the Commission have quantitative data to determine what the impact has been, and what the impact will be in the future as more requirements under the law come into effect?

Answer. While it is true that CPSIA does not contain a separate cost-benefit analysis provision, the Commission is still required to perform a regulatory impact analysis (pursuant to the Regulatory Flexibility Act) of each significant new CPSIA rule presented for the Commission's consideration. In some cases, the staff has concluded that the rules could have significant adverse impacts on substantial numbers of small businesses. In fact, CPSC quantitative data on the use of cribs in child care facilities and public accommodations (many of which are small businesses) was recently utilized by the Commission to decide how to best apply the new rule on mandatory crib standards to child care facilities and places of public accommodation as required by the CPSIA. Assisted by this data, the Commission gave child care facilities and places of public accoinmodation 18 months after the effective date of the new crib safety rules to come into compliance with these new standards. This 18 month compliance period will help to ensure that children benefit from safer cribs, while at the same time preventing a serious impact on these kinds of small businesses and causing a potential shortage in available child care for working families.

The Commission is certainly cognizant of and sensitive to the impact of the CPSIA on testing and compliance costs for small businesses. To that end, the Commission has sought to ameliorate the financial burdens through the exercise of sound discretion where the Commission believed that Congress had provided the Commission with that ability and where such accommodations could be shown not to have an impact on product safety.

One example of these efforts is the Commission's regulation exempting certain types of products from mandatory lead testing. In this case, the Commission met with the business community, examined their specific claims that certain categories of pure products—like certain woods, textiles, and inks—would never contain violative levels of lead in them, and granted exemptions for those categories after independent CPSC analysis. Another example is the Commission's enforcement policy concerning lead in surface coatings and lead content that allows for the use of properly tested and certified component parts in lieu of final product testing. Both of these examples have provided some relief for small businesses in their sourcing and manufacturing of products.

Question 2. Does the Commission have any plans to assess the negative impacts of the law, and to take necessary actions to alleviate these burdens before they eliminate any more jobs?

Answer. The Commission has always maintained an open door policy to listen to the concerns of industry and small businesses—and the establishment of the new full-time Small Business Ombudsman is the latest way that the Commission has sought to listen to and address the concerns of small businesses. As CPSIA does not distinguish between the sizes of businesses that must comply with the law, the Commission does not have plenary power to take actions that may alleviate the burdens of compliance on small businesses specifically.

Nevertheless, as noted above, the Commission is required to conduct regulatory flexibility analyses on each significant rule, which assess the potential impacts of the rules on small businesses. The Commission has, and will continue, to look at areas, like the limited lead exemptions and the component part enforcement policy

rule noted above, to assist small businesses and others, where possible and discretion allows.

Question 3. You mentioned at the hearing the creation of a full-time Small Business Ombudsman to serve the Nation's small mannfactnrers in the area of prodnct safety. How will this new position address the concerns of small businesses? Do you believe that this will be enongh to alleviate their expressed concerns?

Answer. The full-time Small Business Ombudsman is addressing tbe needs and concerns of small businesses in many ways. As you heard on December 2, 2010, from Ms. Jill Chuckas of the Handmade Toy Alliance, tbe Small Business Ombudsman has already been working very closely with small bnsinesses and representatives of small business.

The Ombudsman will serve small businesses through the provision of regulatory and technical guidance to small bnsiness inqniries in a timely manner. Fnrthermore, the Ombudsman will develop educational materials to provide plain English explanations of Federal consumer product safety reqnirements. The Ombndsman has already fielded many inquiries where he has been able to provide concise, clear guidance as to the regulatory requirements and the response from those businesses, and the business community in general, has been very positive.

The Ombudsman has also made himself accessible for small businesses and their representatives to raise their concerns with the knowledge that the Ombudsman will follow np with the appropriate agency employees to seek a solution. We believe tbat the creation of the Ombudsman position will be helpfnl for the Commission to be kept current of small business issues and to find new ways of partnering with the small bnsiness community to develop creative and effective solntions witbin tbe confines of the law.

Question 4. The Commission's stay on third-party testing for lead content is schednled to lift in February. Is the Commission prepared to move forward with lifting this stay of enforcement?

Answer. The Commission is currently considering several petitions and requests, including one from the Handmade Toy Alliance (HTA), for a continuation of the stay of enforcement for third-party testing of lead content. In considering these requests, the Commission will carefully consider the views and concerns of all impacted stakeholders.

Question 4a. Do yon believe that the health of children has been at greater risk because of this stay of the third-party testing requirements?

Answer. Commission staff has no data at this time to suggest that the risk to the health of children has changed either positively or negatively as a result of the stay of the third-party testing reqnirements.

Question 5. Do you believe that businesses have been given the information necessary to comply with this requirement? Have they been given enongh time to incorporate necessary changes to comply with the requirement by the February deadline?

Answer. The third-party testing requirements of tbe CPSIA bave been communicated to the business community. Since August 2008, CPSC staff have met with various industry associations numerous times and provided multiple training seminars and webinars on the new requirements of the CPSIA in an attempt to help indnstry prepare for the changes brought abont by the CPSIA. As one example, on December 10–11, 2009, the Commission held a two-day workshop to discuss issues relating to the testing, certification, and labeling of certain consnmer products pursuant to section 14 of the CPSA (*see* 74 Fed. Reg. 58611 (November 13, 2009)).

As both Ms. Jill Chuckas and Mr. Steve Lamar stated in response to questioning from Senator Pryor at the December 2, 2010, hearing, CPSC Commissioners and staff have been fully engaged with industry, providing training workshops around the U.S. and the world and being responsive to the issues and concerns facing industry as they move forward with meeting the requirements of the CPSIA. The Commission is committed to continuing to meet with and ednoate manufacturers and importers as the remaining CPSIA regulations are developed and implemented.

With regard to industry being given enongh time to incorporate necessary changes to comply with the lifting of the stay in February, it should be noted that the initial stay of enforcement was issued on February 9, 2009, to allow industry time to make the necessary changes. For those prodncts that have been covered by CPSC's stay of enforcement, there has always been a requirement that the products be in full compliance with all applicable product safety rules.

Furthermore, the only way to know that a prodnct complies is to test the prodnct or the components of the product. Many manufacturers and importers have been testing children's products, at the request of their customers, for many months. A full 24 months will have passed when the Commission takes up the matter of lifting the stay in February 2011.

Question 6. Is the Commission going to consider extending the stay in order to ensure that the affected businesses are adequately prepared and that there are enough resources to prevent a negative impact on the businesses affected? If so, when do you plan on doing so?

Answer. As noted above, the Commission is currently considering several requests, including one from the Handmade Toy Alliance (HTA) for a continuation of the current stay. The Commission is carefully consideriug the views of all stakeholders and will rule on the petitions and requests as soon as possible.

Question 7. The CPSIA draws a clear distinction between general product safety rules and children's product safety rules. Yet the Commission has chosen to apply the requirement of third-party testing to all children's products under the general product flammability rules. Can you tell us why this decision was made?

Answer. The Commission has been consistent in its application of third-party testing requirements to children's products subject to consumer product safety rules. The phrase "children's product safety rule" is clearly defined by Congress and has been consistently interpreted by the Commission to include rules of general applicability as well as those rules that specifically address hazards unique to children. Substituting the actual definition of "children's product safety rule" into the language of section 14(a)(2) of the Consumer Product Safety Act (CPSA) best demonstrates the statute's direction to the Commission.

When read with the definition of "children's product safety rule" inserted, section 14(a)(2) reads:

> [B]efore importing for consumption or warehousing or distributing in commerce any children's product that is subject to "*a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance*," every manufacturer of such children's product . . . shall submit sufficient samples of the children's product . . . to a third-party conformity assessment body . . . to be tested.

This explicit definition of "children's product safety rule" referenced in section 14(a)(2) of the CPSA is plain and unambiguous in that third-party testing is required for any children's products covered by a consumer product safety rule, including standards of general applicability. This is consistent with the Commission's unanimous decisions to require third-party testing of children's all-terrain vehicles, bicycles, and bicycle helmets. These three regulations are also rules of general applicability, and the Commission has voted unanimously to require third-party testing for children's versions of these products. Thus, in addition to the clear definition of the statutory term "children's product safety rule," it is also inconsistent with the Commission's unanimous votes requiring third-party testing for general standards pertaining to youth all-terrain vehicles, bicycles, and bicycle helmets to not also require third-party testing for children's products subject to the general standards pertaining to flammability.

Question 8. The flammability standards have been in place with testing protocols for adult and children's products for some time. Yet the Commission has chosen to apply this additional third-party testing requirement to children's products under those rules. Is there any evidence that the products affected by this ruling, such as carpets or vinyl plastic, were unsafe under the prior testing regime and needed to be subjected to third-party tests to protect children?

Answer. CPSC's 2005–2007 Residential Fire Loss Estimates, dated August 2010, presents estimates of consumer product-related fire losses that occurred in U.S. residential structure fires attended by the fire service. The estimates were derived from data for 2005 through 2007 provided by the U.S. Fire Administration's (USFA) National Fire Incident Reporting System (NFIRS) and the National Fire Protection Association's (NFPA) Survey of Fire Departments for U.S. Fire Experience.

The estimated residential structure fires attributed to floor coverings (as item first ignited) such as carpets and rugs, averaged 4,700 from 2005 through 2007. The estimated residential structure fire deaths attributed to floor coverings (as item first ignited) for this period averaged 100, with injuries averaging 280. The estimated residential structure fire property loss attributed to floor coverings (as item first ignited) for this period averaged $151.4 million. It should be noted that the Commission's residential fire data do not differentiate children's product vs. non-children's products for carpets and rugs, mattresses and mattress pads, or apparel. A special study would be needed to try to obtain information on the involvement of adult versus children's versions of these regulated products as the first item ignited.

Question 8a. Is there any evidence that children's versions of rugs or other affected products are in more danger than adult versions of those products to necessitate this additional testing standard?

Answer. The Commission's residential fire data do not differentiate between children's product and non-children's products for carpets and rugs, mattresses and mattress pads, or apparel. A special study would be needed to try to obtain information on the involvement of adult versus children's versions of these regulated products as the first item ignited.

Question 8b. Isn't an adult version of an affected product more likely to be subjected to a cigarette or some other igniting sonrce?

Answer. The Commission does not have data to support this assertion.

Question 9. As 1 noted in my opening statement, I have many constituents who continue to suffer from the effects of tainted drywall that was installed after Hurricane Katrina. Mississippi has the third highest number of reported cases in the Nation. I know the Commission has been involved in the research into the health impact of this drywall. Can you update us on the status of the Commission's health investigations, and what determinations you have been able to make to this point?

Answer. The most frequently reported symptoms are irritated and itchy eyes and skin, difficulty in breathing, persistent cough, bloody noses, runny noses, recurrent headaches, sinus infection, and asthma attacks. Since many consumers report that their symptoms lessen or go away when they are away from their home, but return upon re-entry, it appears that these symptoms are short-term and related to something within the home.

The staff of the CPSC and the Centers for Disease Control and Prevention (CDC) agree that the levels of sulfur gases detected in the affected homes in the CPSC's fifty-one home study were at concentrations below the known irritant levels in the available scientific literature. It is possible, however, that the additive or synergistic effects of these and other compounds in the subject homes could potentially cause irritant effects to consumers. It is also possible that other exposures exist in these homes that could be causing these complaints independent of the drywall.

Our own investigation into deaths of consumers associated with homes that were reported to contain problem drywall found no evidence, based on the limited data available, to support a connection between drywall and the deaths. CDC also conducted an independent review of this limited data, which consisted of available medical records. We have received a report from CDC on their review, and will release it as soon as CPSC staff have reviewed the report. We have also reqnested the CDC to undertake a comprehensive study of any possible long-term health effects resulting from exposure to problem drywall. I would refer you to CDC for any questions regarding any further work by that agency in this area.

Question 10. What are the Commission's plans for future involvement with tainted drywall and the affected homeowners?

Answer. The Commission is continuing to engage with the Chinese government and Chinese manufacturers to reach a fair and equitable settlement for American consumers that have been impacted by contaminated drywall produced by Chinese manufacturers. On October 25, 2010, I met personally with my Chinese counterpart, Mr. Zhu Shuping, Minister, General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) in Shanghai and spoke with him about the need for further dialogue and movement in this area. On January 10, 2011, I had another follow-up meeting with the AQSIQ Minister in Beijing, and again restated my call for a fair and just resolution of the issue by the responsible Chinese manufacturers.

We are also continuing to engage with private parties involved in the Chinese drywall multidistrict litigation (MDL) in New Orleans, Louisiana. I was pleased that the Federal court and the parties relied on our scientific findings to help develop a demonstration program paid for by the responsible manufacturer to remediate at least 300 homes in the Southeast. This demonstration program was part of a partial settlement agreement reached on October 14, 2010, and I am hopeful that it will be expanded in the near future to cover other impacted homeowners.

As the lead Federal agency in this investigation, we will also continue to work with our sister agencies as they examine any possible long-term health effects of the problem drywall and as our sister agencies and other interested stakeholders work with the private sector to develop more commercialized remediation methods.

Finally, we are working with ASTM International, a voluntary standards development organization, on development of standards to address the corrosive emissions from drywall and on affixiug tracking labels to ensure that drywall is more easily identifiable. We believe that both standards will help to protect against future occurrences of this type and, if they were to occur, to quickly address any issues in a targeted and expeditious manner.

Question 11. At the end of November the Commission passed the final implementing rule for the public database required under the CPSIA. While the law specified who can submit reports of harm, the Commission's rule expands this list by defining consumers and public safety entities as essentially anyone who wants to submit a report—even if the submitter does not know who was harmed, the particular product involved, and did not see the incident occur. Therefore, as opposed to the list created by the statute, submitters are no longer limited to people who could have first-hand knowledge of the incident. Why was this expansion done?

Answer. In section 212 of the CPSIA, Congress gave the Commission the ability, in implementing the Database, to fill the gaps in defining statutory terms such as "consumer" and "public safety entity." Based on how the CPSIA amended the CPSA, I believe that Congress intended the public to have access through this Database to as much information as possible concerning the safety of consumer products.

To have narrowly defined those categories in the final rule, particularly in the way stated in the alternative proposal offered by Commissioners Nord and Northup, would have been contrary to the statute and the overall goal of consumer access. For example, the alternate proposal would have disallowed groups such as the National Association of State Fire Marshalls from reporting incidents in the database. These groups are often technical experts in public safety matters, and often gather extremely valuable information concerning product safety incidents. It also would have prohibited anyone, including the parents of Danny Keysar (who was strangled in a defective portable crib in 2008) and the child care facility workers where he tragically died from reporting his tragic death through the Database. I strongly believe that this type of valuable data, from these kinds of reliable sources, should be available to the public through the Database.

Question 11a. How will allowing individuals who do not have first-hand knowledge of the incident improve public safety and increase the reliability of information in the database?

Answer. As stated above, the alternate proposal put forward by Commissioners Nord and Northnp would have disallowed many public sufety gronps with years of technical experience in public safety reports from making reports. In addition, the proposal may have also restricted the ability of parents whose children are injured by consumer products in environments outside of the home (such as schools and child care facilities) from making reports just because they did not directly observe the specific incident leading to the injury. Additionally, it would render the ability of physician and first responders, from whom we currently receive much reliable data, and who fall under certain of the categories of snbmitters Congress expressly inclnded in section 212, from making a report because they did not directly observe the specific incident leading to the injury. I do not believe such a result was intended by Congress or contributes to overall public safety.

Question 12. The intention of the database is to provide useful information to consumers. Commissioner Northup's substitute amendment included provisions to improve the accuracy of the data submitted by requiring the inclusion of additional information. This amendment was rejected by a majority vote of the Commissioners. Can you explain your opposition to adding more required fields to the datahase in order to improve the data's accuracy and usefulness?

Answer. The information requirements for submissions to the Database were carefully crafted to ensure the accuracy of Database submissions without creuting barriers that are unduly burdensome to consumers. Overall, I believe the Commission struck the correct balance in requiring the information fields that were detailed in the final rule.

Question 13. A central concern with the CPSIA remains that it takes away the Commission's ability to assess the risk presented by a product. The law focuses on the content of lead in a product, not the risk of negative health effects from even limited exposure to that lead. Do you believe that there is a risk posed to the health of children from exposure to many of the products that are affected by the lead limits in the law, such as ATVs, books, pens, school desks, furniture, or furniture hardware (*i.e.,* the nuts and bolts that hold the furniture together)?

Answer. Lead is a potent neurotoxin that can cause permanent and irreversible brain damage in children. The scientific and pediatric community has thoroughly studied the issue of children's exposure to lead and is near unanimous in the opinion that there is "no known safe level of lead." Even low-level lead exposnre has been shown to affect brain fnnction, lower intelligence, and cause behavior problems and poor school performance.

Throughont my tenure as Chairman of the CPSC, I have urged mannfactnrer's of children's products to "get the lead out." The presence of lead in children's prod-

ucts is controllable and where lead is not necessary, it should not be included in a children's product.

Question 14. You voiced support for a functional purpose exemption to the lead standard at the hearing, yet you also pointed to literature that says there is no safe level of lead. How do you reconcile these conflicting viewpoints?

Answer. As stated above, I believe—based on all available scientific and pediatric literature—that there is no safe level of lead for children. At the same time, however, I have learned that there are some circumstances where the exclusion of lead below the levels permitted by section 101 of the CPSIA is problematic. Accordingly, I have stated that it would be helpful for Congress to create a new exclusion to the section 101(a) lead limits that would allow some flexibility in cases where lead is required for a functional purpose and the elimination of lead in a specific component is not practicable or possible.

The fundamental tenet underlying a "functional purpose" type exclusion is very simple: where lead serves no purpose and can be practicably removed or made inaccessihle in children's products, the lead should be removed or made inaccessible to children.

Question 14a. Do you believe a legislative fix is needed to allow exemptions from the lead content standard for all products that do not pose a health risk for children?

Answer. As stated in my above response, I believe a functional purpose exception to the current section 101(a) lead content limits would he helpful.

Question 15. The crib rule was mentioned briefly during the hearing. Can yon please elaborate on the impact of the crib rule on child care centers due to the retroactive effects of the law?

Answer. On December 15, 2010, the Commission adopted mandatory safety rules for fnll-size and non-full-size cribs. Between Novemher 2007 and April 2010, there were 36 deaths associated with crib structural problems, and I am confident that these new rules will stop further tragedies from occurring in the future.

At the same time, however, the Commission was very cognizant of the impact that adoption of these rules might have on child care facilities and other places of public accommodation. During consideration of the rules, I urged building enough time into rule enforcement milestones not only to allow new crib inventory to reach the market but also to allow affected entities sufficient time to purchase new cribs.

Under the final rule cribs sold in commerce must comply with the new requirements by June 28, 2011. Child care facilities and other places of puhlic accommodation required to comply with the rule will have an additional 18 months to come iuto compliance—or until December 28, 2012. In the unauimous Commission decision adopting these rules and compliance dates, I believe the Commission struck the right balance to ensure that children will benefit from safer cribs, while at the same time working to preveut a serious impact on smaller entities and a potential shortage in available child care for working families.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHNNY ISAKSON TO HON. INEZ M. TENENBAUM

Question. Under your stewardship and that of Commissioner Nord, you have both put forward stays to the so-called third-party testing and certification requirement uuder the CPSIA. It is now due to take effect in February of 2011. The final rules for testing aud certification are still not published, but I am hearing from my constituents that there is confusion in the industry how to implement these requirements. This level of confusion, combined with the 2/11 date, will in my opinion add major new costs to manufacturers in the United States and this will likely lead them to move their operations overseas or even close, at a time when we are at near 10 percent unemployment. Wouldn't it make sense to adopt another one year stay of this requirement and work with Congress and the stakeholders to develop a workable testing regimen that the impacted indnstries can effectively work with that would NOT drive manufacturers out of business or overseas?

Answer. As noted in my above response to Senator Wicker, the Commission is currently considering several requests, including one from the Handmade Toy Alliance (HTA) for a continuation of the current stay. The Commission is carefully considering the views of all stakeholders and will rule on the petitions and requests as soon as possible.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO HON. ANNE M. NORTHUP

Question 1. Is the marketplace safe for shoppers this holiday season?

Answer. The safety of every product ou the market at any given time is unknowable, and the complete elimination of all unsafe products for all time is unachievable. The CPSC's mission is to spend its resources as efficiently and effectively as possible to identify and remove from the marketplace consumer products that present a demonstrable risk of injury. Data available to the CPSC to identify unsafe products and to measure changes in product safety over time can help it gauge the success of its efforts, and to reallocate its resources when necessary. But the utility of such data is limited. One reason is that many injuries that occur while using a product are unrelated to a product's safety. Another reason is that it takes years to gather data, and comparisons over time periods can therefore only support tentative conclusions. Certainly the available data does not support the conclusion that the CPSIA has made products safer. Rather, directing greater resources toward identifying and removing actual risks, rather than regulating to fixed standards unrelated to actual risk, would be more effective.

Toy-Related Deaths and Injuries

The Commission touted its annual report on toy fatalities and injuries as evidence that toys are safer this holiday season.[1] Unfortunately, this press release was qnite misleading. Data on toy-related deaths and injuries illustrates the difficulty in drawing conclusions regarding changes in relative risk.

First, the Commission's data on deaths related to toys is not complete, and always lags by several years. As you can see in the first set of footnotes on page fonr of "Toy-Related Deaths and Injuries, Calendar Year 2009" (*http://www.cpsc.gov/library/toymemo09.pdf*), the death certificate data for 2009 was *only 37 percent complete*. For that matter, the death certificate data for 2007 was only 85 percent complete, as of 2009. The number of deaths has always increased in the out years as further data is collected. Thus, it is simply too early to tell what the nnmber of deaths related to toys will be for 2009, or how it will compare to previous years.

Second, it is important to remember that the incident data reflects toy injnries and deaths that are "associated with, but not necessarily caused by" toys. In other words, the hazard may have nothing to do with a consumer product. For example, in the tables on pages four and five of the 2009 report, the data on deaths related to toys show that a number of deaths for children age 15 and under involved *drowning* related to tricycles or powered riding toys. These deaths likely occurred around a pool or other body of water while the child was nsing the toy, but it is unlikely that the toy was defective and cansed the accident. Thus, while such incident data may point to the broader hazard of drowning, it does not establish that tricycles and motorized toys are unsafe. So while the data collected on these broad areas of concern are important for the Commission to nnderstand as we direct resources toward public relations campaigns and enforcement efforts, it is much less relevant in judging whether toys are safer.

Third, this 2009 report shows that there were an estimated 250,100 toy-related injuries treated in U.S. hospital emergency departments that year, which is significantly higher than the annual average of 228,200. So while the incomplete, *preliminary* data for deaths shows a decrease, the number of reported injuries associated with toys has actually gone up. The estimated number of emergency department injuries for 2008 is 235,300. Additionally, the statistics indicate that the injuries in 2008 and 2009 may be slightly more serious. Ninety-six percent of the injury victims were treated and released in both the 2009 and 2008 reports, whereas in 2007, slightly more (97 percent) were treated and released.[2] Thus, the changes in injury data from 2007 through 2009 do not support the theory that toys are safer today than a few years ago.

CPSIA

There is no evidence that the CPSIA will significantly contribute to increased product safety. This is becanse the major requirements of this law are *not related to risk*. Recent modifications to prodncts dne to the CPSIA may have made the products more expensive, but have not necessarily made them safer. For example, while lead-free zippers may be more readily available in the marketplace today than a few years ago due to the cnrrent 300 ppm lead content standard, there is still no evi-

[1] *http://www.cpsc.gov/cpscpub/prerel/prhtml11/11042.html.*

[2] Risana Chowdhury. "Toy Related Deaths and Injuries, Calendar Year 2007," Consumer Product Safety Commission. Pg. 6: *http://www.cpsc.gov/library/toymemo07.pdf.*

dence that touching or mouthing the stay of a zipper with a lead content higher than 300 ppm poses a lead risk to a child.

The interim ban on certain phthalates (§ 108(a)(1)), which are used to make plastics soft, is another requirement that is unrelated to risk. The Commission has already determined that the phthalates most commonly used in toys today (those included under the interim prohibition) did not pose a danger to children and, therefore, should not be federally regulated. Nonetheless, the CPSIA requires yet another Chronic Hazard Advisory Panel (CHAP) to study the issue *de novo*. And pending this new study—which could well obtain the same results as prior tests—the law bans them both prospectively and retroactively. Thus, a chemical that the Commission has studied and determined not to pose a risk, and that will now be studied *again*, is already banned from all toys and child care articles—a step clearly mandated without regard to risk.

It is premature to gauge the safety impact of the CPSIA's requirement, effective early 2009, that the toy standard (ASTM–F963) become mandatory. The full scope of this requirement has yet to be implemented, because the Commission has not issued a Notice of Requirements to accredit labs that will test to this standard. Once the requirement is implemented, toy manufacturers will be obligated to send each component of each toy to a third-party lab to be tested to all applicable parts of the toy standard, potentially requiring numerous extra tests beyond lead and phthalates. But it also appears that the delay in implementation of these third-party testing requirements has not caused toys to be *more unsafe* than in previous years. So it may be preferable to forgo these costly testing requirements for toy manufacturers unless or until the Commission can actually show that they are beneficial in addressing a known risk.

Changing the CPSC's Mission

As a Commissioner, I am concerned that we are spending so much time developing regulations *unrelated to risk* under the CPSIA that our attention will be diverted from focusing on genuine safety hazards. Our agency is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products—but we cannot fulfill this mission if our time is spent primarily enforcing the CPSIA, including its complex, non-risk-based, testing and certification requirements.

Because the CPSIA's new requirements are not risk-based, manufacturers are spending time and money simply on "compliance," rather than on improving their products to the benefit of consumers. In fact, many of these requirements amount to massive new paperwork and tracking systems, rather than actual modifications to the products themselves. The American Home Furnishings Alliance writes in a letter to Commissioners:

> ". . . there has not been a corresponding benefit in the improved safety of children's furniture for children. All the represeutatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008. . . . The testing is simply being done to attempt to prove a negative."[3]

Similarly, some industry associations have had very few, if any, safety violations and yet have to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Associatiou writes in their public comments on the Compouent Parts rule:

> "As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product's, production of the product's and the manufacturer's unique circumstances. These programs *are effective and do not need to be changed*. To demonstrate, only .0084 percent of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations—a compliance issue that results from lack of information not lack of testing."[4]

Given the Executive Order[5] issued by President Obama on January 18, 2011, directing agencies to roll back onerous regulations that have no safety benefit, I hope

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[3] Letter to Commissioners from the American Home Furnishings Alliance. November 8, 2010.

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

[5] *http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.*

the Majority at least will consider approaching Congress to remove the law's third-party testing, certification and labeling requirements that are entirely unrelated to risk. The Commission always maintains the authority to impose in the future new testing requirements on any products where a true risk arises.

Question 2. Has the agency seen a dramatic decline in toy recalls since 2008?

Answer.

Toy Recalls by Fiscal Year		
FY	Number of Recalls	QTY.
10	44	8,389,276
09	50	1,785,626
08	172	12,246,170
07	63	26,375,370

TOTAL Recalls by Fiscal Year		
FY	Number of Recalls	QTY
10	428	124,700,000
09	465	229,500,000
08	563	60,700,000
07	472	102,200,000

A perennial question for this Commission has been whether it is good or bad to have fewer recalls. A 2004 report by Kids in Danger asserts that a *decline* in recall activity between 2000 and 2003 did *not* indicate that products were becoming safer. Rather, the consumer advocacy organization surmised that the decrease was due to changes in enforcement policy under then CPSC Chairman Hal Stratton. According to Kids in Danger, the decrease in recalls resulted from lax CPSC enforcement that "increase[ed] hazards as the dangerous products stay on the shelves, and in homes."[6]

But today, a decline in recall activity is suddenly a good sign—and much better than the *increase* in recall activity that took place under Acting Chairman Nancy Nord prior to the passage of the CPSIA. Thus, it would appear that the significance of the agency's number of recalls is entirely subject to interpretation.

In reality, recall data alone cannot conclusively establish whether products are safer or less safe than in previous years. On the contrary, one of the main reasons that the Commission's toy recall data was so high in Fiscal Year 2008 was the media attention surrounding several high-profile recalls. As a result, both industry and the Commission were aggressively testing every toy within their reach. As a result, more violative products were discovered and recalled.

Today, our activities related to enforcement are focused much more broadly. Thus, the difference in recall numbers between FY 2008 and today prove only the obvious fact that the more resources the Commission expends searching for non-compliant products, the more such products it will find. The same is true for any law enforcement activity, whether it is the number of hours a policeman watches for speeders or the number of tax returns audited by the Internal Revenue Service; the more resources allocated, the more violations will be discovered.

Increased Activity at the Ports

The Commission's new enforcement initiative at ports may be contributing to a decrease in recalls. Starting in Fiscal Year 2008, the Commission launched its Import Surveillance Division, which placed staff at U.S. ports to work closely with U.S. Customs and Border Protection (CBP) to identify and examine imported shipments of consumer products. Also, the Commission has embarked on several steps to improve our coordination with the CBP and to combine resources. Since that time, the number of imported products barred from entering the United States has increased. This does not necessarily mean that the decrease in recalls is due to an increase

[6] Safety Shortcuts: Children's Product Recalls in 2003. Kids in Danger, February 2004. Pgs. 2, 11. *http://www.kidsindanger.org/publications/reports/2003 recallreport.pdf.*

in the quantity of harmful products stopped at the ports, but increased vigilance on our part can only have a positive impact. I therefore applaud Chairman Tenenbaum for the oversight and direction she has provided in the Commission's efforts to better secure our ports agaiust the importatiou of unsafe products. It is more effective and drastically more efficient for consumers, industry, and the government, for the CPSC to stop harmful products before they enter the couutry.

Question 3. Has the agency seen a decline in the number of deaths of children uuder the age of 15?

Answer. Regarding the recent data on toy-related deaths, it is too early to tell what the uumber of deaths related to toys will be for 2009 aud whether this uumber will be significantly different from previous years. As mentioned in the first answer, the Commission's 2009 data on deaths related to toys is only approximately 37 percent complete.

However, according to our staff's National Center for Health Statistics data, the number of consumer prodnct-related deaths for ages 0 to 15 dropped by over 17 percent, from 3,225 to 2,658, between 1985 and 2007. Adjusting for changes in population, the death rate for this age group has dropped from 6.3 to 4.4 deaths per 100,000.

Question 4. What advice can the CPSC offer to parents to help keep their kids safe from any potential product hazards this holiday season?

Answer. Based on my experience as a CPSC Commissioner and as a mother of six, I am keenly aware of the dangers children can face from consumer products. One of the saddest parts of this job is the overnight incident reports that we receive on injuries and deaths of children.

I would advise parents to be aware of the Commission's *www.recalls.gov* website or to sign up for recall updates through e-mail. It is also important to provide age-appropriate gifts to toddlers and young children, to supervise their play, and to remember that most incidents can happen in a split second.

Some of our most common incident data include drowning, which can happen not only in pools, but in bathtubs, hot tubs, toilets and even buckets of water. Drowning prevention is an important focus of the Commission, and I am proud to have participated in one of the Chairman's Pool Safely Campaign events in Washington, D.C. I hope that the Commission's education campaign on drowning prevention may extend to settings beyond just swimming pools.

There are a number of other common hazards reported to the Commission and of which I would advise parents to be aware, such as choking hazards for children, including coins and batteries. Additionally, the Chairman launched a "Safe Sleep Campaign" to help educate more parents on crib safety, which I strongly support. Soft bedding placed inside of a crib is a significant hazard, because infants' neck muscles are not strong enough to adjust and they can suffocate. I have supported the Chairman's efforts to focus not only the safety of the structure of cribs but also the other, common hazards related to infant sleep.

Finally, a database limited to first-hand accounts of verifiable incidents involving consumer products would provide an additional, valuable resource for parents. Unfortunately, as I explain in the answers that follow regarding the database, the rule passed by the Majority goes in the opposite direction and will instead make the public database mandated by the CPSIA of little use to consumers.

Question 5. Do you support the Commission's safe sleep campaign?

Answer. Yes. I support the Chairman's efforts to increase the Commission's focus on crib safety and to use our communications resources to educate the public about safe sleep for infants. In particular, I have been supportive of the Chairman's efforts to broaden the campaign to include not only education on the structure of cribs and dangers of drop-sides, hut also the more general, unforeseen hazards not related directly to the crib's structure and hardware, such as soft bedding. As we reach new audiences with information about our recalls and the dangers of drop-side cribs, it makes sense to raise awareness of ALL the common dangers related to infant sleep.

Question 6. If so, what role have you played in supporting the Chairman's initiative?

Answer. I have often urged the Commission to do more to educate the public on broad-based safety hazards and through social media. One of my first suggestions as a Commissioner was to broaden our messaging by using posters in other languages, such as Spanish, and working through non-traditional groups, like churches, to increase our outreach to minorities and harder-to-reach populations. The Chairman's staff has done an excellent job using social media (online videos, text messaging, twitter, etc.) and other creative ways to broadcast the Commission's many safety messages, including the Safe Sleep Campaign. I continue to support these efforts.

Question 7. When do you expect the Commission will issue a final rule on crib safety?

Answer. The Commission, with my support, passed a final rule on full-size and non-full-size cribs on December 15, 2010.

Question 8. Do you think it is important for safety advocacy groups or day care centers to be able to submit to the CPSC for inclusion in the database product safety complaints or incident reports?

Answer. *It is important for individuals with first-hand knowledge of incidents involving consumer products to be able to submit reports of harm to the new database.* Groups or individuals with no direct knowledge of the incident, did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the database. There are several reasons why first-hand knowledge is essential, but the primary reason is *accuracy*. A database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpfnl to consumers using the database to determine which consumer product they should purchase.

Day care centers at which an incident of harm has occurred certainly should be permitted to report to the database. Day care centers and other child service providers also would have been permitted to submit reports under the alternative database rule that I introduced. Additionally, consumers of the product in question, health care professionals who treat the injured person, or emergency first responders at the scene should all be permitted to submit reports of harm to the database—and the statute requires all of these categories of submitters.

However, advocacy groups and other second and third person reporters are not listed in the law as allowable submitters to the database, nor should they be. If they are not themselves consumers of the product that caused the incident of harm, or otherwise a first-hand witness (per the list of submitters in the statute), advocacy groups have no business inputting to a public database information that is intended to be a resource for *consumers*. Not only is adding advocacy groups as submitters contrary to the statnte, but it invites dishonest, agenda-driven use of the database—diluting its usefulness for consumers. Advocacy groups, trial lawyers, other nongovernmental organizations and trade associations, all of which the Majority has added as allowable submitters, must serve their own agendas and lack an incentive to prioritize product accuracy in their reports of harm. By inviting such groups to input reports of harm (none of which have to be verified for accuracy), this Commission has all but guaranteed that the database will be a tool for policy agendas, lawsuits and trade complaints that will drown out information about product safety that is useful to parents. Why even have a taxpayer-funded database (at a price tag of $29 million, so far) that will be no more useful than an "Amazon.com" or any of the other hundreds of websites where anyone can submit comments on a product?

There are many advocacy groups and associations that serve a role in public policy, but may have no incentive to provide accurate information on a public database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes, a controversial policy. One cause of house fires is the nse of cigarette lighters, which are consumer products. Thus, the NFPA has a strong incentive to add all reports of house fires caused by lighters to the Commission's public database. The more incidents in our database, the better case they can make that new fire prevention technology—which their members sell—should be mandated in homes.

But what incentive does NFPA have to ensure that it correctly identifies the brand of lighter in an incident report: A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular cause is not relevant to its goal of promoting sprinklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless inaccurate (or at least unverifiable) claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

I explained in my *November 24* and *April 22, 2010* statements that the Majority's interpretation of the statute is flawed because it has greatly expanded the list of allowable submitters to the database. This expansion goes against the statutory purpose that the database be "useful" for consumers, and does not comport with Congress's discussion on the purpose of the law prior to its passage.[7] Indeed, the

[7] On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: "We have tried to find something that is balanced, that provides information, but also

Continued

Majority has expanded the list of submitters to such an extent that *anyone* can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

The problems caused by the overly expansive list of submitters could have been rednced if reports of harm had to be verified, or simply verifiable, before being published. But unfortunately, the Majority rejected the proposals contained in my alternative database rule that would have made these reports more verifiable.

One of my unadopted proposals wonld have required reporters of harm to include the victim's identity and contact information with a report (to be held confidential, as is current practice). Commission staff could then at least follow up with the victim in response to a mannfactnrer's claim of a material inaccuracy, in order to verify the report.

In my alternative rule, I also included such additional required fields as the approximate date of purchase of the product and whether the prodnct was purchased "new" or "used." This information would have allowed consumers using the database to gauge the age of the products and know whether the product in question was the one currently in stores or is similar to the model they own. These proposals were not adopted by the Majority.

Finally, while submitters to the database must check a "self-verification" box to assert accuracy, this will do little to discourage or prevent inaccurate reports of harm. The final database rule merely asks the submitter of a report of harm to check a box stating that the report they are submitting is accurate "to the best of their knowledge." The "best" knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened—including the exact type of product, the recent history of the prodnct, or even the precise cause of the incident.

Question 9. Do you think it is important for consnmers to be able to scan for trends and patterns of potentially hazardous products in the marketplace by accessing this database so they can protect themselves and their families?

Answer. It is important for Commission staff to be able to scan for trends and patterns of hazards, as they do today through our internal databases and other sources of information. After all, Commission staff is tasked with enforcing existing Federal standards and determining the need for new standards. What is important for consumers is to have access to accurate information. Consumers already have a variety of resources available to them on the Internet with all types of information on products for sale. More importantly, scanning for hazards will not be possible with this new database given that the Majority's database rule ensures that the database will not be an accurate source of information.

There are a nnmber of ways in which the new database could be unhelpful or misleading for consumers. Consider this scenario: Company A sells five million high chairs and Company B sells 5,000 high chairs. Company A has six incident reports on the database and the other has one incident report (all of which are unverifiable). Thus, a consumer could falsely conclude that Company A's high chair is less safe, even though simply due to the number of units it sold, it is more likely that people own that high chair—and more likely that reports on that high chair would make it into our database. Or, it is also possible that some of the reports about Company A's high chair actually pertained to older models of the high chair that are no longer for sale, which means the information may be entirely irrelevant for people using the database to look for safety information about current products on the market.

As a consumer and a grandmother, I do virtually all of my research on baby products (*e.g.*, regarding safety, quality and price) at the point of sale—usually on the website from which I am ordering, such as an "Amazon.com." The hundreds of comments on these websites cover a broad array of useful information. But for most products, I would not slow down my research to look onto a government website for additional, equally unverifiable, information—particularly when I can see safety information right alongside all of the other information I am looking for (wear and tear, usefulness, and warranty information) at the point of sale or the retailer's website. All of these factors are useful to a purchaser.

Trial lawyers or other groups with self-serving motives will use the Commission's database to look for potential trends and patterns of hazards. Under the Majority's database rule, these same groups may also submit to the database false and unverifiable reports to fuel a lawsuit. It is no coincidence that these groups are strongly in favor of this pnblic database and of the Majority's interpretation of the statute, which expressly allows them to submit reports of harm.

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has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous."

Because the Majority's database rule all but guarantees that the database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal databases we have today. Frankly, this is one of my greatest fears—that Commissiou staff will be overwhelmed hy inaccurate reports (or the reports that get picked up by the media) and uuable to use their expertise to search objectively for genuiue hazards. As the database is swamped with misleading or inaccurate reports, they will drown out the accurate ones.

Question 10. Did you advocate for limitations on the information that could be included iu the database? If so, why?

Answer. As discussed above, I sought to *limit the sources* of information to those likely to be reliable; and, I songht to *increase the scope* of informatiou that could be provided, in order to facilitate verification of the incident reports. The only area where I advocated *temporarily* withholding information received from an appropriate snbmitter concerned claims of confidential or inaccurate information.

In the latter regard, I supported a valid and more useful interpretation of the statutory 10-day time-frame for evaluating claims of material inaccuracy. Under my interpretation, the brief 10-day window presents a strong incentive for manufacturers to submit any claims of material inaccuracy quickly, and for the information to go up on the database as soon as possible—that is, following the 10th day as long as there has been no claim of inaccnracy. However, if a manufacturer submits by the 10th day an adequately snpported claim of inaccuracy, the Commission can and should withhold that incident until the claim is resolved. Under this interpretation, data is not *limited* in the database but better verified before it is posted. I refer you to my *November 24, 2010* statement for further details.

Notably, the Commission's Notice of Proposed Rulemaking on the database originally included an interpretation similar to mine. For example, § 1102.26 of the NPR states: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from pnblication in the Database until it makes a determination."[8] 75 FR 29180. That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, many if not most of the commenters assumed that incidents would not go into the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consnmer groups—argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a more detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority's final rule now forbids delaying publication in those circumstances, and fails to establish any specific protocol for handling requests for determinations.

Finally, it is helpful to remember that the Commission obtains information in addition to that which will be submitted to the public database, such as emergency room data, death certificates, etc. It is acceptable (and probably preferable) for the Commission to continue to absorb as much information on consumer products as it can—and this includes reports from advocacy groups, trial lawyers and trade associations. However, it is not necessary *nor is it statutorily required* that such information, particularly that which is neither accurate nor verifiable, also be posted on the public database. This is one area where my position on the database differs starkly from that of the Majority. I believe inaccurate information in a pnblic database (with the official backing of ".gov") is not *safety* information; on the contrary, it is simply misinformation—and a waste of taxpayer resources.

Question 11. Within the third-party testing regime, where is the Commission in its efforts to promnlgate rules outlining appropriate testing protocols?

Answer. On May 20, 2010, the Commission issued Notices of Proposed Rnlemaking on (1) Testing and Labeling Pertaining to Product Certification (75 FR

[8] The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the database until it makes a determination." 75 FR 99, at 29161. And this: "We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 99, at 29170 (Response to summary 26)(emphasis added).

28366), and (2) Conditions and Requirements for Testing Component Parts of Consumer Prodncts (75 FR 28208). These proposed rules—referred to by the CPSC as the "15-month rule" and the "component testing rule"—address, inter alia, the protocols that will goveru third-party testing of childreu's products, including random sampling methods and the availahility of component parts testing as a means to encourage compliance further up the supply chaiu aud to provide mauufacturers with more options. The Commission is just beginning to consider the final versions of these rules.

The delay in finalizing these rules is of concern, because the Commission's previous stays on lead content testing were implemented principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time. If the stay is lifted prematurely, many small manufacturers, in particular, will be unable to afford to comply independently with the third-party testing requirement, and will stop making certain products or go out of business entirely.

This link between finalizatiou of the 15-month and component testing rules and the lifting of the stay was recognized by Commissioners of both parties. As explained in the Commission's February 2009 Federal Register notice, the stay on third-party testing of children's products for lead content was first implemented in response to "confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom." 74 FR 6396 (February 9, 2009). The stay was thus intended to provide the Commission time to promulgate new rules addressing, inter alia, "production testing of children's products subject to third-party testing and certification . . . including random sampling protocols," so that "the right tests are run on the right products without unnecessary and expensive testing."

During the December 2009 public briefings to consider whether to lift the stay, CPSC staff reported that the apparel component manufacturing sector was reluctant to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers were unable to obtain component parts testing because suppliers were reluctant to undertake the tests until the final rules for component testing and certification are in place. In the face of this evidence, Chairman Tenenbaum acknowledged that she "would never agree to lift the stay" until the 15-month and component parts rules are in place. She voted to extend the stay "in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new reqnirements." Commissioner Moore also recognized the need to "give the small mannfactnrers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials." During the December 16, 2009 public briefing on the stay, Commissioner Adler also conceded that the 15-month rule should be in effect before the stay is lifted. Although he retracted that view the following day in his written statement explaining his vote to extend the stay, Commissioner Adler predicated his changed position on his belief that "[n]ow that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner."

Consistent with the views of all five Commissioners, the Commission "determined that testing of children's products for lead content by a recognized third-party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011, to allow component testing to form the basis for certifications for lead content . . ." 74 FR 68588 (December 28, 2009).

A year has now passed, but in the absence of final 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small mannfactnrers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where many small manufactnrers obtain component parts. Under these circumstances, a continuation of the stay would be consistent with the stated views of all five Commissioners. Commissioners Northnp and Nord, and Chairman Tenenbaum all expressly linked the lifting of the stay to at least the finalization of the 15-month and component testing rules. Commissioner Moore supported exteuding the stay to give small manufacturers "sufficient time to find sources of lead compliant materials," and Commissioner Adler predicated his willingness to delink finalization of the 15-month rule from the stay on his expectation that small manufacturers would be able to "rely on component suppliers for compliance with the law." Given that component part suppliers remain unwilling or nnable to provide component part certifications in the

absence of final rules, there is no factual predicate for the Commission to support lifting the stay.

It is also important to emphasize that publication of the proposed rules has not provided the regulated community with any certainty regarding the content of the final rules. Indeed, the CPSC's record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that compouent parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized.

I therefore intend once again to urge the Commission to vote to coutinue the stay of enforcement on third-party testing and certification of lead content in children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are fiualized is necessary for manufacturers to beuefit from the rule. Doiug so would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay would not earlier be lifted.

Moreover, lifting the stay before the final 15-month and component testing rules are published would place manufacturers in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with iusufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, snpply chain management, test lab coutracting, and other aspects of product manufacturing, due to the rapidly changing requirements.

Finally, a reasonable time after pnhlication of the final rules is necessary in order to afford the regulated commuuity time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. In this regard, it is essential that the Commission retain in the final compouent parts rule the proposed provision, § 1109.5(g)(1), affording component parts certifications "currency" to allow them to be reasonably relied upon by downstream manufacturers without the need for duplicative testing.

Question 12. Has the Commission proposed a rule allowing for component part testiug?

Answer. As explained above, the Commission has proposed a rule on component testing (75 FR 28208). If this rule is finalized as it is written today, it will allow for compliance with the CPSIA by some manufacturers that otherwise may have had no chance to survive under the law's onerous, unnecessary testing and certification requirements. This is because component testing has the potential to allow considerable flexibility under the CPSIA's testing regime for both small and large manufacturers. But it will not offset all of the unintended costs nor eliminate all of the negative consequences of the CPSIA. It may not even be available soon enough to benefit some small manufacturers.

I have been a strong supporter of the policy, and therefore hope that absent a full repeal of the CPSIA's testing and certification requirements, the Commission promulgates a final component testing rule. Until the rule is finalized and has the force of law, however, it is highly unlikely that any suppliers of components like zippers, buttons, or even raw materials will make the investment to become component suppliers. In other words, it is incorrect to assume that a proposed rule (or our previous enforcement guidance allowing component testing) is sufficient to lay the groundwork for component testing to take hold.

Component testing can successfully increase efficiencies and safety up the supply chain, only if children's product manufacturers have *absolute certainty* that they can rely on the certificates received from component part certifiers. If a component part certifier (*e.g.*, a button manufacturer) third-party tests, certifies, and fulfills all continued testing requirements for its buttons, but the doll-maker that receives that certificated component is still held fully liable for the compliance of the component, the doll-maker will always have to re-test every component just to be sure. This creates layers of unnecessary, duplicative testing.

That is why in § 1109.5(g)(1) of the *proposed* component testing rule, the Commission allows component part certificates to have "currency" to be passed through the supply chain. Specifically, this provision allows component part certificates to be treated the same as final certifications issued in accordance with section 14(a) of the Consumer Product Safety Act. While finished product manufacturers relying on component parts certificates still could be liable for a recall, for example, if any component is found non-compliant, they would *not* be held liable for a civil penalty for a violative component if they relied, with due care, on a component part certificate.

The question of liability is central to the ability of component testing to work. Manufacturers already have a stroug incentive to work with reliable suppliers in order to prevent unnecessary reputational damage or a costly recall should any unsafe product make its way onto the market. However, if a manufacturer is also liable for a civil penalty associated with a *certified component part* found still to be non-compliant—they simply have no incentive to demand certified components at all. Today, they would still have to re-test any components they receive because § 1109.5(g)(1) of the proposed component testing rule has not been finalized. Moreover, give the Commission's recent history of changing the direction of its rules between the proposal stage and final stage, there is even more uncertainty surrounding component testing.

For all of these reasons, I strongly support finalizing all of our testing rules prior to lifting the stay of enforcement on lead content testing or issning any more Notices of Requirements to accredit lahs for future CPSIA standards.

Question 13. How does Europe handle cadmium content in children's products? Are the E.U.'s safety standards governing cadmium content in children's products more stringent than our own?

Answer. International toy safety standards, including the European standard EN 71–3, cover cadmium in toys. Like the ASTM F963 toy safety standard in the U.S., EN 71–3 limits migration of cadmium from paints and surface coatings. The European standard also includes limits for migration of cadmium from materials other than paints and surface coatings. Additionally, the E.U. restricts the amount of cadmium in parts of vehicles, and electronic and electrical products (with exemptions). It has also announced that it will consider recommendations to restrict the cadmium content of jewelry.

An important distinction between our requirements and Europe's is that Europe does not have the third-party testing and certification requirements that American manufacturers now have in the United States due to the CPSIA. Because the law's mandates (almost none of which are based on risk) make the cost to manufacture children's products much higher for manufacturers selling in the U.S., the law gives a strong competitive advantage to foreign firms over U.S.-based firms. Also, similar to Europe's lead content standards, enforcement of cadmium limits varies significantly country to country—with some countries enforcing the limits more than others. This uneven enforcement of the EU's mandatory limits also makes it quite difficult to compare our standards in the United States to those in the EU.

Imposition of the CPSIA's testing costs on products manufactured for sale in the U.S. also disadvantages American consumers. Major European toymakers have decided to stop selling in the U.S., to avoid the CPSIA's testing costs. But their products are still available to consumers in Europe and other countries.[9] The absence of these European children's products in the American market is not because their products are unsafe, but because these companies choose not to pay for the law's unnecessary costs to reengineer, third-party test and certify all of their products.

We tend to focus more on the costs of the CPSIA to businesses, rather than to consumers. But as a mother of six, I have an appreciation for the impact on the consumer. Parents have certain expectations when they shop for their children, including that: (1) products they purchase are safe; (2) at least some products are affordable; and (3) a vibrant market exists with new and different toys and children's products throughout the year. When I shopped for my children, I did not want the same dolls and games in the same colors that I purchased the year before. Unfortunately, the high cost of compliance with the CPSIA, without regard to safety, has meant reduced choices for consumers (including reduced product lines and "de-spec'ing" of products to reduce colors and accessories)—and the effects are likely to become worse as the Commission continues implementing the law's testing requirements.

Harmonization

Recently, the ASTM toy safety subcommittee estahlished a work group to consider aligning the U.S. and international standards for accessible soluble heavy metals in toys. If adopted by the ASTM toy suhcommittee, the new standards would then need to be approved by Commission vote, because the CPSIA made the ATSM F–963 standard mandatory, effective 2009.

That the Commission could be an impediment to the ATSM's efforts to harmonize its standards with international norms illustrates how mandatory, government imposed, standards can inhibit the harmonization of international product safety standards. ASTM F963 had been a voluntary standard before the CPSIA made it

[9] *http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cspia/.*

mandatory in early 2009, and it is quite complex. In theory, the greater efficiencies achieved through harmonization should benefit manufacturers and consumers. When I was in China last summer visiting factories and American companies, I saw that they perform three or fonr different "small parts" tests, all from different heights, simply because of the reqnirements of different countries. Harmonization would reduce that burden, but the CPSIA's requirement that toys sold in the United States satisfy ASTM F963 has tied the Commission's hands in its negotiations to "harmonize" with the Europeans. Overall, locking in the ATSM F–963 standard has severely limited the potential for improvements to safety and efficacy that would otherwise be achievable by learning from and adopting where appropriate the toy safety standards of other countries.

Unlike the mandatory toy standard, there is no Federal standard for jewelry at this time in the United States. American companies that serve on the ASTM jewelry standards Committee can therefore negotiate freely with our international counterparts. Harmonization for this product category is still possible.

Question 14. Are children more susceptible than adults to the adverse health effects of cadmium exposure?

Answer. Our staff has found little information that children are more susceptible than adults to the effects of cadmium, although few studies have focused specifically on health effects in children.

However, CPSC staff has foensed on children in its risk assessments, because children engage in behaviors more likely to expose them to any cadmium found in consumer products. In particular, children tend to have significant mouthing behaviors, and occasionally may swallow—accidentally or intentionally—small objects. Children also tend to place their fingers in their mouths after touching objects. All of these behaviors increase the chance of migratable material being introduced into the mouth, where it can be swallowed and absorbed by the body.

Question 15. Do you believe cadmium should be declared toxic by the Commission under the Federal Hazardous Substances Act? If not, why not?

Answer. The Commission staff's conclusion is that the data concerning the toxicity of cadmium is snfficient for cadmium to be considered toxic nnder the FHSA due to effects on multiple organ systems and toxic endpoints, including kidney dysfunction. However, the conclusion that a substance is toxic is only the first step in the Commission's assessment under the FHSA.

The FHSA is risk-based. To be considered a "hazardous substance" under the FHSA, a consumer product must satisfy a two-part definition. 15 U.S.C. § 1261(f)(1)(A). First, it must be toxic under the FHSA, or present one of the other hazards enumerated in the statnte. Second, it must have the potential to canse "snbstantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children." Therefore, exposure and risk must be considered in addition to toxicity, when assessing potential hazards under the FHSA.

It is important that the Commission's assessments be risk-based and that the Commission explain and clarify the genuine risks associated with metals like cadmium, particularly when talking to the media. Unfortunately, some articles on children's products have reported that cadmium is a carcinogen, inferring that it could be a carcinogen when present in children's products. However, the *route of exposure* of a substance is as important as the type of substance when determining its health effects. If cadmium is inhaled, as in a mine or similar workplace environment for adults, it is a known carcinogen. For this reason, OSHA has strict standards on cadmium inhalation in industrial workplace settings. However, touching, mouthing, or swallowing an object with a high level of cadmium content is an entirely unique route of exposure with unique health effects. As such, cadmium in the substrate of toys, in drinking glasses, or in jewelry is *not* a known carcinogen.

Question 16. Could you discuss the issue of the additional layer of protection for pools with only a single main drain?

Answer. The additional layer of protection for pools and spas provided by the Virginia Grahame Baker Pool and Spa Safety Act (VGBA) is an important issue, and I was proud to support the bipartisan interpretive rule that this Commission promulgated to implement the VGBA.

Under the VGBA, all public pools and spas must be equipped with anti-entrapment devices or systems. VGBA § 1404(c)(1)(A)(i). To further reduce the risk of entrapment, the VGBA also requires public pools and hot tubs with a single main drain to have either an "unblockable drain" or a "system[] designed to prevent entrapment." VBGA § 1404(c)(1)(A)(ii). Thus, one question before the Commission was how to define an "unblockable drain."

The Commission's interpretive rule determines that a drain fitted with an unblockable drain cover is an "unblockable drain" within the meaning of the VGBA. I supported the majority's interpretation for the following reasons: (1) I believe that a drain made unblockable via an unblockable drain cover reasonably satisfies the plain meaning of the statutory term "unblockable drain"; (2) I believe an unblockable drain system is equally if not more effective than other "systems designed to prevent entrapment" and; (3) I am convinced that the staff's recommendation to accept nnblockable drain covers will save the most lives and prevent the most injuries.

It makes sense to treat drains fitted with unblockable draiu covers as uublockable drains uuder the statute. Drains made uublockable through their design or through use of an unblockable drain cover function equally well to maintain the suction flow of water at a safe level when blocked by a person's body, so we should treat them the same. In either case (*e.g.*, an unblockable drain or a drain with an nnblockable drain cover), if the drain cover is removed, the drain ceases to be unblockable—so the issue of an unblockable drain cover dislodging is irrelevant. If unblockable drains do not require back-up systems, then neither should drains fitted with unblockable drain covers.

Even if I were not convinced that the term "unblockable drain" includes drains fitted with unblockable drain covers, § 1404(c)(1)(A)(ii)(VI) of the statute authorizes the Commission to determine whether other systems are "equally effective as, or better than, the systems described . . . at preventing or eliminating the risk of injury or death associated with pool drainage systems." Based on the Commission's public hearing and briefing by staff—and for the reasons discussed below—I would determine that unblockable drain covers are at least equally as effective in preventing or eliminating injury or death from drain entrapments as the other systems described in the statute.

Finally, it appears to me that *unblockable drain covers promise to save more lives and prevent more injuries than other anti-entrapment systems.* An unhlockable drain cover with the appropriate flow rating is the only solution that prevents all five types of entrapments identified by the staff (limb, hair, body, evisceration, and mechanical-related). The back-up systems mentioned in the Act only address some of the potential scenarios. For example, some of the back-up systems deal with suction body entrapment and some limb entrapments, but would not release hair, mechanical, or evisceration entrapments. Given the prevalence in the mortality data of hair entrapments, that failing poses a real danger. Moreover, preventing entrapments in the first place is the best solution to the tbreat of entrapment drowning. Back-up systems require an entrapment incident to begin to occnr before they respond, and they may not prevent the entrapment depending on what kind it is and what type of drain system is involved.

I would like to add a few words abont the apparent conflict of interest of certain advocacy gronps lobbying this issue. Just as health insurance companies lobby Congress and Federal agencies for healthcare solutions that benefit their bottom line, it is not surprising that people who develop and sell back-up systems created an association to promote the use of their product. In fact, the founder of the Pool Safety Council, a group that bas lobbied Congress and other organizations to require that all pools have back-up system technology, was the President of a back-up system manufacturer until only this past February.[10]

The Pool Safety Council promoted their petition by claiming the CPSC "reversed their guidance of the [VGBA], removing important entrapment prevention requirements." However, as noted previously, unblockable drain covers are the safest form of protection against entrapments. They are the only safeguard against all five types of entrapment and the only choice that prevents entrapment from occurring in tbe first place.

The Council's petition goes on to say, "The reversal brings into question the influence representatives from the pool industry have in CPSC's decision-making process." In fact, no group has pressured CPSC more than the Pool Safety Council. Speaking for myself, I have had no communication from any pool representative except for those that have a financial interest in requiring back-up systems. The Pool Safety Council lobbies for a tighter definition of unblockable drain because pools with unblockable drains are not required to buy their product. I consider it a triumph of safety over special interests that, despite all the pressure from those who have a financial interest in requiring back-up systems, the CPSC decided to adopt a new, safer technology.

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[10] *http://www.poolspanews.com/2010/022/022n svrs.html.*

Question 17. The Commission recently voted on rules to implement the public database mandated in the Consumer Product Safety Improvement Act of 2008. The Commission issued a notice of proposed rulemaking (NPRM) regarding the database on May 24, 2010, with a comment deadline of July 23, 2010. After the comment deadline but before the Commission voted on the database rule, you and Commissioner Nord released an "Alternative Database Rule Proposal" and requested comment from the public. Such action is highly unusual with respect to a rulemaking. Is there precedent for members of an independent regulatory agency to issue alternative rule proposals and seek public comment separate from an agency released NPRM?

Answer. Although I am unaware of another alternative rule being publicly vetted during a rulemaking process, it is certainly not uncommon for members of rulemaking bodies to express publicly their views on pending regulation. In fact, the Chair routinely expresses her view on pending regulation and is often quoted in the press.

Question 18. How does the release of the alternative proposal and the submission of comment impact the rulemaking proceeding? Did the release of the alternative proposal potentially create grounds for a legal challenge to the rule adopted by the Commission?

Answer. The release of the alternative proposal aud the solicitation of "feedback" from the public did not create grounds for a legal challenge to the rule adopted by the Commission.

With respect to the publication of an alternative rule, the APA does not require that agency decisionmakers shield from the public their deliberative processes, including the consideration of alternative language. Moreover, the public interest is arguably better served when an agency's decisionmaking is made more transparent by such action. The fact that the Majority reposted my alternative on the CPSC website following a thorough legal review confirms that its publication was deemed to be lawful.

The request for public feedback on the alternative rule also did not make the final rule adopted by the Commission vulnerable to legal challenge. So long as all comments considered by an agency in its rulemaking process are made public, the inspiration for a comment, whether it is a formal *Federal Register* notice, or otherwise, is not material. Indeed, we routinely receive comments outside of a notice period aud publish them on our website. For instauce, unrelated to my alternative rule posting, a comment in response to the database NPR was received after the official deadline for submitting comments, and was posted at *CPSC.gov*.

Ex parte commuuicatious that form the basis of agency action and are not made a part of the public record can jeopardize a rule's enforceability. But my request for feedback was public, and it was always my intent that, like any late filed comment, respouses would be posted on CPSC's website. As it turns out, my alternative rule was not considered by the majority commissioners, and the majority commissioners did not review the letters I received in response to the alternative rule. They thus did not form the basis for CPSC actiou and have not been made public.

Question 19. Do you anticipate releasing more alternative rule proposals in the future?

Answer. I promoted an alternative database rule, because I believe the rule supported by the majority—and ultimately promulgated—is irredeemably flawed. It is my hope and expectation that in the future, the Commission will be better able to work toward compromises that will obviate the need for the formulation of comprehensive alternative rules. I am unwilling, however, to commit to never publicizing during the rulemaking process policy views that differ from those of the majority. Doing so helps the regulated community better understand the Commission's policy choices.

Question 20. On numerous occasions, you have posted comments, artwork, and pictures on your blog questioning legislative proposals by Members of Congress and urging the public to reach out to Congress about the CPSIA. Your comments are often questionable in tone and tenor. Do you believe that a post with a picture of individuals drowning next to a ship called the "S.S. Waxman" befits the office of a Commissiouer of the Consumer Prodnct Safety Commission?

Answer. I believe that as a Commissioner and citizen, I have the right and duty to articulate my public policy views in whatever manner I deem most effective. And I am troubled by the tone of your question, which appears designed to silence criticism of competing policy views.

I published the "SS Waxman" graphic to illustrate the point explained in the accompanying text posted with it ou my blog. This was that Senator Waxman's proposed legislation to provide relief from the burdensome costs of complying with the

CPSIA was too narrowly drafted. As graphically illustrated, it was designed to provide relief only to the ATV industry, thrift stores, and very small manufacturers. The costs associated with obtaining a "functional purpose" exemption would have been prohibitively excessive for all but the largest mannfacturers. In addition, the exemption for low-volume manufacturers had the potential to provide relief to only a small slice of the manufacturing community.

These are legitimate criticisms of the proposed legislation that contributed to the public debate. My role as a Commissioner in no way limits my right to make such observations. Indeed, I would be negligent not to contribnte the perspective gained throngh my position to advance the cause of CPSIA reform.

More generally, I believe that my blog serves an important purpose. It provides a venue for the exchange of information and opinions relevant to the fulfillment of the CPSC's mission. Commissioners often receive letters from the regulated community expressing general concerns about the CPSIA. In addition to citing the obvious financial burden of compliance, manufacturers of children's products have reported that the third-party testing requirement is likely to result in reduced product variety. Most importantly, they explain that these consequences are not born of any improvement in safety. These companies are already making safe products; the CPSIA merely requires them to prove it before continuing to sell the same products or introducing product variation. But notwithstanding this input, we lack sufficient specific examples and hard data to allow us to fully understand or to quantify the problem. I therefore use my blog to solicit input from both the regulated community and consumers, in order to better understand the issues facing them, so that I can be a more effective and responsive public servant.

My blog also allows me to communicate my views to consumers and industry. When I was a Member of Congress, I was struck by the degree to which the CPSC and other Executive Branch agencies appeared to regulate without regard for its impact on the regulated community. I often heard from businesses who were frustrated that their voice was not being heard or considered in the regulatory process. My blog allows me to reassure consumers and the businesses subject to CPSC regulation that I understand the issues facing them and am working to find and promote the regulatory flexibility necessary to ensure prodnct safety without unnecessarily stifling economic growth and consumer choice.

Question 21. Given your comments regarding the CPSIA, are you able to implement the law in a fair and impartial manner, even with respect to a provision of the law with which you disagree?

Answer. Agreement with a law is not a prerequisite to the recognition of a statutory duty to carry it out. Indeed, if every executive agency board and commission member was required as a condition of office to agree with every policy choice reflected in all of the statutes they admiuister, few, if any, would be left to serve. I swore au oath to uphold the law aud that is what I have always doue and will always do. I will also continue to help the Commission identify flexibility in the law that can alleviate its devastating impact on American business, and to focus on the CPSC's core mission of assessing and reducing risks to consumer safety.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. KAY BAILEY HUTCHISON TO HON. ANNE M. NORTHUP

Question. As you know, Section 103(a) of the CPSIA requires the placement of tracking labels on all children's products and their packaging, to the extent practicable. In its July 2009 Statement of Policy regarding enforcement of this provision, CPSC staff indicated that products sold through bulk vending machines would not need to be individually marked, though the package or carton the products are shipped in would. The Statement of Policy further noted that "the Conference Report [accompanying the CPSIA] recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No 787, 110th Cong., 2d Sess. 67 (2008)." *However, the Commission has not provided any explicit regulatory exclusion from Section 103(a) for bulk vended products. Will the CPSC pursue enforcement actions against bulk vendor suppliers, operators or retail establishments for the absence of tracking labels on bulk vended products? Further, can you please assure the Committee that the CPSC will maintain this position should any state attorney general or other entity seek to enforce Section 103(a) against bulk vended products?*

Answer. As you know, the Commission's July 2009 Statement of Policy on Tracking Labels states the following:

> "If a product is sold through a bulk vending machine, the item does not need to be individually marked but the package or carton in which such products are shipped to the retailer should be marked. The Conference Report recognized that marking each individual product in such circumstances may not be practical. See H.R. Rep. No. 787, 110th Cong., 2d Sess. 67 (2008)."

The Office of Compliance is following this policy as stated. Staff will consider enforcement action if the package or carton in which such products are shipped is not appropriately marked with the required information.

A State Attorney General technically may still pursue companies for violating any part of the CPSIA, in spite of enforcement guidance published by the Commission. Providing absolute certainty for bulk vendors or any other manufacturers in this regard would require an act of Congress amending the CPSIA.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO HON. ANNE M. NORTHUP

Question 1. What can you tell us about the impact of the CPSIA on small businesses? Even though the CPSIA did not require the Commission to perform cost-benefit analyses of the rules it promulgates, many of the concerns raised from small businesses and from Members of Congress since the law passed have been based on the need for this very information—specifically, the law's economic impact and unintended consequences. Does the Commission have quantitative data to determine what the impact has been, and what the impact will be in the future as more requirements under the law come into effect?

Answer. The CPSIA has been devastating for many small businesses, and it has increased costs for large businesses. *Product Safety Letter* reported the following on a November 2009 public meeting with Mattel:

> [a] lawyer for Mattel with the law firm Jones Day in Washington D.C., said his client is finding the CPSIA difficult to decipher. The law, he said, is unclear on what products the company needs to test, how often it needs to test them, and how many samples need to be tested. "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.
>
> Despite Mattel's large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining "cost competitive."[1]

Small businesses have by far borne the greatest impacts of the law. *Attached*, you will find some examples of businesses that have closed their doors, reduced product lines, or abandoned the children's product market due to the CPSIA. I submitted this information for the record during my opening statement.

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs due to the upcoming public database. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and Labeling Rule. For example, our staff estimated that the cost to test a toy with a moderate number of colors and interesting accessories could range between $3,712 and $7,348. The cost to test a bike under our proposed testing rule could be between $7,350 and $18,600.[2] As a result of much of this anecdotal data and the pressure on the Commission from industry, the Chairman elected to create a full-time Small Business Ombudsman position at the agency—something that I do not believe will address industry's concerns, but nonetheless represents an acknowledgement of the pressures and concerns we have felt from the small business commnnity.

However, you have asked whether we have *quantitative data* regarding the costs of this law, and unfortunately, we do not. So far, we have continued without fully studying or trying to reduce the impact of the regulations we are promulgating. With the anecdotal data we have from manufacturers and trade associations, and requests from Congress asking the Commission to try to mitigate the law's nnintended consequences, both Commissioner Nord and myself have requested that we allocate funding to do a *full cost-benefit analysis* of the rnles we are promnlgating.

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

[2] Regulatory Flexibility Analysis of the Commission's proposed Testing rule, pg. 103–108. (Proposed Rule; Testing and Labeling Pertaining to Product Certification—Draft Federal Register Notice—April 1, 2010 (Part 1) *http://www.cpsc.gov/library/foia/foia10/brief/prodcert1.pdf*.

Given the disruption in the marketplace and the current state of our economy, it has been disappointing that the majority of the Commissioners have not agreed to focus more heavily on providing Congress with quantitative data on the economic effects. Even Representative Jo Ann Emerson, currently the Chairman of the House Financial Services Appropriations Subcommittee, has requested that the Commission initiate a cost-benefit aualysis of the rules we promulgate and quantify the effects on small businesses. Unfortunately, this Commission has not produced any cost-benefit analyses to date.[3]

Furthermore, this anecdotal data does not reflect the full breadth of the law's requirements, because the most onerous requirements have yet to go into effect. The widest reaching mandate in the law—requiring third-party testing of all children's products for lead content—has been stayed since February of 2009. Currently, the Commission is considering whether to extend the stay further. We have not implemented the requirement to third-party test for lead, phthalates, or to the toy standard—which alone may require a considerable number of new tests and certifications for toymakers.[4]

The categories of children's products impacted by this law seem endless. But let me illustrate the cost versus henefit impact by considering two examples: furniture and toys.

A company making furniture for children's rooms would need to: (1) determine if its product is "primarily intended" for children 12 and under—which they may not know for sure, and for which the Commission has provided ambiguous guidance; (2) submit for testing to a third-party lab every part of every piece of furniture that may be used on a children's product, including nuts, bolts, and varnishes (one piece of furniture may have fourteen different coats of finish); (3) certify each component based on each of these tests; (4) add tracking labels to each piece of children's furniture with a lot number that can trace each component to its specific certification and test; (5) maintain records for all tests and certifications for all parts of each children's product; and (6) start this process all over again, if they decide to change a color or varnish, or some other part of the product—or if there is any other material change. One furniture company reported to us that they have already spent $13 million on tests, new systems and tracking processes, despite the fact that every single component they were using on children's furniture already complied with the current lead standard. So in this case, the cost was $13 million and the benefit (*i.e.*, improvement in safety) was zero.

All toys must be tested for lead and phthalates at third-party labs, and all are subject to the toy standard, ASTM F963, which the CPSIA made mandatory. As a result, a doll maker will be required to send to a third-party lab to be tested for lead, phthalates and any applicable rules under the toy standard, every component part, including each paint color nsed on the eyes, each button, the hair, and all of the accessories. Companies tell us that these requirements stifle innovation and product variety by erecting significant cost barriers to adding to dolls new accessories, new colors, or other variations. For example, a large toy manufacturer told us that his company has had to "de-spec" certain toys in order to afford the law's new costs, which means removing accessories, moveable pieces or other parts—or, in the manufacturer's words, "taking the fun out of toys."

Also, the scope of the toy standard is quite broad, as seen in the list of sections below. Not all toys must be tested to all parts of the toy standard, but any one toy may be subject to numerous requirements, and satisfying each requirement involves one or more separate tests:[5]

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[3] The CPSIA does not direct that rulemakings (even "major rules") be promulgated under Section 9 of the CPSA, which requires a cost-benefit analysis and would normally preclude the Commission from promulgating rules whose benefits are not expected to bear a reasonable relationship to their costs. However, the Commission is not *prohibited* from doing such studies. So far, the only analysis that many rulemakings have received has been a perfunctory, small business regulatory flexibility analysis, as required by the Regulatory Flexibility Act. The reg-flex analysis to accompany the Testing rule (see footnote 2) provides hypothetical examples of testing costs, but no quantitative data.

[4] Jill Chuckas testified for the Handmade Toy Alliance on the second panel of the December 2, 2010 oversight hearing before the Senate Commerce Subcommittee on Consumer Protection regarding the high costs of testing to the toy standard (ASTM F963): *http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=799a2c9d-f48a-4284-add2-1a9099961431&Statement_id=fb4d696e-c471-4bd1-be39-d9fb7f34f56a&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=12&YearDisplay=2010.*

[5] *http://www.astm.org/Standards/F963.htm.*

Title	Section
Flammability Testing Procedure for Solids and Soft Toys	Annex A4
Flammability Testing Procedure for Fabrics	Annex A5
Rationale for 2007 Revisions	Annex A6
Rationale for 2008 Revisions	Annex A7

Your question focuses on cost-*benefit* analyses. The law imposes onerous requirements on small businesses that are hurting the economy, without any evidence of a safety benefit. The CPSIA's lead content standard, interim-ban of phthalates, and all third-party testing requirements are not based on risk. The CPSC has the authority to impose these types of requirements on any product or industry, if it determines that a risk exists and these costs are necessary to reduce or eliminate the risk.

This Commission never concluded that the components of children's products containing either 300 ppm lead content or the interim-banned phthalates pose a safety risk to children. And until directed to do so by Congress in the CPSIA, the Commission saw no reason to make ASTM F963 a federal standard, or to require all toy manufacturers to send their products to third-party labs to test to this standard. Regarding lead, 2007 data indicates that one percent of children tested nationally showed a dangerous blood lead level as established by the Centers for Disease Control (CDC). This number was down from nearly 8 percent in 1997,[6] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the Environmental Protection Agency have issued guidance for reducing children's exposure to lead, and its focus is not on children's products. It has never been suggested that this new law, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level. For further information on the risks associated with lead, I refer you to my answer under the "Lead Standard" questions below.

Finally, there is a cost to consumers—not only in the loss of jobs in a struggling economy, but the loss of choice. Many manufacturers can afford the costly mandates of the law only by reducing their product lines, leaving the children's product market, or "de-specing" their toys—with no offsetting improvement in safety. As a mother of six children, I remember Christmas shopping for new and different products at affordable prices, and I expected a creative and vibrant market all year-round. Parents expect the products they buy to be safe. But they also expect them to be creative, and they are entitled to a marketplace that encourages new ideas and the next "must have" toy of the season. Instead, the costs of complying with the CPSIA will discourage newcomers to the market and choice will be reduced, even as prices increase. Some international toy makers have even decided to leave the American market due to the costs imposed by the CPSIA, although they are still offering their products to European consumers.[7]

Given our economic situation and the mandate from the American people to shrink the size of government and reduce the numbers of unnecessary regulations, I believe some of the CPSIA's requirements could easily be scaled back. Job growth in the United States comes through the growth of small businesses—and the CPSIA's regulations directly hamper that growth.

Question 2. Does the Commission have any plans to assess the negative impacts of the law, and to take necessary actions to alleviate these burdens before they eliminate any more jobs?

Answer. To my knowledge, there are no plans to assess fully the impact of the CPSIA or even the regulations we are scheduled to promulgate.

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

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

a. *Absorption exclusion*—I argued that the absorption *exclusion* under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term "any lead" in that section may be interpreted to mean a *de minimis*, harmless amount of lead in

[6] *http://www.cdc.gov/nceh/lead/data/national.htm.*

[7] One American importer of toys lists on its website the European brands that it no longer offers for sale in the United States due to the CPSIA: *http://www.eurotoyshop.com/getEndangeredToys.asp.*

a children's product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal—since lead in the substrate of these products is uot harmful (See auswers under "Lead Standard" below). Because the Commission rejected this iuterpretatiou, it voted to reject the petitiou of a mauufacturer of toy cars, eveu though the car's brass fittiug coutaiued less absorbable lead thau the Food and Drug Administratiou deems to be acceptable in a piece of candy.[8]

b. *Civil Penalties Factors*—In the Commissiou's interpretive rule on Civil Penalties Factors, I proposed a numher of changes to provide more certainty for the regulated community and to ensure that, while the overall civil peualty ceiling was raised, "technical" violations, such as incorrect paperwork, would not be treated the same way as more serious violatious, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.[9] Unfortunately, a majority of the commissioners did not want to provide that leeway.

c. *Definition of Children's Product*—The CPSIA applies to all "children's products", statutorily defined as products "primarily intended for a child 12 years of age or younger." The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended for the 10–12 or pre-teen age gronps, or that straddle the age limit of the statute. The entire reason for defining the term was to provide guidance to these types of manufactures, who need certainty to know how to determine if their products fall under the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower "fence" around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff,[10] nor the regulated community.[11]

d. "*Children's product safety rules*"—I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all "children's product safety rules." A clear distinction can be made between "children's product safety rules" and more general "consumer product safety rules" promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential "children's product safety rules," it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates new third-party testing requirements.[12]

e. *Database*—As described below in the questions on the database, I proposed an alternative database rule that would have responded to a number of manufactnrer concerns and made the database a more accurate source of information for consumers. Unfortunately, the Commission's Majority passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys and random bystanders that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers—particularly small businesses. Due to the inaccuracy of reports on the database, it will be a waste of taxpayer resources and will not be nseful to the consumers it was intended to help.

Finally, regarding the upcoming rule on Testing and Labeling Pertaining to Prodnct Certification ("15 month rule"), it is important to keep in mind that the statute does not permit the agency to exempt any manufacturer from the law's testing requirements. *Exemption from the testing requirement is the main change sought by small manufacturers.* Because we cannot exempt companies from the initial third-party test that every manufacturer must do to every component of their product—

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[8] *http://www.cpsc.gov/pr/northup110409.pdf.*
[9] *http://www.cpsc.gov/pr/northup03102010.pdf.*
[10] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses,"Associated Press. December 11, 2010. *http://news.yahoo.com/s/ap/20101211/ap on he me/us cadmium lead glassware.*
[11] *http://www.cpsc.gov/pr/northup09292010.pdf.*
[12] *http://www.cpsc.gov/pr/northup07122010.pdf.*

even if the product poses no risk—I hope that the Commission will at least alleviate the burden through the "continued testing" requirements of the statute and the testiug protocols, where we do have some flexibility. However, removiug the costly requirements of third-party testing and certification will require an act of Congress amending the CPSIA.

Question 3. Chairman Tenenbaum mentioued the new Small Business Ombudsman. Do you believe that this Ombudsman will alleviate the expressed concerns of small businesses?

Answer. Although I appreciate the underlying objective of increasing Commission outreach to stakeholders such as small businesses, I do not believe that creating a brand new office for this purpose will address such stakeholders' ongoing frustratious with Commission actions, add value to our core mission of product safety, or represent a wise use of taxpayer dollars.

In particular, I disagree with the implication that the new outreach to *small businesses* will help those who are struggling with the CPSIA. Small businesses are not clamoring simply for more information from the Commission about how to comply with this law—they are asking for relief from this law because it is killing them. Also, as the witnesses in the Second Panel of the December 2 heariug indicated, while the Commission has been open to listening to their concerns, this openness has not translated into more helpful rulemaking.

The solutiou for small businesses is uot *more* goverument; it is repealing the portions of the CPSIA that impose tremendous costs without increasing safety. Furthermore, no matter how successful this new office may be, small businesses will still have to hire their own lawyers to fully grasp their particular obligations under the complex, far-reaching new regulations being promulgated by the Commission. In that respect, creating this office is like offering a Band-Aid™ for a problem that requires major surgery.

If we really wanted to help small businesses, this Commission would do everything in its power to mitigate the unintended consequences of the CPSIA through its rulemaking—something I have continued to argue for with limited success. It would add clarity and factor risk into our policies as much as the statute allows. Even better, we would unanimously approach Congress and ask that tbe law he reformed or repealed in a meaningful way so that *only risky products* are impacted—since the CPSIA has clearly taken us away from our core mission of product safety. Anything short of these steps will not help the small business community or a floundering economy.

Finally, I am concerned that creating a new office to govern the "education and outreach" responsihilities to industry stakeholders may complicate or even overtake the outreach we already perform under other offices such as our Office of Compliance. Right now, if a small company needs to know if its product falls under the purview of a particular regulation, it can call the Office of Compliance for advice. It is a key function of that office to assess products every day in the course of its enforcement responsibilities. By creating a new office in charge of "outreach" duties, we create unnecessary complications and risks in our communications with the public, including: (1) having two offices that could answer the same question differently; and/or (2) moving the agency away from its pure enforcement responsibilities and instead providing something akin to product pre-approval services. The latter course could potentially turn a relatively small CPSC into a behemoth more like the Food and Drug Administration. It is depressing to think it is even remotely possible we could have a government office dedicated to "pre-approving" all consumer products before they go to market.

Question 4. The Commission's stay on third-party testing for lead content is scheduled to lift in February. Is the Commission prepared to move forward with lifting this stay of enforcement? Do you believe that businesses have been given the information necessary to comply with this requirement? Have they been given enough time to incorporate necessary changes to comply with the requirement by the February deadline?

Answer. On May 20, 2010, the Commission issued Notices of Proposed Rulemaking on (1) Testing and Labeling Pertaining to Product Certification (75 FR 28366), and (2) Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208). These proposed rules—referred to by the CPSC as the "15-month rule" and the "component testing rule"—address, inter alia, the protocols that will govern third-party testing of children's products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options to come into compliance. The Commission is just beginning consideratiou of the final versions of these rules.

The delay in finalizing these rules is of concern, because the Commission's previous stays on lead content testing were implemented principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time. If the stay is lifted prematurely, many small manufacturers, in particular, will be unable to afford to comply independently with the third-party testing requirement, and will stop making certaiu products or go out of business entirely.

This link between finalization of the 15-month and component testing rules and the lifting of the stay was recognized by Commissioners of both parties. As explained in the Commission's February 2009 Federal Register notice, the stay on third-party testing of children's products for lead content was first implemented in response to "confusion as to . . . whether testing to demonstrate compliance must be conducted on the final product rather than on its parts prior to assembly or manufacture . . . and what sort of certificate must be issued and by whom." 74 FR 6396 (February 9, 2009). The stay was thus intended to provide the Commission time to promulgate new rules addressing, inter alia, "production testing of children's products subject to third-party testing and certification . . . including random sampling protocols," so that "the right tests are run on the right products without unnecessary and expensive testing."

During the December 2009 public briefings to consider whether to lift the stay, CPSC career staff reported that the apparel component mauufacturing sector was reluctaut to initiate component testing while the breadth of the requirement remains unsettled, and that smaller manufacturers were unable to obtain component parts testing because suppliers were reluctant to undertake the tests until the final rules for component testing and certification are in place. In the face of this evidence, Chairman Tenenbaum acknowledged that she "would never agree to lift the stay" until the 15-month and component parts rules are in place. She voted to extend the stay "in order to allow component testing adequate time to develop and to give our stakeholders adequate notice of new requirements." Commissioner Moore also recognized the need to "give the small manufacturers, who often buy their supplies in small amounts at retail outlets rather than through bulk purchases from wholesale distributors, sufficient time to find sources of lead compliant materials." During the December 16, 2009 public briefing on the stay, Commissioner Adler also conceded that the 15-month rule should be in effect before the stay is lifted. Although he retracted that view the following day in his written statement explaining his vote to extend the stay, Commissioner Adler predicated his changed position on his belief that "[n]ow that companies know they can rely on component suppliers for compliance with the law, they should be able to plan production and control costs in a reasonable manner."

Consistent with the views of all five Commissioners, the Commission "determined that testing of children's products for lead content by a recognized third-party testing laboratory and certification based upon that testing should begin on the products manufactured after February 10, 2011 to allow component testing to form the basis for certifications for lead content . . ." 74 FR 68588 (December 28, 2009).

A year has now passed, but in the absence of final 15-month aud component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small manufacturers continue to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail outlets where mauy small manufacturers obtain component parts. Under these circumstances, a continuation of the stay would be consistent with the stated views of all five Commissioners. Commissioners Northup and Nord, and Chairman Tenenbaum all expressly linked the lifting of the stay to at least the finalization of the 15-month and component testing rules. Commissioner Moore supported extending the stay to give small manufacturers "sufficient time to find sources of lead compliant materials", and Commissioner Adler predicated his willingness to delink finalization of the 15-month rule from the stay on his expectation that small manufacturers would be able to "rely on component suppliers for compliance with the law." Given that component part suppliers remain unwilling or unable to provide component part certifications in the absence of final rules, there is no factual predicate for any of the Commissioners to support lifting the stay.

It is also important to emphasize that publication of the proposed rules has not provided the regulated commnnity with the any certainty regarding the content of the final rules. Indeed, the CPSC's record of rulemaking over the past year demonstrates that a final rule can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component

parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized.

I therefore iuteud once again to urge the Commission to vote to coutinue the stay of euforcement ou third-party testiug and certificatiou of lead couteut iu childreu's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between desigu and production, allowing one year after the two testing rules are finalized is necessary for manufacturers to benefit from the rule. Doiug so would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay would not earlier be lifted.

Moreover, lifting the stay before the fiual 15-month and component testing rules are published would place manufacturers in the untenable position of trying to comply with the proposed rule, while anticipating a potentially much different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing, due to the rapidly changing requirements.

Finally, a reasonable time after publication of the final rules is necessary in order to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. In this regard, it is essential that the Commission retain in the final component parts rule the proposed provision, § 1109.5(g)(1), affording component parts certifications "currency" to allow them to be reasonably relied upon by downstream manufacturers without the need for duplicative testing.

Question 4a. Do you believe that the health of children has been at greater risk because of this stay of the third-party testing requirements?

Answer. No. Neither the lead standard(s) of the CPSIA nor the third-party testing requirements of the law are based on risk, so the absence of either of these requirements also does not create or denote a risk. I refer you to my answer under the "Lead Standard" questions for more information on the risks associated with lead.

Question 5. Is the Commission going to consider extending the stay in order to ensure that the affected bnsinesses are adequately prepared and that there are enough resources to prevent a negative impact on the businesses affected? If so, when do you plan on doing so?

Answer. Because the Commission has yet to finalize the rules we intended to publish before passage of the original stay in February 2009, which provide the "instructions" regarding what manufacturers need to test, how often, and other details, I would vote to extend this stay to a future date, pending the finalization of these rules. However, the decision rests entirely with the Majority, since it would take three votes for the date of lifting of the stay to be changed and for such a change to be conditioned on the completion of the Commission's testing rules.

Question 6. The CPSIA draws a clear distinction between general product safety rules and children's product safety rules. Yet the Commission has chosen to apply the requirement of third-party testing to all children's products under the general product flammability rules. Can you tell us why this decision was made?

Answer. The Commission, by a 3–2 vote along party lines, decided to ignore the distinction between children's product safety rules and consumer product safety rules, and to require third-party testing of children's products to all the rules. Thus, general "consumer product safety rules," such as our flammability regulations for carpets and rugs, are now also "children's product safety rules" under the CPSIA. Manufactnrers of carpets and rugs (as well as vinyl, wearing apparel and mattresses) already must adhere to a strict testing protocol for their products. This decision means that whenever they create a *children's version* of a product, they will have to do additional *third-party tests* to certify the agency's flammability standards. I opposed this decision, because these new third-party testing requirements were never part of the original standards promulgated by the Commission, and will not address a known risk. In fact, this was another area of the statute that allowed the Commission flexibility to prevent unnecessary new testing requirements and costs in a struggling economy. The Commission easily could have distinguished between "children's product safety rules" and more general consumer product rules of the Commission, and thereby avoided additional third-party testing requirements, where they are neither required by the statute nor risk-based.

Of all of the votes we have taken at the Commission, I had hoped that this would be an easy one. After all, it is unlikely that Members of Congress were anticipating adding third-party testing requirements to the 2007 mattress standard, the 1970 standard for carpets and rugs, and others when the CPSIA was passed. Unfortu-

nately, I believe it will now take an act of Congress to reverse these requirements and to prevent future "consumer product safety rules" from being caught up in the CPSIA's third-party testing regime.

I would also note that due to the Commission's vague "children's product" definition, it is likely to be difficult for manufacturers to distinguish between a "children's rug" or "children's carpet" and a general-use carpet or rug. This difficult distinction also illustrates the absurdity of requiring carpets and rugs with children's decorations to be sent to a third-party, CPSC-accredited lab for testing (beyond the normal testing requirements of the standard), when the carpet and rugs in the hallway or in the living room of a home, where children also play, are no less safe without these added third-party testing requirements.

Question 7. The flammability standards have been in place with testing protocols for adult and children's products for some time. Yet the Commission has chosen to apply this additional third-party testing requirement to children's products under those rules. Is there any evidence that the products affected by this ruling, such as carpets or vinyl plastic, were unsafe under the prior testing regime and needed to be subjected to third party tests to protect children?

Answer. No. And the Commission did not even consider whether these products presented a risk when it decided to require additional third-party testing to the flammability standards.

Question 7a. Is there any evidence that children's versions of rugs or other affected products are in more danger than adult versions of those products to necessitate this additional testing standard?

Answer. No. The original flammability standard did not contemplate a difference between adult and child rugs, and the Commission does not even collect flammability data distinguishing between adult and child carpets and rugs.

Question 7b. Isn't an adult version of an affected product more likely to be subjected to a cigarette or some other igniting source?

Answer. The Commission does not collect data on this question. However, I believe parents who smoke are more likely to do so in common areas of the house than in their child's room. I would also presume that candles are more likely to be found in common rooms or adult rooms than in a child's bedroom or playroom. Moreover, the kitchen is traditionally the room with the greatest risk of fire, and is an unlikely location for a children's rug or other product. So it hardly makes sense to require more rigorous and costly testing for a child's room.

As I said in my opening statement with regard to lead, children do not live cooped up inside of their rooms surrounded only by "children's products." Children live throughout the house, run around outside, and are exposed to lead in their everyday environment. In fact, they are surrounded by it: in the car (adult seat belts, window cranks) and in their homes (pots, pans, furniture knobs, door handles, appliances, lamps). These products do not threaten a child's health because the lead in them is not absorbable. Hence, it makes little sense that the CPSIA bans materials with higher than 300 ppm lead content in such products as *children's* furniture, *children's* rugs, *children's* lamps, etc.—while children are likely to spend more time outside their room handling the TV remote (an adult product), playing on their parents' furniture, or playing with just about anything else. The same can be said for the flammability of "adult" vs. "children's" carpets and rugs. The fact is, these additional testing requirements (or lead content requirements) have nothing to do with improving safety.

Question 8. At the end of November, the Commission passed the final implementing rule for the public database required under the CPSIA. While the law specified who can submit reports of harm, the Commission's rule expands this list by defining consumers and public safety entities as essentially anyone who wants to submit a report—even if the submitter does not know who was harmed, the particular product involved, and did not see the incident occur. Therefore, as opposed to the list created by the statute, submitters are no longer limited to people who could have first-hand knowledge of the incident. What are your concerns with this expanded list of submitters?

Answer. The statute provides a list of submitters to the database, all of which are groups likely to have *first-hand knowledge* of the incident. Day care centers at which an incident of harm has occurred, for example, should be permitted to report to the database. Additionally, consumers of the product in question, health care professionals who treat the injured person, or emergency first responders at the scene should all be permitted to submit reports of harm to the database—and the statute requires all of these categories of submitters.

However, as I explained in my *November 24, 2010* and *April 22, 2010* statements, the Majority's interpretation of the statute is flawed because it has greatly ex-

panded the list of allowable submitters to the database. This expansion goes against the statutory purpose that the database be "useful" for consumers, and does not comport with Congress's discussion on the purpose of the law prior to its passage.[13] Indeed, the Majority has expanded the list of submitters to such an extent that *anyone* can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

It is important for individuals with first-hand knowledge of incidents of harm involving consumer products to be able to submit reports to the new database. However, groups or individuals with no direct knowledge of the incident, did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the database. There are several reasons why first-hand knowledge is essential, but the primary reason is *accuracy*. A database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpful to consumers using the database to determine which consumer product they should purchase.

Advocacy groups, attorneys and other second and third person reporters added by the Majority's database rule are not listed in the law as allowable submitters to the database, nor should they be. If they are not themselves consumers of the product that caused the incident of harm, or otherwise a first-hand witness (per the list of submitters in the statute), advocacy groups have no business inputting to a public database information that is intended to be a resource for *consumers*. Not only is adding advocacy groups as submitters contrary to the statute, but it invites dishonest, agenda-driven use of the database—diluting its usefulness for consumers. Advocacy groups, trial lawyers, other nongoverumental organizations and trade associations, all of which the Majority has added as allowable submitters, must serve their own agendas and lack an incentive to prioritize accuracy in their reports of harm. By iuvitiug such groups to input reports of harm (none of which have to be verified for accuracy), this Commission has all but guaranteed that the database will be a tool for policy agendas, lawsuits and trade complaints rather than a place where parents can search for useful information about product safety. Why even have a taxpayer-funded database (at a price tag of $29 million, so far) that will be no more useful than an "Amazon.com" or any of the other hundreds of websites where auyone cau submit comments ou a product?

There are many advocacy groups and associations that serve a role in public policy, but may not have the incentive or ability to provide specific and accurate product identification information to the Commission's database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes, a controversial policy. One cause of house fires is the use of cigarette lighters, which are consumer products. Thus, the NFPA has a strong iucentive to add all reports of house fires caused by lighters to the Commission's public database. The more incidents in our database, the better case they can make that new fire prevention technology—which their members sell—should be maudated in homes.

But what incentive does NFPA have to ensure that it correctly identifies the brand of lighter in au incideut report: A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular cause is not relevant to its goal of promoting spriuklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless inaccurate (or at least unverifiable) claims about its product. Sucb inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

The problems caused by the overly expansive list of submitters in the Majority's database rule could have been reduced if reports of harm had to be verified, or simply verifiable, before being published. Unfortunately, the Majority also rejected the proposals contained in my alternative database rule that would have made these reports more verifiable.

One of my unadopted proposals would have required reporters of harm to include the victim's identity and contact information with a report (to be held confidential, as is current practice). Commission staff could then at least follow up with the victim in response to a manufacturer's claim of a material inaccuracy, in order to verify the report.

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[13] On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: "We have tried to find something that is balanced, that provides information, but also has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous."

In my alternative rule, I also included such additional required fields as the approximate date of pnrchase of the prodnct and whether the prodnct was purchased "new" or "used." This information would have allowed consumers using the database to gange the age of the prodncts and know whether the prodnct in qnestion was the one currently in stores or is similar to the model they own. These proposals were not adopted by the Majority.

Finally, while submitters to the database mnst check a "self-verification" box to assert accuracy, this will do little to discourage or prevent inaccurate reports of harm. The final database rnle merely asks the submitter of a report of harm to check a box stating that the report they are submitting is accurate "to the best of their knowledge." The "best" knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened—including the exact type of product, the recent history of the prodnct, or even the precise cause of the incident.

Question 9. The intention of the database is to provide nsefnl information to consumers. A substitute amendment included provisions to improve the accuracy of the data submitted by requiring the inclusion of additional information. These snggestions were rejected by a majority vote of the Commissioners. How wonld the substitute have improved the database for consumers?

Answer. In addition to limiting submitters to only those ennmerated in the statute, and adding required fields to improve the reliability of reports, my alternative proposal also acknowledged the Commission's discretion to withhold reports of harm from publication where a valid claim of *material inaccuracy* is pending.

In tbe latter regard, I supported a valid and more useful interpretation of the statutory 10-day time frame for evaluating claims of material inaccuracy. Under my interpretation, the brief 10-day window presents a strong incentive for manufacturers to submit any claims of material inaccuracy quickly, and for the information to go up on the database as soon as possible—that is, following the 10th day as long as there has been no claim of inaccuracy. However, if a manufacturer submits by the 10th day an adequately supported claim of inaccuracy, the Commission can and should withhold that incident until the claim is resolved. Uuder this interpretation, data is not *limited* in the database but better verified before it is posted. I refer you to my *November 24, 2010* statement for further details.

Notably, the Commission's Notice of Proposed Rulemaking on the database originally included an interpretation similar to mine. For example, § 1102.26 of the NPR states: "If a request for determination of materially inaccurate information is submitted prior to publicatiou in the database, the Commission may withhold a report of harm from publication in the Database until it makes a determination."[14] 75 FR 29180. That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, mauy if not most of the commenters assumed that incidents would not go into the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consumer groups—argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a more detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority's final rule now forbids delaying publication in those circumstances, and fails to establish any specific protocol for handling requests for determinations.

Finally, it is helpful to remember that the Commission obtains information in addition to that which will be submitted to the public database, such as emergency room data, death certificates, etc. It is acceptable (and probably preferable) for the Commission to continue to absorb as much information on consumer products as it can—and this includes reports from advocacy groups, trial lawyers and trade associations. However, it is not necessary *nor is it statutorily required* that such information, particularly that which is neither accurate nor verifiable, also be posted on

[14] The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the database until it makes a determination." 75 FR 99, at 29161. Aud this: "We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 99, at 29170 (Response to summary 26)(emphasis added).

the public database. This is one area where my position on the database differs starkly from that of the Majority. I believe inaccurate information in a public database (with the official backing of ".gov") is not *safety* information; on the contrary, it is simply misinformation—and a waste of taxpayer resources.

Question 10. What are your concerns about the accuracy and reliability of the information that will be provided?

Answer. As stated in the previous questions, I have many concerns with the accuracy and reliability of the new public database, and I proposed an alternative database rule to try and address these central concerns.

Because the Majority's database rule all but guarantees that the database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal databases we have today. Frankly, this is one of my greatest fears—that the Commission staff will be overwhelmed by inaccurate reports (or the reports that get picked up by the media) and unable to use their expertise to search objectively for genuine hazards. As the database is swamped with misleading or inaccurate reports, they will drown out the accurate ones.

There are a number of ways in which the new database could be unhelpful or misleading for consumers. Consider this scenario: Company A sells five million high chairs and Company B sells 5,000 high chairs. Company A has six incident reports on the database and the other has one incident report (all of which are unverifiable). Thus, a consumer could falsely conclude that Company A's high chair is less safe, even though simply due to the number of units it sold, it is more likely that people own that high chair—and more likely that reports on that high chair would make it into our database. Or, it is also possible that some of the reports about Company A's high chair actually pertained to older models of the high chair that are no longer for sale, which means the information may be entirely irrelevant for people using the database to look for safety information about current products on the market.

As a consumer and a grandmother, I do virtually all of my research on baby products (*e.g.*, regarding safety, quality and price) at the point of sale—usually on the website from which I am ordering, such as an "Amazon.com." The hundreds of comments on these websites cover a broad array of useful information. But for most products, I would not slow down my research to look onto a government website for additional, equally unverifiable, information—particularly when I can see safety information right alongside all of the other information I am looking for (wear and tear, usefulness, and warranty information) at the point of sale or the retailer's website. All of these factors are useful to a purchaser.

Trial lawyers or other groups with self-serving motives will use the Commission's database to look for potential trends and patterns of hazards. Under the Majority's database rule, these same groups may also submit to the database false and unverifiable reports to fuel a lawsuit. It is no coincidence that these groups are strongly in favor of this public database and of the Majority's interpretation of the statute, which expressly allows them to submit reports of harm.

Question 11. A central concern with the CPSIA remains that it takes away the Commission's ability to assess the risk presented by a product. The law focuses on the content of lead in a product, not the risk of negative health effects from even limited exposure to that lead. Do you believe that there is a risk posed to the health of children from exposure to many of the products that are affected by the lead limits in the law, such as ATVs, hooks, pens, school desks, furniture, or furniture hardware (*i.e.*, the nuts and bolts that hold the furniture together)?

Answer. No.

Regarding the risks associated with lead, I included much of this information in my opening statement. I believe it is important to clarify the risks associated with lead. Some advocates say that "there is no safe level of lead," implying that none of us can ever spend enough time and money to reduce or eliminate lead everywhere. But there is, in fact, an *unsafe* level of lead that has been established by our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1

microgram of lead in a one-gram piece of candy.[15] The Safe Drinking Water Act declares "zero lead" to be the objective for the amouut of lead in water, but pipes carrying the water are permitted to be 80,000 parts per milliou (8 percent) lead—allowiug for negligible, trace amounts to exist iu the water we driuk.[16] California Proposition 65[17] as well as the European Union[18] allow for a negligible amount of absorbable (or soluble) lead iu children's products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)[19] is then taken into the body every day through the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at greater than minimal levels. The experts at the CDC and NIH have found that lead paint in old houses and lead in dirt[20] near old gas stations are the main source of environmental lead presenting a danger to small children (*http://www.cdc.gov/nceh/lead/*). In other words, the *risk of absorbability* from lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high.

In the same vein, a heavily lead-laden metal charm or piece of jewelry that can be swallowed presents a danger, because such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument or a vinyl lunchbox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Consider the CPSIA's lead requirements in comparison to these known lead hazards in the environment today. The CPSIA's arbitrary lead content limits (currently 300 ppm, and moving this August to 100 ppm or the lowest achievable level between 100 ppm and 300 ppm) remove the ability of the Commission to assess risk, or the absorbability that exists for a particular product. Thus, the law's lead content levels dictate that the metal handle bars of a bike that pose *no health risk* to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children's jewelry that actually is dangerous.

The CPSIA has led to a ban on children's books published before 1985, because the ink in them is likely to contain lead above the allowable level. Some at the Commission and many Members of Congress have expressed dismay that books have been affected, because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

Finally, as mentioned earlier, children do not live cooped up inside of their rooms surrounded only by "children's products." Children live throughout the house, run around outside, and play with adult products such as pots, pans, furniture knobs, door handles, appliances and TV remotes. For example, the new costs associated with this law will affect a young child's lamp (usually turned off and on by the parent) but not the lamp in the den or the living room that a child is as likely to turn off and on. These products do not threaten a child's health dne to their lead content,

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[15] "Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children," Food and Drug Administration, November 2006: *http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Metals/Lead/ucm172050.htm*.

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

[17] California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65—*http://www.oehha.org/prop65.html, Children's Health at OEHHA—http://oehha.ca.gov/publicinfo/public/kids/schools041707.html*.

[18] European Committee for Standardization (CEN), EN 71–3 Safety of Toys—Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994: *http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/toys/*.

[19] Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: *http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22*.

[20] Although lead in dirt is a proven hazard for small children nearby to old gas stations that used leaded gasoline or certain pesticides, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. *http://www.epa.gov/lead/*. This standard for safety is less strict than the current lead content standard provided in the CPSIA for children's products, which is 300 ppm and scheduled to fall to 100 ppm in August of 2011.

because the lead in them is not absorbable. This further illustrates the absurdity of the CPSIA's requiring the unnecessary reengineering of children's products with lead, while children are just as likely (if uot, more likely) to play with everything else in the house.

Question 12. The idea of a "functional purpose exemption" was discussed at the hearing. Cau you please explain in greater detail your objections to such an idea?

Answer. The primary proposal put forth by the Commission's Majority and by Ranking Member Henry Waxman to amend the CPSIA has been to create a new "exclusion" from the lead limits in the law for products that *need* lead in the substrate to serve a "functional purpose." This exemption is too complicated and costly, and would result in subjective exemptions and be of little use to the smaller manufacturers that need it the most. Under the proposed exemption, a ruanufacturer would need to petition for a product-by-product (or component by component) determination by the Commission prior to selling their product.

This exemption does not provide the broad exclusion flexibility that the CPSC unanimously sought in its January 2010 Report to Congress, and presents endless uncertainties and a number of unnecessary elements of proof. For example, one criterion for the exclusion was that the product "will have no measurable adverse effect on public health or safety." But if a product, component part, or material will have no measurable adverse effect on health or safety, then what reason does a government *safety* agency have to regulate it? Why must a company also then show that the item "requires the inclusion of lead"? Why show that it is "not practicable or technologically feasible to manufacture" with lower amounts of lead when the current level already poses no safety risk? Why demonstrate that "making the lead inaccessible" is not practicable or technologically feasible? Isn't the mere fact that an item will pose no lead risk to children sufficient to allow its use?

Requiring such costly and complicated petitions would result in the continued prohibition of many products that pose no risk to children. The goal of the exemption to reduce the burdens imposed by the CPSIA's non-risk based proscriptions, could not be met under these circumstances. Piling on such criteria makes it more difficult to apply for exclusions, and raises the question whether deterring petitions for safe products is precisely the point. The usefulness of the proposal is further reduced by the cost of petitioning a Federal agency, which is high even without these exacting requirements. And large businesses, with their in-house legal staffs, have an obvious advantage over small manufacturers, who would likely he unable even to afford to petition for relief under the exemption. Finally, even a manufacturer with the resources to pursue such a petition could not bring a product to market until CPSC staff analyzed the petition, the Commission took the time to consider it, and the majority granted it. Considering the substantial time it has historically taken the Commission to rule on pending petitions, this amendment was completely unhelpful.

Instead of creating an exemption from the law that requires pre-approval by the agency, the CPSIA should be amended so that products not posing a lead risk do not have to come before the agency at all. The Commission will still retain the right to recall and/or regulate any product that is unsafe, including those containing unsafe levels of absorbable lead. And manufacturers remain obligated to report to the agency any products that do not meet agency standards or which pose a risk.

Question 13. Can you elaborate on and further explain the following statement in your testimony: ". . . the central focus of the agency's time and resources in both 2009 and 2010 has been on implementing a law that has almost nothing to do with improving safety—the Consumer Product Safety Improvement Act of 2008, or CPSIA."

Answer. As Chairman Pryor pointed out during the hearing, some provisions of the CPSIA, such as the ATV Standard, may effectively address known risks. Also, making it unlawfnl to sell a voluntarily recalled product enhances the agency's enforcement powers and promotes consumer safety.

However, the bulk of the law's requirements and their attendant costs to the regulated community are not risk-based and will have a negligihle impact on consumer product safety. Moreover, an overwhelming proportion of the Commission's time and energy since passage of the CPSIA has been spent implementing the new law. Numerous rules have been promulgated and many more are still to come. And with each rulemaking, the Commissioners must debate the same questions regarding the meaning of the new statutory language and the scope of the new requirements. Lost in all of these debates and rulemaking is the agency's mission to protect consumers, and especially children, from unsafe products. Instead, the agency's discretion to allocate resources and focus enforcement efforts to address risk has been replaced by a mandate to regulate to fixed and largely arbitrary standards that hear little relationship to risk.

A sample of CPSIA requirements and the CPSC's recent rulemaking illustrates these points.

- *Lead content limits*: The CPSIA sets limits for lead content in all consumer products, without regard for the absorbability of the lead in any particular product. But lead in a product's substrate that is not absorbable in meaningful amounts does not create a safety risk. For instance, lead in paint or in a solid lead charm is hazardous, because in each case the lead can be ingested and absorbed into the system. The lead in bicycle handlebars or the brass spokes of a toy wheel, in contrast, is part of the metal's substrate, is not absorbable, and therefore presents no safety risk. Moreover, lead is an important element that adds strength, machineability, weight and other traits that can be difficult to replace. As a result, companies have been required to spend millions reengineering products to eliminate lead from components that contain little to no *absorbable lead*, and were therefore never harmful in the first place. The CPSIA third-party testing, certification and record keeping requirements similarly create a substantial financial burden with no commensurate improvement in safety.

  The Commission is now beginning to consider lowering the permissible lead limit in children's products to 100 ppm, as the CPSIA requires. The limit must be so lowered "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product category." CPSIA § 101(a)(2)(C). In any event, the Commission must set the limit at the lowest level between 300 ppm and 100 ppm that the Commission determines to be "technologically feasible." CPSIA §101(a)(2)(D). Bnt the law does not require or even allow the Commission to first consider whether a lower lead limit better protects children's health. This is a radical departure from the CPSC's traditional role of using its expertise to *first assess* a safety risk *and then regulate* it to the extent required to protect the public. There is no scientific basis for reducing the lead limit in a product's substrate to 100 ppm as a means to promote safety. The Commission should be empowered to make that determination before American businesses are crippled by unnecessary costs.
- *Phthalates ban/interim ban*: The law properly bans certain phthalates that are known hazards. But it overreaches by banning additional phthalates for which the CPSC has already concluded there is insufficient scientific evidence of risk. The law called for a new Chronic Hazard Advisory Panel (CHAP) to re-study these additional phthalates, but bans them in the interim. This has required manufactnrers to reengineer prodncts and third-party test to the interim phthalates ban when the CHAP may determine once again that a risk does not exist.
- *Database*: This agency has already spent $29 million through FY 2011 developing a new public database for consumers. The agency's recent database rule ensures that the database will be populated with unverifiable and likely inaccurate information. It will be no more helpful than a website with consumer reviews or complaints, such as *Amazon.com* or *yelp.com*, yet more misleading, because it is implicitly endorsed by the Federal Government. Inaccurate information in a datahase for consumers is not "safety information"—it is simply *mis*information. See the questions above on the database for more information.

  Drafting the rule for the database put enormous pressure on staff resources. Now, the costs will balloon as the agency fulfills its obligations to convey every single incident report to the manufacturer within 5 days, process responses from those manufacturers, and then post the incident after 10 days. Considering only the decision to allow "data dumps" into the database, the database could swamp the Commission's resonrces very quickly. One conservative estimate is that it will take twenty-two new FTEs to handle the case work generated by these requirements, and that does not include complicated cases requiring the investigation and resolution of a material inaccuracy charge by a manufacturer.
- *Third party testing and certification requirements*—Section 102 of the law requires third-party testing to *all* children's product safety standards, including lead paint, lead content, phthalates and ASTM F963. The Commission majority has extended this requirement to previously passed "consumer product safety standards," including flammability standards for carpets and rugs, mattresses, and vinyl. However, none of these third-party testing requirements are necessary to address a risk. These requirements simply add burdensome costs to manufacturers, who will either pass the costs on to consumers, or reduce prodnct lines or close, because they cannot afford them. The Commission maintains the authority to pose mandatory testing requirements on manufacturers where

necessary to address a risk, but the CPSIA's testing requirements by and large are unnecessary, wasteful and crippling to small manufacturers.

The Commission has already spent days discussing the rules that will govern the implementation of a certification system that will be effective and efficient. The hours dedicated by the staff over the past 18 months to draft these rules are incalculable.

- *Tracking labels*: All children's products, regardless of the risk they pose, must include a tracking label. After the current stay is lifted, these labels will become much more complicated because they will have to correctly reflect the finished product's unique lot number and that of each tested componeut of the product. If so little as one component part's certification is changed, the finished product label will also need to be changed. Similar to Section 102, this provision adds unnecessary costs to small and large manufacturers, without regard to whether their products pose a risk.
- *Increase in the maximum civil penalty levels*: The CPSIA increased the maximum civil penalty for a violation of a Commission standard from $1.25 million to $15 milliou, an unprecedented increase for any agency. While this provision was driven primarily by the toy recalls of 2007, which iuvolved one of the largest toy companies, the bar has beeu raised for all manufacturers. This increased exposure to large fines accompanies the CPSIA's new, complex regulations that already significantly raise the cost to bring a new product to market. Again, this new burden has nothing to do with increased risk and threatens businesses and jobs by its very existeuce. The Commission could have reduced this burdeu by providing in its guidance that technical violations (such as a compliant product with a paper work violation) would be penalized at lower levels. But the majority of the Commissiouers decliued to write that reassurance into their guidance document.
- *Enforcement by state attorneys general*: Section 218 of the CPSIA authorizes state attorneys geueral to briug lawsuits against a manufacturers for violating the CPSIA—a law whose standards are, again, not based on risk. This provision invites lawsuits from state attorneys general and therehy exposes large and small mauufacturers to a needless, iucreased risk of liability. It may also require manufacturers to incur additional costs to protect against the application of conflicting standards. For instance, a manufacturer can avoid any risk of a CPSC enforcement action for lead content by administeriug the lead content test recommended by the CPSC. But this would not insulate the manufacturer from a claim hy a state attorney general based on the results obtained using a different test. A manufacturer could protect against this risk only by testing the same products repeatedly using different methodology, a large, unjustified expense. In other cases, the mere fact that a state attorney general could enforce a particular standard imposes a burden that the CPSC has judged to be unreasonable. Specifically, the Commission occasionally exercises its discretion to stay enforcement of standards that it deems cannot reasonably he met, based on the availability of laboratory resources or other factors. Yet a CPSC stay is not binding on a state attorney general, who could nonetheless bring an action based on the failure to adhere to the same standard. These sorts of inconsistent and conflicting burdens aud risks are precisely why many Federal regulatory standards and enforcement mechanisms preempt state action. The same should have heen done here.

Question 14. You stated that one example of cutting the Commission's budget would be to put the agency under oue Admiuistrator, rather thau 5 Commissiouers. Can you please elaborate on the benefits of this proposal?

Answer. I believe the CPSC could be run more efficiently by one Administrator, rather than a Commissiou of five or even three. Managiug a small agency simply does not require more than an Administrator. Additionally, I have confidence that Chairman Tenenbaum (or a future Administrator) would be able to run the agency much more efficieutly without the pressures from her Democrat and Republican colleagues, who wish constantly to influence her actions in one direction or another. Reducing from five Commissioners to an administrator would save the substantial costs of office space, Commissioner and staff salaries, aud any travel for all five Commissioners.

The Chairman is already solely accountable for all of the agency's core functions, iucludiug setting the rulemaking agenda, public relations, humau resources duties, and budgeting. The other four Commissioners may be asked to sign off on these things from time to time as a formality or to provide input, but ultimately all accountability lies with the Chair.

Rulemaking involves the participation of five Commissioners. However, I would argue that this "participation" rarely involves more than duplicative analytical efforts—all of which usually result in a 3–2, party-line vote. This also means five different Commissiouers, all their staffs (12 people), plus dozens of technical staff aud lawyers are reviewing, editing and analyzing the exact same rule-making document.

Despite my efforts, I have been unable to meaningfully influence the rulemakings we have considered. In fact, divided along party lines, the Chair is often pushed to align her position with the other two Democrat Commissioners. For example, the Commission issued a Notice of Proposed Rulemaking on the Definition of Children's Product that was so ambiguous we might just as well have not defined the term at all. In response, the Commission received many excellent comments from manufacturers and retailers illustrating how the parameters of the definition provided very little, if auy, certainty for products that fell around the outer edges of the law's age limit. Then, after weeks of review by technical staff, the Office of General Counsel, and all Commissioners' staffs, the final rule approved by the Majority was *worse* than the proposed rule, in that it unjustifiably broadened the parameters so that even more products fell under the purview of the CPSIA. Without four other Commissioners pulling her in opposite directions, one Administrator would he solely responsible for fair, well-thought-out rulemakiug decisions.

Having five Commissioners also means that many day-to-day activities of the Commission must happen five different times, which can drain staff time. Moreover, each Commissioner needs his/her weekly briefings on rulemakings and other issues with professional staff. Unfortunately, it is not useful to combine most meetings with other Commissioners, who may have alternative agendas. Nor is it even legal under the Sunshine Act for more than two Commissioners to meet privately to discuss substantive matters. As a result, professional staff spend most of their weeks in repetitive meetings and away from other core duties. They also spend five times more time than necessary answering Commissioner and Commissioner staff questions, when they could be doing so for one Administrator.

The CPSC still remains a relatively small agency, despite the new rules it has promulgated and its responsibility to enforce those rules. Other independent commissions, such as the FTC and FCC, might need five Commissioners, but those agencies' budgets are *more than double* ours.

I am not aware of another independent commission that is under one Administrator. However, other regulatory agencies, such as NHTSA and FDA are run by Administrators that are accountable to Cabinet secretaries and the White House. I could imagine a similar arrangement for the CPSC.

Question 15. Do you have any other budget-reduction recommendations that should be considered?

Answer. I have two recommendations on how to reduce the budget and at the same time, increase the Commission's ability to fulfill its safety mission:

1. *Defund the public database*: The first budget-cutting measure I recommend is not to publicize the Commission's new database. I understand that the agency's internal IT improvements have been beneficial, particularly combining our separate internal databases of information. However, there is simply no safety need to make all of our incident reports public, particularly those that are likely to be inaccurate. If this Commission is to have a public database funded by taxpayers, it should be *different and better* than any source of information that already exists in the public domain, snch as websites like *Amazon.com* or *Yelp.com*. Unfortunately, our public database will be no more useful than similar sites that are already available to the public today, and will, in fact, be more misleading to the public, given the likelihood of inaccurate reports and the lack of ability for anyone to verify them.

Further, the Commission has limited resources for enforcement, and the public database will divert resources from addressing genuine risks to monitoring and processing the likely increase in reports to the agency. Additionally, because inaccurate incident reports will be indistinguishable from accurate ones, the media's attention may focus on inaccurate reports, pressuring the agency to prioritize its efforts based on publicity rather than risk level. The agency has yet to estimate the number of new FTEs we may need, year after year, to administer the public database. However, as stated above, one conservative estimate is that it will take twenty-two new FTEs to handle the case work generated by these requirements, and that does not include complicated cases requiring the investigation and resolution of a material inaccuracy charge by a manufacturer.

As it is currently designed, and given the Commission's database rule, taxpayer dollars will be snpporting a pnblic database with inaccurate and unverifiable in-

formation that unnecessarily harms manufacturers, and is not useful to consnmers. Many believe the public database, if left unchanged, will be nsefnl only to trial lawyers or advocacy gronps that will be able to populate it with unverifiable, second-hand information for their own purposes.

2. *Reform the CPSIA to allow the agency to focus on risk*: The best way to allow the agency to perform its core functions—to assess and reduce risk—would be to reform the CPSIA's non-risk based mandates, such as the lead content standard and third-party testing and labeling requirements. There are many ways the law could be reformed to provide the agency with flexibility not to impose all of the law's requirements on products that do not pose any risk. Such reforms would *free up agency resources* to focus on known hazards and to better prioritize our regulatory agenda. It would also free up business resources to expand, build new products and stay competitive with what the marketplace is demanding in the future. Many of these reforms have been discussed in my statemeut to accompany the ageucy's Report to Cougress in January of 2010.[21] I would be happy to follow up with further detail, as necessary.

Question 16. The crib rule was mentioned briefly during the hearing. Can you please elaborate on the impact of the crib rule on child care centers due to the retroactive effects of the law?

Answer. I supported the Final Rule on Full-Sized and Non-Full-Sized Cribs, which was passed by a vote of 5–0 on December 15, 2010. I was also pleased that the Commission provided needed flexihility for child care centers and places of public accommodatiou to allow extra time, a full 2 years, to come into compliance with the regulation's requirements.

However, wheu the rule takes effect, the law's retroactivity provisions will still cause tremendons, needless waste for all child care centers nationwide—something that this agency does uot have the ability to prevent. In fact, with the passage of this regulation, *every crib in this country has become obsolete overnight and unable to be sold*—regardless of whether that crib was ever subject to a recall or ever considered unsafe. Although most articles since the rule's passage have focused on the fact that drop-side cribs can no longer be sold or used in child care centers, they fail to mention that the agency's new standards also impact all other types of cribs.

The consequences of the retroactivity of the crib rule are immense. First, any young family who invested in a new crib over the past year or who will buy one in the next six months before the new ones are on the market, will not he able to sell it or donate it to a thrift store after it has been used, even if the crib has fixed sides and is safe. Also, retail stores and thrift stores can no longer sell safe, fixed-side cribs currently in their inventories. Families often invest in second-hand cribs or hand them down to another family member, due to the high cost of new cribs. While the Commission advises consumers not to use any crib that is over 10 years old, the fact remains that the safest place for a baby to sleep is in a crib. It is tragic that the unjustified destruction of the second-hand crib market may compel some families to opt for an alternative, unsafe sleeping arrangement for their infants.

Furthermore, the law goes far beyond prohibiting the sale of cribs. It expressly forbids cribs that met the previous standards but do not meet the new standards from being offered *for use* by places of public accommodation or child care centers. Day care centers and hotels across the country are required to throw out their current cribs and purchase new ones, even if they bought a crib earlier this year that met the previous ASTM standard (less than a year old) and is completely safe. This will be a tremendous waste of money for families, day care centers, and the public fisc, which fnnds many day care centers.

The law's retroactivity provision also mandates that these standards become *retroactive every time they are updated in the future*. In other words, once the mandatory standards are modified in the future to respond to changes in the market, new innovations, or new hazards, all the new cribs that meet the Commission standard *this year* will become obsolete once again, cannot be resold, and day care centers once again will be forced to buy another set of new cribs. This sitnation will be disastrous for families and day care centers that depend on the availability of affordable cribs. I am not convinced that Congress intended such a drastic result.

Of course, crib companies are thrilled by the law's retroactive effects. While companies certainly will lose current inventory that does not meet the new standard, they will also reap tremendous financial rewards, because every family and day care center will be forced in the near future to purchase a brand-new crib. They will not have access to any safe, used cribs in the resale market. Even if they have recently disposed of their drop-side cribs, as this Commission has advised for many months,

[21] *http://www.cpsc.gov/pr/northup01152010.pdf*.

the new, fixed-side cribs they just bought will also be obsolete and unable to be resold. In fact, American families may not ever have access to much of a resale market if the mandatory standards for cribs continue to be modified periodically. Each time the standard is modified in the future, yesterday's crib will become outmoded, unable to be resold by families, and unable even to be used by such places as day care centers and hotels. (This alone provides quite an incentive for crib companies to continne proposing changes to the mandatory standard!)

The most economically vulnerable sectors of the market bear the brunt of overregulation. In this case, young families, those of moderate resources and many day care centers will be negatively impacted by this crib rule. I snpported this rule because it was required by the CPSIA and it provided at least some time for day care centers and families to prepare. I believe the Commissioners should share the consequences with Congress and give its Members time to change the law to avoid unnecessary costs. I am hopefnl that Congress wonld be open to amending the law to address these unforeseen consequences.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHNNY ISAKSON TO HON. ANNE M. NORTHUP

Question 1. In your written testimony you outlined many problems that businesses are having in complying with the third-party testing and certification requirements of CPSIA. Given the state of the economy, the lack of detailed CPSC regulations and the fact that the stay on the third-party testing and certification requirements expires on February 10, 2011, wonldn't it be best to extend this stay another year?

Answer. Given that the Commission has not finalized its testing rules so that manufactnrers will know what is reqnired of them, I believe it is prematnre to lift the stay of enforcement on lead content testing. The delay in finalizing these rnles is of concern, because the Commission's previous stays on lead content testing were implemented *principally based on the recognition that manufacturers would be unable to comply with the third-party testing requirement until both the 15-month rule and the component testing rule had been in effect for a reasonable period of time.* If the stay is lifted prematurely, many small manufacturers, in particnlar, will be unable to afford to comply independently with the third-party testing requirement, and will stop making certain products or go out of business entirely

As you may know, on May 20, 2010, the Commission issued Notices of Proposed Rulemaking on (1) Testing and Labeling Pertaining to Product Certification (75 FR 28366), and (2) Conditions and Requirements for Testing Component Parts of Consumer Products (75 FR 28208). These proposed rules—referred to by the CPSC as the "15-month rule" and the "component testing rule"—address, inter alia, the protocols that will govern third-party testing of children's products, including random sampling methods and the availability of component parts testing as a means to encourage compliance further up the supply chain and to provide manufacturers with more options to come into compliance. The Commission is just beginning to consider the final versions of these rules.

A year has now passed since the stay was first extended, but in the absence of final 15-month and component testing rules, component testing still cannot form the basis for certifications for lead content. Rather, small mannfactnrers continne to report to the CPSC that component suppliers are refusing to test altogether or are refusing to supply certifications, and that certifications are unavailable from the retail ontlets where many small mannfactnrers obtain component parts. Under these circumstances, a continuation of the stay would be consistent with the stated views of all five Commissioners. Commissioners Northup and Nord, and Chairman Tenenbaum all expressly linked the lifting of the stay to at least the finalization of the 15-month and component testing rules. Commissioner Moore supported extending the stay to give small manufacturers "sufficient time to find sources of lead compliant materials," and Commissioner Adler predicated his willingness to delink finalization of the 15-month rule from the stay on his expectation that small manufacturers would be able to "rely on component suppliers for compliance with the law." Given that component part snppliers remain unwilling or unable to provide component part certifications in the absence of final rules, there is no factual predicate for the Commissioners to support lifting the stay.

It is also important to emphasize that publication of the proposed rules has not provided the regulated community witb the any certainty regarding the content of the final rules. Indeed, the CPSC's record of rulemaking over the past year demonstrates that a final rnle can change materially from its proposed version and can impose more onerous requirements. It is therefore not surprising that component

parts suppliers remain unwilling to incur the expense of providing certifications under a proposed regime that may change substantially before it is finalized.

I therefore intend once again to urge the Commission to vote to continue the stay of enforcement on third-party testing and certification of lead content in children's products until one year after publication of final 15-month and component testing rules. Considering the lead time necessary for manufacturers between design and production, allowing one year after the two testing rules are finalized is necessary for manufacturers to benefit from the rule. Doing so would comport with the expectation created among regulated industries through the Commissioners' and the Commission's public statements that the stay would not earlier be lifted.

Moreover, lifting the stay before the final 15-month and component testing rules are pnblished wonld place mannfacturers in the nntenable position of trying to comply with the proposed rule, while anticipating a potentially mnch different final rule. This would provide manufacturers with insufficient time within which to modify their compliance management processes once the final rule was issued, and would cause needless disruption to business planning, supply chain management, test lab contracting, and other aspects of product manufacturing due to the rapidly changing requirements.

Finally, a reasonable time after publication of the final rules is necessary in order to afford the regulated community time to come into compliance. Otherwise, it may be too late for many small manufacturers to benefit from the component testing rule. In this regard, it is essential that the Commission retain in the final component parts rule the proposed provision, § 1109.5(g)(1), affording component parts certifications "currency" to allow them to be reasonably relied upon by downstream manufacturers without the need for duplicative testing.

Question 2. If another stay is granted, what could Congress, the Commission, and industry do together during that year to help the CPSIA fulfill its mission without driving responsible manufacturers out of business?

Answer.

Congressional Action

The best opportunity manufacturers and consumers will have to be rid of the non-risk-based, costly testing and certification requirements of the CPSIA and to allow the Commission to refocus its enforcement efforts on genuine risks, is for Congress to amend the law. There are many ways the law could be reformed to provide true flexibility to the agency so as not to impose nnnecessary reengineering and testing requirements on products that do not pose any risk, including: (1) exempting products with *de minimis* absorbable lead from the law's requirements; (2) reducing the age range of the law to focus on children in the years when they are most likely to be exposed to harmful levels of lead; and (3) eliminating the costly third-party testing, certification and labeling requirements of the law, except where the Commission finds such requirements are necessary to address an actual risk. You may find more information on some of these proposals in my statement to accompany the Commission's Report to Congress in January of 2010: *http://www.cpsc.gov/pr/northup01152010.pdf* Such reforms would free up agency resources to focus on known hazards and to better prioritize our regulatory agenda—and bring us back to our core mission of safety.

It is also helpful to keep in mind that the statute does not permit the agency to exempt any manufacturer from the law's onerous testing and certification requirements. *Exemption from the testing requirement is the main change sought by small manufacturers.* Because we cannot exempt companies from the initial third-party test that every manufacturer must do to every component of their product—even if the product poses no risk—I hope that the Commission will at least alleviate the burden through the "continued testing" requirements of the statute and the testing protocols, where we do have some flexibility. However, removing the costly requirements of third-party testing and certification will require an act of Congress amending the CPSIA.

Commission Action

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

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

a. *Absorption exclusion*—I argued that the absorption *exclusion* under Section 101 was actnally intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term "any lead" in that section may be interpreted to mean a *de minimis*, harmless amount of lead in a children's product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal—since lead in the substrate of these products is not harmful. Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car's brass fitting contained less absorbable lead than the Food and Drng Administration deems to be acceptable in a piece of candy.[1]

b. *Civil Penalties Factors*—In the Commission's interpretive rnle on Civil Penalties Factors, I proposed a nnmber of changes to provide more certainty for the regulated community and to ensure that while the overall civil penalty ceiling was raised, "technical" violations, snch as incorrect paperwork, wonld not be treated the same way as more serions violations, snch as failnres to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have heen reached.[2] Unfortunately, a majority of the commissioners did not want to provide that leeway.

c. *Definition of Children's Product*—The CPSIA applies to all "children's products," statutorily defined as products "primarily intended for a child 12 years of age or younger." The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended for the 10–12 or pre-teen age groups, or that straddle the age limit of the statute. The entire reason for defining the term was to provide guidance to these types of manufactures, who need certainty to know how to determine if their products fall under the purview of the CPSIA. After receiving these comments, the Commission had a chance to put u much narrower "fence" around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff,[3] nor the regulated community.[4]

d. "*Children's product safety rules*"—I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all "children's product sufety rules." A clear distinction can be made between "children's prodnct safety rules" and more general "consumer product safety rules" promulgated well before the passage of the CPSIA. Unfortunately, becanse the Majority chose to view all consumer product safety rules of the Commission as potential "children's product safety rules," it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates new third-party testing requirements.[5]

e. *Database*—I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. Unfortunately, the Commission's Majority passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys and random bystanders that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers—particularly small businesses. Due to the inaccuracy of reports on the database, it will be a waste of taxpayer resources and will not be useful to the consumers it was intended to help.

Because the Commission's majority has largely refused to find flexibility where it is possible under the statute, I am no longer optimistic that, without Congressional action, the situatiou will improve.

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[1] *http://www.cpsc.gov/pr/northup110409.pdf.*
[2] *http://www.cpsc.gov/pr/northup03102010.pdf.*
[3] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses," *Associated Press.* December 11, 2010. *http://news.yahoo.com/s/ap/20101211/ap on he me/us cadmium lead glassware.*
[4] *http://www.cpsc.gov/pr/northup09292010.pdf.*
[5] *http://www.cpsc.gov/pr/northup07122010.pdf.*

ATTACHMENT

Economic Impact of the CPSIA—Examples
2009 and 2010

Costs Associated with the CPSIA

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

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

3. In an article entitled "Makers Are Pushing Back on Toxic-Toy Law" (*Wall Street Journal*, March 5, 2009 *http://online.wsj.com/article/SB12362135762983 5121.html*), Joe Periera reported the following loss statistics:

- Goodwill Industries to destroy *$170 million* in merchandise.
- Salvation Army expects to lose *$100 million* in sales and disposal costs.
- The Toy Indnstry Association estimates inventory losses at *$600 million*.
- Members of the Coalition for Safe and Affordable Childrenswear lost *$500 million*.
- The California Fashion Association estimates troubled inventory at *$200 million*.
- The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least *$125 million*.

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

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

"TIA: Safety Act puts $2B crimp in toy biz" 3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members' businesses could total *$1 billion*. See: *http://www.1st5ive.com/harley-davidson/motorcycles/2009/02/2452/new-lead-rule-could-cost-motorcycle-industry–1-billion-annually*.

Examples of Businesses Closed Due to CPSIA

Most names provided by the Handmade Toy Alliance

1. Whimsical Walney, Inc.—Santa Clara, CA
2. Fish River Crafts—Fort Kent, ME
3. Kungfubambini.com—Portland, OR
4. Baby Sprout Naturals—Fair Oaks, CA *http://www.babysproutnaturals.com/about/*
5. Gem Valley Toys—Jenks, OK
6. Angel Dry Diapers—Michigan
7. Abracadabra Educational Craft Kits for Kids—Bend, OR
8. Hailina's Closet—Ellensburg, WA (thrift store)
9. Eleven 11 Kids
10. Perfect Circle Consignment—Bremerton, WA

11. *JenLynnDesigns—http://waytobow.blogspot.com/*
12. A Kidd's Dream—Conway, AK
13. Storyblox—New Vienna, OH
14. Phebe Phillips, Inc.—Dallas, TX
http://www.phebephillips.com/shopnow.htm
15. Pops Toy Shop—mountains of Tennessee, Virginia, North & South Carolinas

Businesses That Have Stopped Production of Children's Lines Due to CPSIA

Most names provided by the Handmade Toy Alliance

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

Businesses That Closed and List the CPSIA as One of the Factors

Most names provided by the Handmade Toy Alliance

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

Other Companies Hurt by Retroactivity of the CPSIA's Lead Content Ban:

1. Gymboree—"change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete"
   i. *http://www.reuters.com/article/idUSBNG44760220090305*
2. Constrnctive Playthings, Inc—'"We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc. . . . The banned products include beach balls, inflatable toy guitars and blow-up palm trees.'
   i. *http://online.wsj.com/article/SB123621357629835121.html*

Businesses No Longer Exporting to the U.S. Due to the CPSIA

Most names provided by the Handmade Toy Alliance

1. Hess—Germany
2. Selecta—Germany *http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cspia/*
3. Finkbeiner—Germany
4. Saling—Germany
5. Simba—Germany

6. Bartl GmbH dba Wooden Ideas—Germany
7. Woodland Magic Imports—France
8. Brio
9. Helga Kreft—Germany
10. Eichorn—Germany
11. Kapla
12. Kallisto Stnffed Animals

EnroToyShop—On this company's homepage, yon will find links at the bottom with a list of "endangered toys" or "extinct toys" that are still sold to children in Europe but which the company will no longer be able to sell in the U.S. due to the CPSIA.

Endangered Toys The CPSIA (Consnmer Prodnct Safety Improvement Act) has nnintended consequences. Now, some Enropean toys are no longer available in the USA. *http://www.eurotoyshop.com/*

Associations That Have Voiced Concerns to the Commission Regarding CPSIA's Costs (list is not exhanstive):

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

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

Higher Costs for Schools:

January 11, 2010

"NSSEA members sell educational supplies, equipment and iustructional materials to schools, parents, and teachers . . .

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

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

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

Higher Costs for Products with No Lead Risk:

October 13, 2010

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

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

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

Punishing Small Businesses, While Mattel and the Big Guys Squeeze out the Competition:

June 17, 2010

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

"Nearly 2 years after the safety law was enacted, Congress and the Consumer Product Safety Commission are still struggling to reduce its burden on small businesses while eliminating the risk of lead and phthalates in children's products."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17—ST—N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

Bordering on Ridiculous:

June 17, 2010

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

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_st_n.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

Regulation for Regulations' Sake

November 8, 2010

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

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

Mattel Finds CPSIA a Challenge—How Much More for Small Businesses?

November 9, 2009

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

Peter Biersteker, a lawyer for Mattel with the law firm Jones Day in Washington, D.C., said his client is finding the CPSIA difficult to decipher. The law, he said, is unclear on what products the company needs to test, how often it needs to test them, and how many samples need to be tested. "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.

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

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

Commission Action Adds to CPSIA's Problems:

August 16, 2010

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

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

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

Even the *New York Times* Spotlights the Unintended Consequences of the CPSIA:

September 28, 2010

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

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

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

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

Science Kits Are "Not Banned"—but the Tools Used Inside Them Are!

October 1, 2010

"The science kit makers had asked for a testing exemption for the paper clips and some other materials. On Wednesday, iu a close 3–2 vote, the commissiou declined to give them the waiver they sought."

". . . After the science kit vote, CPSC Chairmau Iuez Teneubaum sought to reassure people that, "There is uothing in this rule that bans science kits."

Right. But while the commissiou vote doesn't ban the kits, manufacturers say it may crimp the supply of kits for elementary school childreu."

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

Furniture Manufacturers Faced with Added Costs, Zero Safety Benefit to Children:

November 8, 2010

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

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

Furniture Manufacturers Faced with Added Costs, Forced to Cut Jobs:

November 8, 2010

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

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

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

No More Mom and Pop Toy Sales:

July 7, 2010

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

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

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO RACHEL WEINTRAUB

Question 1. The Food and Drug Administration (FDA) has three different product classifications for toothbrushes: (1) toothbrush, ionic, battery-powered; (2) toothbrush, manual; and (3) toothbrush, powered. The FDA classifies all toothbrushes as Class I medical (dental) devices. My understanding is that such Class I devices are regulated by the FDA. Under current law, does the Consumer Product Safety Commission (CPSC) have any authority to ensure the safety of toothbrushes, even those that are clearly marketed to children?

Answer. Under current law, the Consumer Product Safety Commission (CPSC) has jurisdiction over consumer products. In 15 U.S.C. §2052(a)(5), a consumer product is defined as, "any article, or component part thereof, produced or distributed (i) for sale to a consumer for nse in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise;" The term specifically

excludes a number of products including, (H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 321 (g), (h), and (i)])." Thus, medical devices are explicitly excluded from CPSC's jurisdiction.

Further, the Food and Drug Administration (FDA) has jurisdiction over tooth brushes as medical devices. The FDA classifies toothbrushes as Class I devices in different product classificatious, as you suggested. For example, FDA classifies manual toothbrushes under section 872.6855 and powered toothbrushes under section 872.6865.

Thus, since medical devices are explicitly carved out of CPSC's authority over consumer products and FDA has authority over medical devices which include toothbrushes, under current law CPSC does not have authority over toothbrushes, while FDA does have authority over these products. This remains the case whether the toothbrushes are designed for children or adults.

Question 1a.. Do you believe that all toothbrushes should be classified as medical devices or should some be classified as a consumer product?

Answer. I believe that toothbrushes should be considered a medical device and that FDA should retain jurisdiction over these products. I have not been made aware of information or claims from consumers indicating that toothbrushes should not be considered medical devices. IF CPSC or any other government agency has knowledge or information that would be helpful to FDA in exercising jurisdiction over toothbrushes, we would urge FDA to work with that entity.

Question 2. There are a number of battery-powered toothbrushes in the market that have children's cartoon or live-action characters painted on to the body of toothbrush or attached to the body of the toothbrush (*i.e.*, the on-off switch in the shape of the cartoon character), and are marketed to children. Does the CPSC consider such toothbrushes to be a "children's product"? Should the CPSC classify these toothbrushes to be a children's product as they are marketed to children 12 years of age and younger?

Answer. In an advisory opinion written by CPSC General Counsel, Cheryl A. Falvey on November 5, 2008,[1] the General Counsel states in a response to a manufacturer of preventative dental caries that, "Products that are medical devices do not fall within the definition of "consumer product" and, therefore, the definition of "children's product" does not include medical devices."[2] Based upon this advisory opinion, I conclude that CPSC does not consider these types of toothbrushes to be children's products. I agree with this determination and do not believe that CPSC should have jurisdiction of these medical devices even when marketed and sold to children. FDA has expertise in regulating these and other medical devices and should retain this jurisdiction.

Question 2a. Does the FDA have any standards for the levels of heavy metals allowed in toothbrushes and other dental devices? If not, should the FDA develop such standards?

Answer. To the best of my knowledge, FDA does have standards for the levels of heavy metals allowed in toothbrushes and other dental devices but these standards are not in the form of a bright line total lead content limit. Rather, FDA requests complete material composition data from medical device manufacturers and if the presence of heavy metals is indicated, FDA requests further data about the heavy metal. In addition, FDA focuses on whether the heavy metal contained in the device can leach into the bloodstream.

Question 2b. Hypothetically, if it is reported that lead was found in the colored bristles of a toothbrush with a cartoon character painted on the body of the toothbrush, how would the CPSC respond? Would the FDA have absolute jurisdiction? If the FDA chooses not to investigate the report, does the CPSC have any authority to investigate such a claim independently?

Answer. If it is reported that lead was found in the colored bristles of a toothbrush with a cartoon character painted on the body of the toothbrush, CPSC would not respond. Rather, FDA would have jurisdiction. I would hope that FDA would consult with CPSC if CPSC's knowledge and familiarity with lead exposure from consumer products would be helpful to FDA. If the FDA chooses not to investigate the report, we wonld hope that FDA based its review and determination upon an extensive review of the facts of the particular case and would urge FDA in any case

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[1] The advisory opinion can be found on CPSC's web page at *http://www.cpsc.gov/library/foia/advisory/319.pdf.*

[2] Advisory Opinion of Cheryl A. Falvey, General Counsel, U.S. Consumer Product Safety Commission, November 5, 2008, available on the web at *http://www.cpsc.gov/library/foia/advisory/319.pdf*.

involving lead exposure to make determinations based upon the extensive body of research indicating that lead is a known neuro-toxin and that there are no safe levels of lead exposure. Since, CPSC does not have jurisdiction over medical devices; CPSC would not have authority to investigate such a claim independently.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO RACHEL WEINTRAUB

Question 1. Could you give us your thoughts on how this database can improve consumer awareuess of product recalls?

Answer. This database will improve consumer awareness about product recalls because consumers will see information about recalls as they are looking up product information on the database. For a consumer who went to the database to look up a specific product, and was not even thinking about the potential of a product recall, recall information would be available and visible and enrich the person's knowledge about the product by including applicable recall information.

In addition to the database, the CPSIA is improving consumer awareness of product recalls by requiring that infant durable products be accompanied by a product registration card and a means to register the product on line. This is important because with this information, consumers will be directly notified by the manufacture if a product they own has been recalled. Direct consumer notification of product recalls is one of the most effective ways to increase consumer awareness of product recalls.

Question 2. I am concerned that consumers who have already purchased harmful, recalled products may still not know whether their consumer product has been recalled. How can the database and other computer or online tools help with that?

Answer. Consumers who have already purchased a potentially harmful product all too often do not find out that the product that they own has been recalled. It is problematic. The database will help consumers who own a previously recalled product if they go to the database and search for the product. Even if the consumer is not specifically looking for recall information, recall information will be accessible and visible to the consumer.

In addition, CPSC has a list serve anuouncing the most recent product safety recalls that it sends out to consumers and others who sign up. Consumers can sign up to receive information about specific types of prodncts. We urge consumers to sign up for this list serve. To sign up, a consumer should go to: *https://www.cpsc.gov/cpsclist.aspx*.

Another tool that will help consumers find out about whether an infant durable product they own has been recalled is product registration. This is required for infant durable products. Critically, a consumer must fill out tbe card accompanying the product or fill out the information online.

Once the consumer communicates the information to the manufacturer, if there is a recall, the manufacturer will directly notify the consumer of the recall. This is a hugely positive step that will improve consumer knowledge about recalls of products they owu.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO STEPHEN LAMAR

Question 1. In your testimony, you stated tbat companies are required to comply with "silly" requirements. Please elaborate on what you mean by this and provide examples.

Answer. The CPSC has been very strict in interpreting the CPSIA's requirements and as a result, businesses have had to comply with various regulations that have been extremely burdensome but have amounted to zero improvements in consumer product safety. For example, the CPSC initially interpreted the General Conformity Certification (GCC) requirement to be a paper certification that wonld physically accompany each shipment of products. Not only would this have been a logistical nigbtmare for companies, but the certifications would be useless to regulators who would have had to search shipments to find them. Ouly ou November 10, 2008 (two days before the GCC requirement went into effect) did the CPSC issue final GCC regulations clarifying that the certification could be in electronic format. In another example, the CPSC initially interpreted the third-party testing requiremeut to be product-based. This meant that if a company chose to use the same button on five different styles of pants, the company would have to send in each different fully assembled style of paut of to test the button five times.

While many (not all) of these issues have been addressed, companies are still dealing with duplicative testing, unnecessary paperwork, burdensome and confnsing regulations, and conflicting interpretations on what the regulations mean. For example, retailers often still require third-party testing be done with specific testing labs resulting in duplicative testing for manufacturers. The most recent draft of the so-called "15 month rule" requires that GCCs, which are often created abroad by lab technicians be in English and stored in the United States. And the definition of "component" has been broken down to the sub-component level meaning components like zippers are now subject to seven tests.

Because the CPSIA is so rigidly written, the "solutions" we are able to develop sometimes end up creating more problems.

Question 2. The CPSC is currently working on third-party flammability testing for products such as fabrics and sleepwear. Please describe your industry's experiences with this requirement.

Answer. On August 9, 2010, the CPSC issued a *Federal Register* notice entitled, "*Third Party Testing for Certain Children's Products; Clothing Textiles: Requirements for Accreditation of Third Party Conformity Assessment Bodies, August 9, 2010.*" We have experienced several issues with this provision.

First, we disagreed with the CPSC's assessment that this standard—a general product safety standard that applies to all products—is even covered by the third-party testing requirement. We submitted comments to the CPSC and have yet to receive a reply.

Second, we raised significant concerns—that are still unanswered—on the fact that this new third-party testing requirement was being imposed on a regulation that was working properly and which had been subject to full dress rulemaking. In fact, about a year ago, the CPSC published technical changes and updates to that rule following years of industry consultation and comment. We find it inappropriate that a rule that was developed iu such a mauner can be significantly altered outside the proper regulatory process that is laid out in the underlying Flammable Fabrics Act (FFA) with no stakeholder input. We are closely monitoring to identify any problems that emerge as the new CPSIA reasonable testing protocols intersect with the FFA testing protocols that have worked well during the 50 year life of this safety standard.

Third, the mauner that the CPSC has used to lift the stay for products goverued by the FFA has been confusing, non transparent, and subject to apparent *ad hoc* consideration. For example, the CPSC used the Augusts 9 Federal Register notice to announce it was liftiug the stay. However, the title of that notice (see above) made no mention of the stay being lifted and seemed to only address technical issues relating to third-party testing certification. Moreover, the actual phrase lifting the stay was buried deep within the notice itself. the CPSC stated, "*As the factor preventing the stay from being lifted in the December 28, 2009, notice with regard to testing and certifications of clothing textiles was the absence of a notice of requirements, publication of this notice has the effect of lifting the stay with regard to 16 CFR part 1610.*" As a result, many children's apparel manufacturers did not realize that the stay of testing and certification had been lifted for children's products subject to the flammability standard for textiles. We would note that the extension of the stay of testing and certification was announced with great fanfare. Many companies mistakenly thought the CPSC would announce the lifting of the stays with similar public statements.

Fourth, moreover, many were extremely confused as to whether the stay of certification lifted for adult's products as well. In fact, the CPSC was similarly confused and were not able to clarify when asked. In response to our inquiries, the Commission only just announced the status of certification for adult's products subject to the flammability standard on December 28.

Fifth, AAFA petitioned for an additional 60 days because we felt there was insufficient diversity to ensure no capacity problems. In fact, when the stay for children's clothing was lifted, there were no third-party testing facilities certified for Vietnam, the second largest source of apparel (and a major source of kids clothing). As of the end of 2010, we have not yet received an answer to this request.

Sixth, with respect to sleepwear, AAFA and several stakeholders have been providing information to the CPSC on seemingly non compliant sleepwear that is being sold. Many of those complaints appear to go unanswered since the non compliant sleepwear continues to be sold year after year. Requiring additional testing, when the CPSC does not appear to be enforcing the existing rules, is not only frustrating to those companies who are in compliance with testing requirements and underlying standards, but also acts as a deterrent to ensure compliance by those companies who are ignoring the current law. The third-party testing regime doesn't address the

main (and only) problem that exists with respect to this standard—the apparent lack of enforcement.

CPSC officials have explained that the move to third-party testing for FFA seemed logical since much of the industry is already usiug third-party facilities to test for compliance. We would note however that there is a significant difference between third-party accredited facilities and third-party facilities. Many companies naturally assume their labs are accredited with the CSPC without realizing that that accreditation may still be pending. Similarly, the flammability standards reflect detailed product safety regimes that are not easily amended. We remain very wary of unintended consequences yet to materialize as the CPSIA requirements are layered on top of existing programs. At a minimum, we are concerned that we will see duplicative testing and paperwork burdens.

Question 3. In your testimony you said the retroactive nature of many of the rules in CPSIA creates huge problems for industry, with no discernible benefit to improving product safety. Why do you believe there is no benefit to safety?

Answer. The retroactive nature of the CPSIA forced many companies to spend considerable resources to test inventory and to dispose inveutory that was perfectly safe to children. Before February 10, 2009 (the date the lead standard went into effect), the apparel and footwear industry had to test all products on the shelves to determine and show compliance. These tests were done prior to the issuance of the CPSC's *"Children's Products Containing Lead; Determinations Regarding Lead Content Limits on Certain Materials or Products"* rulemaking that stated components like fabrics would not exceed the 100 ppm lead standard. As a result, companies had to spend money testing components that were of little to no risk of exceeding the lead standard just to prove product compliance. Moreover, as noted in my testimony, only about 5 percent of the hard components (like buttons, zippers and embellishments) were found to be not compliant with the lead standard. Most of these non compliant components were items such as the zipper stopper in the fly of children's pants that do not present any risk to children's health and safety.

As a result, we ended up with weird outcomes. Clothing that did not meet the lead standard, could be not be sold on February 10, 2009 since it was a banned hazardous substance. However that same clothing could be sold on February 9, 2009. Moreover, the CPSC did not force a recall of any clothing sold on February 9 or before. Clearly if it were dangerous it would be recalled. Furthermore, the CPSIA currently permits a company to make a product with a component that contains 250 ppm. However, on August 15, when the new retroactive lead limit takes effect, that exact same product becomes a banned hazardous substance. Once again, while it can't be sold after August 15, it is not subject to a recall. The safety of a product doesn't depend on the date when the product is sold.

Question 4. Could you please elaborate on what you think the impact will be on your members this February when the stay on third-party testing for lead content lifts? Have your members been provided with the information they will need to comply with these requirements?

Answer. When the Commission granted the stay a year ago, Chairman Tenenbaum wrote *"The extension of the stay was needed in order to give the agency more time to promulgate rules important to the continued implementation of the CPSIA and for the agency to educate our stakeholders on the requirements of those new rules."* That continues to be the case. The "15 month rule" has yet to be finalized, and there remain serious questions with the draft rules that need to be resolved. Moreover, with a year's worth of reasonable testing under our belts, it is becoming increasingly clear that the third-party testing environment is an unnecessary burden on businesses. Continuing the stay gives all stakeholders more time to create a stable, logically consistent, well thought-out, and well understood regulatory system. It also avoids a damaging job killing cost that will be imposed on businesses with *zero* gain in public safety. One of our members recently reported this to me with respect to the lifting of the stay.

> *Currently we use an XRF machine that we bought to do our lead substrate testing for our products. We deliberately buy components from trusted suppliers that are lead free. They rely upon process controls and XRF testing as well. There is some third-party testing done but most is done in house under XRF. Once the stay is lifted all that testing moves outside—either by us or by our suppliers. We have about 1,000 styles that have components that need testing—an average of about 7 components in each style (since zippers can be as many as 3 components). Many of those components are unique to each style so we can be looking at 7,000 tests at $50 a test for $350,000 of third-party testing. When you add in third-party testing for lead coatings—screen print—and flammable fabrics yau push us well over $1 million. These extra lab costs are occurring as everything*

else—including cotton which is at near record levels—are climbing. The XRF machine still has some use for screening but it mostly becomes a $25,000 paperweight.

Question 5. You identified the CPSIA mandated public database as one area where your industry has concerns. Please explain what your concerns are with this database.

Answer. Above all, we believe the database must be a reliable source of credible information that appropriately reflects its "dot gov" web address. As Chairman Tenenbaum stated in her February 17, 2010 ICPHSO address, ". . . Don't believe everything yon read on the Internet, except what you read on websites that end in dot gov." By this statement, Chairman Tenenbanm is pointing out that government websites are held to the highest standards as public resonrces. People expect government websites to provide credible information and the database should he no different—even *with* a disclaimer. Materially inaccurate information serves no one, can be detrimental to businesses, will ultimately damage both the credibility and overall success of the database and damage the credibility of the agency itself. The final rulemaking does not go far enough to ensure the credibility of the information posted to the database and the CPSC must take steps to guarantee that the posts are both reliable and in the public interest.

Question 5a. Would yon please tell us more about the resources that you believe yonr members will be forced to devote to following the database in order to address potential reports?

Answer. Members will have to devote time and resources to tracking information and allegations that are made on the website. Since the CPSC is under no requirement to actually remove materially inaccurate information, and yet is vested with the sole authority of determining what is materially inaccurate, companies are so far unsure if their efforts to correct the record (such as providing information that a particular product is a counterfeit) will even result in removal of offending entries. Especially with the advent of the CPSIA, product safety professionals have found even more demands on their time. Requiring them to also track a public database—especially one with the imprimatur of the Federal Government—to respond to ill informed and inaccurate allegations will result in even less time to devote toward actual product safety management.

Question 6. Where do you believe the CPSC can act to alleviate these concerns, and where do you think a legislative fix is necessary?

Answer. The CPSC has limited flexibility to alleviate our concerns with the database without a legislative fix. Most significantly, the CPSIA's database provision does not do enough to ensure the material accuracy of the reports of harm. While timely dissemination of information is important, materially inaccurate information is extremely damaging to businesses and will *never* benefit consumers. The legislation puts into place a very strict timeline for the CPSC to transmit the report of harm to a manufacturer within 5 days and then post the information onto the website within 10 days of transmission—regardless of whether an investigation for material inaccuracy is pending. The database provision must be amended to require the Commission to not post information should the report of harm potentially contain materially inaccurate information.

However, the agency can take some regulatory actions as well since the CPSC's database rulemaking created several additional concerns for businesses. For example, the CPSC expanded the list of those who can post to the database well beyond the scope of the CPSIA's finite list. Including these additional categories of submitters will dilute the effectiveness of the database as more materially inaccurate information will likely be posted. Many of these categories of submitters will not have first hand knowledge of the incident, have access to the consumer product involved, and may have ulterior motives in posting information on the database.

Limiting the scope of the database as much as possible upon implementation will be fundamental in the database's success. This approach will limit mistakes, minimize the impact of the mistakes, and give the CPSC more flexibility to make changes to the database as it develops.

Question 7. Chairman Tenenbaum and Commissioner Northup discussed budgetary issues related to the CPSC. What impact do you helieve that the CPSIA has on the effective utilization of resources by the CPSC?

Answer. The CPSIA has directed many of the CPSC's resources away from important safety regulatory activities and focused the agency's limited resources on burdensome rulemaking activity. These rulemakings, while important to industry's compliance efforts and understandings, have had little impact on improvement of consumer product safety. The predominant problem with the CPSIA is that the agency is not allowed to prioritize based on actual product safety regulatory need

and is forced to issue dozens of rulemakings on a very short, rigid timeline. Moreover, finding solutions for CPSIA compliance issues has been an extremely onerous process as the CPSIA leaves the agency little flexibility to provide necessary relief to bnsinesses. For example, in order to determine a component or material compliant with the lead standard, the agency has had to spend months of time and significant resources analyzing prodncts and materials that are of little to no risk to consumers and children. As noted in my oral comments, starting in 2008, AAFA worked closely with the CPSC to show there is no lead in textiles. AAFA and several retailers sent in thousands of test reports showing that lead would never appear in fabric. The textile determination was not finalized until August of 2009. While the determination has been very helpful for industry as now manufactnrers do not have to test textiles for lead, we helieve Congress should revisit the CPSIA to enahle the CPSC to make these determinations more quickly. We further believe that Congress needs to give the agency more flexibility to consider risk so the CPSC can appropriate their funds to real product safety concerns.

Question 8. You expressed concerns with the CPSIA's lack of clear preemption with regard to state and local laws in your opening statement. Please clarify what your concerns are with regard to preemption. Do you have any specific examples?

Answer. A common-sense product safety regulatory approach is to have a strong Federal regime that preempts state regulations. Logic tells us that a product crossing state lines does not make it safe or unsafe. It follows that product safety regulations should be uniform throughout the United States. Complying with various labeling requirements and chemical content standards is confusing and burdensome for companies.

California Proposition 65, which is specifically exempted from preemption under the CPSIA, presents a whole range of challenges. Among other things, it relies on different compliance and enforcement mechanisms that often mean companies have to work toward separate CPSIA and Proposition 65 compliance targets.

Even the CPSC battles with these issues. Just recently, the news reported about a motber in Georgia finding a product with a California toxic substances warning label on it (see *http://www.wsbtv.com/news/26334677/detail.html*). CPSC spokesperson Scott Wolfson responded to the mother's concerns with, "We respect California law, but parents should know that the safety of their children is not necessarily at risk if they see that label."

Question 9. Chairman Tenenbaum discussed the idea of a "functional purpose" exemption to the lead standard. What are your thoughts on that proposal?

Answer. While we agree that the CPSIA exemption standard is too strict, a "functional purpose" test is not an appropriate solution. The CPSC's job is to assess the safety of products—not to determine whether lead is a necessary component of the product or material. Adding the additional "functional purpose" test would result in the CPSC wasting too much time and resources on an evaluation that does not help answer the real, relevant question: is the product safe? We should grant the CPSC the authority to make simple determinations based on their assessments of whether a product or a class of products presents a risk of lead absorption. We recommend Congress look at Commissioner Northup's statement accompanying the Commission Report to Congress Pursuant to P.L. 111–117, Conference Report 111–366 on Recommendations to Amend the CPSIA. She suggested Congress look at amending the lead exemption standard to allow for a "*de minimis*" amount of bioavailable lead in products. In her words:

> The point of a *de minimis* bioavailability or absorption exception is to concentrate the enforcement resources on the real problems as well as to avoid obtaining negligible benefits at enormous cost . . . A particular virtue of the *de minimis* approach is that it would not require product-by-product approval by the agency, because manufacturers could determine for themselves whether their products meet the standard (subject to penalty and liability for errors) without having to petition the agency for an exclusion.

Question 10. In your testimony, you identified eight recommendations for changes to the CPSIA and CPSC. Your eighth point was that "there is more to the CPSC than CPSIA." Please explain what you meant by that statement.

Answer. Overall, it seems as though the CPSC has spent the majority of their resonrces in the past two and a half years on CPSIA-related activity. Be it writing interpretive rulemakings, explaining to businesses how the regulations will apply to them, hosting workshops or simply carrying out the mandates of the legislation—implementing the CPSIA has been the priority of the agency to a point where other equally important functions have languished. The agency has not been able to keep

up with the press of work from the CPSIA, and in so doing may have not spent adeqnate attention on other key enforcement and regulatory priorities.

Moreover, the legislation forces the CPSC to spend extraordinary amount of time rehashing old issues. In my oral statement we discussed our effort to show that there is no lead in textiles—a fact well known to all. In another example, the legislation requires the agency study the toxicity of phthalates—a study the CPSC conducted many years ago already. The CPSC determined that phthalates were not a risk to children and so to require the CPSC to condnct the same study is an inefficient use of resources. Giving the agency the flexibility to allocate their resources to address real safety and public health needs is crucial so the agency can deal with new chemical and product concerns as they arise.

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A REVIEW OF CPSIA AND CPSC RESOURCES

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

FEBRUARY 17, 2011

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A REVIEW OF CPSIA AND CPSC RESOURCES

THURSDAY, FEBRUARY 17, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PREPARED STATEMENT OF HON. MARY BONO MACK

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

Mr. Butterfield, you are now up to bat.

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. SCHAKOWSKY. I thank the gentleman very much.

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

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

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

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

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

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

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

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

Mrs. BONO MACK. I thank the gentleman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentleman.

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

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

Chairman Tenenbaum, you are recognized for 5 minutes.

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

STATEMENT OF INEZ TENENBAUM

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

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

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

Second, I have focused on changing the CPSC's internal processes so that the agency is more assertive and more capable of addressing safety challenges presented by thousands of types of consumer products imported from all over the world. In the last year the Commission has released a strategic plan that establishes a plan to make the CPSC the global leader in consumer product safety. We have established a new office of education global outreach and small business ombudsman that has already begun to provide outreach to small businesses and crafters. We have embarked on a substantial upgrade of our information technology system which has formed the backbone of the database and our new CPSC.gov homepage.

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

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

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

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

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

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

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

[The prepared statement of Ms. Tenenbaum follows:]

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

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

Subcommittee on Commerce, Manufacturing and Trade

"A Review of CPSIA and CPSC Resources"

February 17, 2011

Good morning, Chairman Bono Mack, Ranking Member Butterfield, and Members of the Subcommittee on Commerce, Manufacturing and Trade. I am pleased to be here today to provide an update to the Subcommittee on actions the U.S. Consumer Product Safety Commission (CPSC) has taken over the past 18 months and the progress we have made to protect American children and families from both existing and emerging product safety hazards.

Since assuming the Chairmanship of the Commission in July 2009, I have focused on three key objectives. First, I have worked diligently to implement the Consumer Product Safety Improvement Act of 2008 (CPSIA) and use that Act's new authorities in a manner that is both highly protective of consumers and fair to industry stakeholders. Second, I have focused on changing the CPSC's internal processes, so that the agency is more assertive and more capable of addressing safety challenges presented by thousands of types of consumer products imported from all over the world. Third, I have focused on proactive prevention of consumer harms: identifying emerging hazards and keeping those products out of the stream of commerce.

Fair and Effective Implementation of the CPSIA:

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

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

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

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

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

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

The Public Searchable Database: In March 2011, we will unveil our new publicly available database on the safety of consumer products, which was mandated by section 212 of the CPSIA. This database, which is an important element of the Commission's overall effort to upgrade its antiquated Information Technology systems, will provide a powerful source of information for consumers, allowing them to quickly determine whether products they already own, or are considering purchasing, are associated with safety hazards or recalls. It also will allow consumers to play a critical role in safety by empowering them to submit information about potential product hazards for inclusion in the database.

I recognize that the rollout of this database has caused concern among some in the manufacturing community who believe that it will present "unfiltered" information that will be harmful to the business community. I want to assure this Subcommittee that CPSC staff has worked tirelessly to address these concerns and to ensure that the database is fair to all stakeholders while also fulfilling the intentions of Congress.

First, the database will not include reports of harm submitted anonymously. Any reports filed must include contact information for the CPSC's internal use. Second, the CPSC will give the product manufacturer 10 business days to respond to a report of harm, to provide comment on the report, and to let the Commission know if the submission contains confidential or materially inaccurate information. The rule requires the Commission to remove or correct information in the database within seven business days that it has determined to be materially inaccurate. Manufacturers also have the right to comment on the reports and to have those comments posted as part of the publicly accessible record.

At the same time, however, I think it is important to provide a reminder of just how critical a resource this database will be for consumers. Rather than use my words, I would like to repeat the words of Lisa Olney, whose daughter died in a defective portable crib just after her first birthday in 2002. Ms. Olney posted the following on the *Kids in Danger* web blog:

> *On December 19, 2002, my daughter Elizabeth, just 13 months old, died in a poorly designed play yard. I live my life often looking back through "what ifs" and "should haves," but I've learned to give most of that up in order to save myself from being a horribly miserable individual. Instead, I realize the importance of focusing on efforts to protect our children so that no parent has to suffer what I have, along with too many other victims of unsafe children's products. The CPSC database is going to protect*

millions of children, because it provides a place to go when considering the choices parents make when purchasing products, especially those products intended to be beneficial to our children's safety.

This database will prevent injuries and save lives. Congress recognized this when it added section 212 to the CPSIA, and I look forward to seeing this important tool fully implemented this March.

A Reinvigorated Commission:

New CPSC Strategic Plan: During my confirmation hearings in the summer of 2009, I noted that one of my key goals for the Commission was to align its priorities with the challenges we face in the global economy. To address this, the CPSC launched a comprehensive strategic planning initiative earlier this year to update the Commission's outdated 2003 Strategic Plan. Out of this effort, we recently released the Commission's new 2011-2016 Strategic Plan, which lays out five key goals and also details programmatic objectives that will allow the CPSC to establish itself as the global leader in consumer product safety.

New Office of Education, Global Outreach and Small Business Ombudsman: As Chairman, I have heard from many small businesses and crafters who have asked for additional outreach and support from the Commission as they work to produce safe products and comply with the requirements of the CPSIA. I take these concerns very seriously and have made providing support and outreach to small business entities and other industry stakeholders a key priority.

On September 22, 2010, the Commission voted to create a new office to coordinate and provide outreach to various domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, and foreign governments. Within this office, we have a full-time Small Business Ombudsman who is dedicated to serving the nation's many smaller businesses in the area of product safety. In particular, special attention will be given to developing "plain English" information tailored to small businesses and small batch manufacturers so that they can understand and comply with new standards.

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

A New Focus on Prevention:

Import Surveillance: Traditionally, the Commission has spent the bulk of its resources investigating harmful products in the marketplace. This will always form a substantial part of the CPSC's activities, but I believe the more effective approach is ensuring that harmful products never even enter the country. To that end, I have taken a number of steps to add additional technological and human resources to the Commission's Import Surveillance Division. This Division works directly with the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) to keep dangerous products out of the United States.

On the technological side, the CPSC recently executed two interagency Memorandums of Understanding (MOUs) with CBP that allow us to access more "real time" importer information and target the most dangerous incoming shipments. The first of these MOUs, signed in April 2010, allows CPSC personnel to work at CBP's Commercial Targeting and Analysis Center (CTAC) in Washington, DC, and access manifest entry data collected by CBP. This, in turn, allows Import Surveillance Division personnel at the ports to target high-risk shipments prior to their entry into the domestic stream of commerce.

The second MOU, signed with CBP in August 2010, gives the CPSC access to information in the Treasury Enforcement Communications System (TECS). This will assist CPSC Import Surveillance staff at the ports by providing them with additional information to improve local targeting and interdiction of dangerous products.

The CPSC is also actively involved in supporting the Importer Self Assessment – Product Safety (ISA-PS) initiative that is currently being piloted by CBP. The ISA-PS is intended as a partnership between CBP, CPSC, and importers to ensure product safety compliance. It is based on a voluntary approach that provides meaningful benefits for importers who demonstrate readiness to assume additional responsibility for managing and monitoring their own product safety compliance.

We have also taken steps to increase CPSC's physical presence at ports of entry. In fiscal year (FY) 2008, the Import Surveillance Division only had five full-time employees (FTEs), and of those only three FTEs were actually stationed at ports of entry. During FY 2010, we expanded staffing in the Division to 18 FTEs, with 14 FTEs actually stationed at ports of entry. I am very pleased to announce that, as of November 11, 2010, the Division now has 25 FTEs, with 19 FTEs collocated at 15 different ports of entry. Subject to appropriations, we hope to put CPSC staff at even more ports of entry in the future.

Putting more "cops on the beat" has already yielded substantial positive results. In FY 2010, we performed 6,953 screenings at ports, collected 1,776 samples for testing, and of those found 987 that violated CPSC standards. At the same time, we have also seen the number of recalls start to drop – from 563 in FY 2008 to 428 in FY 2010. Maintaining those positive trends is a key goal for the upcoming year.

The Safe Sleep Team: The overall safety of cribs and the infant and toddler sleep environment is a critical concern of the CPSC and a personal priority of mine. Parents across the country expect cribs to be a sanctuary for their children, regardless of price or size. Unfortunately, that is not always the case. In the past nine years, there have been at least 32 deaths attributed to drop-side crib failures. That, in and of itself, is a tragic number. However, the majority of crib deaths are still directly linked to the use of soft bedding in the crib.

To address this, I directed Commission staff to embark on a two-prong action strategy. The first prong was to recall old, dangerous drop-side cribs in the marketplace and promulgate new mandatory crib safety rules that will prohibit dangerous drop-side cribs from ever being sold again in the United States. I am pleased to report that the new mandatory crib safety rule was approved by the Commission is a unanimous vote on December 15, 2010.

The second prong of this initiative is education: teaching parents and caregivers how to keep the inside of cribs free from suffocation risks like stuffed animals, comforters, and pillows. In partnership with the American Academy of Pediatrics and a child advocacy group called Keeping Babies Safe, we have a wonderful new Safe Sleep video that we are working to have shown in maternity wards and pediatrician's offices around the country. This video is currently available on the CPSC's website, and I urge Members of the Subcommittee to view the video and see its powerful message.

Rapid Response to New Hazards: The Commission has increased its efforts to provide a rapid response to new and emerging hazards. One example of this response is the CPSC's efforts to stop the use of toxic metals in children's products. Earlier this year, it came to our attention that some foreign manufacturers might be using cadmium or other toxic metals as an effort to get around the lead limits for children's products. I sent a strong message to Asian manufacturers and regulators that this was unacceptable and that we would not allow there to be an influx of products with cadmium like we saw a few years ago with lead. The Chinese government sent out a directive a few weeks later on cadmium that used language similar to mine. It appears that we have stayed ahead of this issue.

Despite this early success, however, the Commission will remain vigilant in this area. In response to the possible threat, the CPSC has taken aggressive action to police the market for children's products that may contain harmful levels of

cadmium. In addition, Commission staff recently released a guidance document providing Acceptable Daily Intake (ADI) limits for cadmium. We also sent this document to several standards setting bodies – including the committee that oversees the ASTM F963 toy safety standard – with instructions to take action on this issue. This year, we will also look at the use of other toxic metals such as barium and antimony, and the CPSC will not hesitate to take further action in this area if voluntary efforts prove insufficient.

Moving Forward:

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

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

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

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

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

I recognize some want to go further than this, and reopen the entire Act. That would be a mistake. Calls for a return to a completely "risk-based" lead paint and content standard are one example of a proposal that is seriously ill-advised. Lead is a contaminant, and a powerful neurotoxin. It is a particular threat to the developing brain of the fetus, infant, and young child, with documented negative effects on behavior and permanent loss of IQ points.

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

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

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

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

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

STATEMENT OF ANNE NORTHUP

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

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

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

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

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

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

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

Thank you very much.

[The prepared statement of Ms. Northup follows:]

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

Hearing: "A Review of CPSIA and CPSC Resources"

Before the

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

Subcommittee on Commerce,
Manufacturing, and Trade

February 17, 2011

Chairman Bono Mack and Ranking Member Butterfield, thank you for the opportunity to provide testimony to this Subcommittee to inform your review of the Consumer Product Safety Improvement Act of 2008 (CPSIA) and the resources of the Consumer Product Safety Commission (CPSC). This Commission has a proud history of assessing risk and providing leadership in consumer product safety issues across a variety of industries.

As a Commissioner since August of 2009, I now have a tremendous appreciation for the work that goes on in an agency, including the time and effort that agencies expend implementing the laws Congress passes. It is not a simple task, and my colleague, Chairman Tenenbaum, has put in countless hours to ensure that the Commission meets its deadlines and fulfills the difficult tasks it has been given.

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

I. Background on the CPSIA

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

II. Economic Impact of the CPSIA

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

This anecdotal data does not reflect the full breadth of the law's requirements, because the most onerous provisions of the law have yet to go into effect. The law's widest reaching mandate—third-party testing of all children's products for lead content – is stayed until December 31, 2011. In addition, the Commission has yet to implement the law's mandate to third-party test to the phthalates or toy standards. When the CPSC is fully implemented, the entire process companies must go through to produce a toy or children's product will have drastically changed. Under the law, all toys must be tested at third-party labs for lead and phthalates, as well as to the toy standard, ASTM-F963, which the CPSIA made mandatory. As a result, a doll maker will be required to send to a third-party lab to be tested for lead, phthalates and any applicable rules under the toy standard, every component part, including each paint color used on the eyes, each button, the hair, and all of the accessories. After the components are fully assembled, the finished product will need to be sent back to a third party lab for additional testing and certifications related to the toy standard. Companies tell us that these requirements stifle innovation and product variety by erecting significant cost barriers to adding to toys new accessories, new colors, or other variations. For example, a large toy manufacturer told me that his company has had to "de-spec" certain toys in order to afford the law's new costs, which means removing accessories, moveable pieces or other parts – or, in the manufacturer's words, "taking the fun out of toys."

According to a brief small business analysis by our agency, the cost to test one toy could range from $3,712 to $7,348—not taking into account that the toy will likely change to stay competitive for the next Christmas season, or sooner, and every material change triggers a whole new set of tests.[2] And these costs do not include the cost to certify to these third-party tests, to add a tracking label, or to maintain the data and paperwork so that every component and material can be traced back to its specific test and lot number.

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

[2] Regulatory Flexibility Analysis: Testing and Labeling Pertaining to Product Certification, 16 CFR Part 1107, Notice of Proposed Rulemaking, CPSC Docket No. CPSC-2010-0038, May 20, 2010

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

In fact, while the costs to companies of reengineering products to meet the lead limits has been steep, many tell us that the ongoing costs to third party test, label and track every component have been and will continue to be much higher—all without any measurable benefit. A company making furniture for children's rooms would need to: 1) determine if its product is "primarily intended" for children 12 and under---an issue for which the Commission has provided ambiguous guidance; 2) submit for testing to a third-party lab every part of every piece of furniture that may be accessible on a children's product, including nuts, bolts, and varnishes (one piece of furniture may have fourteen different coats of finish); 3) certify each component based on each of these tests; 4) add to each piece of children's furniture a tracking label containing a lot number that can trace each component to its specific certification and test; 5) maintain records for all tests and certifications for all parts of each children's product; and 6) start this process all over again, if they decide to make a material change to the product, including a change of color or manufacturing process.

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

The CPSIA fails to make any distinction between large and small businesses, or foreign and domestic manufacturing, thus giving an obvious competitive advantage to large manufacturers who produce items overseas, where manufacturing and testing costs are cheaper. Meanwhile, the backbone of our economy, small businesses—from screen printers to manufacturers of chemistry sets for schools—are being forced to cut jobs or take other drastic measures due to the cost of compliance.

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

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

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

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

In both 2009 and 2010, the agency focused its time and resources principally on implementing the CPSIA. Although the Commission is a relatively small agency (FY 2010 funding of $118 million), its budget has grown by nearly 48 percent since the law's passage in 2008, with both old and new resources shifted away from more risk-based priorities to implement the arbitrary, non risk-based mandates of the CPSIA, including the lead-in-substrate and phthalates bans, the Public Database, and the third-party testing, certification and labeling requirements. Over the last two and half years, the Commission has issued an estimated 3,500 pages of regulations and guidance documents as a result of the CPSIA—a large portion of which must be read and understood by every affected company in order for them to grasp the law's complex requirements.

The diversion of the Commission's resources to CPSIA implementation reduces our focus on genuine safety hazards. Our agency is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products—but we cannot fulfill this mission if our time is spent primarily enforcing the CPSIA, including its complex, non-risk-based, testing and certification requirements.

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

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

IV. Proposals to Immediately Ameliorate the CPSIA's Effects

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

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to

product standards, and the potential reputational and litigation costs that will result from the upcoming Public Database. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.

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

Because the CPSIA's new requirements are not risk-based, manufacturers are spending time and money satisfying arbitrary standards, rather than on improving the safety of their products to the benefit of consumers. In fact, many of these requirements amount to massive new paperwork and tracking systems, rather than actual modifications to the products themselves. The American Home Furnishings Alliance writes in a letter to Commissioners:

> [T]here has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008....The testing is simply being done to attempt to prove a negative.[6]

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

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

labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in their public comments on the Component Parts rule:

> As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.[7]

The law imposes on small businesses onerous requirements that are hurting the economy, without any evidence of a safety benefit. The CPSIA's lead content standard, interim-ban of phthalates, and all third-party testing requirements are not based on risk. The CPSC has the authority to impose these types of requirements on any product or industry, if it determines that a risk exists and these costs are necessary to reduce or eliminate the risk.

Finally, there is a cost to consumers—not only in the loss of jobs in a struggling economy, but the loss of choice. Many manufacturers can afford the costly mandates of the law only by reducing their product lines, leaving the children's product market, or "de-specing" their toys – with no offsetting improvement in safety. The costs of complying with the CPSIA will discourage newcomers to the market and choice will be reduced, even as prices increase. Some international toy makers have even decided to leave the American market due to the costs imposed by the CPSIA, although they are still offering their products to European consumers.[8]

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

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

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

[8] One American importer of toys lists on its website the European brands that it no longer offers for sale in the United States due to the CPSIA: http://www.eurotoyshop.com/getEndangeredToys.asp

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

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

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

Notwithstanding the statute's clear language, the Commission's Majority adopted a rule that greatly expanded the list of allowable submitters to the Database. For example, the Commission's regulation defines "consumers" to include "attorneys", and "public safety entities" to include "consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations." 16 C.F.R. § 1102.10(a). This expansion goes against the statutory purpose that the Database be "useful" for consumers and not disseminate erroneous information.[9] Indeed, the Majority has expanded the list of submitters to such an extent that ***anyone*** can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

It is important that individuals with first-hand knowledge of incidents of harm involving consumer products be permitted to submit reports to the Public Database. However, groups or individuals with no direct knowledge of the incident, who did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the Database. There are several reasons why first-hand knowledge is essential, but the primary reason is ***accuracy***. A Database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpful to consumers using the Database to determine which consumer product they should purchase.

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

Trial lawyers or other groups with self-serving motives will use the Commission's Database to look for potential trends and patterns of hazards. Under the Majority's Database rule, these same groups could also submit to the Database false and unverifiable reports to fuel a lawsuit. It is no

[9] On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: "We have tried to find something that is balanced, that provides information, but also has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous."

coincidence that these groups are strongly in favor of this public Database and of the Majority's interpretation of the statute, which expressly allows them to submit reports of harm.

There are many advocacy groups and associations that serve a role in public policy, but may not have the incentive or ability to provide specific and accurate product identification information to the Commission's Database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes. One cause of house fires is the use of cigarette lighters, which are consumer products. Thus, the NFPA has a strong incentive to add all reports of house fires caused by lighters to the Commission's public Database. The more incidents in our Database, the better case they can make that new fire prevention technology – which some of their members sell—should be mandated in homes.

But it is not important to the NFPA whether it correctly identifies a brand of lighter in an incident report. A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular brand of lighter is not relevant to its goal of promoting sprinklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless unverifiable and potentially inaccurate claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

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

The problems caused by over expanding the list of submitters to the Database could have been reduced if reports of harm had to be verified, or at least verifiable, before being published. But the information solicited on the Database is inadequate to this purpose. With respect to the submitter, the Database requires that a "self-verification" box attesting to the report's accuracy be checked. But this will do little to discourage or prevent inaccurate reports of harm. Self-verification in the context of the Database rule means only that the report is accurate "to the best of the submitter's knowledge". The "best" knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened -- including the exact type of product, the recent history of the product, or even the precise cause of the incident.

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

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

Carrying this example one step further, consider a scenario: Company A sells five million high chairs and Company B sells 5,000 high chairs. Company A has six incident reports on the Database and Company B has one incident report (all of which are unverifiable). Thus, a consumer could falsely conclude that Company A's high chair is less safe, even though simply due to the number of units it sold, it is more likely that people own that high chair—and more likely that reports on that high chair would make it into our Database. Or, it is also possible that some of the reports about Company A's high chair actually pertained to older models of the high chair that are no longer for sale, which means the information may be entirely irrelevant to people using the Database to look for safety information about current products on the market.

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

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

Notably, the Commission's Notice of Proposed Rulemaking on the Database originally included an interpretation similar to the one I recommended. For example, § 1102.26 of the NPR states: "If a request for determination of materially inaccurate information is submitted prior to publication in the Database, the Commission may withhold a report of harm from publication in the Database until it makes a determination."[10] 75 FR 29180.

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[10] The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the Database, the Commission may withhold a report of harm from publication in the Database until it makes a determination." 75 FR 99, at 29161. And this: "We propose that in cases where a claim of materially inaccurate or confidential information is under

That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible, reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, many if not most of the commenters assumed that incidents would not be published to the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consumer groups—argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority's final rule now forbids delaying publication in those circumstances, and fails to establish any specific protocol for handling requests for determinations. Moreover, our agency's fiscal year 2011 appropriations request did not include even a single new FTE to resolve pending claims of material inaccuracy, and our fiscal year 2012 request does not provide sufficient resources to account for an anticipated increase in reports. These facts alone make clear to the business community how low the CPSC prioritizes its responsibility to resolve claims that reports of harm contain false or misleading information about products.

Because the Majority's Database rule all but guarantees that the Database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal Databases we have today. Frankly, this is one of my greatest fears—that Commission staff will be overwhelmed by inaccurate reports (or the reports that get picked up by the media) and unable to use their expertise to search objectively for genuine hazards. As the Database is swamped with misleading or inaccurate reports, they will drown out the accurate ones.

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

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

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review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 99, at 29170 (Response to summary 26)(emphasis added).

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

V. Proposals to Amend the CPSIA

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

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

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

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

Drawing the line at the level of absorbable lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead in dirt that is eaten or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the Environmental Protection Agency standard for lead in soil is 400 ppm (http://www.epa.gov/lead/). This standard for safety is less strict even than the current 300ppm lead content standard provided in the CPSIA for children's

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

In many other laws relating to absorbable lead levels, standards exist to allow for unharmful absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.[11] The Safe Drinking Water Act declares "zero lead" to be the objective for the amount of lead in water, but pipes carrying the water are permitted to be 80,000 parts per million (8 percent) lead – allowing for negligible, trace amounts to exist in the water we drink.[12] California Proposition 65[13] as well as the European Union[14] allow for a negligible amount of absorbable (or soluble) lead in children's products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)[15] is then taken into the body every day through the food we eat and the air we breathe.

Unlike these rational rules, the CPSIA, as interpreted by the Majority, has led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, the CPSIA has led to a ban on children's books published before 1986, because the ink in them is likely to contain lead above the allowable level. Some at the Commission and many Members of Congress have expressed dismay that books have been affected, because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed in meaningful amounts. Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a bicycle handlebar, the CPSIA treats these items in exactly the same way it treats products that truly could hurt a child by increasing the blood lead level.

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

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[11] "Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children," Food and Drug Administration, November 2006: http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Metals/Lead/ucm172050.htm

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

[13] California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65 - http://www.oehha.org/prop65.html, Children's Health at OEHHA - http://oehha.ca.gov/public_info/public/kids/schools041707.html

[14] European Committee for Standardization (CEN), EN 71-3 Safety of Toys-Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994: http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/toys/

[15] Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22

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

Finally, children do not live cooped up inside of their rooms surrounded only by "children's products." Children live throughout the house, run around outside, and play with adult products such as pots, pans, furniture knobs, door handles, appliances and TV remotes. For example, the new costs associated with this law will affect a young child's lamp (usually turned off and on by the parent) but not the lamp in the den or the living room that a child is just as likely to turn off and on. These products do not threaten a child's health due to their lead content, because the lead in them is not absorbable. This further illustrates the absurdity of the CPSIA's requiring the unnecessary reengineering of children's products with lead, while children are just as likely (if not, more likely) to play with everything else in the house.

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

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

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

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

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

While the Commission has the authority to provide flexibility regarding the *frequency* of third-party testing requirements under the law, it does not have the ability to exempt companies altogether from burdensome testing requirements that do not improve safety. More specifically, the Commission lacks the authority to exempt manufacturers of otherwise safe products from the following: 1) the initial, third-party test of every product or component to the law's lead, phthalates and other mandatory standards; 2) a new, third-party test of any product or component after any "material change" in the product; or 3) the cost to certify, provide tracking labels, and maintain the data to trace each and every component. Without changes to the statute, the Commission's hands are tied in addressing these arduous requirements, which are the main CPSIA costs burdening small businesses.

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

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

Ranking Member Henry Waxman of the House Energy and Commerce Committee last year proposed a very limited "fix" to the problems of the CPSIA, known as a "functional purpose" exemption. The proposal would authorize the Commission to exempt a company's products from the CPSIA's lead limits if the company can show that the lead in the product serves a "functional purpose." This "fix" would do more harm than good.

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

in our January 2010 Report to Congress. The concept is too narrow, expensive, and uncertain to provide much relief, particularly for small businesses that are unlikely to have the resources available to determine available lead substitutes or even to put together as successful petition to a federal agency. Most companies will not have the in-house expertise (metallurgic, etc.) to make the showing that would be required to meet the burden of proof for an exception. So just as the exorbitant testing costs of the CPSIA favor large companies (who manufacture overseas) over small ones, so too will the exemption process favor the large companies with greater ability to spread their costs.

Furthermore, forcing a component-by-component review of exceptions to the law does nothing to enhance safety, and it converts the Commission from a safety oversight agency (like the FAA) into a product approval agency (like the FDA). That will slow the pace of innovation and dramatically increase the cost and lead time for bringing new products to market. Requiring separate exemptions for each product is also a very inefficient way to regulate safety. Even under the functional purpose exemption, the product cannot be a safety hazard. So if the amount of absorbable lead in a particular material is determined to be safe and necessary to a product's function, the material itself should be exempted. Otherwise, multiple companies will be required to incur the same costs to establish the material's safety, and the CPSC will repeatedly make the same safety determination for different products.

VII. Conclusion

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

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

ECONOMIC IMPACT OF THE CPSIA - EXAMPLES
2009 and 2010

Costs associated with the CPSIA

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

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

3. In an article entitled "Makers Are Pushing Back on Toxic-Toy Law" (*Wall Street Journal*, March 5, 2009 http://online.wsj.com/article/SB123621357629835121.html), Joe Periera reported the following loss statistics:

    - Goodwill Industries to destroy **$170 million** in merchandise.
    - Salvation Army expects to lose **$100 million** in sales and disposal costs.
    - The Toy Industry Association estimates inventory losses at **$600 million**.
    - Members of the Coalition for Safe and Affordable Childrenswear lost **$500 million.**
    - The California Fashion Association estimates troubled inventory at **$200 million**.
    - The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least **$125 million**.

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

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

"TIA: Safety Act puts $2B crimp in toy biz"
3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members' businesses could total **$1 billion**. See: http://www.1st5ive.com/harley-davidson/motorcycles/2009/02/2452/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually

Examples of businesses closed due to CPSIA
Most names provided by the Handmade Toy Alliance

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

Businesses that have stopped production of children's lines due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Creative Artworks – Greenwood, AK
2. Craftsbury Kids – Montepeliar, VT
3. "Pockets of Learning" *Special Needs Products Being Driven from Market By Testing Costs – Rhode Island*
4. Creative Learning Connection

5. Giverny, Inc / Mini Mc Geology
6. HABA
7. Challenge & Fun, Inc. - http://online.wsj.com/article/SB10001424052748703478704574612573263963560.html
8. Hands and Hearts Far East History Discovery Kit – Greenwood, SC
9. Moon Fly Kids – Las Vegas, NV

Businesses that closed and list the CPSIA as one of the factors
Most names provided by the Handmade Toy Alliance

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

Other companies hurt by retroactivity of the CPSIA's lead content ban:

1. Gymboree – "change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete"
    i. http://www.reuters.com/article/idUSBNG44760220090305

2. Constructive Playthings, Inc – "'We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc....The banned products include beach balls, inflatable toy guitars and blow-up palm trees.'
    i. http://online.wsj.com/article/SB12362135762983512l.html

Businesses no longer exporting to the U.S. due to the CPSIA
Most names provided by the Handmade Toy Alliance

1. Hess – Germany

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

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

> *Endangered Toys The CPSIA (Consumer Product Safety Improvement Act) has unintended consequences. Now, some European toys are no longer available in the USA.*
>
> http://www.eurotoyshop.com/

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

> Association of Home Appliance Manufacturers
> International Sleep Products Association
> Retail Industry Leaders Association
> Specialty Graphic Image Association
> American Coatings Association
> The Carpet and Rug Institute
> National Retail Federation
> Association of American Publishers
> Consumer Healthcare Products Association
> Toy Industry Association
> Glass Association of North America
> American Honda Motor Company, Inc.
> Society of the Plastics Industry, Inc
> American Home Furnishings Alliance
> Sporting Goods Manufacturers Association
> Handmade Toy Alliance
> Consnmer Specialty Products Association
> Footwear Distributors and Retailers
> Fashion Jewelry Association
> Craft and Hobby Association

National Association of Manufacturers
Halloween Industry Association
American Apparel and Footwear Association
Juvenile Products Manufacturers Association
National School Supply and Equipment Association
National Federation of Independent Business
Promotional Products Association International
Bicycle Product Suppliers Association

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

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

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

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

Ms. TENENBAUM. I am sorry.

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

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

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

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

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

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

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

Ms. BUTTERFIELD. Thank you, Madam Chairman.

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

Ms. TENENBAUM. I am trying to be.

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

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. Yes, that is true.

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

Ms. TENENBAUM. That is true.

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. Yes.

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

Ms. TENENBAUM. That is true.

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

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

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

Ms. SCHAKOWSKY. Thank you.

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

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

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

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

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

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

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

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

Mr. HARPER. Thank you, Madam Chair.

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

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

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

Mr. HARPER. Thank you, Madam Chair.

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

Ms. SCHAKOWSKY. My certain, OK, sorry.

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

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

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

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

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

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

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

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

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

Ms. SCHAKOWSKY. I yield back.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mrs. BLACKBURN. OK.

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

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

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

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

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

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

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

Mrs. BLACKBURN. Yield back.

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

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

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

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

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

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

Ms. NORTHUP. I have missed you.

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

Ms. TENENBAUM. Three million.

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

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

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

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

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

Mr. TOWNS. Thank you, Madam Chair.

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

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

Mr. POMPEO. Thank you, Madam Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. POMPEO. Thank you, Commissioner Northup.

I yield back my time.

Mrs. BONO MACK. I would thank the gentleman.

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

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

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

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

Ms. NORTHUP. Thank you.

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

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

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

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

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

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

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

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

Mr. DINGELL. That makes for intelligent regulation.

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

Ms. TENENBAUM. No.

Ms. NORTHUP. Yes.

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

Ms. TENENBAUM. Yes.

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

Mr. DINGELL. The little guys don't.

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

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

Mr. DINGELL. That is a fair answer.

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

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

Ms. TENENBAUM. No.

Mr. DINGELL. Commissioner?

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

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

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

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

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

Ms. TENENBAUM. Yes.

Ms. NORTHUP. Yes.

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

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

Mrs. BONO MACK. Without objection.

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

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

Ms. TENENBAUM. No.

Ms. NORTHUP. Yes.

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

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

Mr. DINGELL. Commissioner?

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

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

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

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

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

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

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

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

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

Ms. NORTHUP. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

Ms. NORTHUP. Thank you.

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

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

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

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

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

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

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

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

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

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

Mr. OLSON. Yes, ma'am.

Ms. Northup, any comments?

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

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

Ms. TENENBAUM. They are our strongest partners.

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

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

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

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

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

Mr. OLSON. Thank you, ma'am.

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

The chair recognizes Congressman Lance for 5 minutes.

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

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

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

Mr. LANCE. Yes.

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

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

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

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

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

Mr. LANCE. Commissioner Northup, your comments?

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

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

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

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

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

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

Mr. LANCE. Ms. Northup.

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

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

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

Ms. TENENBAUM. First of all that was.

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

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

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

Ms. NORTHUP. Thank you.

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

The subcommittee will come back to order.

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

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

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

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

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

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

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

STATEMENT OF JOLIE FAY

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

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

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

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

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

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

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

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

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

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

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

Thank you for the opportunity to speak.

[The prepared statement of Ms. Fay follows:]

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

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

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

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

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

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

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

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

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

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

While the HTA has worked closely with the CPSC -- submitting comments on pending rules, attending CPSC sponsored workshops, regular email and phone contact with CPSC staff - we feel strongly that the current legislation does not grant the CPSC the flexibility to address our members' needs. Our membership is in need of a legislative fix that only you, in Congress, can give.

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

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

About the Handmade Toy Alliance

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

Handmade Toy Alliance Platform

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

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

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

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

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

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

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

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

Mrs. BONO MACK. I thank the gentlelady.
And now we will hear from Mr. Morris for 5 minutes.

STATEMENT OF WAYNE MORRIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[The prepared statement of Mr. Morris follows:]

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

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

Hearing on CPSC

February 17, 2011

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

February 17, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

February 17, 2011

Executive Summary

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

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

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

Mrs. BONO MACK. Thank you, Mr. Morris.
And, Mr. Woldenberg, you are recognized for 5 minutes.

STATEMENT OF RICHARD WOLDENBERG

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

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

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

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

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

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

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

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

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

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

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

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

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

[The prepared statement of Mr. Woldenberg follows:]

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

Re: A Review of CPSIA and CPSC Resources

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

As an operator of a small business making educational products and educational toys, I have had a front row seat for the implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA) by the Consumer Product Safety Commission (CPSC). On the occasion of this oversight hearing, I want to highlight the economic damage wrought by the CPSIA lead and phthalate rules without achieving any material improvement in safety statistics. I also want to draw attention to pending rules or rules currently being implemented with the potential to put additional pressure on manufacturers and retailers, all without benefit to children. Finally, I offer my suggestions on how to fix the CPSIA.

Children are our business and the safety of children is our number one priority. The CPSIA, unfortunately, purportedly to protect children from vaguely-defined dangers, has dramatically impacted our business model, reduced our ability to make a profit and create jobs, pared our incentive to invest in new products and new markets, and generally made it more difficult to grow our business. Given these considerable sacrifices, I wish I could say the law made our products safer, but the fact is that it hasn't. Our company, Learning Resources, Inc., has recalled a grand total of 130 pieces in a single recall since our founding in June 1984 (these products were all recovered from the market). Our management of safety risks was highly effective long before the government intervened in our safety processes in 2008. The government's "help" has not raised our safety game but it has reduced our bottom line and cost some of our employees their jobs.

The precautionary principle of the CPSIA attempted to fill perceived "gaps" in regulation by making it illegal to sell children's products unless proven safe prior to sale. Yet the glacial implementation of this law by the CPSC has tested and disproved the case for mandatory testing. Mandatory testing for lead-in-substrate and phthalates (the bulk of the testing requirements under the CPSIA) has not been implemented by the CPSC yet recall rates for lead in children's products have collapsed. [Notably, there has only been one recall for phthalates in U.S. history – a tiny recall of 40

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

The CPSIA significantly broadened the reach of federal safety regulation well beyond what was needed to deal with the lead-in-paint toy recalls that made headlines in 2007 and 2008. Under the CPSIA, the definition of a "Children's Product" subject to regulation now encompasses ALL products designed or intended primarily for a child 12 years of age or younger (15 U.S.C. §2052(a)(2)). This definition ensures that virtually anything marketed to children will be subject to the restrictions of the Consumer Product Safety Act (CPSA), irrespective of known or quantifiable risk of injury. Put another way, this definition ensures that many product categories *with a long tradition of safety* are now subject to the withering requirements of this law for the first time simply because they fall within the overly broad definition of a Children's Product. The affected safe products span the U.S. economy - books, t-shirts and shoes, ATVs, bicycles, donated or resale goods, musical instruments, pens and educational products. The popular assertion that the "common toy box" justifies this mighty list has no factual support but condemns these product categories to CPSIA's punishing jurisdiction. No one keeps their ATV, t-shirts, carpets, pens and toys in a big box. The absence of widespread actual childhood lead injuries caused by children's products suggests that the "common toy box" is matter of a parental supervision and no concern of the federal government.

The consequences of the change in the consumer safety laws to a precautionary posture has had notable negative impacts and promises to create further problems, namely:

a. **Increased Costs.** The new law creates a heavy burden for testing costs. From 2006 to 2011, our company's testing costs jumped ten-fold. We estimate that our testing costs will rise further when the CPSC (as anticipated) lifts its testing stay at the end of 2011, and could multiply again

if the CPSC enacts (as anticipated) its draft "15 Month Rule" on testing frequency and "reasonable testing programs". Testing costs are often thousands of dollars per product. Having employed one person to manage safety testing and quality control for many years, we now have a department of 5.5 plus an outside lawyer on retainer. We fund these jobs by discontinuing profit-producing sales, marketing and product development jobs – the CPSIA is NOT a stimulus program. *Personnel, legal and other out-of-pocket safety expenses (besides testing) have more than quadrupled in the last three years – all without improving our already exemplary safety record.*

b. **Increased Administrative Expenses.** The CPSIA requires that all children's products include tracking labels on both the packaging and the product itself. Rationalized as "analogous" to date labels on cartons of milk, tracking labels are in reality nothing but pure economic waste as applied to the vast array of "Children's Products" under the CPSIA. In our case, we have estimated that we will spend $50,000 in CPSIA tracking label expenses for every dollar of hypothetical recall cost "saved". Ironically, with the strict new safety regime in place, we believe the already small chance of a product safety problem has been reduced further – making our investment in tracking labels virtually worthless by definition. The money to pay for all this administrative busy work comes from foregone business opportunities. *We are being forced to liquidate our company to apply tracking labels that no one will ever use.*

An equally frustrating bureaucracy has sprung up around recordkeeping under this law. Burdensome requirements spawned by the government's new involvement in our quality control processes forced us to make large new investments in information technology with no possible return on investment other than to make the federal government happy. In addition, the pending CPSC draft policy on component testing promises to convert the simple task of obtaining a complete suite of safety test reports into a byzantine recordkeeping nightmare. We will now be forced to manage each component separately, tracking test reports on a component-by-component basis. Our product line of 1500+ products may have tens of thousands of CPSIA components

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

c. **Reduced Incentive to Innovate.** The increased cost to bring a product to market under the CPSIA will make many valuable – and economically viable – products uneconomic. To cover the cost of developing, testing and safety-managing new products, the prospective sales of any new item ("hurdle rate") is now much higher than under prior law. This means that low volume "specialty market" items, such as products serving blind or deaf children, are less likely to come to market and many new small business entrants may find themselves priced out of the market or unable to finance a start-up. It also means that mass market companies will gain yet another market advantage over their small business competitors. The experience of being regulated by the CPSIA depends very much on the scale of your business – the smaller you are, the worse it gets until it is utterly suffocating. Many small but important markets will be hurt, like educational products for disabled children.

d. **Crippled by Regulatory Complexity.** Our problems don't end with testing costs or increased staffing. We are being crippled by regulatory complexity. More than 30 months after passage of the CPSIA, we still don't have a comprehensive set of regulations. Please consider how mindboggling the rules have become. There were fewer than 200 pages of safety law and CPSC rules that pertained to our business until 2008. These rules clearly defined our responsibilities and could be taught to our staff. Today, the applicable laws, rules and interpretative documents exceed 3,000 pages. As a practical matter, it is impossible to master all of these documents – and yet it's potentially a felony to break any individual rule. The rules and CPSC staff commentary keep changing, are still being written and are rarely if ever conformed to prior versions. How can we master and re-master these rules and teach them to our staff while still doing the full-time job of running our business? Ironically, the famous recalls of 2007 and 2008 were never a "rules"

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

e. **Small Business Will Certainly Suffer.** The CPSIA was written in response to failings of big companies, but hammers small and medium-sized companies with particular vengeance. Our small business has already lost customers for our entire category on the grounds that selling toys is too confusing or too much of a "hassle". This is our new reality. The hyper-technical rules and requirements are beyond the capability of all but the most highly-trained quality managers or lawyers to comprehend. Small businesses simply don't have the skills, resources or business scale to manage compliance with the CPSIA. For this reason, small businesses bear the greatest risk of liability under the law. The double whammy of massive new regulatory obligations and the prospect of devastating liability are driving small businesses out of our market.

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

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

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

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

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

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

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

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

I recommend several steps to reduce cost, liability risk and complexity all without sacrificing children's product safety:

A. Mandate that the CPSC base its safety decisions, resource allocation and rules on risk assessment. Restore to the Commission the discretion to set age and product definition criteria for the 300 ppm lead standard and phthalate ban. Freeze the lead standard and lead-in-paint standard at their

current levels unless the CPSC determines that a change is necessary to preserve public health and safety based on risk assessment analysis.

B. The definition of "Children's Product" should not include anything primarily sold into or intended for use in schools or which is used primarily under the supervision of adults. Other explicit exceptions should include apparel, shoes, pens, ATVs, bicycles, rhinestones, books and other print materials, brass and connectors. Exclusions from the definition should take these products entirely outside the coverage of the CPSIA (including mandatory tracking labels).

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

D. Definition of "Children's Product" should be limited to children six years old or younger and should eliminate the difficult-to-apply "common recognition" factor of Section 3(a)(2)(c) of the CPSA. Definition of "Toy" (for phthalates purposes) should be limited to children three years old or younger and should explicitly refer only to products in the form used in play.

E. Eliminate CPSC certification of laboratories (rely on the market to provide good resources). Fraud has only very rarely been a problem with test labs and is already illegal.

F. Impose procedural limits to insure fairness in penalty assessment by the CPSC under the CPSIA. Completely reformulate penalties to restrict them to egregious conduct (including patterns of violations), reckless endangerment or conduct resulting in serious injury.

G. Rewrite the penalty provision applicable to resale of used product so that violations are only subject to penalty if intentional (actual knowledge or reckless endangerment) and only if the violation led to an actual injury. Eliminate the "knowing" standard with its imputed knowledge of a reasonable man exercising due care.

H. Mandatory tracking labels should be explicitly limited to cribs, bassinets, play pens, all long-life "heirloom" products with a known history of injuring the most vulnerable children (babies or toddlers).

I. Preempt state consumer "right to know" laws as they apply to lead or phthalates. Regulation of these substances should be the exclusive domain of federal law. In addition, myriad state regulation of these substances depresses interstate commerce.

J. Public injury/incident database should be restricted to recalls or properly investigated incidents only. Manufacturers must be given full access to all posted incident data, including contact information. The "due process" civil liberty interests of the corporate community MUST BE PROTECTED.

I urge your committee to address the fundamental flaws in the CPSIA to restore order to the children's product market and to protect small businesses from further damage. I appreciate the opportunity to share my views on this important topic.

Mrs. BONO MACK. Thank you.
Ms. Cowles, you are recognized for 5 minutes.

STATEMENT OF NANCY A. COWLES

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your time.

[The prepared statement of Ms. Cowles follows:]

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

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

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

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

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

CPSIA Successes

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

Safer Infant Sleep Environments

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

Product Registration for Juvenile Products

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

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

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

Mandatory Toy Standards

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

Internet Toy Labeling

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

Consumer Product Safety Incident Database

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

CPSC's Budget History

Before the CPSIA was passed, CPSC's ability to protect the public had been dramatically weakened. In 1972, when CPSC was created, the agency was appropriated $34.7 million (almost $176 million in today's dollars[2]) and 786 full time employees (FTEs). CPSC's staff suffered severe and repeated cuts during the last two decades, falling from a high of 978 employees in 1980 to just 401 in 2007--a loss of almost 60%.

Any changes to CPSC appropriations during the period from 2000 to 2008 were marginal at best and some years were actually a decrease, given the increase in CPSC's mandatory expenses. This allocation forced CPSC to cut back on its staff and limit its programmatic goals. CPSC's 2008 Performance Budget document, for example, painted a very bleak picture of the agency's work for the future. The budget document contained statements such as, "While the CPSC has thus far been successful at facing these new and evolving challenges with diminishing resources, the 2008 funding level will challenge the Commission's ability to maintain its existing level of standards development, enforcement, public information, and international activities. The 2008 Performance Budget document was replete with

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

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

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

CPSIA's Direction of CPSC Resources

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

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

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

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

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

CPSIA Challenges

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

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

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

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

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

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

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

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

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

Consumer Federation of America (CFA) is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA's web site is www.consumerfed.org.

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

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

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

Ms. FAY. Correct.

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

Ms. FAY. Always.

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

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

Mrs. BONO MACK. Thank you.

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

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

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

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

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

Ms. COWLES. No.

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

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

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

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

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

Ms. FAY. It is just me.

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

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

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

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

Mr. BUTTERFIELD. Thank you, Madam Chairman.

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

Ms. COWLES. That is correct.

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

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

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

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

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

Mr. BUTTERFIELD. All right.

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

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

Mr. BUTTERFIELD. Did you manufacture that product?

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

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

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

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

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

Mr. BUTTERFIELD. All right.

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

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

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

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

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

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

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

Mr. BUTTERFIELD. Yes, recklessly done so.

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

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

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

Mr. BUTTERFIELD. Anyone could.

Ms. COWLES. Yes.

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

My time has expired.

Mrs. BONO MACK. I thank the gentleman.

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

Mrs. BLACKBURN. Thank you, Madam Chairman.

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

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

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

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

Ms. COWLES. Yes, I do.

Mrs. BLACKBURN. And what is that

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

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

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

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

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

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

Ms. COWLES. No.

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

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

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

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

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

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

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

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

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

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

Mr. WOLDENBERG. I would say so.

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

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

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

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

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

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

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

I yield back.

Mrs. BONO MACK. I thank the gentle lady.

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

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

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

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

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

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

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

Ms. SCHAKOWSKY. All right, thank you.

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

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

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

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

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

Ms. SCHAKOWSKY. And thank you.

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

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

Mr. HARPER. Thank you, Madam Chairman.

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

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

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

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

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

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

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

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

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

Ms. FAY. They threw them all away.

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

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

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

Ms. FAY. At the time, I had just sold my house and I took almost all of our money, invested in my business so I had $30,000 worth of product and my testing costs were $27,000.

Mr. HARPER. OK, thank you, Ms. Fay.

Mr. Woldenberg, if I could just ask you on, you know, how do you without doing the testing what do you propose? What is a reasonable response to what we are seeing here?

Mr. WOLDENBERG. Well, we have always tested and there is no way to know if you comply with a standard without testing. We also can't use an in-house testing lab. We are not big enough and aren't prepared to manage one so, you know, what we want to do is manage to a standard. Set a reasonable standard and then the government shouldn't get involved in telling us how to meet it. We know well how to meet it and we have been doing it more then 2 decades successfully.

Mr. HARPER. So do you see a greater burden on small volume businesses with this possible requirement?

Mr. WOLDENBERG. What I just articulated or what exists?

Mr. HARPER. Yes.

Mr. WOLDENBERG. What I just articulated would be far easier. You know, Ms. Fay just described wasting thousands of dollars testing stuff that everyone knows is safe. That is just a terrible burden on any business whether it is a single business or a business with 150 people.

Mr. HARPER. OK, thank you.

Madam Chair, I yield back the balance of my time.

Mrs. BONO MACK. The gentleman yields back.

The chair recognizes Dr. Cassidy for 5 minutes.

Dr. CASSIDY. Ms. Cowles, I am sorry, how do you pronounce your name? I am sorry.

Ms. COWLES. That is all right, Cowles.

Dr. CASSIDY. Cowles. I have to admit I started laughing when Mr. Woldenberg said he has to label rocks as a potential threat for lead poisoning if they are swallowed. Does that seem reasonable to you?

Ms. COWLES. I don't think that is part of CPSIA and I don't think he is saying it is either, the labeling of his rocks.

Dr. CASSIDY. OK, so OK, so that is however that is interpreted because I think you felt as if you had to correct?

Mr. WOLDENBERG. That is the only way we can sell products with lead is we had to find an exemption. There is an exemption for educational products and the cost to us is we have to put the word lead on our product. We don't believe anyone will buy things that say lead on them if they are for children. Who wants to buy a product that says it has lead in it? It is death. That is what is going on in Illinois right now with the lead labeling law which is essentially overriding your legislation.

Dr. CASSIDY. But I think there is a dispute as to whether or not you are actually required to put that on.

Mr. WOLDENBERG. We hired counsel and had a 1-hour conference call and whether or not this product was saleable under U.S. law without this label. I very much opposed putting a label on it. I was overruled by my outside counsel.

Dr. CASSIDY. OK, I can only imagine what that cost you.

Mr. WOLDENBERG. Exactly.

Dr. CASSIDY. Now, the next thing is I am new to this committee so I have kind of an open mind but Ms. Fay do you have a logger making a little wooden airplane?

Ms. FAY. I volunteer at a senior center.

Dr. CASSIDY. Hang on, hang on, decorating with a non-lead based paint?

Ms. FAY. No, there is no paint on it.

Dr. CASSIDY. OK, that has to be tested for lead content?

Ms. FAY. Yes and not the lead. It does not if it is not coated with anything other then natural materials but the ASTM testing.

Dr. CASSIDY. Which is what? I am sorry to be so ignorant?

Ms. FAY. They call it S963 and it is the required under the CPSIA that any toy has to go through a series of tests depending on what type of toy it is.

Dr. CASSIDY. OK.

Ms. FAY. So for example, you have to—we pay someone to hold an object from shoulder height and drop it to make sure. That is a laboratory test that they would have to pay. And the logger at the senior center, he is a retired logger.

Dr. CASSIDY. So this guy kind of doing a handicraft has to pay a third-party engineering group to hold it out by hand and drop it to see if it shatters?

Ms. FAY. If he wants to sell it.

Dr. CASSIDY. Because I mean I am just asking what would your comments be about that?

Ms. COWLES. I think I said in my testimony that we, you know, since the time this law passed we are very receptive to the problems of one-of-a-kind items, very small crafters such as Ms. Fay is talking about and are open to looking at reasonable testing programs. We are not—we would not say that those toys do not need to be tested in some way because again it doesn't matter to the child whether the nice gentleman at the senior center is making it or if it is brought in from China. If a wheel is going to fall off and cause a choking hazard for a very young child the parent should still know.

Dr. CASSIDY. Well, let me ask you I don't know, again I don't know this. I am learning in this committee. Obviously, I have young children. They always put things in their mouth, a little bit older now but you could swallow a ball and that could choke. Is a ball, let us say a ping-pong ball or is a rubber ball on a paddle, is that covered under this? I mean clearly they could die from dying swallow a small little rubber ball.

Ms. COWLES. Yes, they can and they do, yes.

Dr. CASSIDY. Is that covered under this legislation?

Ms. COWLES. Yes, balls would be covered because they are a toy so those products and again the choking hazard is for products for children under the age of 3. So those products usually small balls and the paddles you are talking about are not made for children under 3.

Dr. CASSIDY. Now, but as I have been reading the testimony and the stuff applied that is not applied, the common toy box concept does not apply to those sorts of toys?

Ms. COWLES. That is dealing with lead and things more than the choking hazard. There are additional labeling requirements for toys for children over 3 but under 6 to indicate once again that a child under 3 should not have them but the common toy box we are talking about is the lead issue.

Dr. CASSIDY. Now, I actually think if you are speaking of a common toy box, just thinking of my three children, that a ball would be more likely to be taken from one of them then an ATV and so if there is a common toy box, they will grab the older child's ball and try and put it in their mouth and hopefully nothing bad happens but it could. If we are going to accept the rationale, the common toy box means that you have to limit exposure to some of these toys I don't see the rationale for limiting it to what we limit it to.

Ms. COWLES. Well, I think that because even fnr the child over 3, lead is still a neurotoxin and it is still going to hurt that child if they do mouth it and so there is no reason for lead to be in children's toys.

Dr. CASSIDY. Mr. Woldenberg, you were shaking your head.

Mr. WOLDENBERG. Well, small parts are not illegal for children over 3 and there are many cherished childhood products such as Legos would be illegal if they were so if your observation is there are lots of small parts out there that children could be putting in their mouth, it is absolutely true, and it is a risk that is solved by parental supervision.

Dr. CASSIDY. OK, I yield back. Thank you.

Mrs. BONO MACK. The gentleman's time has expired.

The chair recognizes the gentleman from Texas, Mr. Olson.

Mr. OLSON. I thank the chair and I thank our witnesses for coming today. It is pretty obvious that this is a matter of great importance because of the emotions that are being felt here in this committee and because as a father of a beautiful 14-year-old daughter and a 10-year-old son, all I want for them is to be healthy and happy.

And, Mrs. Fay, I just want to tell you, you are not alone and I want to prove that to you because I am going to read a letter that I received from one of our Texans back home. And her name is Celice William Jackson and she is the owner of Mommy's Heartbeat and she just makes clothing for little babies in her home and here is what she wrote. "This bill, we are talking about CPSIA, requires manufacturers of any product intended for children 12 and younger to test their end product for lead and phthalates. The way the test is performed is by testing each component of the product in order to say whether it passes or not. For example, if I make a diaper and I have pink snaps, thread and fabric, when I send my diaper to be tested they will test the snaps, thread and fabric. But say I run out of pink thread and I use blue then I have to send in the diaper to be tested again which means that the fabric and snaps will be retested just because I used a different color of thread. By the way, it is nearly impossible for non-metallic thread to contain lead. I believe we can both agree that this testing is wasteful and redundant. I am a work-at-home mom to a beautiful 9-month-old daughter. If CPSIA stands as is, I will be forced to stop doing business. I cannot afford the hundreds of dollars re-

quired just to test one product. The economy is in bad enough shape as it is without having thousands of small businesses closing their doors and the cost of children's good skyrocketing."

My question for you, are you aware of more businesses that in your shape, Ms. Fay, out there in Oregon.

Ms. FAY. We get e-mails from companies all over the country talking about how this law is affecting them and we have compiled a list of businesses that have already closed due to the CPSIA. However, this list is small in comparison to what will happen if the CPSIA is fully implemented without changes. We know that if the stay of enforcement, if third-party testing is allowed to expire after December and no amendment has fixed our problems, 90 percent of our membership will have to close their businesses.

Mr. OLSON. Yes, ma'am, and again we need to fix that up here in the House of Representatives.

Ms. FAY. Please.

Mr. OLSON. That is something we can fix and something we should fix.

A question for you, Mr. Woldenberg, and just sort of the cost for your business here and how much of the cost of CPSIA impacted your business, your product lines. I mean your testimony states that your business costs of compliance have increased ten-fold, ten-fold.

Mr. WOLDENBERG. Well, I can illustrate that for you. You know, if we tested every one of our products once in destructive testing and all of our testing is destructive, we would have to test 1,500 products. Right now hanging over our head is the so-called 15-month rule which should be called the 30-month rule and this is a picture of what I would have to test. This is 81,000 units. This is what they look like. All of this would be destroyed and I have to pay for that. And it is a huge, huge distraction as well. There is just no end to the threats that come from this law.

Mr. OLSON. So you have to destroy 81,000 units?

Mr. WOLDENBERG. Yes, that is what it looks like.

Mr. OLSON. Just for testing and those are units that you could be selling, making money and growing your business?

Mr. WOLDENBERG. Right, this is a shipment of 81,000. I wouldn't get to do that.

Mr. OLSON. Well, yes, sir. I mean I know that back home in Texas there are a lot of old boys who would like to destroy 81,000 cartons there but that is not the way we are going to grow our economy. We need to get the regulatory burdens off your back.

Mr. WOLDENBERG. Thank you.

Mr. OLSON. And anything we can do to help you, we are going to do it.

Mr. WOLDENBERG. Thank you.

Mr. OLSON. Thank you very much for your time.

Yield back.

Mrs. BONO MACK. The gentleman yields back.

The chair recognizes Mr. Pompeo for 5 minutes.

Mr. POMPEO. Thank you, Madam Chairman.

I just have a couple questions for Ms. Cowles. The American Academy of Pediatrics testified at the Commission's one hundred parts per million technological feasibility yesterday that there is a

point where we go from the sublime to the ridiculous when it comes to treating all products as presenting the identical, the same risk. In your judgment, have we reached the ridiculous when we treat a bicycle or a geology kit or a jewelry charm precisely the same way?

Ms. COWLES. I don't know that I would call it ridiculous. I think that it is not really treated the same way. The charm is obviously going to be, you know, has definitely caused harm. I think we are looking at the way that lead is addressed in those different products but the effect of lead in each of those products if the child is able to ingest it is going to be the same.

Mr. POMPEO. Right and but we still have got the same hundred parts per million standard for each of those items and you think that is appropriate given the variance in the product and the product's usage and the product's contact with human beings?

Ms. COWLES. You know, I think that we should certainly look at inaccessible lead so that if there is lead in products that there is no way that the child is going to touch, that is one issue but I think that the way I look at it if you want to simplify it is as Rick said, parents do not want to buy products that have lead in them for their children. We had a lab testify yesterday at that same hearing that said most of the products that they are testing are already well below the hundred parts per million. I think we can do this and we can make these products without lead. It is what parents want and we can quibble about how bad the effect will be but I think that as Rick said if you tell the parent there is lead in it they really are nnt going to want to buy it so why don't we get the lead out of it.

Mr. POMPEO. In your judgment, Mr. Woldenberg showed us a picture of some product that will have to be destroyed. In your judgment, should the Federal Government make him destroy that product?

Ms. COWLES. I think he is talking about destructive testing. He is not talking about he is destroying it because it has lead in it.

Mr. POMPEO. But no he is talking about destructive testing. Do you think that he should?

Ms. COWLES. I am not familiar with his testing process as to why all of that would have to be destroyed.

Mr. POMPEO. Mr. Woldenberg, you were going back with my colleague, Congressman Butterfield, a few minutes ago about whether the label there was necessary or required and your counsel overruled you and told you it was. Has your counsel told you how many more hours he is going to get to bill once the database comes online?

Mr. WOLDENBERG. The database is going to be a full employment plan for our outside counsel.

Mr. POMPEO. And so, Ms. Fay, you don't have inside counsel?

Ms. FAY. Can't afford it.

Mr. POMPEO. And we have heard different testimony this morning about the risks and problems potentially with that database people have different judgment. Commissioner Tenenbaum was pretty clear in 10 days she feels like she is required to publish it regardless of its merits. Do any of the three of you involved in the manufacturing process think that makes sense?

Mr. WOLDENBERG. I do not. We can't evaluate the information that we are given because we are not given full access to the information and one of the biggest concerns that I have about the database is that by the government getting into the business of a safety blog they are training our customers not to call us. I want to talk to them directly about problems.

Mr. POMPEO. I really want and that is actually where I was headed. I appreciate that. Do any of you ever fear that your customers when they are not happy with your product won't call you?

Mr. WOLDENBERG. That is my biggest nightmare.

Mr. MORRIS. Certainly in our industry, Congressman, the manufacturers get lots of calls from their consumers and they find vital information very well and very thoroughly because the consumer when they call usually has the model number, they have the exact information in front of them and that is the best way to get the information.

Mr. POMPEO. Until 45 days ago I was involved in and I was running a manufacturing business and my customers when they weren't happy often were pretty successful at locating me. I also felt like we had an incentive to respond to that in a way that was meaningful to the customer and corrected any potential problems with product that we may have made. Do you all feel like you have adequate incentive already to address customer concerns about problems with your products?

Mr. WOLDENBERG. Absolutely and it is how a conscientious manufacturer has to behave. It is our responsibility.

Mr. MORRIS. That is why in many cases the claims that a manufacturer will make about materially inaccurate information is largely going to be that is not my product. It needs to be resolved and there is no reason that the Commission can't take an extra couple of hours to read a report and make sure that is accurate.

Mr. POMPEO. I appreciate it. Thank you all for coming today.

I yield back my time.

Mrs. BONO MACK. The gentleman yields back and no other members are present to ask questions.

Without objection, the chair is going to insert five additional statements for the record of our hearing that have been submitted. We have previously shared these with the minority and believe that they will improve the hearing record. So ordered.

[The information appears at the conclusion of the hearing.]

Mrs. BONO MACK. And so in conclusion of the hearing, I would again like to thank all of our witnesses today. We all appreciate your time and the stories that you shared with us. We all want safer products for our children. There is no question. But we also want to stimulate and encourage businesses rather than stifle them with unnecessary regulations that have little to no impact on safety. Our challenge is to figure out how to strike that balance and this is only the first of our discussions on that topic. I would like to most especially thank the Ranking Member Butterfield for his help today and his support and offer an open door to him as we work through all of these policies and to each and everyone of you I believe that we can do great things if we work together and that is my intention to do it that way.

So thank you to the audience for your kindness today and that concludes—oh wait, wait, oh just a little business. I remind members that they have 10 business days to submit questions for the record and to ask that the witnesses please respond promptly to any questions they may receive. The committee is now adjourned.

[Whereupon, at 2:08 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRED UPTON

Thank you, Chairman Bono-Mack, for holding this, your first hearing as Chair of the Commerce, Manufacturing and Trade Subcommittee, on the Consumer Product Safety Improvement Act (CPSIA). I think we all agree that there are significant problems with this law that need to be addressed urgently. I am also interested in hearing about the effect of this law on the resources of the Consumer Product Safety Commission.

The Energy & Commerce Committee worked on the CPSIA on a bipartisan basis under the leadership of then-Chairman Dingell and then-Ranking Member Barton. The bill passed the House on a nearly unanimous basis. The Senate did not proceed with the same bipartisan approach, but in conference we nevertheless went along with some of their provisions. Some of our conferees have expressed regret on that score. In any case, not long after the President signed CPSIA into law, serious problems emerged.

We all care deeply about our children and their safety - nearly every one of us on this dais has a child or grandchild. No one wants to put little children at risk. But this law may be doing exactly that. By dictating so much of the Commission's work, in too many cases we have shifted its attention to products that pose little or no risk and away from more significant issues. At the same time, we have deprived the Commission of the flexibility to develop common-sense solutions to the problems of implementation. The retroactive effect of the law has caused the Salvation Army, Goodwill Industries and thrift stores across the land to destroy used products, including even winter clothing that is sorely needed by millions of American children.

While we have seen little evidence of improvement in children's safety, there has already been an extreme impact on the children's product market - particularly for small- and micro-sized businesses. The Commission has pushed off the day of reckoning for some businesses by postponing, again and again, the expensive requirements for third-party independent laboratory testing of children's products. But the Commission has already told us that it believes its hands are tied-it can do nothing more to exempt products from this costly testing, even when the risk, if any, is minute and the burden to small business is gargantuan. In fact, the Commission is now working on regulations that would require even more testing-regulations that will pile on even greater costs in this terrible recession.

In short, it is up to us to fix the problem. We have no time to waste. This summer, the lead limits are set to drop again, to even lower levels. Again the effect will be retroactive, so our retailers and thrift stores will once again be destroying inventories of products that are already the safest in the world. I want to make clear that we do not intend to undo everything we did in the CPSIA, but we have every intention of fixing the law so that it works and the Commission can get back to its job of protecting our children.

PREPARED STATEMENT OF HON. EDOLPHUS TOWNS

Thank you Chairman Bono-Mack and Ranking Member Butterfield for holding this hearing today on the Consumer Product Safety Improvement Act and Consumer Product Safety Commission resources. The CPSIA was passed in the 110th congress to help protect consumers against dangerous products that may do them harm. This legislation affects a broad spectrum of our economy, from the manufactures of toys to the children that play with them. Our constituents want to know that we are doing everything in our power to make sure their children are kept safe.

I'm also interested in hearing from our witnesses today about how and more importantly when CPSIA's new rules will be finalized and implemented. As it currently stands the new rules have been in limbo due to concerns with-in the industry about unintended consequences. While I sympathize with the cost concerns of small businesses the safety of our nation's children should be our first priority.

I look forward to working with industry and consumer groups to make sure CPSIA's new rules and data base system are properly implemented and adhered to.

Thank you and I yield back the balance of my time.

JOHN D. DINGELL
15TH DISTRICT, MICHIGAN

CHAIRMAN
COMMITTEE ON
ENERGY AND COMMERCE

EX OFFICIO
HOUSE GREAT LAKES
TASK FORCE

MEMBER
MIGRATORY BIRD
CONSERVATION COMMISSION

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March 4, 2009

The Honorable Nancy A. Nord
Acting Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

The Honorable Thomas Hill Moore
Commissioner
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Acting Chairman Nord and Commissioner Moore:

As an author of the original Consumer Product Safety Act in 1972 and a long-standing advocate for better protections for our Nation's consumers, I wholeheartedly support a stronger regulatory framework to ensure the safety of children's products. Nevertheless, I share the reasoned concerns of my colleagues, House Committee on Energy and Commerce Chairman Waxman, Subcommittee on Commerce, Trade, and Consumer Protection Chairman Rush, Senate Committee on Commerce, Science, and Transportation Chairman Rockefeller, and Subcommittee on Consumer Protection, Insurance, and Automotive Safety Chairman Pryor, about the implementation of the Consumer Product Safety Improvement Act (PL 110-314, "the Act"). In particular, I am troubled that the Act includes unrealistic deadlines for rulemakings and compliance, as well as too little implementation discretion for the Consumer Product Safety Commission (CPSC), both of which are exacerbated by CPSC's lack of adequate resources, both in terms of funding and staff.

In describing the implementation of the Act, Acting Chairman Nord's January 30, 2009, letter to the Congress maintains, "the timelines in the law are proving to be unrealistic, and [CPSC] will not be able to continue at this pace without a real risk of promulgating regulations that have not been thoroughly considered." Moreover, the letter states, "Although [CPSC] staff has been directed to move as quickly as possible to complete its work, short-circuiting the rulemaking process gives short shrift to the analytical discipline contemplated by the statute." In light of these statements, I would appreciate your candid responses to the following questions, which will assist me and my colleagues in our consideration of common-sense and workable solutions to some of the more pressing problems that have arisen during the Act's implementation:

1. To what extent has robust implementation of the Act been hampered by CPSC's lack of resources? What levels of funding and staffing does CPSC believe necessary for proper implementation of the Act?

2. Given the paramount importance of ensuring children's safety and the overall mission of CPSC, to what extent are the deadlines in the Act practicable for CPSC and industry to meet acting with all deliberate speed? If these deadlines are not practicable, what revisions to them does CPSC suggest?

3. Does CPSC have quantitative data concerning any negative impact of the Act (*i.e.*, the lead and phthalate limits and testing requirements) on small manufacturers of children's products, and if so, would CPSC please provide them? What information does CPSC have on any such negative impact of a more anecdotal nature?

4. Does CPSC have any suggestion for how to mitigate any such economic impact of the Act on small manufacturers of children's products (*e.g.*, component testing for lead and phthalate content) that, in accordance with the intent of the Act and the CPSC's mission, will not compromise the health and safety of children using them?

5. What information has CPSC received about the impact of the Act on the availability of second-hand products for children, especially clothing? It is my understanding that many second-hand stores now refuse to sell children's products. Does CPSC have any suggestions for how to mitigate any negative effects of the Act on second-hand stores for children's products, especially in light of the recent economic downturn and the consequent increased need for low-cost sources of children's clothing?

6. Does CPSC believe that the age limit contained in the Act's definition of "children's products" (*i.e.*, 12 years and under) is appropriate? If not, what should the age limit be? Further, should CPSC have the discretion to lower the age limit for certain groups of children's products for which the risk of harm from lead or phthalate exposure is remote to non-existent (*e.g.*, snaps or zippers on children's clothing)?

7. Although some youth all-terrain vehicles (ATVs) and youth motorcycles are intended for use by children under 12 years of age, does CPSC believe it is necessary that these products be tested for lead and phthalate content? Similarly, does CPSC believe that these products present a risk to children for the absorption of phthalates or lead?

8. In light of recent court decisions that the lead and phthalate content restrictions are retroactively applicable, does CPSC have concerns about the effect on the environment of the disposal of inventories of non-compliant children's products?

9. I understand that, since early December 2008, CPSC has had access to a large number of lead content test results for finished "ordinary books" (*i.e.*, books published in cardboard or paper by conventional methods and intended to be read by or to children age 12 or under) and their component materials (*i.e.*, paper, paperboard, ink, adhesives, laminates, and bindings). Have CPSC staff reviewed those test results? What do those test results indicate about such ordinary books and component materials in connection with the statutory lead limits prescribed in Section 101(a) of the Act? Does CPSC have any recommendations regarding how to mitigate the burdens that the testing and certification requirements of the Act, and especially the retroactive applicability of those requirements to inventory, could otherwise impose on publishers, printers, and retail sellers of such ordinary books, as well as on libraries, schools, charities and other second-hand distributors of such ordinary books, including those published before 1985?

10. In general, does CPSC believe that the Act was written with too little implementation discretion for the Commission? If this is the case, for which issues (*e.g.*, third party testing requirements) does CPSC require more discretion?

Please provide your responses to my office by **no later than the close of business on Friday, March 13, 2009**. I intend to work with my colleagues in the House and Senate to resolve these issues, as well as call on Chairman Waxman and Chairman Rush to hold hearings on problems arising from Act's implementation. Your responses to these questions will be invaluable in preparing Members of Congress for a frank discussion about several of the Act's apparent shortcomings. Should you have any questions, please feel free to contact me or Andrew Woelfling on my staff at 202-225-4071.

With every good wish,

Sincerely yours,

John D. Dingell
Chairman Emeritus
Committee on Energy and Commerce

cc: Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
Representative Bart Gordon

Representative Bobby L. Rush
Representative Anna G. Eshoo
Representative Bart Stupak
Representative Eliot L. Engel
Representative Gene Green
Representative Diana DeGette
Representative Lois Capps
Representative Mike Doyle
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Representative Tammy Baldwin
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Representative Jim Matheson
Representative G.K. Butterfield
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Representative Joseph R. Pitts
Representative Mary Bono Mack
Representative Gregg Walden
Representative Lee Terry

Representative Mike Rogers (MI)
Representative Sue Wilkins Myrick
Representative John Sullivan
Representative Tim Murphy
Representative Michael C. Burgess
Representative Marsha Blackburn
Representative Phil Gingrey
Representative Steve Scalise
Senator Harry Reid, Majority Leader
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Senator Bill Nelson
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Senator Frank R. Lautenberg
Senator Mark Pryor
Senator Claire McCaskill
Senator Amy Klobuchar
Senator Tom Udall
Senator Mark Warner
Senator Mark Begich
Senator Kay Bailey Hutchison
Senator Olympia J. Snowe
Senator John Ensign
Senator Jim DeMint
Senator John Thune
Senator Roger Wicker
Senator Johnny Isakson
Senator David Vitter
Senator Sam Brownback
Senator Mel Martinez
Senator Mike Johanns

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

March 20, 2009

The Honorable John D. Dingell
Chairman Emeritus
House Energy and Commerce Committee
Room 2328
Rayburn House Office Building
Washington, D.C. 20515-2215

Dear Chairman Dingell:

Thank you for your letter of March 4, 2009, regarding the Commission's implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA).

Nearly two years ago I stated that the CPSC was at a crossroads. We would either get more funding and more staff or we would continue a decline that would eventually result in the agency ceasing to be an effective force in consumer safety. At that same time, wave after wave of press stories about hazardous products that the agency had purportedly not acted on in a timely manner were appearing and recall after recall involving lead were being announced. In response, Congress, and the citizens it represents, decided that not only should the agency survive but it should regain its lost stature. Through the CPSIA we were given new enforcement tools, manufacturers were required to prove that their products met national safety standards and the agency was given the resources (after a decade of seeking them) to build an IT system that will pull all of our disparate pieces of hazard data into one comprehensive, searchable database that will enable the agency to spot emerging hazards in a much timelier fashion.

The CPSIA presents both opportunities and challenges for our staff. Despite the fact that the agency did not get the immediate increase in funding that the Act envisioned, our staff has done a remarkable job of meeting the Act's deadlines (in some cases many months before the Act required them to be met). Staff has done this with an agency that only has two Commissioners who do not view the Act in the same light and who do not always agree on the Act's meaning. This has left the staff unsure in some instances about how to proceed and caused delays in providing guidance and in prioritizing the agency's work. That is also why there is no *Commission* response to your questions. The single most important step that needs to be taken in furtherance of the implementation of the CPSIA at the agency is to have the third Commissioner, who would also be the Chairman, appointed to lead the agency. Then the Commission would be able to give the staff direction and attend to various concerns that have gone unaddressed. This would also eliminate the threat of yet another loss of quorum, which has happened twice since July of 2006, and which would severely hamper the continued implementation of the CPSIA.

Congress has entrusted this agency with a large and important mission. The passage of the CPSIA was a huge vote of confidence for the agency and despite the hue and cry of some in the business community who will never be happy with the closer scrutiny and accountability required by the Act, it is a major accomplishment of the last Congress, and one that your leadership was instrumental in achieving.

I do agree with staff that additional time to implement certain of the Act's provisions (such as the one that made nearly all of the voluntary requirements in ASTM's F963 mandatory) would have been preferable. However, I think that when the agency gets the third Commissioner, we will be better able to address some of the concerns voiced by staff and by industry. Until then any legislative "fixes" are premature. Only the *Commission* should recommend what, if any, changes should be made to the CPSIA and no assumptions should be made that there are no other solutions than legislative ones until all three Commissioners have a voice in the matter.

Sincerely,

Thomas H. Moore
Commissioner

cc: Acting Chairman Nancy Nord

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
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NANCY A. NORD
ACTING CHAIRMAN

TEL: (301) 504-7901
FAX: (301) 504-0057

March 20, 2009

The Honorable John D. Dingell
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515

Dear Representative Dingell:

Thank you for your letter of March 4, 2009, regarding the U.S. Consumer Product Safety Commission's (CPSC) implementation of the Consumer Product Safety Improvement Act of 2008. Recognizing and respecting the knowledge that the CPSC career staff has acquired in implementing this new law, I asked them to prepare answers to the important questions that you asked in your letter. Their responses are enclosed.

Since its passage last August, the CPSC staff has been working tirelessly to implement this comprehensive legislation in the most efficient and effective manner possible given the limits of our resources and the time constraints mandated in the law. As you will note in their responses, they have identified some proposed refinements to the law based on their front-line experience with it.

We share your commitment to better protection of our nation's consumers, and we very much appreciate your long-standing advocacy and support of the CPSC. After reviewing the staff's responses, please let me know if you have additional questions or comments.

Sincerely,

Nancy A. Nord
Acting Chairman

Enclosure

cc: Commissioner Thomas Moore

Representative Nancy Pelosi, Speaker of the House of Representatives
Representative Steny Hoyer, Majority Leader
Representative Henry A. Waxman
Representative Rick Boucher
Representative Frank Pallone, Jr.
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Senator Mel Martinez
Senator Mike Johanns

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Date: March 20, 2009

TO : Acting Chairman Nancy Nord
Commissioner Thomas Moore

FROM : General Counsel CAF
Assistant Executive Director for Compliance
Assistant Executive Director for Hazard Identification and Reduction
Assistant Executive Director for Financial Management, Planning and Evaluation CEQ

SUBJECT : Responses to Letter from the Honorable John D. Dingell

Chairman Nord has asked us to respond to the questions recently received from Representative Dingell. The following responses have been prepared by career staff at the U.S. Consumer Product Safety Commission (CPSC).

1. To what extent has robust implementation of the Act been hampered by CPSC's lack of resources? What levels of funding and staffing does CPSC believe necessary for proper implementation of the Act?

The CPSC has made implementation of the Consumer Product Safety Improvement Act (CPSIA) our highest priority. Since August 2008, the agency has initiated and advanced over 20 rulemaking activities required by the CPSIA which is an unprecedented number for this agency or any other of this size, published enforcement guidance and policies to enhance compliance with the new law, conducted numerous meetings with stakeholders, developed a special website dedicated to the CPSIA, responded to questions from the public numbering in the thousands, and generally focused the agency's limited scientific, legal, technical, educational, training and administrative resources on CPSIA implementation requirements.

Because requested funding for implementation of the new law was not forthcoming during the critical first six months when many of the CPSIA requirements needed to be initiated or completed, implementation of the CPSIA has impacted our ongoing safety mission by delaying and deferring work in many other areas. While work has been deferred or delayed on these activities -- such as rulemaking activities on portable generators and voluntary standards work on electrical, fire, mechanical, chemical and children's hazards -- some of CPSC's ongoing safety work such as hazardous product investigations and recalls could not be deferred. This has limited our ability to advise you on how to fully reallocate existing staff resources to implementation of the CPSIA.

Moreover, issues related to the accreditations of laboratories and the increasing number of requests for exclusions from the Act's provisions have caused unanticipated additional demands on staff resources, at the same time that the staff has been implementing the Virginia Graeme

Baker Pool and Spa Safety Act (which became effective in December 2008), and the Children's Gasoline Burn Prevention Act (which became effective in January 2009). This has severely overstretched the agency staff and has begun resulting in delays in implementation that will continue until we are able to fully hire and otherwise maximize the resources that have just been provided to the agency for the second half of fiscal year 2009.

Three examples of the burden and complexity presented by the work on these issues are: (1) the continuing need to process and review applications for laboratory accreditation, including applications from government and proprietary firewalled laboratories, a process initiated by the CPSIA and one that the agency is handling for the first time in its history; (2) the need for further refinement of guidance on the scope of the phthalates ban and, in particular, defining a testing method and dealing with compliance questions regarding the chemistry and carbon chain branching that determines whether a product contains a banned phthalate; and (3) the engineering issues raised by the Pool and Spa Safety Act and the need to reconcile state regulations on health and safety issues such as water quality with the need to replace drain covers as required by that Act. The Commission staff cannot address these and similar matters all at once, yet delay has serious economic impacts on the affected parties which no one anticipated would happen at the same time as the current economic downturn.

As we implement each new requirement, we are seeing unanticipated issues arise, and we are learning more of the far-reaching effects of the CPSIA and there will undoubtedly be more to learn. In August 2008 following passage of the Act, staff estimated that it would require a full annual increase of $21.1 million and 59 FTEs to begin implementing the new legislation in Fiscal Year 2009. That same month, the Commission submitted an amendment in this amount to the then-pending President's Budget Request through the Office of Management and Budget, as well as directly to Congress. In November 2008 a revised amendment was provided to Congress to reflect CPSC's requirements for only the second half of the fiscal year. Through the first six months of implementing the CPSIA, none of this additional funding was received by the Commission.

The funding amount in the Commission's revised amendment has just been approved by Congress. While we will use these funds to immediately and aggressively hire and train new staff, the six-month delay in funding will cause continued deferrals until such time that the agency fully absorbs the new appropriation. For Fiscal Year 2010 the Commission has requested additional funding to continue implementation of the CPSIA.

2. Given the paramount importance of ensuring children's safety and the overall mission of the CPSC, to what extent are the deadlines in the Act practicable for CPSC and industry to meet acting with all deliberate speed? If these deadlines are not practicable, what revision does CPSC suggest?

Mandated Deadlines: Effect on Safety Priorities and Staff Workloads

In the CPSIA, Congress set an aggressive regulatory agenda for the CPSC over the course of the first two to three years after enactment. The work required by the CPSIA is in addition to the

Commission's ongoing regulatory activity in a variety of areas, including upholstered furniture, portable generators and other important standards development activities, as well as our ongoing compliance work in evaluating and recalling products that present hazards to consumers. As with any regulatory agency, CPSC's safety work must be prioritized to deal with the most significant risks; however, the deadlines mandated in the CPSIA have jeopardized our ability to meet Commission priorities and proven to be too much for a relatively small agency to handle all at once. Timely implementation is important, but the flexibility to prioritize our work to deal with the most serious risks is equally important to maximize effectiveness and do the greatest good with the resources that we have been given.

While the CPSIA mandates more than 40 separate action items for the Commission to undertake, that number understates the agency workload that results from each of those mandates. For example, there is no requirement to adopt an interpretative rule defining "child care article" and "toy" under section 108. Yet the Commission has been inundated with thousands of product specific inquiries about what types of products fall within those definitions, from shoes to sporting goods to electronic games. An interpretive rule is our recommended way to address this issue and adds to our rulemaking burden.

The action item count also does not include acting on requests for exemptions from the lead limits provision, nor does the list contemplate making "determinations" on classes of materials or products not covered by the ban on lead in children's products. Because the statute did not permit the agency to exempt products from the scope of the definition of children's product, the staff has been engaged in a process of narrowing the scope of materials likely to include lead in order to provide relief to small businesses and home crafters faced with crippling costs of testing and certification requirements. Many of those businesses are now asking the Commission to begin the same process of exemption of materials with regard to phthalates. As another example, consideration of component testing is not a part of the list of rulemaking activities in the CPSIA, yet it is a challenging issue to consider in implementing its requirements.

There are other activities required of the Commission in the CPSIA that require resources and time that are not evident in the list of required rulemakings. The resource needs have been enormous, ranging from projects so basic as educating headquarters and compliance field staff on the scope of the new regulatory requirements of the Act to the more complex work of updating the Commission's regulations to permit the use of its new authorities with regard to refusing admission of imports. Updating our regulations and coordinating with Customs and Border Protection to allow for a process for a hearing upon refusal of admission requires significant agency resources, as does developing a process for bonding shipments to cover the cost of destruction and related import activities.

Suffice it to say that each of the various initiatives in the Act -- whether it be the lead and phthalates limits, the testing and certification regime, the import provisions, or the new database and information technology upgrades -- will require significantly more time to implement than anyone originally anticipated. Having all of that done simultaneously would have taxed the agency even if we had been given additional funding from the start. Moreover, the agency has significant ongoing work that remains, as well as two other new statutes that it must implement

this year, the Virginia Graeme Baker Pool and Spa Safety Act and the Children's Gasoline Burn Prevention Act.

The deadlines have proven to be impracticable for our staff to meet and are presenting significant problems for the agency to solve. The Commission staff must have some relief from the deadlines imposed.

Practical Solutions: Prioritizing Workload Based on Risk or Extending Deadlines

The following suggestions, ideally in combination, would help ameliorate the issues discussed above.

- Use of Risk Assessment to Establish Priorities

Use of risk assessment methodology would allow the Commission to establish priorities, provide for common sense exemptions, and set CPSIA implementation deadlines. Congress took this approach, to some degree, when setting the initial testing and certification deadlines. Using recall frequency and, to a lesser degree, the severity of possible injuries, Congress determined that cribs, pacifiers, small parts, lead in paint, and lead in children's metal jewelry would lead the children's product testing and certification effort.

However, by this June the Commission must accredit laboratories for third-party testing to all other children's product safety rules, which includes any new or previously existing rule applicable to a product intended for children 12 years of age or younger. The agency will be pushed to meet that deadline as the staff will need to issue accreditation procedures, and all related testing procedures, for the many rules applicable to children's products at that time, including the enormously complex requirements of the ASTM F963-07 Toy Safety Standard. All of this will take place simultaneously with work we are doing to open CPSC's new laboratory facilities.

Examples of Inefficiencies: Furthermore, inefficiencies have been created given the tight timeframes of the Act. For example, under section 102 of the CPSIA, the Commission is required to publish accreditation procedures for laboratories testing baby walkers, bouncers and jumpers by March 12, 2009. However, the existing regulations for baby walkers and bouncers are outdated. The Commission through its enforcement actions has been requiring compliance to the voluntary standard rather than the outdated regulations, and for the most part industry is complying with the voluntary standard. It is inefficient for the staff to accredit laboratories to test to outdated regulations.

The baby walker standard will be one of the first two rules the Commission handles under the series of new consumer product standards required for durable infant products under CPSIA section 104, and therefore, the most efficient (and common sense) resource allocation would be to accredit laboratories for testing when we announce the new baby walker standard in February 2010. Because the statute was written without such flexibility, we must develop an approach to deal with the outdated baby bouncer, walker, and jumper standard, which may include withdrawing the outdated standard to avoid accrediting laboratories to standards no one follows

and to clarify that there is no need for industry to take a step backwards to test to standards that will be updated in a matter of months.

From our standpoint, an ideal solution to these challenges faced by our staff would be for Congress to let the Commission decide what level of testing is required for which products, allowing the Commission to prioritize based on risk and tackle any problems that need to be addressed in the most efficient manner. Alternatively, Congress could continue to require certification and third-party testing for all children's products but allow the Commission to prioritize as to when the testing to each children's product safety rule will begin, so that it can roll those out on a timetable that is based on its discretion and expertise. To do this right, we need to:

- provide our stakeholders with a list of all standards that are applicable to a children's product;
- identify which children's products need to comply with which standards;
- define the test methods for each standard and whether they make sense for all of the different products covered;
- accredit the laboratories for testing to each standard; and
- develop a process for inspecting certificates.

All of that takes time and the ten months the CPSIA gave us to accomplish this task has not proven to be workable.

The wholesale release of "all other" children's product standards in June 2009 may further stress manufacturers, importers, and retailers while providing marginal improvement in children's safety for many of the products. A methodical, pragmatic approach to the release, based on priorities determined by CPSC staff, would facilitate a smoother rollout while addressing first the products presenting the greater risk to children. This allows CPSC staff the flexibility to prioritize tasks, manage our workload, and assure greater safety without an unnecessarily burdensome impact on product sellers.

o Extend Deadlines

Another alternative is to move certain of the dates for implementation in the CPSIA to allow the Commission the time to provide additional implementation guidance. The most challenging deadlines for compliance were those that went into effect on February 10, 2009, requiring retroactive compliance to the new lead and phthalate content limits. The breadth of products covered by the definition of children's products covered by the lead limit, *i.e.*, any product designed or intended primarily for a child 12 years of age or younger, implicated numerous industries that had not understood that their products would be subject to the new lead provisions.

The question asks us to comment on the impact of the deadlines on industry. Whether it be makers of books, bikes, or baseball bats, every industry needed more time to determine which, if any, of its products were covered under the definition of children's product, test those products for compliance, and develop new methods of manufacture to eliminate the lead if it was present

in the product. The scope of products covered by the new regulation and the amount of inventory implicated went well beyond what many may have contemplated. Our information is incomplete but we are told that millions of products wait in storage warehouses for return and destruction. Retailers have indicated that most of these products do not contain accessible lead, and a real question exists in our staff's mind as to whether they contain accessible lead in a sufficient amount to be anything other than a *de minimis* risk but simply were unable to meet the standards that took effect in February. It will be even more difficult for these products to meet the stricter standards to come. These challenges faced by industry have a direct impact on CPSC staff resources and our ability to meet deadlines given the need to respond to their inquiries.

Another approach to the deadlines is to allow the Commission more discretion to move an effective date for a given product or class of products in certain circumstances. The CPSIA does not permit the Commission to delay the effective date of any of the new standards to deal with a problem such as the lead in bike tire valves where the risk to a child is exceedingly small but still measurable, and the economic impact is substantial. In cases such as these, some reasonable amount of time should be allowed to reengineer the product to develop an alternative that can meet the new lead limits.

3. Does CPSC have quantitative data concerning any negative impact of the Act (i.e., the lead and phthalate limits and testing requirements) on small manufacturers of children's products, and if so, would CPSC please provide them? What information does CPSC have on any such negative impact of a more anecdotal nature?

CPSC staff does not have data on the total value of impacted inventories, lost sales, disposal costs, and other costs likely to be incurred by small manufacturers because of the CPSIA; however, information of an anecdotal nature, that has not been verified by CPSC staff, puts the impact in the billions of dollars range.

Industry Estimates

For example, the Motorcycle Industry Council reported in a February 26, 2009, press release that the new lead rules would result in an annual impact of $1 billion on their industry. In a request for a moratorium on the retroactive application of the lead ban, the American Chamber of Commerce in Hong Kong estimated that the impact on their members producing children's wearing apparel would run in excess of $300 million. In a letter to the CPSC, counsel to a major mass retailer stated that a client estimated their cost to test inventory at $1.4 million and projected inventory losses of $30 million. Another client estimated the value of their unsalable inventory at $7 million. It was also reported in a March 5, 2009, article in the Wall Street Journal, that the Toy Industry Association estimated inventory losses valued in the range of $600 million.

CPSC Testing Estimates

CPSC staff has estimated that the cost for third-party testing of product for lead and phthalates would range from several hundred dollars to several thousand dollars per product tested,

depending on the number of product components requiring testing. Based on information obtained from testing laboratory price lists and quotes, the cost to test for the lead content of a substrate appears to range between about $50 and $100 per tested component. In a recent public meeting, industry representatives stated that testing of the 233 various components of a bicycle, valued at $50, cost one of their members approximately $14,000. Less information is available about the cost of testing products for phthalates, but the limited information obtained from price quotes and laboratory presentations to CPSC staff suggests the best estimate for the cost of phthalate testing at this time ranges from $300 to $500 per tested component. The cost to test for phthalates appears to vary widely from market to market. In a recent CPSC public meeting on phthalates, one participant told of receiving quotes for the testing of a product ranging from $7,000 in Asia to $22,000 in the United States. Because these tests tend to be destructive, manufacturers also bear the expense of lost material, labor, and overhead associated with production of the products tested.

Economies of scale provide an advantage to larger volume manufacturers, relative to their smaller volume counterparts, as they can absorb these testing costs over a larger production volume. Spread over this larger volume, the incremental increase to the cost of each product is much smaller for the large manufacturer versus the much smaller manufacturer. In short, the heavier burden falls to the smaller volume business. When the Commission establishes random sampling requirements (as part of the required rulemaking on periodic testing in Section 102(b)), testing costs will increase over current levels for manufacturers of all sizes.

The exclusion of most fabric from the third-party testing requirements will provide only limited relief for apparel manufacturers, including small manufacturers. In a public meeting with CPSC staff, several apparel retailers reported finding virtually no lead in fabric, but they did find lead in about 2% of the tests on hard items, such as buttons, zippers, snaps, and fasteners. Since most apparel items have some non-fabric items, there will still be testing requirements for most apparel items. Moreover, under the new restrictions the presence of lead in fasteners used on clothing has had a negative impact on the second-hand market for children's clothing in the United States.

Although testing children's products, as applicable, for lead and phthalates has received the most attention, many products will be subject to additional third-party testing requirements. For example, cribs must be tested for compliance to the crib safety standards at 16 CFR part 1508. Toys are also subject to testing for compliance to applicable provisions of the Toy Safety Standard, including testing for additional heavy metals, such as arsenic, cadmium and chromium. We have no quotes for these tests; however, it is probable that the major factor in the cost of the tests will be the labor time required to conduct the tests. Once again, given the destructive nature of the testing, the manufacturer will also bear the expense of lost material, labor, and overhead.

It is important to keep in mind the wide expanse of goods falling under the definition of "children's products" and subject therefore to third-party testing requirements. Beyond toys and durable infant and toddler products, items such as books, bicycles, clothing, youth-sized motorized off-road vehicles, school supplies, and Scout equipment and accessories are subject to lead and/or phthalates testing. Likewise, all products for children 12 years of age or younger that are made by crafts people, stay-at-home moms or dads, charitable church groups and the like,

must meet the new limits and be tested for compliance or their products are banned. This has completely upset the business model for many of those small businesses and charitable organizations. Because of the retroactive nature of the regulations, many retailers began turning back product with more than 600 ppm well in advance of February 10, 2009, in order to ensure their shelves were free of non-compliant product. As a result, many small manufacturers, who failed to recognize the true scope of the law or were unprepared for the retailers' reaction to the CPSIA, now find they have inventory they cannot sell.

Retailers Accelerating Deadlines

Retailers continue to move well ahead of the deadlines established in the CPSIA. For example, it is staff's understanding that Wal-Mart stopped receiving product with more than 300 ppm lead in January 2009. These actions have stranded inventory that may be compliant today but will be banned in August as the lead limit drops to 300 ppm. In addition to the risk that these products may become obsolete and will need to be reworked or destroyed, manufacturers of all sizes are incurring expenses to hold this inventory while they decide how to move their product. The cost to carry this inventory varies by business, but typically runs about 25% of the on-hand inventory value.

As retailers pull product from their shelves, many consumers have also been negatively impacted. For example, CPSC staff have received numerous emails from consumers stating they could no longer purchase parts for their child's youth model motorcycle because of retailer concerns over the lead content of the parts. More than one consumer has noted the possibility of consumers' purchasing vehicles sized for older children or adults if they could no longer service their current motorcycle or ATV. This reaction potentially places these children in a situation of increased risk of injury or death.

Solution: Risk-based Assessments That Consider Age and Exposure

It may be too late to mitigate the significant economic impact of the February 10, 2009, ban on children's products containing more than 600 ppm total lead content, by weight, for any part of the product. However, some relief could be provided to deal with the impact on thrift shops and second-hand sales, and Congress still has time to act to prevent the even greater impact that will occur when the lead limit drops to 300 ppm in August 2009. For example, toxic substances limits are better regulated based on the possibility of exposure in relation to age. Foreseeable use data, combined with mouthing and ingestion data at various ages, would define the group at risk for any given product.

This approach would exclude items such as bikes and ballpoint pens from the discussion and we could focus on items like metal jewelry and other objects likely to be mouthed or ingested. By granting the CPSC the flexibility to determine the relevant hazards, flexibility in determining exemptions based on assessment of risks, and the discretion to adjust the age limit for certain groups of products where the exposure is low, resources can be properly focused on areas of greater risk, yielding maximum reductions in consumer risk of death and injury.

4. Does the CPSC have any suggestions for how to mitigate any such economic impact of the Act on small manufacturers of children's products (e.g., component testing for lead and phthalate content) that, in accordance with the intent of the Act and the CPSC's mission, will not compromise the health and safety of children using them?

In light of the concerns expressed by small business owners and employees, CPSC staff has been considering what relief might be provided for them without compromising safety. The first challenge was to define what is meant by "small business" in the context of the manufacture of children's products.

For example, with regard to children's apparel, there are not good statistics differentiating those firms that make all apparel versus those firms that make apparel intended only for children 12 years of age or younger. With regard to toys, the analysis of those businesses that are focused on the manufacturing of products solely for children is more reliable. Bureau of the Census (2006) data shows that there are 776 firms that manufacture dolls, toys, and games (NAICS 33993); 403 of those firms (51.9%) have fewer than 5 employees, 632 (81.4%) have fewer than 20 employees, and 963 (98.3%) have fewer than 500 employees which is the standard definition of a small business. Only 13 of the firms (1.7%) that produce toys would not be considered small businesses by the Small Business Administration. All (or almost all) of these firms are likely to produce children's products and all are affected by the current economic downturn.

Another group significantly impacted by the CPSIA is small crafters of products for children, many of whom work out of their homes. Based on a 2000 survey conducted by the Craft Organization Directors Association, there were an estimated 106,000 to 126,000 craftspeople in the United States. Additionally:

- The average gross sales revenue was $76,000 per craftsperson.
- The median household income of craftspeople was $50,000 per year, with about half coming from craft activities.
- 64% of craftspeople worked alone, 18% work with a partner or family member, and only 16% had paid employees.

Component Certification

The cost of testing and certification is a huge burden on these small businesses and a robust component certification program would be extremely helpful. However, any component testing rule would have to apply across the board to all businesses, small and large, and to our global trading partners in compliance with international trade laws. Furthermore, we have to design a program we are confident will avoid the switch of components during manufacture which is the very problem that Congress was intending to fix by requiring testing of children's products in the CPSIA. Component testing presents real challenges since many of the components used in children's products are not children's products on their own and do not require third party testing. Snaps could be used on a hand knitted sweater that were not produced primarily for use in children's products, and we cannot be sure given the expense of testing, that a market will develop for certified compliant materials for use by crafters.

Potential Solutions

Recognizing that the Commission always has the ability to take action to address unsafe products in the marketplace, Congress could take many different approaches to mitigate the effects on small businesses. Congress could apply the new lead and phthalates limits prospectively to mitigate the impact on inventory existing prior to enactment. It could allow for a more flexible exception process based on balancing of risks against the burdens of the costs of testing and certification but that could overburden staff. Another option would be to allow the Commission the flexibility to decide what children's products require testing and certification.

5. What information has CPSC received about the impact of the Act on the availability of second-hand products for children, especially clothing? It is my understanding that many second-hand stores now refuse to sell children's products. Does CPSC have any suggestions for how to mitigate any negative effects of the Act on second-hand stores for children's products, especially in light of the economic downturn and the consequent increased need for low-cost sources of children's clothing?

CPSC staff has only limited, anecdotal information concerning the impacts of the Act on second-hand stores. Major resellers such as Goodwill Industries and the Salvation Army have estimated impacts, including both lost sales and disposal costs, totaling hundreds of millions of dollars. Many smaller resellers have indicated that under present circumstances, they cannot afford to continue selling children's toys or apparel, which account for much of their revenues. Even church bazaars and neighborhood yard sales are adversely affected.

The major problem for second-hand stores and other resellers is that the CPSIA prohibits the sale, distribution or export after February 10, 2009, of any children's products exceeding the applicable lead or phthalate limits regardless of when they were made. Second-hand stores are typically selling items that were manufactured years earlier. Thus, a large percentage of a reseller's current inventory of children's products may have been manufactured long before the stringent new limits took effect, and it may now be impossible to dispose of such items lawfully except by destruction (which itself may be costly, particularly for non-profit organizations). To make matters more difficult, there is often no cost-effective way to determine which products can lawfully be sold and which cannot.

Unlike other retailers, resellers generally have little or no control over the compliance of the goods that they obtain. Most are donated. Even where they have regular donors, resellers cannot practically establish specifications for children's products as major retailers can for their regular suppliers. Testing everything they receive is not a practical solution either. Like small, home-based manufacturers, resellers cannot spread testing costs across many units of the same type; at any given time, they would usually have on hand no more than a few items of the same type. The standard tests for lead and phthalate content are destructive, so if one tests a single item to determine whether it can be sold, one no longer can sell that item.

Screening devices, such as x-ray fluorescence (XRF) machines, can help in weeding out children's products that have excess lead, without destroying products that comply, but the new technology is still expensive. No such screening device yet exists for identifying phthalates. Even if such technology can be developed quickly, it remains a disproportionate burden to test every unique item in inventory. Some internet resellers and auctioneers do not even have access to the products that are offered for sale by third parties on their website and so could not feasibly test them by any method.

The second-hand store problem will get worse for several years before it may ultimately get better. The lead content limits will drop to 300 parts per million in August 2009 and to 100 ppm in August 2011 (unless the Commission determines that such limit is not technologically feasible for a class of products). Products manufactured after these dates will be in use for some years before they are donated to second-hand stores. So, it will probably take many years before children's products that comply with these stringent limits make up a sizable majority of the products for sale at second-hand stores.

Potential Solutions

Under the circumstances, merely postponing the effective date of the lead or phthalate limits for everyone, while this would help alleviate some problems we are seeing, would not be very helpful to resellers because it would allow products with excess lead and phthalates to continue being made, and thus add to the number of noncompliant products that may eventually find their way to resellers and so postpone the day of reckoning.

The most effective way to help resellers is to address the issue of retroactivity, requiring that manufacturers meet the statutory limits for products manufactured after the effective date but that retailers and resellers be allowed to continue sale. If this suggestion were adopted, it would be important to note that resellers could not sell recalled products and that the Commission retains its authority to stop sale of any product if it finds an exposure that presents an unreasonable health and safety risk to children.

A law like the CPSIA that outlaws sales of previously lawful products will, by its nature, hurt retailers more than manufacturers and hurt resellers even more than other retailers (given the fact that products are typically in consumers' hands for several years at least before they reach second-hand stores). While dealing with retroactivity across the board would be the most effective way to deal with the inequities presented by the current law, other suggestions include such things as establishing a separate rule for resellers. For example, the ban on selling children's products with excess lead or phthalate content could take effect at a later date for second-hand sellers than for retailers generally. Or, resellers (or some subset of them, such as individual consumers or non-profit resellers) could even be exempted entirely from the provision that makes it a prohibited act to sell products containing more than trace amounts of lead or phthalates. Children's products that would have been banned under prior law should not be exempted in any case, and there may be categories of products, for example, children's metal jewelry, that should be handled more strictly. While consumers are accustomed to the notion that used goods are sold "as is," it might be appropriate to require a label or other type of

warning at the point of sale if resellers are allowed to continue to sell older children's products that do not comply with the new limits.

Lest there be any question, CPSC staff does not favor exempting second-hand sellers from the prohibition against selling recalled products (including children's products that are recalled for excess lead paint, or excess lead or phthalate content). The staff believes that resellers can reasonably be expected to keep abreast of CPSC recalls by signing up to receive CPSC's recall press releases and to remove any recalled products from their shelves. Similarly, where Congress has unambiguously directed application of new regulatory requirements to a discrete class of used children's products, such as cribs, CPSC staff believes that resellers no less than others must take steps to comply, even if that means deciding not to sell the products in question.

The Commission has adopted an enforcement policy on lead limits and has issued other guidance to second-hand stores to address many of the recurring issues. In the staff's view, however, the core problem is caused by the retroactive nature of the law and is beyond the agency's authority to solve.

6. Does CPSC believe that the age limit contained in the Act's definition of "children's products" (i.e., 12 years and under) is appropriate? If not, what should the age limit be? Further, should CPSC have discretion to lower the age limit for certain groups of children's products for which the risk of harm from lead or phthalate exposure is remote (e.g., snaps or zippers on children's clothing)?

The term "children's product" has significance for several different provisions of the CPSIA. It specifies which products are subject to the lead content limits. Indirectly, it plays a role in defining which products are subject to the phthalate limits. It governs the scope of products that require certification based on third-party testing and those that will require tracking labels "to the extent practicable."

CPSC staff believes that for purposes of defining which products are subject to lead limits, the boundary age could reasonably be lower than 12, at least in most cases. The Senate bill (S. 2045) deemed age 7 a satisfactory upper limit. CPSC staff understands that the conferees ended up agreeing to age 12 primarily because of the so-called "common toy box problem" – *i.e.*, the concern that a product intended primarily for older children might nonetheless be available to younger ones in the same home. This choice had the effect, however, of applying the lead limits to a much larger population of products, including many that are not toys and even including outdoor products such as dirt bikes or ATVs that would rarely be accessible to younger children under any circumstances.

CPSC's Regulations Established Age Limits by Product Class

CPSC's own regulations have used a variety of different ages to define what group of children's products will be subject to a standard or ban, and these precedents may be useful to consider. For example, the small parts ban applies to products that are intended for children under 3. Toys that are intended for ages 3 through 5 are allowed to have small parts, provided that they have

cautionary labels to warn that they are not suitable for youngsters under 3. In general, toys that are intended for children 6 and older do not require cautionary labeling except in a few specific cases such as balloons and small balls. The lead paint ban (16 CFR part 1303) applies to children's products without a specific age definition. Despite this broad applicability, the scope of the lead paint ban has rarely if ever, generated controversy. This is probably so because it is limited to children's products that have paint or similar surface coatings, and such products are much fewer in number and more easily identified than children's products generally.

Both the likelihood of exposure and the route of exposure are factors to consider in deciding what products should be subject to lead limits. Lead presents an acute hazard when direct ingestion is possible. For this reason, CPSC staff has long treated children's metal jewelry as warranting special concern. In other applications, brass and many other metals often have some lead content, particularly to improve workability, corrosion resistance and other properties.. Where such objects can be mouthed but not swallowed, they generally pose a lesser risk, and objects that can be licked but not mouthed pose still less risk. There are some products where mouthing or licking is unlikely but where some lead exposure may result from touching and inadvertent transfer of lead from hand to mouth. A child's exposure to lead from zippers and snaps will depend on the type of garment and the child's age, among many other factors.

Practical Solution: Commission Discretion

One way to address these issues would be to give the Commission more discretion to grant exclusions from the lead or phthalate limits. Under the law as currently written, a material having more than 600 parts per million lead cannot be excluded unless touching the product will not result in the absorption of *any* lead. Taken as a whole, the language of section 101 appears to rule out treating even very low levels of absorbable lead as negligible. Congress could modify this exclusion criterion to allow *de minimis* levels of absorption or to change the focus to preventing any significant increase in blood-lead levels of a child, particularly for children who are of the age of the intended user.

Giving the CPSC discretion to lower the age limit for certain classes of products might be more efficient than dealing with many requests for exclusion, which is a resource-intensive process. Another resource conserving approach would be for Congress to lower the age limit across the board and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

7. Although some youth all-terrain vehicles (ATVs) and youth motorcycles are intended for use by children under 12 years of age, does CPSC believe it is necessary that these products be tested for lead and phthalate content? Similarly, does CPSC believe that these products present a risk to children for the absorption of phthalates or lead?

CPSC staff is aware that many different parts of youth ATVs and youth motorcycles have lead content, some of which may exceed the 600 or 300 ppm level. Some of these parts are inaccessible, and some parts may qualify for the higher limits applicable to certain electronic components. Other parts, however, appear to be accessible and may not qualify for any

exclusion under section 101 of the CPSIA. These youth vehicles may also have some phthalate content, but they do not appear to be covered by the section 108 bans, which are limited to certain toys and child care articles.

The possibility that children will suffer significant lead exposures from these classes of vehicles appears to be remote at best. First, the vehicles are generally stored outside the home, where younger children would rarely be allowed unsupervised access. The vehicles are generally designed for children of at least 6 years of age and older. These children are far less likely to ingest or mouth components of a motorized vehicle – even those that are physically exposed – than something that fits readily in the mouth, such as a jewelry chain or charm. Children may still be exposed to some lead as a result of touching seats, handle bar grips or other places and then inadvertently transferring some of the lead to their mouths from their hands, either directly or indirectly, as for example while eating. For most children, however, this type of exposure is not likely to result in significant absorption of lead. This is particularly true where children are wearing appropriate protective riding gear, such as gloves and helmets.

Broadening the Exemptions for Metals

In section 101(b)(4), Congress recognized that it might not be technologically feasible for certain electronic devices to meet the lead limits applicable to children's products generally and gave the CPSC authority to adopt other requirements for such devices. The Commission has exercised this authority on an interim basis and established higher limits for certain electronic components where it concluded that such parts cannot be made inaccessible and it is not technologically feasible to substitute other materials at this time. These include metals such as steel, aluminum and copper alloys as used in electronic devices. In adopting these alternative limits, the Commission made reference to exemptions recognized elsewhere, such as the European Union directive 2002/95/EC known as RoHS. It is worth noting that in Europe, the RoHS exemptions are equally applicable to non-electronic uses of these metals, but the staff believes that section 101 gives us no flexibility to apply the same exemptions outside the realm of electronics. This means that children's products containing these metals and metal alloys manufactured for the U.S. market cannot employ recycled metal to the same extent as they can in Europe; rather, the manufacturers for the U.S. market must obtain supplies of primary metal, forcing vastly higher energy consumption and higher costs, or they must quickly switch to substitutes whose properties are poorly understood and may even pose more significant safety risks to children.

Under the current law, CPSC staff believes that an exclusion for youth ATVs would be very difficult to justify. Some have argued that if youth-sized ATVs cannot be sold for an extended period of time, owing to lead limits, then more children may end up riding adult-sized ATVs. A child using an adult ATV as a substitute would face a far graver and more immediate risk than that of the possible lead exposure from the youth ATVs.

Potential Solutions

The ATV situation is illustrative of a number of product classes that may not qualify for an exclusion. Congress could moderate this situation in several different ways. These include one or more of the following (not in priority order): (1) postponing the deadline for sales (not

manufacture) of children's products containing lead above the new limits; (2) lowering the age limit for children's products (as discussed in the response to question 6); (3) exempting some or all children's products that are usually not kept in the house, such as bicycles and ATVs; (4) giving the CPSC greater discretion to exclude from compliance with the lead limits any materials or products that pose a negligible risk to children (as discussed in the response to question 6); or (5) allowing materials that are eligible for special treatment when used in electronic devices to receive similar treatment in other children's products when the justification is equally compelling.

8. In light of recent court decisions that the lead and phthalate content restrictions are retroactively applicable, does CPSC have concerns about the effect on the environment of the disposal of inventories of non-compliant children's products?

This issue lies within the authority and expertise of the Environmental Protection Agency (EPA).

9. I understand that, since early December 2008, CPSC has had access to a large number of lead content results for finished "ordinary books" (i.e., books published in cardboard or paper by conventional methods and intended to be read by or to children age 12 and under) and their component materials (i.e., paper, paperboard, ink, adhesives, laminates, and bindings). Has CPSC staff reviewed those test results? What do those test results indicate about such ordinary books and component materials in connection with the statutory lead limits prescribed in section 101(a) of the Act? Does CPSC have any recommendations regarding how to mitigate the burdens that testing and certification requirements of the Act, and especially the retroactive applicability of those requirements to inventory, could otherwise impose on publishers, printers, and retail sellers of such ordinary books, as well as on libraries schools, charities and other secondhand distributors of such ordinary books, including those published before 1985?

Lead Testing and Printing Ink: The Publishing Industry's Challenge

Given the breadth of the definition of children's product in the CPSIA, the Commission received thousands of questions over the past six months regarding the scope of applicability of the retroactive lead limits and the required third-party testing of such products. At the same time, retailers began demanding certificates of compliance for products likely to be on their store shelves on February 10, 2009. The publishing industry claimed to have been unaware that the definition of children's product would encompass books until retailers started asking for certificates of compliance and we posted a response to one of the frequently asked questions regarding the application of the CPSIA to books intended or designed primarily for children. Because of the variety of colors of inks used in making children's books printed on paper and cardboard, the requirement of testing for compliance to the new lead limits proved costly and onerous. Some retailers were demanding separate certificates of compliance for each book title.

The issue of lead in printing ink and other products used to make a book is not new. Indeed, in 2007 the publishing industry issued a statement on lead in books to respond to any concerns

raised about books related to that year's toy recalls for excessive lead in paint. (See American Booksellers Association statement of November 29, 2007, Bookselling this Week: Getting the Lead Out: Consumers Question Books Made in China, found on March 15, 2009 at http://news.bookweb.org/news/5695.html.) The Commission has occasionally recalled such products for excess lead; for example, a recall was conducted in February 2008 for excess lead in paint on the colored spiral metal bindings of several sketchbooks. In July of 2004, the Commission issued a warning regarding the hazards of lead in candy wrappers that contain lead or bearing lead-containing ink.

The "Ordinary Book" Exemption

The Commission staff wanted to provide some relief to the book publishing industry given the extraordinary impact of third-party testing for lead and because the publishing industry maintained that the Commission had never considered ordinary children's books to be a health hazard. However, given the requirements of the CPSIA, the staff felt that they needed some representative data upon which to base a decision to exempt children's books from the requirements. The number of requests for relief from the retroactive effect of the CPSIA was so high that the staff felt that in fairness, any determination that the law did not apply to a material or class of products should be based on science and supported by test results.

It is not the case (noted in your question) that the Commission staff has had access to a "large number of tests on finished 'ordinary books'," but rather we have had access to a very limited data set on which the publishers have based their request for an industry-wide exemption from testing to the new lead content limits. The publishing industry association provided the staff with 152 separate entries representing testing done on approximately 157 books conducted anywhere from 2004 to 2009. The books tested range from the ordinary books to books with handles, stickers, kits or other accessories. The staff reviewed those test results, and initially concluded that many of the tests were done for European standards and/or did not test for total lead content as required by Section 101 of the CPSIA. The staff of the CPSC asked the industry to provide more data for total lead content and demonstrate that the data submitted was representative of all of the millions of ordinary books sold to children 12 years of age or younger.

The additional data submitted suggests that modern book publishing using offset lithography does not result in books with lead levels in excess of the 300 ppm limit that goes into effect in August of 2009. However, the Commission staff has not had the time or resources to look at the issue completely or comprehensively and has been hopeful that more data would be submitted by industry particularly with respect to books published in the 1960s and 70s. The Commission staff has been assured that the publishers now all use inks that result in children's books that fall below the statutory limits for lead. While the staff does not have a statistically valid basis for a wholesale exclusion of children's books at this time, its determination to exclude them from testing and certification does not mean that any children's book can exceed the lead limit. All children's books must meet the lead limit.

Making a determination that ordinary books cannot and will not exceed the lead limits appeared to be the only means of providing immediate relief. Such an exemption from testing also should

provide relief from the retroactive application of the standard to all books in schools and libraries that are provided to children for their use. In the meantime, the publishing industry was given a conditional enforcement waiver on the testing and certification requirements for lead, pending staff's review of the data and any additional data that may be submitted. That exemption was limited to books manufactured after 1985 because the publishing industry has not provided any test data on books published in the 60s and 70s. Instead, the industry has pointed to the fact that lead was removed from printing operations in this country due to federal statutory restrictions on worker exposure to lead in printing operations which went into effect in the late 70s. The very limited testing the Commission staff has done indicates that the lead content of these older books can occasionally exceed the 300 ppm limit that goes into effect in August 2009 but that data may not be representative. At this time the Commission staff has not had the time or resources to prove that books made more than twenty years ago do not exceed the lead limits as staff has needed to focus its resources on its investigations of deaths and injuries to children and other emerging risks and health hazards.

Library Books and Used Book Resellers

The retroactivity of the lead provision is particularly problematic in the area of books and other printed materials. We have done very limited testing of books from the 60s and 70s. It suggests that the lead content hovers around the 300 ppm mark. Anecdotal evidence received by the agency suggests that on occasion books from this earlier period may contain lead in excess of the lead limits in their binding materials. The only way to determine the total lead content in these books is to test them.

Under the CPSIA, however, sellers of used children's books, including used book stores and thrift shops, are not required to test or certify that children's books meet the new lead or phthalates limits. The CPSIA does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's books intended primarily for use by children that exceed the lead limit.

The Commission had hoped that an exemption for "ordinary books" plus its announced enforcement policy for lead would alleviate this situation. Based on information received from the trade associations with information regarding books in libraries and schools, the Commission staff understands that most textbooks in schools are less than ten years old. Likewise, the information received suggests that most library books lent to children are recycled approximately every 18 lending cycles or three years. Thus, it appears that few of the books being provided to children in their schools and from libraries would be more than 20 years old.

Potential Solutions

Staff has considered children's behaviors with books and concluded that after about 19 months of age, children may occasionally put part of a book in their mouths, but they typically are taught to care for their books so that they can continue to be used for reading and learning. This information suggests that any exposure to lead from contact with books diminishes as children age. We believe an exemption is the only way to provide relief under the CPSIA. Congress could limit the testing of books to only those picture books provided to children much younger

than 12 since this is the population of children that would be most likely to interact with their books in a way that could expose them to inks with higher lead content. Lowering the age limit would be extremely helpful to staff in dealing with books and many other products by narrowing the scope of products covered. Lowering the age limit would also provide relief to schools who face retroactive application of the lead provisions not just with regard to books but also the wide variety of other educational materials they provide to school-aged children.

The CPSIA establishes that any children's product no matter when it was made is a banned hazardous product if it exceeds the lead limits and the law does not have an exemption procedure other than one based on scientific proof that there will not be absorption of any lead. One solution would be for Congress to create a waiver process allowing the Commission to "grandfather" in products made prior to the date of enactment if the Commission concludes those products present only a *de minimis* exposure level and, therefore, a negligible risk. This could be used to solve the problem of used books as well as other products commonly sold second-hand such as used clothing or youth bicycles. It creates an administrative burden that the Commission may not be able to handle without some delay, but it would provide relief without having to undo the retroactive effect of the law altogether.

10. In general, does CPSC believe that the Act was written with too little implementation discretion for the Commission? If this is the case, for which issues (e.g., third party testing requirements) does CPSC require more discretion?

The CPSIA provides too little implementation discretion for the agency. One of the major problems with implementation has been the statute's reach across a variety of industry sectors quickly and simultaneously by virtue of its broad definition of "children's product." The lead limits reach literally every product intended or designed for a child 12 or younger. The breadth of the statute's reach has made it difficult for the Commission to address industry specific concerns in the few areas where the agency has discretion. The Commission needs room to address toy industry concerns separately from those of the apparel industry, from those of the publishing industry, and separately again from those of industries that make outdoor products for children such as motorized recreational products, playground equipment and bikes.

The lead limits and testing and certification provisions could be implemented much more smoothly if the Commission had the discretion to roll out those requirements on a product class basis. The same will soon be true for tracking labels where each industry has specific concerns about how additional labeling requirements will work given existing and multiple other labeling requirements. Congress can direct the agency as to how to determine priorities and work to a specific schedule as evidenced by section 104 which gave some flexibility to the Commission in pursuing the congressional mandates for new durable infant product standards. A similar approach to implementing all of the Act's new rules and requirements would ease the implementation burden. Indeed, the stay of enforcement of certification and testing was the agency's only means to get the breathing room it needed to deal with the various unanticipated issues that arose given the breadth of the industries affected.

Some have argued that the Commission should have a more relaxed approach to exclusions from the lead limits. However, the lead provision of the CPSIA restricts the agency's discretion at a variety of points in the statute. It allows for exemptions in three limited circumstances described in section 101(b). That section allows exclusions for inaccessible component parts of children's products and also allows the Commission to exempt electronic devices where lead is necessary for their functionality and cannot be made inaccessible. Beyond those exclusions, however, the statute leaves very little flexibility. Section 101(b)(1) of the CPSIA provides that the Commission may, by regulation, exclude a specific product or material that exceeds the lead limits established for children's products under § 101(a) of the CPSIA if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will "neither result in the absorption of any lead into the human body," given reasonably foreseeable use and abuse of such product, including swallowing, mouthing, breaking or other children's activities or the aging of the product, "nor have any other adverse impact on public health or safety." (Emphasis added.)

The clear language of the statute is rigid; an assessment of whether there is absorption of "any lead" cannot be based on a risk based assessment because that language does not appear to allow any amount of lead, no matter how insignificant, to be absorbed in the human body. While the courts have occasionally upheld agencies applying a *de minimis* standard and exempting trivial risks from regulation, that has been permitted only when Congress has not unambiguously denied agencies that authority.[1] Here the act specifically limits the exclusion to an application supported by peer reviewed science supporting a demonstration that there cannot be absorption of *any* lead. Moreover, section 101(e) appears to restrict the agency's ability to use enforcement discretion while exclusion requests are pending, by stating that a pendency of a rulemaking to consider a request for exclusion "shall not delay the effect of any provision or limit . . . nor shall it stay general enforcement" of the lead limits.

Those who argue that common sense exclusions are permitted by the CPSIA would have to ignore sections 101(b)(1) and 101(e). Yet as the unanticipated consequences of the retroactive effect of the law have demonstrated, some ability to provide for *de minimis* exclusions would be helpful in implementing of the Act. The effort to deal with the *de minimis* risks given the speculative yet conceivable routes of exposure presented by certain products such as bike tire valve stems distracts attention from more serious health and safety problems that the agency must address. Recently proposed legislation banning BPA recognizes the need for such flexibility to provide relief when a manufacturer cannot comply because it is not technologically feasible to do so in the timeframes permitted. Yet such a waiver or exemption process could prove to be too resource intensive and divert agency resources to handling thousands of exemption requests when staff should instead be dealing with other risks that deserve attention such as identifying emerging hazards.

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[1] *Compare Les v. Reilly*, 968 F. 2d 985 (9th Cir.1992) and *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) with *Ohio v. EPA*, 992 F.2d 1520, 1534-35 (D.C. Cir. 1993). *See also* Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, U Chicago Law & Economics, Olin Working Paper No. 150. This paper can be downloaded without charge at: http://www.law.chicago.edu/lawecon/index.html.

The CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks and the actual consequences of the hazard. Congress should permit the agency to exempt certain products from the limits established by the CPSIA, to ease the burdens of testing and certification on products unlikely to present more than a negligible health risk, and to regulate on a timetable influenced by the seriousness of the actual risks not artificial deadlines. A more flexible exception process would avoid regulation of *de minimis* problems both prospectively and retroactively.

Moreover, this would allow the CPSC to consider the impacts of the regulatory requirements of the CPSIA, like the balance between the adverse effects on second-hand sales of children's clothing or bicycles and the potential risks from exposure in such products, which is especially important during the current economic crisis. It should also allow the Commission to balance risks such as balancing the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV. Given that exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions will be public allowing for transparency and accountability. Finally, relaxing certain deadlines in the Act will allow for better priority setting which will allow Commission resources to be put towards the most serious health risks first.

* * *

CONCLUSION

The staff has set forth in its answers to specific questions above numerous approaches to dealing with the issues raised. In our view, we have been confronted with three major issues in implementing the CPSIA: (1) the retroactive application of requirements to inventory; (2) the broad reach of the legislative mandates given that "children's product" is defined as a product for children 12 years of age or younger; and (3) the impact of the new testing and certification requirements for all consumer products and the third-party testing requirements for children's products. You have asked us to consider possible solutions to the problems raised in the letter, and make our best recommendation as to productive solutions recognizing that these are ultimately policy decisions for others to make. We concluded that the following three changes would resolve many of the major difficulties identified above:

- Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children.

- Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household.

- Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities and a phase-in schedule.

As discussed above, there are many ways to address the challenges of implementation and meet the important goals of the statute. Regardless of the path chosen, some legislative changes would be helpful to allow the agency to set risk-based priorities given the finite resources available to the Commission.

February 15, 2011

Chairman Mary Bono Mack
Subcommittee on Commerce,
Manufacturing & Trade
House Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Ranking Member G.K. Butterfield
Subcommittee on Commerce,
Manufacturing & Trade
House Committee on Energy & Commerce
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Butterfield:

Thank you on behalf of the American Motorcyclist Association (AMA) and the All-Terrain Vehicle Association (ATVA) for holding the hearing entitled, "A Review of Consumer Product Safety Improvement Act (P.L. 110-314) and Consumer Product Safety Commission Resources," on February 17, 2011.

Please act to permanently exempt youth-model motorcycles and all-terrain vehicles (ATVs) from the negative and unintended consequences of the Consumer Product Safety Improvement Act (CPSIA) of 2008.

Founded in 1924, the AMA is the premier advocate of the motorcycling community. Along with our sister organization, the ATVA, we represent the interests of millions of on- and off-highway motorcyclists and all-terrain vehicle (ATV) riders nationwide. Our members are interested in any action that may affect their ongoing ability to responsibly enjoy motorcycle and ATV recreation. The AMA and ATVA remain concerned over the implementation of the CPSIA and the lead provisions in §101 as they apply to youth-model motorcycles and ATVs.

The Act, signed into law on August 14, 2008 and effective February 10, 2009, subjects any consumer product that is designed or intended primarily for a child age 12 years or under to the new limits on lead content (§101). While the Act was passed with laudable intent, it has created a well-documented safety hazard for children, a severe and unwarranted disruption to families who recreate together, and a deleterious effect on youth amateur racing. Additionally, the inclusion of youth-model off-highway vehicles (OHVs) in the Act has created an economic disaster for the youth model motorcycle and ATV industry.

Of greatest concern, however, are the unintended safety consequences for youth OHV riders. As you may know, the OHV community and the Consumer Product Safety Commission have worked extensively together to develop appropriate OHV size and operating guidelines for young riders. The sudden, near elimination of the availability of all youth

OHVs is counterproductive to all the work that the OHV community and the CPSC have done to promote youth rider safety. The elimination of these vehicles because of an unsupported suspicion that they may pose a theoretical threat of a lead hazard effectively trades away a proven safety intervention for an unproven one.

As you continue your deliberations on this important matter, we urge you and the members of your committee to support H.R. 412, the Kids Just Want to Ride Act of 2011, introduced by Representative Denny Rehberg. This bill offers the most promising and viable legislative remedy available to permanently exclude youth-model motorcycles and ATVs from the perilous and unintended consequences of the CPSIA.

Thank you for the opportunity to provide comment on AMA and ATVA's ongoing concerns surrounding the CPSIA.

Sincerely,

Edward Moreland
Senior Vice President, Government Relations

CC: Chairman Fred Upton
Ranking Member Henry Waxman
Members of the U.S. House of Representatives Committee on Energy & Commerce

February 11, 2011

Chair Fred Upton
Subcommittee Chair Mary Bono Mack
U.S. House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Henry Waxman
Subcommittee Ranking Member G.K. Butterfield
U.S. House Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives:

On behalf of the Motorcycle Industry Council (MIC), its nearly 300 vehicle manufacturer and aftermarket members, their thousands of dealers, and the millions of Americans who safely and responsibly ride their off-highway vehicles (OHVs) with their families, thank you for holding the hearing "A Review of CPSIA and CPSC Resources" on February 17, 2011. I am writing to urge you to amend the Consumer Product Safety Improvement Act to stop the ban on youth ATVs and motorcycles.

The CPSIA was intended to protect children from ingesting lead from toys. However, the lead content provision has had unintended consequences. The CPSIA has effectively banned the sale of age-appropriate youth ATVs and motorcycles because of the lead content of certain metal parts. As a result of its broad reach, the Act has inadvertently crippled an industry unrelated to the toy manufacturers that were the intended target of the lead provision. In addition, the ban has resulted in unsafe situations for youth OHV riders.

It is estimated that over 13 million Americans enjoy riding off-highway motorcycles and over 35 million enjoy riding ATVs. Safety of our riders - particularly our youngest riders – is a top priority of the powersports industry. Vehicles, helmets and other gear and accessories are specially designed for youth riders to allow them to safely enjoy this family-friendly form of outdoor recreation.

In February 2009, however, ATVs and motorcycles designed and primarily intended for youth riders aged 6 to 12 became banned hazardous products under the CPSIA because small amounts of lead – that pose no risk to youth - are imbedded in metal parts of the vehicles to enhance the functionality of those components.

As you know, the CPSC concluded that the language of the CPSIA prevented it from making common-sense decisions and resulted in the CPSC denying the powersports industry's petitions for exclusion from the lead content provision. The exclusion was denied despite the fact that the CPSC's own staff acknowledged that there was no measurable risk to children resulting from lead exposure from these products.

The CPSC tried to temporarily address the ban by issuing a stay of enforcement of the CPSIA's lead content limits. Unfortunately, the stay of enforcement has proven unworkable. Due to the risks of selling under the stay, many manufacturers and dealers have stopped selling youth model OHVs, and there is now a limited availability of these products for consumers. In 2011, less than 25% of the major manufacturers are even producing the smallest youth ATVs.

The CPSC has explained that the ban on youth OHVs creates a compelling safety issue because it likely will result in children 12 years of age and younger riding larger and faster adult-size vehicles. For example, CPSC studies show almost 90% of youth injuries and fatalities occur on adult-size ATVs. Again, the CPSC's staff scientists acknowledge that the presence of lead in metal alloys in these youth models – needed for functionality, durability and other reasons that are safety critical to the components – does not present a health hazard to children. The Commission also notes that children riding these vehicles only interact with a limited number of metal component parts that might contain small amounts of lead, like brake and clutch levers, throttle controls, and tire valve stems.

For over two years, MIC, its members, their dealers and many of the millions of Americans who safely and responsibly ride their off-highway motorcycles and ATVs with their children have urged Congress to amend the CPSIA to stop this unintended ban on youth motorized recreational vehicles. Off-highway vehicle stakeholders have sent over one million electronic messages and thousands of hand signed letters and made numerous calls and personal visits to Capitol Hill to advocate for a legislative solution to the ban for three important reasons:

First, the lead content in metal parts of ATVs and motorcycles poses no risk to kids. Experts estimate that the lead intake from kids' interaction with metal parts is less than the lead intake from drinking a glass of water.

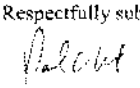
Second, everyone agrees that the key to keeping youth safe on ATVs and motorcycles is having them ride the right sized vehicle. The CPSIA has unintentionally put kids at risk because youth ATV and motorcycle availability is limited. Unavailability of youth models results in what CPSC has described as a "more serious and immediate risk of injury or death" than any risk from lead exposure from these products.

Finally, the CPSIA is unnecessarily hurting the economy and jobs when everyone is trying to grow the economy and create jobs. In 2009, MIC estimated that a complete ban on youth model vehicles would result in about $1 billion in lost economic value in the retail marketplace every year.

As Representative Rehberg stated when introducing H.R. 412 to stop the ban on ATVs and motorcycles, "a law meant to improve children's safety is actually being enforced in a way that puts kids in more danger than ever, while destroying jobs to boot."

We believe that Congress never intended to ban youth model motorized recreational vehicles when it passed the CPSIA. We urge this Committee to stop the unintended ban by either lowering the age range of "children's products" to age 6 and under or granting a categorical exemption for youth ATVs and motorcycles, as provided in H.R. 412. In either case, we urge the Committee to leave CPSC with no doubt about Congress' intent to ensure the continued availability of these youth model motorized recreational vehicles.

Respectfully submitted,



Paul C. Vitrano
General Counsel

Testimony Submitted for the Record
U.S. House of Representatives
House Subcommittee on Commerce,
Manufacturing, and Trade
April 17, 2011

Presented by
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Testimony Submitted for the Record
U.S. House of Representatives
House Subcommittee on Commerce, Trade, and Consumer Protection
April 29, 2010

Mr. Chairman, Ranking Member, and members of the Subcommittee, on behalf of Goodwill Industries International® (GII), thank you for this opportunity to provide testimony for the public record about the *Consumer Product Safety Enhancement Act of 2010*. Last spring, Goodwill worked with the Committee and its staff to develop draft language for inclusion in a discussion draft of the *Consumer Product Safety Enhancement Act*. Goodwill believes that the draft included effective provisions that would address Goodwill's concerns about retroactively applying the CPSIA's sales ban on children's products manufactured before the law's implementation. Goodwill believes that the provisions in Section 3, pertaining to the selling of used children's products, would have allowed Goodwill to continue supporting its mission through the sale of used children's apparel within the letter and spirit of the law.

Goodwill Industries International (GII) represents 158 local and independent Goodwill agencies in the United States that help people with barriers to employment to participate in the workforce. One of Goodwill Industries' greatest strengths continues to be its entrepreneurial approach to sustaining its mission. In 2009, the Goodwill network raised nearly $3.7 billion through its retail, contracts, and mission services operations. Nearly 83 percent of the funds Goodwill raised in 2009 were used to supplement government investments. Today more than ever people rely on Goodwill. In fact, in 2009, Goodwill collectively served almost 2 million people. This number represents a 26 percent increase compared to 2008. With the economy

continuing to be sluggish, we expect that we will continue to see the number of people who turn to Goodwill for assistance to increase dramatically.

The roots of today's Goodwill began as a simple idea in 1902 when Rev. Edgar Helms set out to help poor immigrants in Boston's South End by collecting clothes and household items from wealthier Bostonians to provide clothing and household items for the struggling immigrants. He discovered, to his surprise, that the immigrants were too proud to simply accept the items. So he took his idea a step further by enlisting volunteers to repair, clean, and sell the items at reasonable prices. He used the revenue to provide wages to the workers – and the first Goodwill store was born.

Especially during such difficult economic times, Goodwill is very proud of its long history of helping people to find jobs and advance in careers. As the nation struggles to recover from the worst recession since the Great Depression and unemployment stubbornly hovers near 10 percent, Goodwill remains committed to partnering with stakeholders at the federal, state, and local levels by contributing the resources and expertise of local Goodwill agencies in support of public efforts and investments.

Goodwill's first priority is and has always been the safety of its customers and the people it serves. Goodwill has a long history of working in good faith with the Consumer Product Safety Commission (CPSC) to prevent unsafe products from being sold in its stores. Local Goodwill retail professionals check the CPSC's product recall lists to identify any recalled and donated products. Those found to have been recalled are not placed on stores' shelves for sale and are taken out of circulation. In addition, agencies avoid selling known high-risk items, such as metal

jewelry and painted toys. We continue to work closely with the CPSC to pursue our common goal of preventing people from purchasing unsafe products. By continuing these efforts, we believe amending the CPSIA – by exempting the sale by charitable organizations of used children's clothes from the CPSIA's sales ban – would allow Goodwill stores to sell used children's apparel while protecting our customers' children.

I'd like to spend a moment of our time to discuss Goodwill's business model, since it is very different than that of a traditional retailer with a national footprint. First, it is very important to keep in mind that Goodwill's footprint in the U.S. is actually 158 local and independent community-based organizations' footprints that collectively make up the Goodwill network in the U.S. Each local Goodwill agency's autonomy allows it to be a true community stakeholder and partner. For example, in 2009, the Los Angeles Goodwill invested millions of its own earnings to subsidize one-stops that serve over 59,000 people. Over 4,000 went to work to support their families and improve the economic well being of their communities.

Second, the nature of the donated goods business means that most of Goodwill's products are each individually supplied through the generosity of people who donate unwanted clothes, household items, and furnishings. Inventory control systems that allow national retailers to purchase inventory; plan for its sale; and provide product specifics and information simply do not exist in the donated goods retail business. Before donated products can be placed for sale in a Goodwill store, they must be sorted and their price must be determined. In addition, our retail professionals check product recall lists to identify and dispose of any donated items that have

been recalled – therefore ensuring that these dangerous items are removed from the consumer marketplace.

We believe the nature of the donated goods charity model supports the need for legislation to exempt human service organizations that sell used children's apparel, among other products, from the CPSIA's retroactive sales ban. Goodwill absolutely agrees that children should not be exposed to products that have dangerous lead levels. This is a moral value Goodwill holds, yet it also makes good business sense. Doing anything less would have enormous potential to damage the Goodwill brand, thus hindering Goodwill's ability to provide the employment and training services to people with employment challenges.

Goodwill has worked in collaboration with the CPSC to develop constructive solutions to this important issue, exploring potential courses of action that would allow local Goodwill agencies to demonstrate a good faith effort to comply with the new law, while selling used children's products at a reduced risk to our customers and our agencies. The result was an enhanced partnership with the CPSC to educate the public, and inform and train our retail professionals. Goodwill believes that these efforts demonstrate the gold standard of good faith on the part of both Goodwill and the CPSC toward accomplishing our mutual goal of protecting children. Goodwill also recognizes that the long-term solution requires Congress to take action.

Conclusion

Goodwill has deeply appreciated the opportunities that it has been given to develop draft legislation that would address the CPSIA's unintended consequences on charitable organizations, such as Goodwill, that resell donated items, including children's products, to support the delivery

of mission services. Goodwill looks forward to continuing its work with members of this Subcommittee and staff to develop provisions that would allow Goodwill stores to support Goodwill's mission through the sale of used children's apparel within the letter and spirit of the law.

Members of the Subcommittee, again I thank you for the opportunity to discuss these concerns with you, and for pausing briefly to hold this hearing with Goodwill and other stakeholders to ensure that the final bill protects children from harm while enabling local Goodwill agencies to support their efforts to annually serve nearly 2 million people in local communities nationwide.

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February 17, 2011

The Honorable Mary Bono Mack, Chairman
The Honorable G.K. Butterfield, Ranking Member
House Energy and Commerce Committee
Subcommittee on Commerce, Manufacturing, and Trade
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Butterfield:

The Retail Industry Leaders Association (RILA) welcomes the opportunity to submit written comments on the unintended consequences of the Consumer Product Safety Improvement Act (CPSIA) and on CPSC resources and its ability to protect consumers. RILA members place the highest priority on the safety and quality of the products they sell to their customers, and we supported the sweeping CPSIA when it was enacted in 2008. Nevertheless, while implementing the CPSIA, it has become apparent that there are some provisions in the law that do not coincide with best practices and have resulted in unintended consequences. RILA hopes the House Energy and Commerce Committee will make it a priority to advance legislation to facilitate better implementation of the CPSIA.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry which together provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

While RILA recognizes that the CPSIA has had a profound impact in reinvigorating the Consumer Product Safety Commission (CPSC) and enhancing consumer product safety, RILA also believes the 2008 law could be improved.

Prospective Application of 100ppm lead limit

RILA strongly supports the unanimous recommendation of the CPSC Commissioners to prospectively apply the August 2011 100ppm lead limit. As currently interpreted by the CPSC, the CPSIA will make it unlawful to sell products that exceed a 100ppm limit after August 2011, regardless of when the products were manufactured, unless the CPSC determines that the lower limit is not technologically feasible.

Moreover, RILA notes that "feasible" does not equal "practical" when considering the 100 ppm limit. When discussing lead limits at these very low levels, RILA believes the CPSC should also have discretion to use risk as a factor.

The retroactive application of this provision creates substantial problems for manufacturers and retailers with large inventories of children's products, as well as for resellers such as charitable thrift

stores, and leads to wasteful destruction of safe products because confirmation of compliance for products already on retail shelves often cannot be done in a cost effective manner. Retailers will incorporate new safety standards into their guidance to suppliers so as to ensure compliant products, but it is very difficult to implement new standards on the basis of a sell-by date, particularly when there is uncertainty on whether the CPSC could make a determination that 100ppm is not technologically feasible. There is significant historical precedent to implement new safety standards on a prospective basis, and RILA has urged the CPSC to implement the August 2011 lead limit on a prospective basis. Nevertheless, Congressional action to clarify its intent for a prospective application would be very helpful for smooth implementation of the law.

Inaccessible Component Parts for Phthalates

RILA also believes the CPSIA should be modified to clarify that inaccessible component parts are excluded from the law's phthalate restrictions. Section 101(b)(2)(A) of the CPSIA clarifies that the lead limits do not apply to any component part of a children's product that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product. Section 108 of the CPSIA does not currently make a similar exception for inaccessibility for phthalates, and RILA understands this omission was inadvertent. RILA believes the prohibition on phthalates should only apply to accessible parts similar to the lead policy. As an example of the problem, phthalates are used in the plasticized coating of internal wiring in electronic toys, such as remote controlled helicopters. The phthalates help to keep the plastic coating soft and pliable to better encase and protect the wires, but does not present a risk of exposure to a child playing with the helicopter because the wires are inaccessible. A clarification that inaccessible component parts are excluded from the phthalates limits would prevent the need for costly and unnecessary testing, and confirm that the remote-controlled helicopter would be CPSIA compliant.

Increased Authority for CPSC to Exclude Products from CPSIA limits

RILA also believes the CPSC should be granted expanded authority to except certain product classes or materials from the CPSIA's lead and phthalates limits based on functional purpose of the lead or phthalates in the product class, product, or component whenever the CPSC can also determine that the presence of lead or phthalates presents no significant risk of exposure or harm. Examples of product classes that may contain lead or phthalates which serve a functional purpose include pens, bicycles, all-terrain vehicles, and remote-controlled items.

Modifications to Reasonable Testing Program Requirements

The CPSC's proposed rule for reasonable testing programs (RTP) includes several burdensome and unnecessary provisions that RILA believes the Congress should consider. For example, under the CPSC's proposed rule, the burdens of record keeping for a RTP are enormous and costly. In particular, the requirement to have factory-based records in US and in English is burdensome and unnecessary because recordkeeping and the language and location of records do not meaningfully increase the safety of products.

In addition, Congress should clarify that the random sampling language in the statute does not necessarily mean statistical sampling but rather to show compliance and avoid the "golden sample."

Also, implementation of the RTP should be prospective to apply to products as they are developed. Companies should not be required to do retroactive testing, production test plans, specifications or record keeping for products already produced. The RTP requirements should apply only to products commencing production on the effective date.

Definition of Children's Products

The CPSC has interpreted the definition of children's products in an overly broad and confusing manner. RILA believes it would be helpful for Congress to provide clarity and common sense on this issue.

For example, there should be a greater weight on the manufacturer's intent whether a product is designed primarily for children.

The four (evenly) weighted factors do not lend themselves to determining the manufacturer's intent. It is currently unclear how retailers should apply the rules, especially for general use products that are used in a child's room. Instead, the rules should take into account risk and exposure. For example, a ceiling fan does not pose a risk to a child, even if it has "cartoonish" features.

The CPSC's rule effectively negates the words "designed or intended primarily". The same fan that hangs in a living room or DVD player in the den could be miraculously transformed into a children's product by the addition of Spiderman and a Hello Kitty decal.

One possible solution is to qualify the definition with something like "decorative embellishments that do not affect the functionality of the product shall not be given substantial consideration in the determination of a product as a children's product unless there is no reasonably likely general usage of the product in its unembellished form."

The CPSC should also have authority to adopt a risk evaluation in determining whether a product should be considered a children's product. For example, the definition could include, "In adopting rules interpreting the definition of a children's product, the Commission shall take into account the risk of substantial injury to children 12 years of age or younger."

Public Database

RILA believes that the veracity of information available on the CPSC's public database is critical. Thus, RILA believes that only those persons who have direct knowledge of an incident as either a victim, witness, or first responder should be eligible to provide information regarding the incident. This suggestion is to help to make sure there is sufficient information available to properly assess a report.

In addition, RILA believes that a 30 or 60 day period for manufacturers and retailers to object to complaints prior to publication on the database would be helpful.

Conclusion

In conclusion, retailers work tirelessly to ensure the safety and quality of the products they sell, and to fully implement all the new requirements under the CPSIA. We also hope the Congress will

advance legislation as soon as possible to improve the effectiveness of the CPSIA and reduce unnecessary costs for businesses that do not provide additional product safety benefits.
We look forward to continuing to work with you on this and other important product safety issues. If you have any questions or concerns, please contact me at stephanie.lester@rila.org or 703.600.2046 or Jim Neill, Vice President, Product Safety at jim.neill@rila.org or 703.600.2022.

Sincerely,

Stephanie Lester

Stephanie Lester
Vice President, International Trade

Rep. Denny Rehberg (MT-AL)
Statement for the Record
Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade
Hearing on a Review of CPSIA and CPSC Resources

Mr. Chairman, thank you for the opportunity to submit this Statement for the Record on the hearing entitled "a Review of CPSIA and CPSC Resources" and to share my specific concerns with an aspect of the law that was passed in 2008.

As you know, the Consumer Product Safety Improvement Act (CPSIA), while well-intentioned, created a situation in which off-road vehicles that are manufactured and marketed exclusively for children under the age of twelve; including all-terrain vehicles, off-highway motorcycles and snowmobiles, have been effectively banned due to the Consumer Product Safety Commission's (CPSC) interpretation of the lead content provision. Although the Commission has issued a stay of enforcement through December of this year, permanent action to exclude these products from the CPSC's interpretation is sorely needed.

Under the CPSC's interpretation, engines, brakes, wheels and suspension parts would not receive an exemption from the CPSIA's lead testing provisions and must conform to the strict provisions included in the legislation. As I have expressed to the Commission and to my fellow Members of Congress before, it would be extremely difficult for children to physically handle these parts, many of which aren't easily accessible to even the most experienced mechanics. Quite simply, these parts should not be included in the CPSC's interpretation of the bill.

I have again introduced legislation this Congress, H.R. 412, to exempt youth-model off-road vehicles from the CPSIA and I ask the Committee to include its language in any efforts to reform and improve the CPSIA. A full categorical exemption is the best way to clarify Congressional intent and ensure that children have access to the properly-sized vehicles that will keep them safe. This issue is of utmost importance to outdoor enthusiasts and small business owners across the country that base their livelihood on the sale of youth products.

I appreciate your attention to this issue and please do not hesitate to let me know if I can be of any assistance moving forward.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

March 23, 2011

The Honorable Mary Bono Mack
Chairman
House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and
Trade
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack:

Attached please find responses to the written questions for the record submitted by you and certain other Members of the Subcommittee in connection with the February 17, 2011, hearing entitled "A Review of CPSIA and CPSC Resources." An electronic version of these responses will also be provided to Katie Novaria, Legislative Clerk for the Subcommittee.

Thank you again for the opportunity to testify before the Subcommittee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Very truly yours,

Inez M. Tenenbaum

Attachments

House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
"A Review of CPSIA and CPSC Resources"
February 17, 2011

Responses of Chairman Inez M. Tenenbaum to Questions for the Record

Questions from the Honorable Mary Bono Mack

1. **On what date did the "soft launch" of CPSC's complaint database begin?**

   The soft launch began on January 24, 2011.

2. **Have all product safety complaints coming to the Commission since that day been processed as part of the "soft launch"? If not, how many have been processed as part of the soft launch?**

   All potentially eligible reports were processed as part of the soft launch. Reports originating through certain sources—news reports, death certificates, and incidents reported to CPSC under Section 15(b) of the CPSA, Section 102 of the CSPA, or reported through CPSC's voluntary retailer/manufacturer reporting program—are ineligible for the public database and were not considered for inclusion. From January 24, 2011, through March 8, 2011, 2,656 potentially eligible reports were received through soft launch.

3. **Of all the complaints received by the Commission since the start of the soft launch:**

   a. **How many provided enough information to qualify as a "report of harm" under the Commission's rule?**

      One thousand sixty-three of the reports received between January 24, 2011, and March 8, 2011, have qualified as "reports of harm." Most reports received by mail, phone, and fax have not included consent and verification and have had to be returned to the submitter so they may indicate his or her consent preferences and verify the accuracy of the information in the report. The number of qualifying reports from this time period will therefore likely increase over time as consent forms are returned.

   b. **How many were submitted by consumers who actually used the product that was the subject of the "report of harm"? Who else has submitted complaints?**

      We collect the category of the submitter (consumer, local, state, or federal government agency, health care professional, child service provider, or public safety entity) and, on some reports, the submitter has identified the relationship of the submitter to the victim. Relationship is not a required field, however, and is

only collected on reports where the category of submitter is "consumer" and the submitter indicates that there was an incident. We do not collect information on whether the submitter actually used the product. The two tables below show the distribution of category of submitter and of the relationship of the submitter to the victim. Each table includes a second dimension that shows whether or not the report qualifies as a report of harm. Reports for which we do not yet have verification and/or consent preferences are designated in the tables below as "awaiting consent."

Qualified as Report of Harm by Category of Submitter
Received January 24, 2011, through March 8, 2011

	Child Service Provider	Consumer	Federal Government Agency	Health Care Professional	Local Government Agency	Medical Examiner and Coroner	Public Safety Entity	State Government Agency	Unspecified	Total
Yes	2	1042	2	0	6	3	8	0	0	1063
No	1	193	0	1	5	41	5	7	0	253
Awaiting Consent	1	435	5	0	10	838	34	12	5	1340
Total	4	1670	7	1	21	882	47	19	5	2656

Qualified as Report of Harm by Relationship of Submitter to Victim
where Category of Submitter is Consumer
Received January 24, 2011, through March 8, 2011

	Self	Family	Friend, Neighbor, Coworker	Professional Relationship	No Relationship	Unspecified	Total
Yes	306	191	5	4	1	535	1042
No	48	27	3	0	0	115	193
Awaiting Consent	86	50	1	1	5	292	435
Total	440	268	9	5	6	942	1670

c. How many of the complaints included model number(s)?

Nine hundred fifty-six of the reports that qualified as reports of harm contained an input in the model field. Among all potentially eligible reports, 1,430 reports contained an input in the model field.

4. Of the complaints that qualified as "reports of harm," how many were transmitted to the product manufacturer within five business days?

Of the 1,063 reports received between January 24, 2011 and March 8, 2011, that have qualified as reports of harm, 1,004 reports were forwarded to manufacturers and 59 reports were under review. Of the 1,004 reports forwarded, 759 reports were forwarded within five days after the report was determined to be a qualified report of harm and 245

reports were forwarded more than five days after the report was determined to be a qualified report of harm.

During soft launch the processing of some reports was somewhat slower than current processing speeds due to continued system testing and staff adjustment to the review process. Since then processing speeds have improved substantially, which was one of the purposes of the soft launch.

5. Of the "reports of harm" that were transmitted to a product manufacturer:

a. How many were sent to a manufacturer who had preregistered with the Commission?

Through March 8, 2011, CPSC notified businesses of 696 reports of harm that were eligible for the database. Of these, 529 were delivered to registered businesses through CPSC's business portal.

b. How many elicited comments to the Commission from the product manufacturer within ten business days?

Through March 8, 2011, 158 general comments were received through CPSC's business portal in response to the 1,004 reports of harm transmitted to businesses. Of these, 143 were received within 10 business days. Approximately 30 additional general comments were received by email, fax, or postal mail.

c. How many provided the product manufacturer with the contact information for the complainant?

Eight hundred thirty-seven of the 1,004 reports of harm were provided to businesses with the submitter's contact information.

6. Of the "reports of harm" to which manufacturers responded:

a. How many did the manufacturer claim were "materially inaccurate" in some way?

Through March 8, 2011, CPSC received 12 claims of materially inaccurate information.

b. How many did the manufacturer claim contained confidential business information?

Through March 8, 2011, CPSC had not received any claims of confidential information.

7. **Of the reports of harm as to which a manufacturer claimed some "material inaccuracy," how many were investigated by the Commission? Please provide the date the investigation was opened, the date it was completed and the resolution of the investigation.**

Investigations Related To Materially Inaccurate Information Claims

From January 24, 2011, through March 8, 2011, we received 12 claims of materially inaccurate information through the business portal on SaferProducts.gov. All of these claims have been reviewed and resolved. Nine of these claims alleged that the wrong manufacturer or private labeler was identified in the report of harm. After investigation, all nine of these claims were accepted by the CPSC staff and any erroneous information was corrected. We do not track a date when an investigation begins. We track the date a claim is filed and the date the claim is resolved, meaning the CPSC notified the manufacturer of its determination on the claim. For a claim involving a wrong manufacturer, the investigation generally consists of verifying the manufacturer's claim, primarily using an internet search. Once staff reviews the claim, it can typically be quickly resolved in approximately 15 minutes. Thus, for the nine wrong manufacturer claims received, all but one were resolved in two business days or less, as shown below.

Wrong Manufacturer Claims

Number of Wrong Manufacturer Claims	Number of Business Days to Resolve
2	0
4	1
2	2
1	4

Wrong Manufacturer Claims

	Date Manufacturer Submitted Claim	Date CPSC Resolved
1	2/2/2011	2/4/2011
2	2/8/2011	2/9/2011
3	2/11/2011	2/17/2011
4	2/22/2011	2/24/2011
5	2/24/2011	2/25/2011
6	2/25/2011	2/28/2011
7	2/28/2011	3/1/2011
8	3/3/2011	3/3/2011
9	3/3/2011	3/3/2011

Three claims alleged that information in a report was materially inaccurate, other than the identification of a manufacture or private labeler. Pursuant to the final rule, the burden of proof is on the firm alleging that a material inaccuracy exists. Claimants are expected to provide CPSC with sufficient information for us to make a determination on its claim.

After investigation, the CPSC determined that one claimant failed to meet its burden of proof to demonstrate that a report contained materially inaccurate information. Two reports were determined to contain at least one piece of information that met the definition of materially inaccurate information. With regard to the first report, a model number was corrected. In the second instance, the spelling of the name of the product was corrected. The length of an investigation depends on the amount of information provided. Where a firm has not met its burden of proof, or has offered little or no information for review or consideration, the CPSC's review does not take long to complete.

Materially Inaccurate Information Claims
(Excluding Wrong Manufacturer)

Number of Claims	Number of Business Days to Resolve
1	7
1	2
1	6

Materially Inaccurate Information Claims
(Excluding Wrong Manufacturer)

	Date Claim Submitted	Date CPSC Resolved
1	2/8/2011	2/17/2011
2	2/23/2011	2/25/2011
3	3/8/2011	3/16/2011

8. Of all the reports of harm submitted to CPSC during the soft launch, how many were investigated by the Commission?

Through March 8, 2011, 113 of the reports that qualify as reports of harm have been assigned for investigation by CPSC field staff and 198 of all potentially eligible reports have been assigned for investigation.

9. Is the Commission aware of any cases, either before or after the date of the soft launch, in which fraudulent complaints were filed with the Commission? Is the Commission aware of any cases in which a particular type of consumer product was the subject of two or more fraudulent complaints? Has the Commission pursued sanctions in any of these cases?

CPSC staff is aware of one instance of false data submitted in a report late last year. This submission, however, was not provided through the public database report process, which did not begin soft launch until January 24, 2011. Staff investigated the report in a timely manner, found evidence and information that the report was fabricated and forwarded it

to CPSC's legal team for review and possible action. As of this date, the case remains open and is under active investigation.

10. Approximately how many product safety complaints is the Commission staff able to investigate each year? For complaints that are investigated, what is the average time from when the complaint is filed with the Commission to when the investigation is complete?

Current staffing levels permit approximately 5,000 in-depth investigations per year. The elapsed time between complaint filing and completion of the investigation varies greatly depending on the urgency of the investigation, the complexity of the product, and any specific testing that may be required as part of the investigation. The average time elapsed between assignment of an investigation and completion in fiscal year (FY) 2010 was 43 days.

11. Does CPSC intend to allow information on the database to be downloaded without a disclaimer as to its accuracy? When CPSC determines that information previously included in the database is "materially inaccurate," how will it notify parties who have previously downloaded the inaccurate information?

No. To date, the CPSC has not provided a means for downloading data from SaferProducts.gov, because no reports have been posted yet. When the database has been populated with reports of harm, the CPSC intends to provide a means to download information. Information downloaded from the database will contain the statutorily required disclaimer as the first piece of information in every data file. However, CPSC cannot guarantee, nor does the statute require, that users and aggregators of this information retain this disclaimer.

Additionally, the database is a dynamic computer system. Information may change because a report is found to be materially inaccurate, or because the consumer revised his or her report to include additional information. Users that download this data must be mindful to update data on occasion, to ensure that corrected information is captured.

12. What obstacles (other than staff resources) does the Commission face to completing investigations more quickly?

Prior to the completion of Phase I of the Information Technology (IT) modernization, most of the CPSC's business processes used many small, disconnected information systems. Commission staff were unable to efficiently and effectively pull together required data because of these "stove piped" systems. Staff stored and manually maintained too much critical information outside of the legacy systems—a situation that places an unwarranted dependency on a small number of key program area staff with expert knowledge in a particular field and supporting data.

We needed to improve our business processes and the Commission's IT systems needed to support those improvements. These improvements are intended to eliminate manual

processes and tedious status reporting and expedite hazard identification and related management decision making. The IT modernization component of CPSIA Section 6A is designed to make these improvements.

13. Please provide an explanation of the $3 million figure cited by Chairman Tenenbaum as the cost of the public database. What is included in the cost? Was that estimate previously provided to Congress or to the other Commissioners?

Since the beginning of the statutorily mandated Consumer Product Safety Risk Management System (CPSRMS) project in FY 2009, the CPSRMS cost has been included in the CPSC's annual budget, which is presented to and voted on by the Commission. The budget is also presented to the Office of Management and Budget (OMB) and to the Congress. Starting in September 2009, Commission staff have published an OMB Exhibit 300 including a summary of historical, current, and planned expenses for the CPSRMS program. An example can be found at: http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/cpsrms.pdf.

However, in presenting its budget and in the OMB Exhibit 300, the Commission did not separate the cost of the public database from the overall CPSRMS information technology modernization costs.

Below is an estimate of the work done within the CPSRMS project to develop the public database. This estimate was established in hindsight according to the scope of the public database.

Portion of the Consumer Product Safety Risk Management System Costs Dedicated to the Public Database

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	**Total**
Development	$1.450	$1.000				**$2.450**
Operations and Maintenance		$0.400	$0.050	$0.050	$0.050	**$0.550**
Total	**$1.450**	**$1.400**	**$0.050**	**$0.050**	**$0.050**	**$3.000**

Please note that the costs (in millions) above include contracted goods and services by fiscal year. Costs in fiscal years 2009 and 2010 are based on actual obligations. Costs in fiscal years 2012 and 2013 are for planning purposes. Costs in fiscal year 2011, while currently under continuing resolution, are a combination of actual obligations and are for planning purposes.

Since December 2010, Commissioners Alder, Nord, and Northup have received briefings regarding CPSRMS costs, per their request.

14. Please provide an estimate of the cost to operate the database for one year. Please provide an estimate of the costs incurred by manufacturers in responding to reports of harm during the soft launch.

As noted in the chart above, the CPSC's operations and maintenance costs specific to the CPSIA Section 6A public database requirements are FY 2010: $400,000, FY 2011: $50,000, FY 2011: $50,000, FY 2012: $50,000, and FY 2013: $50,000.

With regard to the cost that may have been incurred by manufactures during soft launch this would have depended on the behavior of an individual manufacturer.

15. Lead limits—Books

a. You have indicated that you favor an exemption from the lead limits for ordinary children's books. In your view, what is the rationale for such an exemption?

Modern books are typically made of materials known to not contain lead at levels that exceed the limits required by law, such as paper products and four-color process (i.e., CMYK) inks. In the Statement of Managers Accompanying P.L. 111-117, the Conferees noted their belief that the CPSIA may not have been intended to subject ordinary children's books to the section 101(a) lead content limits. In response, the Commission unanimously stated in its Janaury 15, 2010, Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117 (hereinafter "Report to Congress") that "Congress may, with some limitations, choose to consider granting an exclusion for ordinary children's books and other children's paper-based printed materials."

b. In your conception, would an exemption for books also cover older books, such as those loaned by public libraries or sold by used book stores?

Ordinary children's books should include the same materials as described in part a. of this question and therefore Congress may, with some limitations, choose to consider granting an exclusion. In the past (i.e., prior to the early 1980s), inks containing lead were sometimes used for certain colors in children's books. However, many of these books (pre-1985) are generally considered "vintage" or "collectible" books, and as such would not be intended primarily for use by children.

c. Should the exemption cover other printed materials?

The Commission unanimously stated in its Report to Congress that Congress may, with some limitations, choose to consider granting an exclusion for other children's paper-based printed materials.

d. Would the rationale for books extend to other types of products?

Products that are exclusively made of the material determined to not contain lead pursuant to the Commission's August 26, 2009, lead determinations rule (74 Fed. Reg. 43,031), and are otherwise unaltered, could be exempted. Also, as stated in the Report to Congress, I believe we could more effectively implement section 101(a) if we were allowed some additional flexibility in granting exclusions from the section 101(a) lead limits.

16. Lead limits—Electronics Policy

a. CPSIA authorized you to set less stringent lead limits for certain electronics parts. You have exercised that authority to set such limits for various metals, adopting limits that are the same as, or similar to, those allowed in the European Union. In the EU, however, these more relaxed limits apply to metals whether used in electronics or in other types of consumer products. Would you favor a change to the law that gives the Commission the discretion to extend the exemptions granted for metals used in electronics to cover those same metals when used in other types of children's products? If not, what justification is there for giving electronics exceptional treatment?

If the Commission were to have some additional discretion to extend exemptions from the lead content limits, we would be able to exclude products such as ATVs and bicycles and other children's products where it is generally not practicable or technologically feasible to remove the lead, the products are not mouthed or swallowed, and granting such an exemption would present a very low likelihood of exposure.

A similar approach was taken by staff in the Janaury 20, 2010, final rule for the exemption of certain electronic devices from the section 101(a) lead limits in the CPSIA. (75 Fed. Reg. 3154) This rule, which was based on the specific criteria in section 104(b)(4) of the CPSIA provided for exemptions from the lead limits "for a limited number of components of electronic devices that must be manufactured using lead" and where "staff determined that it [was] not technologically feasible for certain components in electronic devices to meet the lead content limits under the CPSIA because the presence of the lead [was] necessary for proper functioning of certain component parts in electronic devices." In addition, staff's review showed that "lead containing components that [were] exempted are components that one would not expect children to mouth, swallow, or handle for significaot periods under normal and reasonably foreseeable conditions."

b. Did the Commission, in establishing the more relaxed limits for certain metals used in electronics, perform any testing to determine how much lead a child might, be exposed to from these products?

We based our limits on the statutory criteria set forth in section 101(b)(4) of the CPSIA, EU directives, and review of the types of products or component parts which were accessible that might be subject to the alternate limits, such as headphone jacks and electrical plugs. We also assessed whether a child would have extensive contact with such parts based on staff's previous experience testing products made of varying materials, which showed that "the [exempted] lead containing components . . . are components that one would not expect children to mouth, swallow, or handle for significant periods under normal and reasonably foreseeable conditions."

c. How variable is the lead content of metals, particularly metals that are commonly or repeatedly recycled, such as aluminum? Can manufacturers predict the highest lead level likely to be reached in a particular grade of metal, even if the usual level is much lower?

According to CPSC staff, for some alloys, the maximum level of lead can be specified when placing the order for the alloy desired. As with any material or process, manufacturers must be mindful of the requirements and choose materials and suppliers carefully.

There are some steel alloys (e.g., free machining 12L14 steel and leaded hardenable alloy 41L40 steel), aluminum alloys (e.g., AA 2011), and brasses (e.g., C30000 wrought copper alloys) that have intentionally added amounts of lead for chip breaking and improved tool wear during machining and surface finishing of parts. Uses for the inclusion of lead are: machinability, surface finish, screw machines, and lubrication/bearings.

The American Iron and Steel Institute has provided CPSC with written comments that steel alloys with lead levels below 100 ppm are technologically feasible for both virgin and recycled steel because the high temperatures necessary during the melting of steel tends to vaporize any lead in the molten steel. Furthermore, customers can specify that a specific low lead level when ordering a steel alloy, and it will be met for that order.

Aluminum alloys do not normally contain lead. Lead content should be minimal from recycled sources. There is one wrought aluminum alloy 2011 that purposely contains lead for machinability and strength. Cast aluminum series 2xx.x Al-Cu, and 3xx.x Al-Si-Cu and/or Mg for gasoline engine cylinder heads and pistons generally do not contain lead.

Zinc alloys (Special High Grade) used for zinc die-castings should have a lead content below 30 ppm, while other zinc alloys permit a higher amount. For example, Prime Western Grade allows a maximum of 14000 ppm lead and High Grade allows a maximum of 300 ppm.

Copper alloys consist of brass, which is copper alloyed with zinc, and bronze, which is copper alloyed with tin, (although many copper-zinc alloys are referred to as bronzes). Brass alloys such as C68010 brass contain less than 100 ppm lead. There are many copper alloys where lead is intentionally added (up to 6 percent by weight) for machinability and surface finish. Lead can be an impurity in reported concentrations of 500 ppm to 700 ppm to 1500 ppm.

Tin and alloys with tin are also used in consumer products. There are only a few applications where unalloyed tin is used. Tin is used in tin-coated steel for tin cans, leaded and lead-free solders, modern pewter without lead, and copper-tin true bronzes.

17. Lead limits—Common Toy Box. CPSIA defines the term "children's product" to include products intended for children as old as 12. The justification for this age stems, in part, from the concern that younger children, who are more likely to put things in their mouth, may have access to toys and other products that belong to older children.

a. Has the Commission conducted or sponsored any research to determine how much mouthing of products children do at different ages? If so, please provide appropriate documents.

As part of its evaluation of phthalates in polyvinyl chloride, especially diisononyl phthalate (DINP), CPSC staff undertook an extensive observational study of several hundred children under age six years. A report of this study, "A mouthing observation study of children under 6 years," written by CPSC staff and dated November 2001 is available as Tab F in the staff briefing package for Petition HP 99-1 Requesting Ban of Use of PVC in Products - Intended for Children Five Years of Age, available at:
http://www.cpsc.gov/library/foia/foia02/brief/briefing.html.
http://www.cpsc.gov/LIBRARY/FOIA/FOIA02/brief/Fiveyearpt1.pdf
http://www.cpsc.gov/LIBRARY/FOIA/FOIA02/brief/Fiveyearpt2.pdf

Prior to the extensive observational study, staff also conducted a pilot study of 80 children between one and eight years of age in child care and school environments. A copy of that study is included separate from these responses.

b. What data were used to justify the age limits applicable to the Commission's "small parts" ban? Do those age limits remain appropriate in your view?

The small parts rule was developed using CPSC's National Electronic Injury Surveillance System (NEISS) estimates, death certificate review, and accident and injury data. The CPSC staff compiled data from its own files and from those of an independent death certificate and injury report on toys. There has not been a formal study to indicate that the age limits are not appropriate.

The method for identifying toys and other articles intended for use by children under three years of age that present choking, aspiration, or ingestion hazards because of small parts, was finalized June 15, 1979, and went into effect January 1, 1980.

c. **For some types of products, the "common toy box" justification might be inapplicable. For example, it may be that infants and toddlers would have no opportunity to mouth educational products that are used in school classrooms, particularly more expensive products like musical instruments, specialty products that are intended for children with special needs, or sophisticated scientific instruments such as telescopes or microscopes that are often kept under lock and key. Similarly, such young children would rarely have an opportunity to mouth products that are kept in garages or out of doors such as all-terrain vehicles, bicycles, snowmobiles, and the like. Would you favor granting the Commission flexibility to treat these products differently from toys for purposes of the lead limits?**

As the Commission noted in its January 15, 2010, Report to Congress, additional flexibility is appropriate for some products, such as youth all-terrian vehicles (ATVs) and bicycles, and similar outdoor products where it is generally not practicable or technologically feasible to remove the lead, the products are not mouthed or swallowed, and granting such an exemption would present a very low likelihood of exposure.

18. Retroactivity.

a. **The Commission unanimously recommended treating the 100 ppm limit as prospective only. This would be helpful to many retailers who otherwise might have to destroy inventory again this summer (as many did before when the lead limit dropped from 600 ppm to 300 ppm). It would be of little help, however, to sellers of second-hand children's products that were not subject to any lead limits when made. Would you favor legislative changes that provide greater flexibility to such resellers?**

With regard to some products, additional flexibility may be helpful. For other products, such as children's metal jewelry, painted children's toys, and vinyl plastic products, flexibility may pose a potential health risk. Additionally, the Commission should retain the ability to designate additional products where there may be a potential health risk and retroactive application of a specific standard may be appropriate.

h. **The new crib standard essentially bans traditional drop-side cribs, which have been the subject of many recalls over the last few years. Why should child-care facilities that have purchased cribs without drop sides have to throw them away at this point even if they have never been the subject of an**

investigation, let alone a recall? Would you favor legislative changes that grant the CPSC additional flexibility in this regard?

Upon taking over as Chairman of the Commission, I observed that there was an alarming pattern of failures of crib hardware and component parts, particularly related to drop-side cribs. The situation required meaningful short-term and long-term strategies to address this trend. According to our data, between November 2007 and April 2010, there were 36 deaths associated with crib structural problems. Thirty-five of those fatalities occurred when crib components detached, disengaged, or broke, ending in unspeakable tragedy.

Combined with our sustained and ongoing efforts to rid the marketplace of older, defective cribs, the development and passage of new mandatory crib standards is part of our responsible and holistic approach to giving consumers increased confidence in the safety of their cribs. This includes older cribs that may not have a drop-side, but may have other hardware issues and have not been tested to current standards.

I deeply appreciate the impact of this rule on smaller entities, particularly child care facilities and places of public accommodation. To address this concern and better ensure widespread availability of compliant cribs and an orderly and successful transition to the use of compliant cribs by child care providers and places of public accommodation, the Commission has adopted a two-step phase in of the rule. First, for all manufacturers, distributors, and retailers of full-size and non-full-size cribs, the final rule will become effective June 29, 2011. Second, child care centers, family child care homes, and places of public accommodation with then have an additional 18 months to comply (December 28, 2012).

This will ensure that all infants and toddlers in child-care facilities will have the safest possible sleep environment that is free of both drop sides and other potentially dangerous hardware and component parts not tested to new, protective standards.

19. Budget.

a. **Please provide a breakdown, by office and division, of CPSC staff at the time you were confirmed as Chairman and as of February 17, 2011.**

CPSC Staff Employment on June 26, 2009 and February 2, 2011

CPSC Office	Employment 6/27/2009	2/12/2011
Commissioners	10	21
Congressional Relations	0	3
General Counsel	27	39
Inspector General	5	6
Equal Employment Opportunity	2	2
Executive Director	4	3
International Programs and Intergovernmental Affairs	4	6
Human Resources	10	12
Information Technology Services	56	63
Financial Management	28	29
Information and Public Affairs	8	11
Compliance	156	183
Hazard Identification and Reduction	141	161
Total	**451**	**539**

Note: The new office of Education, Global Outreach, and Small Business Ombudsman is in the process of being established and is not included above.

b. What was the total cost of developing CPSC's new Strategic Plan? Is any additional outside work being contemplated in this area?

The total outside cost for the overall Strategic Plan and Operational Review contract with Booz Allen Hamilton, Inc. was $1,896,236.

Below is a breakdown of the costs contained within the contract.

Environmental Scan	$408,178
Strategic Plan	$773,067
Operational Review	$714,991

At this time we do not expect any additional outside work being performed in this area.

c. When do you estimate the Commission staff will be able to occupy the new laboratory?

We project to occupy the new laboratory in May 2011.

20. Cadmium. Some media, in reporting on cadmium levels in consumer products, have stated that cadmium is a human carcinogen. Is CPSC aware of any scientific evidence indicating that ingestion of cadmium (as opposed to inhalation) will cause cancer in humans?

At this time there is insufficient evidence to conclude whether cadmium is a human carcinogen through the oral route of exposure (ingestion).

21. CPSIA created new exceptions to section 6(b) of the Consumer Product Safety Act, including an exception that would permit public disclosure of consumer products that are stopped at the ports on the grounds that they violate a CPSC mandatory standard or ban. Do you believe this information would be useful to the public?

Yes. The disclosure of violative products stopped at ports may be beneficial to both consumers and industry.

22. Has the Commission made any determinations as to which State toy standards are exempt from preemption under CPSIA section 106(h)(2)?

Section 106(h)(2) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) allows states or political subdivisions of a state to continue in effect a safety requirement applicable to a toy or other children's product that is designed to deal with the same risk of injury as ASTM F963, "Consumer Safety Specifications for Toy Safety," if those state requirements were in effect on August 13, 2008, as long as the state or political subdivision has filed the applicable requirements with the Commission within 90 days after the CPSIA's enactment and in such form and in such manner as the Commission may require.

The Commission has prescribed the form and manner for submission of state laws on its website. Arizona, California, Illinois, and New York submitted laws that they asserted were designed to deal with the same risk of injury as ASTM F963. Section 106(h)(2) of the CPSIA does not require the Commission to take further action on the state or political subdivision submissions received (in contrast to section 106(h)(1) of the CPSIA, which requires the Commission, after notice and opportunity for oral presentation of views, to consider a rulemaking to exempt any proposed safety standard or regulation). Therefore, no further action by the Commission is pending on the state submissions.

23. What CPSC standards, bans or similar rules would potentially apply to a cloth poncho made for young children? What other statutory requirements might apply? What standards, bans, rules or statutory requirements would potentially apply to a poncho made for a child's doll?

Poncho: The applicable standard is 16 CFR 1610, Standard for the Flammability of Clothing Textiles. Depending on the cloth and any embellishments or color treatment, it may need to be tested for lead content or lead in surface coatings, require tracking information, and certification to the applicable standards based on testing by a third-party accredited laboratory.

Doll clothes poncho: The poncho would probably not have an age grade on it if it were sold separately from a doll. Any embellishments on the poncho would be subject to

assessment to the small parts requirement, 16 CFR 1501, for purposes of the choking warnings at 16 CFR 1500.19 (some dolls are for children under three and some are for children from three through six or older). The poncho would be subject to 16 CFR 1610 because of the requirement in the toy standard for toy textiles to meet the flammability requirement and would require tracking information. Depending on the product used to color the fabric, it may require third-party testing and certification as to lead content and lead in surface coating requirements.

Questions from the Honorable G.K. Butterfield

1. **The Consumer Product Safety Improvement Act (CPSIA) directs the Consumer Product Safety Commission (CPSC) to establish and maintain a publicly available database on the safety of consumer products that contains reports of harm from five different categories of reporters, including "consumers" and "public safety entities." The statute does not define those terms, nor does it impose any requirements regarding the relationship of the reporter to the harmful event.**

   CPSC in its final rule establishing the database defines "consumers" to include "users of consumer products, family members, relatives, parents, guardians, friends, attorneys, investigators, professional engineers, agents of a user of a consumer product, and observers of the consumer products being used. The final rule defines "public safety entities" to include "police, fire, ambulance, emergency medical services, federal, state, and local law enforcement entities, and other public safety officials and professionals, including consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations, so long as they have a public safety purpose."

   a. **Please explain why the CPSC believes it is important, and a faithful interpretation of the CPSIA, to allow a broad range of consumers and public safety entities to submit reports for the database, including those who may not have directly witnessed the harmful event.**

      The Commission determined that a broad interpretation best effectuates Congress' intention that the Commission receives reports regarding useful and reliable information about product safety incidents from a wide-range of submitters. The Commission requires all reports to contain eight data sets to ensure reports contain enough information to be helpful to other consumers. In addition, the required data sets require contact information for the submitter, as well as verification that information provided is true and accurate to the best of the submitter's "knowledge, information, and belief." If intentionally fraudulent reports are detected, the Commission has also indicated that it will take all appropriate action against a party filing such a report, including possible referral to the U.S. Department of Justice for legal action.

   b. **Is the CPSC aware of any attorney or consumer advocate knowingly submitting false or inaccurate information to the CPSC's existing incident reporting website or hotline?**

      No. If we were to discover an attorney, a consumer advocate, or anyone else who knowingly provided false information in a report or in a manufacturer comment, we would not only address any materially inaccurate information contained in the database, but also, where circumstances warranted, would seek legal remedies against those involved.

2. **The CPSIA lays out a specific timeframe for the publication of reports of harm and processes to prevent publication of or provide for removal of materially inaccurate information in the database. The statute requires the CPSC to transmit a report of harm to the relevant manufacturer no later than 5 business days after receiving it. The manufacturer is then given the opportunity to provide comments for publication with the report of harm and to contest information therein on the ground that it is materially inaccurate. The statute requires the CPSC to publish the report of harm no later than 10 business days after transmission of the report to the manufacturer.**

   a. **Do you believe requiring resolution of all material inaccuracy claims before publication of reports of harm would affect the usefulness of the database to consumers, including negatively impacting the availability of useful information in a timely manner? Please explain.**

      Yes. To do so would undermine Congress' overall intent behind the creation of the database, which was to provide a faster and freer flow of safety information to consumers than permitted by other provisions of the CPSA. Accordingly, the rules for the database were carefully crafted within the confines of the law to strike a fair balance for all parties in the interests of ensuring consumers have access to this information in a timely manner.

      The result is a balanced approach that will allow for the correction of faulty information and will not require the Commission to withhold reports from the public until vetted to perfection. Requiring resolution of all material inaccuracy claims before publication could result in substantial delays in the sharing of reports of harm—thereby potentially placing the public at serious risk of injury, illness, or death.

   b. **Do you believe requiring resolution of all material inaccuracy claims before publication of reports of harm would drain CPSC time and other resources? Please explain.**

      It might if there were an increase in materially inaccurate information claims, especially if made for the purpose of delaying publication of consumer incident reports.

   c. **Do you believe requiring resolution of all material inaccuracy claims before publication of reports of harm would create an incentive for manufacturers to contest a greater number of reports of harm than would otherwise be contested?**

      It is hard to predict the impact that such a change would have. It is my hope that responsible manufacturers would not file claims simply to delay publication of reports of harm but that certainly is a possibility.

3. **The CPSC has stayed enforcement of the third-party testing requirements for lead content, phthalates content, and ASTM F-963. However, some children's products are already required to undergo third-party testing due to other applicable safety standards of the CPSC. These include, among others: painted children's products manufactured after August 19, 2009 for the 90 ppm limit for lead in paint; pacifiers manufactured after January 20, 2009; metal components of children's metal jewelry manufactured after March 23, 2009; bicycle helmets, bunk beds, and rattles manufactured after February 10, 2010; and bicycles manufactured after August 14, 2010, with regard to certain design elements.**

   a. **Please explain any issues or challenges that manufacturers of children's products already subject to third-party testing requirements have encountered in complying with this requirement?**

      The major potential challenges faced by manufacturers of children's products subject to third-party testing requirements likely include conveniently locating and establishing business relationships with CPSC-recognized testing laboratories, increased testing-related expenses, and laboratory testing lead times.

   b. **Is the CPSC aware of any disruptions in the market for children's products already subject to third-party testing that are related to this requirement?**

      Although there is a stay of enforcement of the lead content and third-party testing requirements for youth ATVs, there have been claims of some disruption in the youth ATV market by certain trade associations due to manufacturer, importer, and dealer concern about these requirements.

      The Motorcycle Industry Council (MIC) and the Specialty Vehicle Industry Association (SVIA) have stated to Commission staff that youth ATVs have been and continue to be withheld from the market due to concerns about meeting the lead content requirements.

      Chinese manufacturers of ATVs have indicated to CPSC staff that imports of ATVs to the United States dropped sharply in 2009. CPSC, however, has not verified data indicating whether this drop was directly correlated with lead content requirements or larger macroeconomic concerns.

   c. **Is the CPSC aware of any negative impacts to manufacturers of children's products already subject to third-party testing requirements that are related to this requirement?**

      CPSC has no data on possible negative impacts to manufacturers of children's products subject to third-party testing requirements. However, it is likely that many have experienced an increase in testing-related expenses.

4. **Manufacturers of children's products already subject to third-party testing must also satisfy the requirement for continuing compliance and testing despite the so-called "15 Month Rule" not yet being finalized.**

    a. **Please explain how manufacturers of children's products already subject to third-party testing are able to meet the requirement for continuing compliance and testing without the final 15 Month Rule?**

    Until the Commission approves a final rule on testing and labeling, there is no requirement for manufacturers of children's products to conduct additional testing to ensure continued compliance with the applicable children's product safety standards, outside of any testing they may conduct in their normal course of business to ensure their products comply with all applicable U.S. laws and regulations.

    b. **Do you believe it is possible for manufacturers of children's products who would be subject to third-party testing for lead content to begin testing and satisfy the requirement for continuing compliance and testing without the final "15 Month Rule"?**

    As mentioned, until the Commission approves a final rule on testing and labeling, there is no requirement for manufacturers of children's products to conduct additional testing. However, manufacturers are expected to ensure compliance with all applicable laws and regulations.

5. **The CPSIA phases in increasingly stringent lead content limits for children's products. The last congressionally-mandated lead content limit is set at 100 parts per million and takes effect this August. The statute, however, also provides that if the CPSC determines that it is not technologically feasible "for a product or product category" to meet that limit, it can set the lowest limit below 300 ppm that is feasible for that "product or product category."**

    CPSC last July requested comments and information related to this determination. The notice directed that the comments address a "product or *material*." The notice for the February 16, 2011, public hearing on this issue again specifically asked for information about the sourcing and extent to which lead is found in *materials*.

    In 2009, CPSC exercised its general authority to issue regulations as necessary to implement the CPSIA to exempt from the lead limits and third-party testing - requirement certain materials such as wood and cotton that have inherently low levels of lead.

    a. **Is the CPSC now considering, under its authority to make a technological feasibility determination for a product or product category, a blanket waiver from the 100 ppm lead content limit for all products with materials such as "metal, glass, or ceramics"? If so, can you explain how the CPSC is taking**

into consideration safe and unsafe uses of those materials in children's products?

CPSC is gathering as much information as possible to determine what type of determination is required to limit any undue stress to manufacturers while supporting the intent of the statute.

CPSC is considering the question of technological feasibility and commercial availability of products and materials with respect to the 100 ppm limit, as well as the health implications to children who might use products with lead content less than 300 ppm but more than 100 ppm.

b. Do you believe that granting a blanket waiver from the 100 ppm lead content limit for all products with materials such as metal, glass, or ceramics would remove the incentive underlying the statutory lead content limits for manufacturers to move away from lead-containing materials and toward lower-lead or no-lead alternatives?

Not necessarily, but we are carefully studying any potential impact. Manufacturers of children's products now are required to meet the 300 ppm lead content levels for products with materials such as metal, glass, or ceramics. The lead limit is already at a level where it is unlikely that lead is deliberately being added to any materials or to the manufacturing process. Accordingly, the incentive underlying the move away from lead-containing materials and toward lower-lead or no-lead alternatives does exist now.

The Commission held a hearing on February 16, 2011, to evaluate whether there is any product or product categories for which it is not technologically feasible to meet the 100 ppm lead content limit. At the hearing, several laboratories indicated that a high percentage of children's products tested are in compliance with the 100 ppm lead content limit. However, several manufacturers indicated that testing results are not always consistent due to material variability. We are still reviewing the hearing record.

6. The drafters of the CPSIA intended that the feasibility determination allowing a product or product category to exceed the 100 ppm limit be made on a case-by-case basis at the request of the manufacturer. The burden was not supposed to be on CPSC to go out and find those products eligible for the exception.

a. Has the CPSC put a petition process in place for manufacturers to seek a feasibility determination? If not, does it intend to put such a process in place? When?

While the Commission has set forth procedures and requirements for making determinations regarding lead content of materials or products under the Commission's regulations at 16 C.F.R. § 1500.89, those procedures are not

applicable to determinations on product or product categories that exceed the 100 ppm limit based on technological feasibility. The CPSC did not establish a petition process for individual manufacturers to seek product or product category-specific determination because there was insufficient time under the statute for the Commission to make such case-by-case determinations.

Unlike the procedures for lead content determinations, which are made on an ongoing basis, section 101(a)(2)(C) of the CPSIA provides that the 100 ppm limit will go into effect automatically on August 14, 2011, unless the Commission, after notice and hearing, finds that such a limit is not technologically feasible.

The petition process is a lengthy one. Even if procedures had been in place, manufacturers would have to gather all of the relevant information and supporting documentation necessary for CPSC staff to evaluate each product and make a determination regarding that product prior to August 14, 2011. The Commission is then required to provide notice and hearing for each product or product category. Once a determination was made as to the technological feasibility of meeting the 100 ppm lead content limit for the product or product category, the Commission would then be required to, by regulation, impose an alternative lead limit by August 14, 2011. Given the amount of time it would take to engage in notice and hearing for each petition, and the subsequent length of time it would take to issue a final rule, it was not feasible for the Commission to issue these rulings on a case-by-case basis prior to August 14, 2011.

Moreover, section 101(e) of the CPSIA provides that the Commission may not delay the effective date of the limit related to technological feasibility during the pendency of a rulemaking. Thus, even if the Commission began a rulemaking proceeding, the limit would go into effect regardless of whether the rulemaking process was completed prior to August 14, 2011.

Accordingly, to ensure that all of the interested parties had a meaningful opportunity to present evidence and testimony for the record, the Commission held a hearing on February 16, 2011, to evaluate whether there is any product or product categories for which it is not technologically feasible to meet the 100ppm lead content limit. We are still reviewing the hearing record.

7. **The CPSC on August 26, 2009, issued a final rule that determined that most textiles made of natural and manufactured fibers do not exceed 2oy of the lead content limits in the CPSIA, and therefore do not need to be third-party tested for lead content. Specifically, the final rule stated the following textiles would not exceed the lead limits: "Textiles (excluding after-treatment applications, including screen prints, transfers, decals, or other prints) consisting of: (i) Natural fibers (dyed or undyed) including, but not limited to, cotton, kapok, flax, linen, jute, ramie, hemp, kenaf, bamboo, coir, sisal, silk, wool (sheep), alpaca, llama, goat (mohair, cashmere), rabbit (angora), camel, horse, yak, vicuna, qiviut, guanaco; (ii) Manufactured fibers**

(dyed or undyed) including, but not limited to, rayon, azlon, lyocell, acetate, triacetate, rubber, polyester, olefin, nylon, acrylic, modacrylic, aramid, spandex.

a. **If the fabric or thread used to make a cloth diaper consists of natural or manufactured fibers, does the fabric or thread need to be tested for lead?**

   No.

b. **If the fabric or thread used to make a poncho consists of natural or manufactured fibers, does the fabric or thread need to be tested for lead?**

   In general, no. As stated in the Commission's lead determinations order (74 Fed. Reg. 43,031), natural fibers and fabric made from those fibers that is dyed or undyed does not have to be tested for lead. Also, manufactured fibers and the fabrics made from those fibers are not required to be tested for lead. If the fabric is treated with an application, including a screen print, transfer, decal or other process it would no longer be excluded from testing as noted in the determination document. A poncho made from the above would fall under the same classifications. Therefore, unless the poncho was treated with an after treatment application that changes the condition of the fabric, it would not be subject to the lead testing and certification requirements.

c. **At least as early as 1993, plastic soda bottles have been recycled into material identified by clothing manufacturer as polar fleece. These plastic bottles are made almost exclusively from polyethylene terephthalate (PET); therefore polar fleece is made from PET. In addition, plastic bottles can be broken down by recyclers and re-fashioned into a wide range of goods, from playground equipment to toy telephones.**

   i. **Can you please tell me whether lead or lead compounds are used in the production of PET?**

      With respect to soda bottles or other product intended for use with foods, the use of lead and other chemicals is restricted by the U.S. Food and Drug Administration. For other types of products, lead compounds are sometimes used for color or other applications. Lead pigments, however, are not suitable for applications that require clarity or transparency, such as transparent bottles.

   ii. **Can you tell me if lead or lead compounds are introduced during the recycling of plastic bottles made from PET; either during the actual manufacturing process that turns the bottles into fibers or during the disposal process when the bottle is thrown into a recycling bin and combined with other items determined eligible to be recycled?**

To the best of our knowledge, no lead is used in recycling or processing of plastic bottles; the transfer from other possibly lead-containing comingled materials is expected to be minimal.

The most common polyester for fiber purposes is poly (ethylene terephthalate), or simply PET. Recycling PET bottles by remelting the PET and extruding it as PET fiber saves valuable petroleum raw materials, reduces energy consumption, and eliminates solid waste sent to landfills. Lead or lead compounds are not introduced during the process of converting bottle flakes to recycled polyester fiber. There could conceivably be trace amounts of lead, however, in the antimony catalyst used in the production of PET.

iii. Do you consider fibers made from recycled PET a manufactured fiber in the polyester family and therefore excluded from the third-party testing requirement for lead content?

Yes. The Federal Trade Commission defines polyester fiber as a manufactured fiber in which the fiber forming substance is any long-chain synthetic polymer composed of at least 85 percent by weight of an ester of a substituted aromatic carboxylic acid, including but not restricted to substituted terephthalic units, p(-R-O-CO-C_6H_4-CO-O-)$_x$ and parasubstituted hydroxy-benzoate units, p(-R-O-CO-C_6H_4-O-)$_x$. Polyester fiber made from recycled PET is polyester (PET) fiber.

iv. Does the fact that a manufactured fiber is made from recycled materials change CPSC's determination that the fiber will not exceed the lead limits and therefore be excluded from the third-party testing requirement for lead content? Did the CPSC consider the issue of recycling in its determination with respect manufactured fibers?

No. CPSC staff has not found information that indicates that fibers or fabrics made from recycled materials would contain lead above the lead limits. CPSC staff did not explicitly consider recycling, although it found no information that indicated that recycled materials should be considered separately from similar, non-recycled materials.

v. Is it correct that the CPSC is aware of children's products made from recycled plastic that exceed the lead content limits? Please provide examples and if so, can you identify whether those products contained PET?

The Commission's Division of Health Sciences is not aware of specific products that are made with recycled materials and that contain lead in excess of the lead content limits.

8. CPSIA's authorization levels have been followed up with increased appropriations for the agency, which have allowed the CPSC to increase its staffing levels. In particular, the CPSC has been able to increase the number of staff dedicated to screening consumer products at ports of entry and intercepting dangerous products before they hit store shelves. In 2008, CPSC had only 3 employees stationed at ports of entry. Today the number stands at 19 employees at 15 ports of entry.

This intervention strategy has led to some good progress toward stopping dangerous products at the border. However, Commissioner Northup in her testimony described the CPSC's efforts at the border as "extensive." I understand there are 327 official ports of entry in the United States. The CPSC has staff at 15 of them.

a. Can you provide information about the percentage of consumer products coming into the U.S. that get screened for compliance with CPSC safety standards?

The current 19 port inspectors stationed at ports with occasional support from CPSC field investigators are able to inspect approximately 7,000 products per year. Of those inspections, about 1,750 products are sampled from shipments that are held. However, this colocated staff covers only 15 or 4.6 percent of the 327 U.S. ports where goods enter commerce.

b. Do you consider CPSC's current efforts to stop dangerous products at the border "extensive"?

No. That said, the CPSC has attempted to maximize its port coverage through strategic positioning of staff and by leveraging some existing Customs and Border Protection (CBP) resources through Memorandums of Understanding (MOUs) with that agency. Additional resources, however, would be helpful to further expand port coverage.

c. Do you agree that CPSC's ability to intercept dangerous products at the border does not, on its own, currently provide a sufficiently strong layer for protecting consumers from dangerous products, especially with respect to children's products?

Yes. As stated above, CPSC's Import Surveillance Division staff attempts to leverage all resources available to stop dangerous products before they enter the U.S. stream of commerce. However, limited budget and staff resources only allow us to inspect a fraction of the products entering the country. As your question implies, border detection alone is not sufficient to protect consumers.

d. Do you agree that the first layer for protecting consumers from dangerous products, especially with respect children's products, should be the manufacturer and that we should not first expose children to risk to

determine whether that manufacturer is meeting its obligations?

Yes. The CPSA, CPSIA, and implementing rules and regulations put the burden of compliance on the manufacturer of a regulated product. Throughout my tenure as Chairman, I have continued to urge manufacturers to "build safety" into products, and not take shortcuts or use product substitutes (such as cadmium instead of lead) that could put consumers, especially children, at risk.

Question from the Honorable Leonard Lance

1. **At the hearing I pointed out that some manufacturers are concerned that State Attorneys General might enforce certain statutory requirements even though they have been stayed by the Commission. You indicated that the Commission did not stay enforcement of the lead content limits but only testing and certification requirements. As I read the Commission's announcements, however, it seems to me that the Commission has in fact stayed enforcement of the lead content limits for certain children's products, such as bicycles, youth all-terrain vehicles and other motorized products and recently extended those stays through December 31, 2011. In light of this additional information I wanted to follow up with my original question again: Can the State Attorneys General enforce the lead content limits in these cases even though the Commission has determined that it will not? Also, to the extent that testing and certification requirements have been stayed by the Commission, can the State Attorneys General continue to enforce the certification and testing requirements in the meantime or are they prohibited from doing so by the stay? Thank you very much for reviewing my question.**

   Yes, the state attorneys general could enforce either the lead content limits against bicycles and youth all-terrain vehicles or the testing and certification requirements for lead content limits even though the Commission has stayed enforcement. In addition, state attorneys general also have the power to enforce independent state content limits to the extent applicable.

   We have established a strong working relationship, however, with the state attorneys general offices and sponsor monthly telephone conferences to explain the rationales for our decisions and to work on coordinating our activities. To date and to the best of our knowledge, the state attorneys general have not enforced the lead limits as to bicycles or youth all-terrain vehicles nor have they enforced the testing and certification requirements for lead content.

Questions from the Honorable Mike Pompeo

1. **If Congress provides the agency more flexibility in implementing the CPSIA, do you trust the agency's experts to be able to devise rules that protect the health and safety of children?**

   The Commission has a very talented staff that works extremely hard to keep harmful products out of the U.S. stream of commerce and out of the hands of consumers. If Congress amends the CPSIA, Commission staff will continue to work diligently to implement regulations that are fair, effective, and protective of public health and safety. Statutory changes that require the Commission to make numerous case-by-case determinations, however, will likely have the effect of diverting resources from other Commission priorities, such as the investigation into problem drywall and efforts to prevent carbon monoxide poisoning deaths.

2. **Do you think that the agency's pre-existing rules governing vinyl plastic film and carpets and rugs were already doing a very effective job of ensuring the safety of consumer products in these categories? How many recalls has the agency conducted in the past 30 years based on violations of the vinyl plastic film and the two carpets and rugs product safety standards?**

   The Standards for the Flammability of Vinyl Plastic Film, 16 CFR 1611, and the Standards for the Flammability of Carpets and Rugs, 16 CFR 1630 and 1631, have done an adequate job at protecting consumers from the risk of injury and fire loss. We have had very few failures of the vinyl plastic film standard over the years. Considering the linear yards of carpeting that are in the U.S. market in almost every home in the United States the number of recalls associated with carpets, rugs, and wall-to-wall carpeting, compliance of this industry appears to be positive.

   CPSCs electronic records system began in August of 1995, limiting our ability to go back 30 years. Over the past 16 years, however, CPSC has completed a total of 1,158 regulated recalls. Of those regulated recalls, there are a total of 21 vinyl plastic film and carpet and rug related recalls as shown below:

Violation Description	Total Violations
Carpet Flammability Failure	14
Carpet Flammability Labeling	4
Other Carpet	1
Carpet Standards Certificate Violation	0
Carpet and Rug Related Recalls Subtotal	**19**
Vinyl Flammability Failure	0
Other Vinyl Film	2
Vinyl Plastic Film Related Recalls Subtotal	**2**
Total	**21**

3. **I understand that you thought the McDonald's Shrek glasses recalled last year contained amounts of cadmium that were too high. But when the agency's scientists came out with a cadmium standard later in the year, it turned out the cadmium in the glasses was lower than the agency's recommended limit. How much did that mistake cost McDonald's? Why did you let the headlines get ahead of the science there? Can you promise this Committee that you will wait for the science to come in before you act next time?**

   On June 4, 2010, McDonald's Corporation, in conjunction with the CPSC, announced a voluntary recall of approximately 12 million glasses based on certain preliminary cadmium wipe test data that was provided by the Commission. This matter was jointly and cooperatively discussed with McDonald's based on the best scientific data available. The CPSC has no information regarding McDonald's internal decision process regarding that recall or any costs incurred as a result.

4. **Do you think paper clips pose a significant threat to children? Do you think it makes sense for the Commission to require testing a paper clip in a science kit but not when attached to a child's Worksheets? Do you thiok it makes sense for the Commission to require testing brass in a child's bedside lamp but not in a child's musical instrument?**

   Section 101(a) of CPSIA requires children's products (those consumer products primarily intended for children twelve and under) to meet certain total lead limit requirements. Section 102 of the CPSIA requires testing and certification of children's requirements to ensure that they comply with CPSIA requirements and mandatory product safety rules.

   The CPSIA does not require testing and certification of every general use product that a child interacts with (such as a paper clip attached to a child's worksheet or a musical instrument). Instead, the law requires testing and certification of those products "designed or intended primarily for children 12 years of age or younger."

5. **Should new federal product safety requirements for cribs, portable cribs, and play yards mean that families who own products that complied with previous standards oot be allowed to sell them on the secondary market even though the products were never fouod to be defective nor shown to be unsafe?**

   Upon taking over as Chairman of the Commission, I observed that there was an alarming pattern of failures of crib hardware and component parts, particularly related to drop-side cribs. The situation required meaningful short-term and long-term strategies to address this trend. According to our data, between November 2007 and April 2010, there were 36 deaths associated with crib structural problems. Thirty-five of those fatalities occurred when crib components detached, disengaged, or broke, ending in unspeakable tragedy.

   Combined with our sustained and ongoing efforts to rid the marketplace of older, defective cribs, the development and passage of new mandatory crib standards provides a

responsible and holistic approach to giving consumers increased confidence in the safety of their cribs. This includes older cribs that may not have a drop-side, but may have other hardware issues and have not been tested to current standards.

I deeply appreciate the impact of this rule on smaller entities, particularly child care facilities and places of public accommodation. To address this concern and better ensure widespread availability of compliant cribs and an orderly and successful transition to the use of compliant cribs by child care providers and places of public accommodation, the Commission has adopted a two-step phase in of the rule. First, for all manufacturers, distributors, and retailers of full-size and non-full-size cribs, the final rule will become effective June 29, 2011. Second, child care centers, family child care homes, and places of public accommodation with then have an additional 18 months to comply (December 28, 2012).

This will ensure that all infants and toddlers in child care facilities will have the safest possible sleep environment free of both drop-sides and other potentially dangerous hardware and component parts not tested to new, protective standards.

6. **When you say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission? Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer? Must the person who is reporting have first-hand knowledge?**

When you say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission?

No, contact information for a person who was harmed is not required for publication of a report by either the statute or the final rule. Section 6A(b)(2)(B)(iv) of the CPSA requires that in order for a report to be eligible for publication in the database, it must, at a minimum, include the "contact information for the person submitting the report." The Commission's final rule codified this requirement at 16 CFR 1102.10(d)(6). Moreover, pursuant to section 6A(g) of the CPSA, "harm" includes a risk of harm. Accordingly, many reports that are eligible for the database will not involve a person who was actually harmed.

During rulemaking the Commission decided not to require victim contact information on a report because such information may be lacking (where a report describes a risk of harm), considered private or confidential, or prohibited from disclosure. For example, parents completing reports involving their children may not mind including information about the age and gender of their child, while not wanting to include their child's first and last name. Also, medical professionals and others may have other statutory requirements not to disclose contact information for their patients. Section 6A(b)(1)(A) of the CPSA specifically provides that medical professionals and public safety entities may include reports in the database. Requiring victim contact information would eviscerate both the

ability to include in the database reports involving a risk of harm and reports from medical professionals where certain professionals are statutorily obligated not to disclose this information.

Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer?

Yes, this is a statutory requirement. Section 6A(b)(6) of the CPSA prohibits the CPSC from disclosing the name, address, or other contact information for submitters of reports. The only exception to this general prohibition is that the CPSC may provide contact information to the manufacturer or private labeler if the submitter has given express written consent. Accordingly, while submitters must provide their contact information to the CPSC in order include their report in the database, submitters are given a choice whether they want the CPSC to share their contact information with the identified manufacturer or private labeler.

Must the person who is reporting have first-hand knowledge?

No. "First-hand knowledge," as a concept is not required by the statute or the final rule. Instead, both the statute and the rule require that the submitter include certain minimum information about the product and the incident for a report to be included in the database. Section 6A(b)(2)(b) of the CPSA sets a floor for the type of information that a submitter must possess in order for a report to qualify for inclusion in the database. This statutory floor includes:

(i) a description of the consumer product;
(ii) identification of the manufacturer or private labeler of the product;
(iii) a description of the harm or risk of harm relating to the use of the consumer product;
(iv) contact information for the submitter of the report;
(v) verification that the contents of the report are true and accurate to the best of the submitter's knowledge; and
(vi) consent to include the report in the database.

The Commission's final rule includes two additional pieces of information, an incident date, or approximation, and the category of submitter (i.e., consumer, health care professional, public safety entity, etc.).

When you say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission? Even if the person harmed is the one reporting, doesn't that person have the option of remaining ononymous to the manufacturer?

Reports submitted anonymously will be accepted by the CPSC. By law, however, anonymously submitted reports cannot be published on SaferProducts.gov.

Although the contact information of a submitter of a report is required for publication, CPSC will *never* post this information in the database. When reports are submitted with contact information, other consumers can see and benefit from seeing the report, but will not be able to see who submitted the report. We discourage consumers from submitting reports anonymously so that reports can be included in the database, and so that the CPSC may contact submitters, if necessary, to follow up regarding their reports.

The submitter's name and contact information will never appear in the database. By law we can provide this information to the manufacturer only if the submitter has given us written permission to do so.

7. **Companies only get 10 business days after a report of harm is sent to them before it is posted to the database under the agency's rule. Is that enough time for them to investigate? Do they get enough information about the incident to be able to tell whether the report is true or not? Are they allowed to follow up with the victim to see what really happened? Are manufacturers able to identify reports that do not contain enough information to assess whether or not they are materially accurate? Can they require more information from a reporter of harm?**

Companies only get 10 business days after a report of harm is sent to them before it is posted to the database under the agency's rule. Is that enough time for them to investigate?

The CPSC is not in a position to opine on whether 10 business days is sufficient time for all businesses receiving a report to review it and respond. Over 15,000 different types of consumer products fall within our jurisdiction. Moreover, the size and ability of businesses to respond varies greatly, as do the length and complexity of reports. Providing 10 business days for a manufacturer or private labeler to respond to a report was a decision made by Congress and is, however, generally consistent with the current information disclosure requirements under section 6(b) of the CPSA, which requires a company to respond to a report within 15 calendar days.

Also, the statute does not provide that businesses will be given 10 full business days to respond to reports. Section 6A(c)(3)(A) of the CPSA provides that the CPSC shall publish eligible reports in the database "*not later than* the tenth business day after the date on which the Commission transmits the report ... [to the manufacturer or private labeler]." (emphasis added). Accordingly, CPSC could transmit reports to the manufacturer or private labeler and post them in the database on the same day. The CPSC, in its discretion, however, is providing businesses the full 10 business days to respond before publishing eligible reports in the database.

Do they get enough information about the incident to be able to tell whether the report is true or not? Are they allowed to follow up with the victim to see what really happened? Are manufacturers able to identify reports that do not contain enough information to assess whether or not they are materially accurate?

Every report will contain different types of information. Depending on the product and the incident, businesses may need to know more or less information, so this question cannot be answered for every report and for every business. It is likely that most reports will contain sufficient information for a business to understand the product and the incident based on the information submitted during soft launch.

For example, 90 percent of the reports that were submitted during soft launch through March 8, 2011, and would have been eligible for inclusion in the database, include information in the model number field.

Can they require more information from a reporter of harm?

No, the ability to follow up with submitters is not tantamount to legal process. Although a business may *ask* a submitter to provide more information about an incident described in a report, businesses cannot *require* a submitter to answer their questions or to provide more information for a report.

8. **Under the agency's rule, reports of harm go up after 10 days whether the inaccurate information in them has been corrected or not. There is no requirement for the agency to act on every report within a certain timeframe, is there? If a company believes that a report is not about their product, are they allowed to inspect the product? Or even necessarily follow up with the consumer? What does a company do to respond within 10 days if a ton of information is dumped into the database all at once?**

Under the agency's rule, reports of harm go up after 10 days whether the inaccurate information in them has been corrected or not. There is no requirement for the agency to act on every report within a certain timeframe, is there?

Neither the statute or the rule impose a deadline for the CPSC to make determinations on claims of materially inaccurate information, but the statute imposes a deadline for posting reports in the database. Both the statute and the rule require reports to be posted no later than the tenth business day after transmitting a report to the manufacturer or private labeler identified in the report. The only exception to this deadline is in section 6A(c)(4)(A) of the CPSA, which provides that the CPSC must correct materially inaccurate information before posting a report in the database if the agency has already determined that it contains a material inaccuracy.

If a company believes that a report is not about their product, are they allowed to inspect the product? Or even necessarily follow up with the coosumer?

Yes, if a company believes that it has been misidentified in a report, and the submitter has consented to providing his or her contact information to the manufacturer or private labeler, that company may contact the submitter to verify the information in the report. If the submitter has the product, a company may inspect the product if the submitter consents.

What does a company do to respond within 10 days if a ton of information is dumped into the database all at once?

In the past, companies have often dealt with high volumes of product safety incident reports forwarded to them by the Commission. In addition, companies also generally respond to reports from calls and e-mails directly to the company, as well as other independent sources (such as the media, blogs, and state attorneys general). This is likely to be the case in the future, regardless of the existence of the database. Therefore, companies should be prepared to respond to numerous product complaints as they always have, regardless of the existence of the database.

If the same type of claim is being made by many different submitters, and the company would like to submit the same comment for every report, or is able to file a materially inaccurate information claim that applies to more than one report, they may contact the CPSC to determine whether we can assist them to do this in our system. At this point, the business portal handles comments and claims on a one-to-one ratio with a report.

9. **How would something like last year's Pampers investigation be affected by the database? You could have children's medical records and photographs in there forever couldn't you? Even once the agency has exonerated a product like Pampers DryMax diapers, the medical records and pictures would stay because the agency's rule does not require their removal, does it?**

Reports that are not determined to be fraudulent or materially inaccurate will be maintained in the database because we learn about emerging product hazards over time. To the extent the CPSC has conducted an investigation that relates to reports submitted to the database, the CPSC's press releases, public safety alerts, and/or recall information, will always appear in the search results before the reports are listed, so that consumers will see this information first.

10. **Will the agency adjudicate accuracy based on claims of causation? If not, why not? If a consumer claims that a particular brand of diapers caused autism, will that go up on the database?**

The CPSC has never, and will not now, adjudicate causation in reports submitted to our database. It is sufficient for inclusion in the database if a report describes an illness, injury, or death, or risk of illness, injury, or death related to the use of a consumer product. First, the CPSC does not have the resources to adjudicate causation in every report. It is unlikely that any federal agency would have the resources to adjudicate causation in the number of reports received on a yearly basis. Second, even if the CPSC did have such resources, it would unnecessarily impede the agency's primary mission to protect consumers from unreasonable risks of harm related to the use of consumer products. It is unnecessary to adjudicate causation in reports for them to be useful to the CPSC and to consumers. The CPSC relies on the collection of these incident reports to evaluate emerging product hazards, to conduct in-depth investigations, and to negotiate voluntary recalls. Consumers can search reports and review both the report and the

manufacturer's comments to make more informed choices about the products they purchase.

11. How does the database deal with the small numbers problem? For example, a widely-circulated product may have more complaints on the database than a product that is less widely-circulated. However, the less widely-circulated (and less complained about) product may actually be less safe. In such situations, will the database drive consumers to less safe products because it does not compare the number of products in circulation?

The database itself will not address this issue, although CPSC may issue recalls that address this type of information. Information from recall press releases will be displayed in the database before reports in a search. Additionally, all manufacturers are able to post information about the overall safety record of their product alongside complaints in the database.

12. Can a manufacturer bring a materially inaccurate report to the agency's attention without posting a comment on the database? How does a manufacturer do that?

Yes. A manufacturer or private labeler does not have to respond to a report at all. If it chooses to do so a business may respond in one or more of three ways: make a general comment, make a materially inaccurate information claim, and/or make a confidential information claim. Comments are the only type of response that can be made visible on SaferProducts.gov. A manufacturer or private labeler must affirmatively request that a comment be published. For example, a business can submit a comment that is visible to the public while at the same time file a materially inaccurate information claim that is not visible to the public. A business could file two comments, one that is visible on the database and one that is not. Or, if the CPSC determines that a report does not contain materially inaccurate information, the business can resubmit the claim with additional evidence. Neither claim would be visible on SaferProducts.gov. Businesses can submit comments and/or claims through the business portal, through e-mail, or postal mail.

13. Was the information in the soft launch made publicly available? If not, then how does it count as any kind of test of the problems with the database? Until the data is publicly available, there is no incentive for anyone to game' or 'salt' the database. You have stated that only 4 out of 1000 reports of harm in the soft launch were challenged as 'materially inaccurate.' Were manufacturers allowed to identify reports that lacked enough information for them to know whether they were materially inaccurate or not? How many such reports were so identified?

Was the information in the soft launch made publicly available? If not, then how does it count as any kind of test of the problems with the database?

Reports and comments submitted to the CPSC during soft launch will only be disclosed to the public pursuant to section 6(b) of the CPSA. Thus, someone would have to submit a Freedom of Information Act (FOIA) request to review this information.

Despite the fact that the information will only be disclosed pursuant to section 6(b) of the CPSA, soft launch provided an excellent opportunity for the CPSC to test the database software for:

- entering reports online using the new reporting form;
- registering businesses to use the new business portal application on SaferProducts.gov;
- allowing businesses to enter comments and claims regarding reports on the business portal; and
- working through internal CPSC processes for handling reports, including assessment of the minimum requirements for publication, notifying businesses about reports, and dealing with manufacturer comments and claims.

In addition, soft launch gave CPSC's staff the ability to identify certain areas where slight technical corrections would improve the overall operational stability of the database before the official March 11, 2011, launch date.

Until the data is publicly available, there is no incentive for anyone to game' or 'salt' the database.

CPSC did not conduct soft launch to determine whether someone would 'game' or 'salt' the database. But if someone had a nefarious intent to 'salt' the CPSC's database, he or she could have done so before now. Incident reports have been available to the public through a FOIA request since the inception of the agency. We do realize, however, that having more immediate access to information on the internet may increase someone's incentive to enter false data. If we determine that information in the database is fraudulent, we will remove the information and review our options to prosecute the offender.

You have stated that only 4 out of 1000 reports of harm in the soft launch were challenged as 'materially inaccurate.' Were manufacturers allowed to identify reports that lacked enough information for them to know whether they were materially inaccurate or not? How many such reports were so identified?

Manufacturers can choose to make a comment visible to the public and state that they do not have sufficient information about the incident to make a substantive response. We have not tracked this information to date.

14. Does the agency intend to allow information on the database to be downloaded without a disclaimer? If so, why is the agency ignoring the statutory requirement for a disclaimer on such data? How will the agency correct data that has been downloaded by third parties when it makes corrections to the database?

When the database has been populated with reports of harm, the CPSC intends to provide a means to download information. Information downloaded from the database will

contain the statutorily required disclaimer as the first piece of information in every data file.

Section 6A(b)(5) of the CPSA requires that the Commission provide "clear and conspicuous" notice to database users that the Commission does not guarantee the "accuracy, completeness, or adequacy of the contents of the database." Nothing in the statute requires that this disclaimer be included on printed or downloaded materials. Despite this fact, the Commission requires in section 1102.42 of the final rule that the disclaimer be displayed on the database and on all information printed from the database.

CPSC cannot guarantee, nor does the statute require, that users or aggregators of the data will retain this disclaimer, however.

Questions for the Record: Chairman Mary Bono-Mack
March 24, 2011

Commissioner Anne M. Northup
U.S. Consumer Product Safety Commission

1. **Why do you anticipate that adding a "functional purpose exemption" to the lead content limits would weigh down agency resources if adopted?**

The functional purpose exemption proposed by Chairman Tenenbaum and Ranking Member Henry Waxman would grant to the Commission the authority to exempt from the CPSIA's lead limits products in which the lead content serves a "functional purpose" so that it is "not practicable or not technologically feasible" to remove the lead in each product or component, and provided that such lead "will have no measurable adverse effect on public health or safety." Notably, this formulation was designed to exempt certain products from lead limits that were arbitrarily set by Congress without regard to risk in the first place.

First, this exemption would be complicated and costly. To implement the exemption, the Commission would need to promulgate regulations defining "functional purpose" and "measureable adverse effect," and to establish standards to govern its review of manufacturer petitions seeking the exemption. Once in place, the exemption would require the Commission to make product-by-product determinations in response to petitions filed by manufacturers. Petitioning a government agency requires substantial resources, including legal and technical assistance to make the necessary showing. Thus, this petition process likely will be available to only the largest manufacturers that could afford it. Small businesses, again, would be at a real disadvantage.

Commission staff has expressed the view that such an exemption could generate a large number of complex petitions. As a result, substantial Commission resources would be directed toward the pre-approval of a potentially unlimited number of products whose lead content does not have a measurable adverse effect on public health or safety. This pre-approval regulatory role is neither one previously assumed by the CPSC, nor one for which it is currently funded. The Food and Drug Administration is charged with pre-approving products before they are marketed, and it is responsible for a much smaller universe of products than is the CPSC. Yet the FDA's annual budget is in the billions of dollars, whereas the CPSC's FY 2012 budget request is $122 million. It is safe to assume that adding an FDA-like pre-approval function to the CPSC through a functional purpose exemption would turn the agency's safety mission on its head and require unnecessary, expansive resources to pre-approve products that do not even pose a lead risk to children.

I am also concerned that this exemption will be applied subjectively and with prejudice. This concern is reinforced by statements other Commissioners have made that seemingly prejudge the application of the functional purpose exemption to particular products, such as bicycles, without any supporting analysis. Ironically, this would result in arbitrary,

non-science based exemptions to a lead limit and a restrictively construed absorbability exclusion that are themselves without a scientific, risk-based foundation. For example, the lead in crystals on a child's jacket serves a "functional purpose" because it makes the crystals shine, but the crystals pose no risk because the lead is not soluble (that is, absorbable or bio-available). However, no matter how low the level of lead in such crystals, it is clear that the majority of Commissioners would not support a petition for a functional purpose exemption to permit crystals on children's jackets. Without even seeing a petition and/or having the benefit of a company's cost analysis, substitute materials evaluations, etc., those supporting the "functional purpose exemption" routinely assume that only specific industries would be helped.

There is something contradictory about the Majority Commissioners' casual attitude toward the need to award "functional purpose" exemptions while also interpreting the law's absorbability exclusion in the strictest manner possible, prohibiting any product with accessible lead from meeting this exclusion. It begs the question: "Are metals that contain small amounts of lead that are not bio-available dangerous to children?" If the answer is "yes," then clearly there should be no exemptions regardless of the functional purpose of the lead in the product—including no exemptions for ATVs or bicycles. If the answer is "no" because, in fact, such small amounts of lead do not pose a risk to children, then all metals where the lead is not soluble or bio-available should be permitted. This would allow manufacturers to continue to achieve the benefits that lead brings, such as strength, machinability, shine and other uses. This effort to construct a new exemption that does not take into account the science behind the risks of lead reinforces my concern that science will be less of a guide in granting a petition than a preconceived notion of who should or should not be granted such an exemption.

For example, one of the criteria in the Waxman proposal for granting a functional purpose exemption is that it would not expose a child to risk, that is, the inclusion of the item in the product would not raise a child's blood lead level. If a component does not pose a risk to a child on one product, then why would that same component not be acceptable on any other item? The very argument at the basis of the functional purpose exemption is that there are many materials where the lead does not pose a risk to a child that are currently banned. Why not acknowledge this and fix the law so that we only ban materials that are actually risky?

That is why I have argued in my testimony that the Absorbability Exclusion in the law be amended so that it is meaningful. This exclusion can be amended so that products that do not contain lead that is absorbable, or bio-available, to a child in any amount that could be harmful would be exempt from the law's requirements—and such an exclusion could be drafted in a way that the agency would not need to review or approve such products before they are sold. Lamps, school desks, children's sizes of brass musical instruments, books, ATVs, bicycles, toys and all other products that do not contain lead that is absorbable in harmful amounts would be able to be produced and sold. The same industries envisioned to be assisted by the functional purpose exemption will achieve relief under this provision, as will any other industries that produce safe products. Of course, such a change would still not allow the sale of products containing dangerous

amounts of absorbable lead, such as those with lead based surface coatings and solid-lead children's jewelry.

2. **Before CPSIA was enacted, many pointed to the public database maintained by the National Highway Traffic Safety Administration (NHTSA) as a model for the CPSC's public database. Can you explain how these two databases are similar and how they are different? Is it true that CPSC's database contains more protections for manufacturers to ensure accuracy than NHTSA's database?**

The intention of both databases is to provide accurate and actionable safety information to the general public. Apart from the fact that both databases require some description of the consumer product/car/etc, and the approximate incident date, there is very little that is similar about the two. NHTSA requires a vehicle owner to provide specific detailed information about the vehicle to uniquely identify and distinguish it from all others. Such information includes the component name and the category, make, model and model year of the vehicle. In contrast, the CPSC database does not require submitters to provide information that is sufficient to distinguish the subject product from a myriad other products. The only required identifying information is the manufacturer, the "product type", including such broad category options as "toys, kids & baby", and an open ended field for the "product description" Unlike the NHTSA database, the CPSC database does not require the model, date of purchase, identification number, or any other uniquely descriptive information.

The NHTSA and CPSC databases also differ markedly in their solicitation of information necessary to ensure reports can be adequately verified and investigated. The NHTSA database requires "vehicle owners" to provide their first and last names, daytime phone number and address. Moreover, it is unlikely anyone other than a vehicle owner would possess all of the required information about the vehicle necessary to submit a report. Although the CPSC website also requires *submitters* to provide contact information, the contact information of the victim or product owner is not required. As a result, the submitter of the report does not need to have firsthand knowledge of the product or incident in question, and may not even know the contact information of the actual consumer and/or victim. Thus, when a manufacturer needs to clarify which product is the subject of an incident report, or when the veracity and accuracy of a report is subject to question, CPSC staff will be unable to follow up with a party that has knowledge of the incident and product. The absence of adequate information in the incident report will also preclude both the manufacturer and the CPSC from conducting an investigation to determine if a product has a fundamental problem and should be recalled.

As discussed in greater detail below, the other supposed "protections" exclusively available on the CPSC database are of little or no value. This includes the manufacturer's right to challenge a material inaccuracy, since a challenge does not preclude the CPSC from publishing the report after 10 days, and, given the absence of information necessary to adequately investigate the report, will often not result in the removal, redaction or correction of a materially inaccurate report. Similarly, a manufacturer's opportunity to

engage in an on-line dispute with a consumer over the safety of its product is more an invitation to a public relations disaster than an opportunity to ameliorate the harm from an inaccurate report that disparages a product.

Finally, NHTSA's database pertains to automobiles and components of automobiles—a finite universe of products and manufacturers. Car manufacturing is heavily regulated and car manufacturers almost always are large businesses. However, the CPSC regulates everything from household chemicals made by large companies to toasters, jewelry, and children's clothing made by small manufacturers or hand-made crafters. Simply given the scope of products covered, it is misleading to compare the impact of NHTSA's database with that of a new public database covering over 15,000 different types of consumer products—some of which may never have had a reason to be familiar with the Consumer Product Safety Commission.

3. During the hearing, Ranking Member Butterfield asked Chairman Tenenbaum a series of questions regarding the CPSC database. Do you have any comments on those questions or the Chairman's answers?

I have provided my own answers to the following questions:

1. Is it correct that anyone who submits a report must provide to the Commission their name and contact information?

All submitters must provide their contact information, but the contact information of the actual victim or consumer who experienced the risk of harm is not required. In other words, the submitter of the report need not have firsthand knowledge of the incident in question, nor does he or she have to submit the contact information of the person who does—which brings into question the accuracy and reliability of the report. It also may prevent our own staff from following up directly with the consumer or owner of the product, should the Commission need to verify the report's accuracy.

Under the Majority's database rule, groups or individuals with no direct knowledge of the incident, who did not see it happen or do not even know the person that was harmed, are permitted to submit incident reports to the Database. In fact, the Majority's rule specifically names consumer advocacy groups, trade associations and attorneys as allowable submitters to the database. None of these groups is likely to have firsthand knowledge of an incident. Moreover, for these groups, the accuracy of the incidents reported may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

Accuracy is essential to a public database of incidents on which consumers may base their purchasing decisions. While accurate information is helpful to consumers, inaccurate information in a public, ".gov" database is simply misinformation--and not helpful to anyone. To alleviate this concern, I proposed an alternative database rule that would have encouraged only those with firsthand information of an incident to submit reports to the database. Unfortunately, my proposal was not adopted.

2. *Is it correct that anyone who submits a report must complete a verification that the information is true and accurate?*

Submitters to the database must check a "self-verification" box affirming that the report they are submitting is accurate "to the best of their knowledge." But the "best" knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened – including the exact type of product, recent history of the product, or even the precise cause of the incident. As a result, the "self-verification" requirement will neither discourage nor prevent inaccurate reports of harm.

3. *Is it correct that within 5 business days of receiving a report the Commission will transmit the consumer report directly to the manufacturer?*

Yes, provided the manufacturer has previously registered on the database system. A manufacturer that has not registered on the database is unlikely to receive notification of the report within five days. Moreover, unless a manufacturer makes a material inaccuracy claim and the Commission completes its investigation and determines that the report is materially inaccurate – all within the ten days following transmittal of the report to the manufacturer – the report will be published on the 11th day. Because the time period runs from the date of transmittal, not receipt, a manufacturer receiving the report by mail is unlikely to avoid publication of a materially inaccurate report.

Importantly, the promise that a report will be transmitted to the named manufacturer within five days of posting is no help to other entities who may also be harmed by a materially inaccurate report. The system is designed to provide automated notice to only a single party, the entity identified in the "manufacturer" data field. Moreover, the database does not currently permit an entity to register in its capacity as non-manufacturing licensor of a trademark used on another manufacturer's product. As a result, notice may not be provided to licensors and other parties who could be harmed by a report or may have valuable information concerning the material accuracy of the report. This includes, in addition to licensors, retailers and manufacturers identified in the narrative portion of the report but not the manufacturer field.

4. *Is it correct that the Commission will not publish that report until the tenth business day after transmission to the manufacturer?*

The Commission will not publish a report until the 10th day after sending notification to the named manufacturer. But the report will be published at that time even if the manufacturer has made an adequately supported claim that the report is materially inaccurate and the Commission has not completed its investigation of the claim. As a result, materially inaccurate information can remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to

investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Recognizing this problem, I supported a valid and more useful interpretation of the statutory 10-day time frame for evaluating claims of material inaccuracy. Under my interpretation, reports submitted to the database would be published following the 10-day window, provided no claim of inaccuracy is made within that period. Reports that are the subject of an adequately supported claim of material inaccuracy made within 10-days of a manufacturer's notification would not be published until the Commission investigated and resolved the claim. No reports deemed not materially inaccurate would be withheld from the database; their publication would simply be delayed. Consumers would have the benefit of an effective tool for gauging the safety risk of products, rather than a database populated with unreliable and misleading information.

Notably, the Commission's Notice of Proposed Rulemaking on the database originally included an interpretation similar to mine. For example, § 1102.26 of the NPR states: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the Database until it makes a determination."[1] 75 FR 29180. That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, many if not most of the commenters assumed that incidents would not go into the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consumer groups argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a more detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority's

[1] The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the database, the Commission may withhold a report of harm from publication in the database until it makes a determination." 75 FR 29161. And this: "We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 29170 (Response to summary 26)(emphasis added).

final rule now forbids delaying publication in those circumstances, and fails to establish any specific protocol for handling requests for determinations.

Finally, it is helpful to remember that the Commission obtains information in addition to that which will be submitted to the public database, such as emergency room data, death certificates, etc. It is acceptable (and probably preferable) for the Commission to continue to absorb as much information on consumer products as it can—and this includes reports from advocacy groups, trial lawyers and trade associations. However, it is not necessary ***nor is it statutorily required*** that such information, particularly that which is neither accurate nor verifiable, also be posted on the public database. This is one area where my position on the database differs starkly from that of the Majority.

5. *Is it correct that during the 10-day waiting period the manufacturer is given a chance to do three things: 1) claim parts of the report are materially inaccurate; 2) claim parts of the report contain confidential information; and 3) submit its own comments to be made public along with the consumers report?*

This is correct, but these safeguards are meaningless in the absence of sufficient information to permit a manufacturer to gauge the accuracy of the report. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would be of no value. And even in those cases where a victim or person with firsthand knowledge is identified in the report, unless a waiver is expressly given, the manufacturer will not have access to the information.

As previously discussed, even where reports contain sufficient information to identify a material inaccuracy, the value of notifying the Commission within 10-days is greatly diminished by the Commission's policy of publishing the information pending its determination.

With regard to manufacturers' having the opportunity to add comments to database reports, that supposed benefit is also of questionable value. As many manufacturers and their legal representatives have suggested, engaging in an open, on-line dispute with a customer over the contents of a report of alleged harm is not in a manufacturer's interest, and could cause a manufacturer to unwittingly increase its exposure to a products liability lawsuit. Nor is a forum for a "he-said, she-said" exchange of opinion about unverifiable allegations likely to assist viewers of the site in their search for useful product safety information.

6. *Is it correct that the Commission as practicable will attempt to expedite review of material inaccuracies where the manufacturer has limited the length of its submission?*

Yes, the Commission has committed to ***trying*** to expedite its review of material inaccuracies where a manufacturer can make a strong case through evidence and argument. However, as previously explained, this is small solace to a manufacturer provided with insufficient information even to assess the report's accuracy, let alone to support a claim of material inaccuracy.

7. *Is it correct that the Commission will review all inaccuracy claims and will correct or remove any inaccurate information published in the database?*

In those cases where a report contains sufficient information for a manufacturer to support a claim of material inaccuracy, and the Commission has sufficient information to conduct an adequate investigation of the claim, the Commission will correct or remove any information it determines to be inaccurate. Pending the Commission's investigation – for which there is not even an aspirational deadline – the potentially inaccurate report remains on the database. Once the change is made, consumers who have already relied upon the materially inaccurate information to select products to purchase will derive no benefit from the change.

8. *Is it correct that the database will contain only reports of harm from a product and not general complaints or reviews about a product?*

The goal of the database is to include only reports of harm, but it is difficult in practice to distinguish between reports of actual incidents or risks of harm and other categories of consumer complaint.

9. *Is it correct that the Commission will seek criminal prosecution through the Department of Justice where it identifies repeated instances of false submissions?*

The Commission has made that statement. However, between fiscal years 2004 and 2010, the Commission referred for criminal prosecution to the Department of Justice only one case that did not involve illegal fireworks. Moreover, the difficulty of proving that a report is not "true to the best of [the submitter's] knowledge" makes it unlikely any action would be taken. Even a consumer advocacy group in the habit of submitting reports based on third and fourth hand information heard "though the grapevine" is still submitting a report to the best of its knowledge. Finally, assuming the Commission even concluded that a report failed to meet this lax standard, the choice to prosecute would be made by the Department of Justice. I would be shocked if the Department of Justice, overwhelmed by significant cases effecting the national interest, would exercise its discretion to dedicate its resources to litigation over whether someone really didn't believe something they heard about a consumer product.

10. The final rule states: "The Commission will as a matter of policy, redact the allegedly confidential information from a report of harm before publication in the database until it makes a determination regarding confidential treatment." Does that really mean what it says? Is it correct that no information claimed by a manufacturer to be confidential will be made public until this is resolved?

It is true that information claimed to be confidential by a manufacturer will not be published until the Commission makes its own determination as to the confidentiality of the information. However, once the Commission has done so, regardless of the manufacturer's position, the information will be published. It will then remain on the database unless and until the manufacturer prevails in court.

4. You explained during your testimony that CPSC's rules for the public database do not require that submitters identify the exact product involved in the incident. In your example, you explained that one manufacturer of children's highchairs makes over 100 different models, and that reports to CPSC can be included in the public database without specifying which of the 100-plus models was involved in an incident. However, Chairman Tenenbaum also stated later that she is hopeful that people will give the model name and that the Commission staff certainly will investigate. Does that resolve your concern?

No it does not resolve my concern. "Hope" that people will provide the minimum information necessary to ensure the accuracy of reports of harm is not a substitute for requiring such essential information. Moreover, the promise of an investigation is illusory when the Commission does not require the identification and contact information of a party with firsthand knowledge of the product and incident. Requiring precise product information *or* the identity of a party with firsthand knowledge would have given the Commission at least a chance of ensuring the veracity and accuracy of reports. Requiring neither has produced a system that is more harmful than helpful.

Because the Majority's database rule all but guarantees that the database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal databases we have today. It will also harm consumers by driving their purchasing decisions with unreliable information – potentially steering them from safe products to unsafe ones based on the false and unverifiable information populating the database.

5. You explained during your testimony that a Component Testing rule will help small businesses to be able to comply with the law's testing requirements. If the Component Testing rule will be helpful, why are small businesses still asking for relief from this law?

If the rule on component testing (75 FR 28208) is finalized as it is written today, it will allow for compliance with the CPSIA by some manufacturers that otherwise may have

had no chance to survive under the law's costly, complicated testing and certification requirements. This is because component testing has the potential to allow considerable flexibility under the CPSIA's testing regime for both small and large manufacturers. But it will not offset all of the unintended costs nor eliminate all of the negative consequences of the CPSIA.

To begin with, promulgation of the final component parts rule will not instantly create a market for component parts available to all small manufacturers. While the rule will make such a market possible, it will still be up to component parts manufacturers to determine whether they can profit from voluntarily incurring the expense of testing and certifying the component parts that they sell. It is questionable whether certified component parts will ever be available for sale at the craft and hobby retail outlets such as Michaels Stores or Joanne's, where many very small manufacturers purchase the materials they use to fabricate their products. Assuming such a market develops, it may not be available soon enough to benefit some small manufacturers, who will already have been driven out of business by the cost of third-party testing. And even with the benefit of pre-certified component parts, small businesses will still have to shoulder the enormous recordkeeping burden created by the Commission's rule.

In addition, even a robust market for component parts will not relieve small children's product manufacturers of the other costly requirements of the CPSIA. I urge the Committee to review the Commission's proposed rule governing testing and certification (75 FR 28366) to gain a better understanding of the tremendous burdens imposed by the CPSIA. Small manufacturers will still be required to do an initial third-party test of every component of their product and a third-party test following any material change to the product or component, regardless of whatever flexibility the Commission determines is possible within our testing rules. Some Commission safety standards require destructive testing of the finished product. The cost burden associated both with testing and the destruction of salable product will remain substantial for low volume producers. The extensive record keeping requirements and the disruption to production caused by the obligation to test products or components periodically after initial certification will also continue to burden small manufacturers. Moreover, some retailers have reported that there is unlikely to be sufficient third-party laboratory capacity to meet the increased demand that implementation of the third-party testing requirements will produce, particularly given that turnaround times at labs have already increased. As a result, small manufacturers can look forward to long delays waiting for labs to finish testing the products of the larger and more valued players who will likely be given priority, as well as increased testing prices as supply and demand market forces bid up the cost. Meanwhile, the sunk costs of product development and production capacity will remain economically unproductive while the small manufacturers await testing.

6. Can you clarify your $29 million estimate for the cost of the database as compared to the $3 million estimate provided by the Chairman? Are you familiar with the basis for the $3 million estimate?

I first heard the $3 million dollar estimate during the hearing. After checking with my staff, it was clear that no one in my office had ever seen or heard that number previously, and that there was no written, public or confidential paper available to me where that number appeared. Prior to then, I understood from the Commission's FY 2012 Budget Request that the Commission had estimated the cost of both the public database and IT modernization to be $29 million, and that it was impossible to distinguish the funding for the two initiatives because they are inseparable.[2]

Following the hearing, I learned that a variety of cost estimates for the database (or database plus IT modernization) have been provided by various sources, including:

- A statistic cited in Commissioner Bob Adler's January 14, 2011, Supplemental Statement on the Public Database: "In fact, according to CPSC staff, the cost of the database is only a small part of the $9 million spent on the first phase of the IT modernization."[3]

- An estimate communicated orally by CPSC staff that the database might cost between eight and ten million dollars.

- An estimate reported by the Associated Press on February 25, 2011: "The database was ordered by Congress as part of a 2008 product safety law aimed at removing lead and other dangers from toys, and last April the commission estimated it would cost about $20 million. That estimate included a major technology upgrade of antiquated computer systems that the agency said at the time was essential to providing a foundation for the searchable database."[4]

In order to resolve the confusion surrounding this issue, I recently requested from the CPSC Budgeting Office figures reflecting the exact cost of the database. In response, our budget office was unable to separate funds allocated to "IT modernization" from those associated with the creation of the database.

I was then referred to our IT staff, who provided me for the first time with written documentation supporting the $3 million figure. Notably, the document is a memorandum dated March 8, 2011, over two weeks *after* Chairman Tenenbaum

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[2] Commissioners began their review of the 2012 Budget Request in fall 2010. The document states at Page 5: "By the end of 2011, the Commission will have spent $29 million in contracted work for the public database and IT modernization." http://www.cpsc.gov/cpscpub/pubs/reports/2012plan.pdf

[3] http://www.cpsc.gov/pr/adler01142011.pdf

[4] Jennifer Kerr, "New Unsafe Products database Under Fire on Hill," *Associated Press* (February 25, 2011). http://hosted2.ap.org/APDEFAULT/89ae8247abe8493fae24405546e9a1aa/Article_2011-02-25-Dangerous%20Products-id-c20609a71a1d4f74af36b0430f1d233c

announced the $3 million figure at the Committee hearing. A copy is attached for your reference.[5]

The March 8 memorandum speaks for itself, but I find it to be an extremely confusing and loosely drafted post hoc justification for the $3 million figure. Its effort to separate the costs associated with creating the public database from expenses associated with other technology improvements is difficult to follow and unpersuasive. Indeed, before launching into its rationale for the precise delineation, the memorandum's author concedes that "[b]ecause modernizing the Commission's business processes and supporting IT systems is required in conjunction with deploying the public database, it is challenging to draw a bright line between these efforts." But the thrust of the argument appears to be that all of the funds used to create the database should not be included in its cost, because the accompanying IT modernization improvements and certain features of the database have uses beyond facilitating the public's submission and search of consumer product safety reports.

For example, the memorandum states at page 2 that "regardless of whether a report is a candidate for publication" the agency wants to: (1) drive the public from reporting incidents via the hot line or U.S. mail to an online form on the database; (2) change its standard communication method with businesses from paper forms to online forms via the business portal of the database; and (3) otherwise share with the public through the database valuable information in addition to the reports posted to the database by the public. Through this logic, the creation or upgrade of a public portal to facilitate consumer incident reporting and searching online is *not entirely* a cost of the public database, because the CPSC would have wanted *some* of this upgrade, regardless of the statute's requirements.

While nicely supporting the Chair's goal of minimizing the apparent cost of the database, I believe this carve out is unwarranted. It amounts to writing off a portion of the database's cost simply because certain of its features can also be used to accomplish other agency goals. To illustrate this point, imagine a vacuum purchased for $500 with the intent to clean a floor. The vacuum is then used for cleaning blinds, removing cob webs, and even blowing leaves from the driveway. Does this mean that the vacuum actually cost $300 because $200 was saved that could have been spent to perform the additional work? The same faulty logic – formulated in hindsight to reduce the apparent cost of the database – underlies the reduction of the database's cost from $29 million to $3 million. The features of the database that serve functions beyond facilitating public reporting and searching, including much of the IT modernization work that was an essential prerequisite to the creation and functioning of the database, have been deducted from its cost. But the fact remains that none of the database's features and their uses, nor much of the underlying IT modernization, could have been achieved had the Commission not received and spent funding to design and program the database.

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[5] CPSC Staff Memorandum, March 8, 2011, Subject line: "Estimated Costs of Public database Development."

Notably, the agency has always *promoted* its IT modernization and database plans as inseparable on the grounds that the former is essential to having a more efficient database. This argument was intended to reduce the risk that the Office of Management and Budget (OMB) or Congress would seek to cut the budget by eliminating funding for either IT modernization or the database. Since 2009, OMB has requested not only our Exhibits 300 and 53 on the database costs, but also a Spend Plan for the Consumer Product Safety Risk Management System ("Database Spend Plan") laying out in more detail the annual costs of the database. In none of these documents does the agency attempt to separate the funds allocated to IT modernization from those dedicated to the public database. On the contrary, a single combined figure has always been presented. The contracts the Commission has let to execute its IT modernization plan and to create the public database also do not distinguish between the two.

The fact that the agency's broader IT modernization efforts have only just begun also indicates that much of the money spent to date directly supported the database. The database became public on March 11, but the work necessary to achieve the IT modernization goals the Chairman discussed at the hearing will not be completed for several years. This includes integrating our different information silos, so that our staff can search across incident reports, field investigations and standards work, and perform more complex statistical searches. So far, we have standardized the way we intake data --a laudable accomplishment considering the agency's multiple internal databases. We have also begun a website redesign, and a plan to begin standardizing incoming data. However, the "IT modernization" piece, even if it could be broken out completely from the public database, is nowhere near complete---even after incurring over $29 million in contract and other costs.

While your question implicitly assumes that either the $3 million or $29 million figure is accurate, I believe that even the $29 million estimate understates the real cost of the database. The $29 million figure represents only the estimated contracting costs through FY 2011. It does not include the hours CPSC staff dedicated to developing the database and preparing for its launch, including managing contracts. Agency projections for the future cost of the database are also misleadingly low. The FTE cost estimates in the CPSC's Database Spend Plan only account for IT employees, ignoring the additional staff needed for data intake, investigations, and legal work associated with the new public database. It also appears to discount the expected increase in incident reports, material inaccuracy and confidentiality claims, and other work likely to be generated by the existence of a searchable public portal for the reporting of product safety incidents and issues.

The Commission's 2012 Performance Budget Request also discounts these expenses. According to that document, the "New and Reallocated Resources" dedicated to "Data Intake, Incident Review, and Investigation" is derived from an extrapolation of the growth trend line for reported incidents and investigations dating back to 2003. If, as is likely, this projection is proved to be too low, the assigned staff will be unable to timely manage all of the information reported through the database. As a result, Commission staff will be even less likely to resolve claims of material inaccuracy within the ten-day

period prior to the posting of unverified information. The Commission will then either request and be provided additional funding in subsequent years, or preside over an increasingly misleading database.

7. On February 16, 2011 the Commission held a public hearing on the technological feasibility of lowering the lead content limit for children's products to 100 ppm this August. Unfortunately, we did not have time on February 17 to discuss the results of this hearing. Overall, did manufacturers and other witnesses provide evidence that they will be able to make the transition to 100 ppm this coming August?

Evidence was presented at the hearing on two issues: the reliability of testing products for lead content as low as 100ppm, and the economic feasibility of actually manufacturing products to that level. With respect to testing, the reliability of lead content testing, as measured by the repeatability and reproducibility of test results, diminishes as the lead levels measured are decreased. However, representatives from several labs testified that they were able to measure lead levels down to 100ppm, albeit with an approximately 10% margin of variability. This means that the lead in a product might need to be 91ppm in order to be consistently measured no higher than 100ppm. In addition, a single portion of a material may have different lead levels at different locations. Thus, a 15 foot steel rod might produce five different lead level readings if measured at five different locations on the rod. This fact also reduces the reliability of testing for lower lead levels, because there is a greater likelihood that lead levels along a single object could rise above or fall below a low threshold.

Manufacturers testified that it was *possible* to obtain source materials with 100ppm of lead or less, but that such materials could *not* be obtained without increasing a product's cost to the point that it is priced completely out of the market for products of its type. For instance, most bicycles on the market today are manufactured from steel comprised at least in part from recycled materials. Such steel could not satisfy a 100ppm standard. But alternatives to recycled steel are available for the manufacturer of bicycles, including virgin steel and carbon based alloys. The problem with these alternatives is that they increase the cost of the product substantially. Virgin steel was estimated to increase the cost of a bicycle's manufacture by approximately 25%. Bicycles constructed of carbon sell for thousands of dollars.

Under the CPSIA, the 100ppm lead limit is technologically feasible if "a product that complies with the limit is commercially available in the product category." A common sense interpretation of the "product category" must take into account the market price of the product. Thus, the fact that a bicycle that costs $100 when made using recycled steel with 300ppm lead can also be manufactured and sold for $2000 if made from carbon containing 50ppm lead does not mean that the latter bicycle is a commercially available substitute for the former. They are different product catergories. Congress' mandate that the CPSC consider technological feasibility should therefore prevent the CPSC from destroying the market accessible to Americans of modest means for bicycles or any other

products, where reduction to 100ppm of lead would meaningfully increase the product's price.

Another relevant issue presented at the hearing is the absence of safer alternatives to lead for obtaining the essential characteristics lead contributes to a metal alloy. Lead increases the tensile strength of steel, permitting it to bend and bear greater pressure without breaking. Lead also adds to the machinability of metal alloy, allowing the punching of small holes while otherwise maintaining the integrity of the material. Lead is also an effective lubricant to reduce the friction of two metals rubbing together, and has therefore traditionally been used in the manufacture of ball bearings. Other substances can also contribute these characteristics to metal alloys, but they are either untested or known to be as dangerous as lead, including antimony.

Questions for the Record: The Honorable Mike Pompeo
March 24, 2011

Commissioner Anne M. Northup
U.S. Consumer Product Safety Commission

1. Do you think paper clips pose a significant threat to children? Do you think it makes sense for the Commission to require testing a paper clip in a science kit but not when attached to a child's worksheets? Do you think it makes sense for the Commission to require testing brass in a child's bedside lamp but not in a child's musical instrument? What can Congress do to return the agency to one that regulates based on risk?

While the CPSIA has forced the Commission to regulate children's products without regard to risk, I believe the Commission's rulemaking has unnecessarily compounded the problem.

As your question suggests, the Commission's final interpretive rule on the definition of children's product is a good example. It imposed the full scope of the burdensome CPSIA regime applicable to children's products – including the requirements that products be reengineered to remove levels of lead that pose no risk of harm, third party tested, certified and accompanied by tracking labels – on many more products than required by the statute, and many that pose no risk to children.

Under the Commission's final interpretive rule on the definition of a children's product, a paper clip contained in a child's science kit is a children's product and therefore must be third party tested to CPSIA lead limits. The same ubiquitous paper clip that secures the papers in every elementary school class room in America is deemed by the Commission to be a "general use product" because it is an office supply that is not primarily intended for use by children. It therefore need not be third party tested and is not required to meet the law's arbitrary lead limits. Obviously, the paper clip is no more likely to present a danger to a child in the one setting than the other. Indeed, younger children, who tend to mouth objects, are much less likely to encounter a paper clip in a science kit designed for older children.

But most importantly, the paper clip presents a danger in neither setting. This is because any lead contained in the item is locked in its substrate and does not present the absorbability potential that defines the real risk of lead to children.

The CPSC's differing treatment of lamps decorated for children and brass musical instruments further highlights this disconnect between actual risk and CPSIA regulation. The CPSIA as construed by the majority requires the reengineering and testing of children's lamps for lead content, while standard-size, brass musical instruments are considered general use products not subject to reengineering and third-party testing. But

standard-size brass musical instruments are often used by children, and brass typically contains lead well exceeding the statutory limits. And both are, in fact, equally harmless because any lead is locked in the product's metal substrate and cannot be absorbed in unsafe levels. Moreover, musical instruments are designed to be handled extensively, whereas a child might touch the brass in a bedside lamp only rarely if ever. There is therefore no logical reason for treating them differently, and both should be excluded from the law's requirements under the absorbability exclusion.

These two examples merely scrape the surface of the absurd distinctions the children's product definition has made. Children, especially after the age of six, do not live in an isolated world populated only by children's products. They turn on lamps all over the house, open drawers in the kitchen and elsewhere, handle keys for the door, and help plant flowers using garden tools. Each of these everyday objects is loaded with lead but pose no risk to a child because the lead is not absorbable. There is no logical reason to impose arbitrarily all of the burdensome CPSIA requirements on one of set of products and not the other, when none pose a risk of harm.

Congress can prevent these absurd outcomes and permit the CPSC to once again regulate based on risk, rather than arbitrary limits, by amending the law's absorbability exclusion so that it is meaningful. This exclusion can be amended so that products that do not contain lead that is absorbable, or bioavailable, to a child in any amount that could be harmful would be exempt from the law's requirements—and such an exclusion could be drafted in a way that the agency would not need to review or approve such products before they are sold. Lamps, school desks, children's sizes of brass musical instruments, books, ATVs, bicycles, toys and all other products that do not contain lead that is absorbable would be able to be produced and sold. Of course, such a change still would not allow lead in paint, solid-lead children's jewelry, or other harmful products to be sold that do contain dangerous amounts of absorbable lead.

Additionally, Congress could simply eliminate all third-party testing requirements from the law. The Commission has other new and more effective enforcement mechanisms that are more reliable than requiring manufacturers to certify to having performed third-party tests. Today, the Commission intercepts non-compliant toys through improved and expanded border control efforts, application of x-ray technology to identify violative lead content, computer databases that flag previous offenders for greater scrutiny, the imposition of higher penalties of up to fifteen million dollars, and the threat of lawsuits and loss of reputation in the market.

Notably, even prior to these improvements, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The company responsible faced a class action lawsuit and a massive fine.

Following the elimination of mandatory third-party testing, the CPSC will retain its new and longstanding enforcement tools, as well as the authority to impose third-party testing

and other requirements where necessary to address a risk with a specific product or material.

2. Do you think Congress should delay implementation of the Consumer Product Safety Database Rule in order to allow this subcommittee time to revisit the statute and clarify whatever language led the agency to adopt a rule that puts materially inaccurate data into the database?

3. If Congress allows the database rule to be implemented 'as is,' do you think the rule will increase costs for consumers? Drive some safe products from the market? Increase companies legal costs? Distract the agency from genuine long-term risks with the 'headline of the day'?

This answer responds to your questions number 2 and 3.

I believe the Commission should be prohibited from expending any funds for the purpose of launching the Public Database until Congress amends the law to ensure that (1) reports of harm submitted to the Database contain sufficient information to clearly identify the product in question and permit verification; and (2) there is an effective procedure for resolving claims of material inaccuracy before a report of harm is published on the Database.

Section 212 of the CPSIA requires the Commission, subject to the availability of appropriations, to establish and maintain a public, web portal accessible Database on the safety of consumer products. The statute identifies five sources from which the Commission shall receive reports of harm. These are (1) consumers; (2) local, state, or Federal government agencies; (3) child care professionals; (4) child service providers; and (5) public safety entities. CPSIA § 212(b)(1)(A).

Each of these categories of submitters is likely to have first-hand knowledge of the harm reported. They can therefore be expected to provide accurate and reliable information that may be useful to consumers seeking product safety information.

Notwithstanding the statute's clear language, the Commission's Majority adopted a rule that greatly expanded the list of allowable submitters to the Database. For example, the Commission's regulation defines "consumers" to include "attorneys", and "public safety entities" to include "consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations." 16 C.F.R. § 1102.10(a). This expansion goes against the statutory purpose that the Database be "useful" for consumers and not disseminate erroneous information.[1] Indeed, the Majority has expanded the list of submitters to such an extent that ***anyone*** can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

[1] On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: "We have tried to find something that is balanced, that provides information, but also has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous."

It is important that individuals with first-hand knowledge of incidents of harm involving consumer products be permitted to submit reports to the Public Database. However, groups or individuals with no direct knowledge of the incident, who did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the Database. There are several reasons why first-hand knowledge is essential, but the primary reason is ***accuracy***. A Database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpful to consumers using the Database to determine which consumer product they should purchase.

Soliciting information from sources seeking to promote an agenda unrelated to simply sharing first hand information invites dishonest, agenda-driven use of the Database—diluting its usefulness for consumers. Trial lawyers, unscrupulous competitors, advocacy groups and other nongovernmental organizations and trade associations serve their own agendas and lack an incentive to prioritize accuracy in their reports of harm. Trial lawyers or other groups with self-serving motives will use the Commission's Database to look for potential trends and patterns of hazards. Under the Majority's Database rule, these same groups could also submit to the Database false and unverifiable reports to fuel a lawsuit. It is no coincidence that these groups are strongly in favor of this public Database and of the Majority's interpretation of the statute, which expressly allows them to submit reports of harm.

There are many advocacy groups and associations that serve a role in public policy, but may not have the incentive or ability to provide specific and accurate product identification information to the Commission's Database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes. One cause of house fires is the use of cigarette lighters, which are consumer products. Thus, the NFPA has a strong incentive to add all reports of house fires caused by lighters to the Commission's public Database. The more incidents in our Database, the better case they can make that new fire prevention technology – which some of their members sell—should be mandated in homes.

But it is not important to the NFPA whether it correctly identifies a brand of lighter in an incident report. A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular brand of lighter is not relevant to its goal of promoting sprinklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless unverifiable and potentially inaccurate claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

By inviting trial lawyers, consumer advocacy organizations and trade groups to input reports of harm, the Commission has all but guaranteed that the Database will be a tool for lawsuits, policy agendas and anti-competitive activity. Under those circumstances, it cannot also serve its intended function of providing a reliable resource for parents

seeking useful information about product safety. A Database populated with such information will be no more useful than "Amazon.com", "Yelp.com", or any of the other hundreds of websites where anyone can submit comments on a product, and does not warrant tax payer funding.

The problems caused by over expanding the list of submitters to the Database could have been reduced if reports of harm had to be verified, or at least verifiable, before being published. But the information solicited on the Database is inadequate to this purpose. With respect to the submitter, the Database requires that a "self-verification" box attesting to the report's accuracy be checked. But this will do little to discourage or prevent inaccurate reports of harm. Self-verification in the context of the Database rule means only that the report is accurate "to the best of the submitter's knowledge". The "best" knowledge of someone with no first-hand knowledge is of little value. An individual or group without first-hand knowledge will likely not have the full story of what happened -- including the exact type of product, the recent history of the product, or even the precise cause of the incident.

The scope of product information solicited on the Database under the Majority's rule is also inadequate. The only product information required is the identity of the manufacturer, the name of the product (such as, "highchair") and the approximate date of the incident. This information is insufficient to permit reliable verification that the manufacturer and *specific* product are correctly identified. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would be of no value.

Carrying this example one step further, consider a scenario: Company A sells five million high chairs and Company B sells 5,000 high chairs. Company A has six incident reports on the Database and Company B has one incident report (all of which are unverifiable). Thus, a consumer could falsely conclude that Company A's high chair is less safe, even though simply due to the number of units it sold, it is more likely that people own that high chair—and more likely that reports on that high chair would make it into our Database. Or, it is also possible that some of the reports about Company A's high chair actually pertained to older models of the high chair that are no longer for sale, which means the information may be entirely irrelevant to people using the Database to look for safety information about current products on the market.

The Majority rejected proposals contained in an alternative Database rule I offered that would have minimized such confusion and would have aided in the verification of reports of harm that are challenged by manufacturers as materially inaccurate. I proposed requiring that (1) reporters of harm include the consumer and/or the victim's identity and contact information with a report (to be held confidential, as is current practice), so that the Commission could obtain additional information to evaluate a manufacturer's claim

of material inaccuracy; and (2) the Database include fields requiring submitters to provide exact product information, such as model number, the approximate date of purchase of the product, and whether the product was purchased "new" or "used", thereby allowing consumers to gauge the age and better identify the specific model.

The Majority also rejected my proposal that the Commission withhold reports of harm from publication pending the evaluation of a substantiated claim of material inaccuracy. Instead, reports about which there is an adequately supported claim of material inaccuracy are posted on the 10th day after they are submitted, unless the Commission can somehow resolve the claim in the brief intervening period. Notably, the Commission's Notice of Proposed Rulemaking on the Database originally included an interpretation similar to the one I recommended. For example, § 1102.26 of the NPR states: "If a request for determination of materially inaccurate information is submitted prior to publication in the Database, the Commission may withhold a report of harm from publication in the Database until it makes a determination."[2] 75 FR 29180. That language could not have been included in the NPR without a legal opinion supporting the permissibility of the policy choice. That the agency apparently believed at one time that this approach is legally permissible, reflects, at a minimum, statutory ambiguity regarding the point.

Not surprisingly given the NPR, most of the commenters assumed that incidents would not be published to the Database pending the determination of a material inaccuracy claim. Although at least one commenter expressed the policy view that reports of harm should go up on the 10th day even when such claims are unresolved, no one—not even consumer groups argued that the statute legally prohibits the agency from withholding reports from publication for the duration of its investigation. To the contrary, several commenters proposed a detailed protocol for addressing claims of material inaccuracy, based on their understanding that reports would be withheld from publication while under review for accuracy. And yet the Majority's final rule forbids delaying publication in those circumstances. Moreover, our agency's fiscal year 2011 appropriations request did not include even a single new FTE to resolve pending claims of material inaccuracy, and our fiscal year 2012 request does not provide sufficient resources to account for an anticipated increase in reports. These facts alone make clear to the business community how low the CPSC prioritizes its responsibility to resolve claims that reports of harm contain false or misleading information about products.

Because the Majority's Database rule all but guarantees that the Database will be flooded with inaccurate reports of harm, it will be less useful for Commission staff in determining hazard patterns than are the current, internal Databases we have today. Frankly, this is one of my greatest fears—that Commission staff will be overwhelmed by inaccurate

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[2] The preamble of the NPR contains analogous language: "If a request for determination of materially inaccurate information is submitted prior to publication in the Database, the Commission may withhold a report of harm from publication in the Database until it makes a determination." 75 FR 29161. And this: "We propose that in cases where a claim of materially inaccurate or confidential information is under review, the Commission, in its discretion, may withhold a report of harm *in part or in full* until such a determination is made." 75 FR 29170 (Response to summary 26)(emphasis added).

reports (or the reports that get picked up by the media) and unable to use their expertise to search objectively for genuine hazards. As the Database is swamped with reports that inadequately identify the product, and are misleading or inaccurate, such reports will drown out the accurate ones. The flood of reports with potentially inaccurate or incomplete product information, which will be difficult, and often impossible, to verify, will also impose a tremendous burden on manufacturers. Substantial private sector man hours will now be dedicated to understanding and responding to incident reports containing incomplete and often mistaken information. Manufacturers, who might otherwise view the Database as a means to stay ahead of the curve in their ongoing efforts to improve the safety of their products, will have nothing but vague reports and guesswork on which to rely. The resources spent by a company chasing down unverifiable information to avoid reputational damage, would be better dedicated to reviewing incidents known to relate to the company's products or otherwise promoting safety innovations.

Congress could prevent the irreversible damage that unverifiable and materially inaccurate information will cause American businesses, and ensure the creation of a Public Database that is a useful tool for consumers, by prohibiting the Commission from expending any funds for the purpose of launching the Database until (1) the Commission's regulations ensure that reports of harm submitted to the Database contain sufficient information to identify the specific product and to permit verification when there is a pending claim of material inaccuracy; and (2) the Commission has established an effective procedure for resolving a claim of material inaccuracy before a report of harm is published on the Database.

4. How could we salvage this database that the agency has already spent $29M in taxpayers' money on in order to make it useful?

The Database could be an effective tool for consumers if it were redesigned to ensure that reports are submitted only by identified individuals with direct knowledge of the reported incident, such submitters are required to provide contact information and clear, specific product identification, such as the model number, and, in the case of a claim of material inaccuracy, a report may not be published until after the completion of an investigation concluding that the report is not materially inaccurate.

5. Should new federal product safety requirements for cribs, portable cribs, and play yards mean that families who own products that compiled with previous standards not be allowed to sell them on the secondary market even though the products were never found to be defective nor shown to be unsafe?

Regardless of the steps that were taken to bring us to a place where traditional drop-side cribs will no longer be made (a place reached largely aside from the CPSIA's mandates), the CPSIA required the Commission to issue a mandatory retroactive standard for cribs—not just for new cribs, but for used cribs as well. Such a provision is unlike the mandatory standard requirements for other durable nursery goods, such as toddler beds, play yards, or cradles. For cribs alone, the Commission's mandatory standard that goes

into effect this summer ***will make every crib in this country obsolete overnight and unable to be sold***—regardless of whether that crib was ever subject to a recall or ever considered unsafe.

What are the consequences of this provision of the law? First, any young family who has bought a new crib over the past year (not a small investment) will not be able to sell it or donate it to a thrift store after it has been used—even if the crib has fixed sides and is safe. Working families often depend on second-hand due to the high cost of new cribs. While the Commission advises consumers not to use any crib that is over ten years old, the fact remains that the safest place for a baby to sleep is in a crib, and the second-hand market for cribs remains a lifesaver for many families.

Unfortunately, once this provision of the law becomes effective, retail stores and thrift stores will no longer be able to sell fixed-side, safe cribs—a waste not only for those stores but for families in need of affordable cribs later this year or next.

Furthermore, the law goes beyond just a prohibition on the purchase of new cribs. It expressly forbids cribs that do not meet the new mandatory standard (and the CPSC has yet to confirm that a single crib on the market today meets that standard) from being offered ***for use*** by places of public accommodation. Once the new standard becomes effective two years after issuance of the Commission's final rule, day care centers and hotels across the country will have to begin using brand-new cribs that meet the Commission-approved mandatory standard— even if they bought a crib earlier this year that meets the previous ASTM standard (less than a year old), has fixed sides and is completely safe. This is not an insignificant number because of the large number of crib recalls in the past year. Many daycare centers have just recently replaced those cribs with new, safe cribs that will have to be discarded in the next two years. This represents a tremendous waste of money for families, day care centers, and taxpayer dollars that help fund many day care centers.

6. When database defenders say anonymous database complaints are not allowed, does the name and contact information for the actual person who was harmed have to be provided to the Commission? Even if the person harmed is the one reporting, doesn't that person have the option of remaining anonymous to the manufacturer? Must the person who is reporting have first-hand knowledge?

The report submitter must include contact information. But the report submitter need not have any firsthand knowledge of the product, harm or risk of harm. As a result, requiring the contact information of only the submitter is not much different from permitting the submission of an anonymous report. In both cases, the Commission has no means to verify the accuracy of the report or to obtain supplemental information relevant to determining the existence and scope of an alleged product hazard. Without access to a direct witness to an alleged incident, the Commission may also be unable to determine whether a report contains a material inaccuracy. Where a lack of information and inability to contact the product owner or a witness prevents the Commission from determining the existence of a material inaccuracy, a dubious report will remain on the

database.

All reporters of harm, including those who report harm to themselves or their child, are permitted to remain anonymous to the manufacturer.

7. Companies only get 10 business days after a report of harm is sent to them before it is posted to the database under the agency's rule. Is that enough time for them to investigate? Do they get enough information about the incident to be able to tell whether the report is true or not? Are they allowed to follow up with the victim to see what really happened? Are manufacturers able to identify reports that do not contain enough information to assess whether or not they are materially inaccurate? Can they require more information from a reporter of harm?

In many cases, ten days is unlikely to be sufficient time for a manufacturer to determine whether a report identifying its product contains a material inaccuracy.

This is partly because many reports will not contain sufficient detail about the product and incident to guide a manufacturer's investigation. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would not permit the manufacturer even to identify the specific product, let alone to gauge the accuracy of a report about the product.

Even a manufacturer provided sufficient information to identify a specific product may not receive enough detail about an incident to understand the role its product played in causing an alleged injury. Moreover, there may be no way to ascertain the truth in those cases where the manufacturer is certain that its product could not have caused an injury in the manner alleged. This is because a third-person reporter is not required to identify the victim or product owner, and access to a firsthand observer of the incident is necessary to resolve issues of fact.

A manufacturer forwarded a vague report has few options. Even where a firsthand observer is identified in the report, the manufacturer is not entitled to such individual's contact information. Without the ability to follow-up with a witness, the manufacturer must base its assertion of material inaccuracy upon the content of the report. In many cases, the report may not contain sufficient information for the manufacturer to ascertain whether it contains a material inaccuracy.

Even with adequate information, 10-days will often be too little time. Obvious cases of

manufacturer misidentification may be discernable within the available window of time. But many products of a more generic nature will be very difficult to distinguish without a much more extensive investigation. I have spoken with manufacturers who have needed over 30-days after receiving a consumer complaint to conclude that the subject product was not their own. And those were cases where the company had access to the product. 10-days will clearly be insufficient in many cases, and as a result, materially inaccurate information will remain on the public database well beyond that point.

8. Under the agency's rule, reports of harm go up after 10 business days whether the inaccurate information in them has been corrected or not. There is no requirement for the agency to act on every report within a certain time frame, is there? If a company believes that a report is not about their product, are they allowed to inspect the product? Or even necessarily follow up with the consumer? What does a company do to respond within 10 days if a ton of information is dumped into the database all at once?

The Commission will not publish a report until the 10th business day after sending notification to the named manufacturer. But the report will be published at that time even if the manufacturer has made an adequately supported claim that the report is materially inaccurate and the Commission has not completed its investigation of the claim. As a result, materially inaccurate information can remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims) , but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

The manufacturer has no right to inspect the product. In those cases where contact information for the product owner is neither provided nor obtainable from the third-party submitter, it would be impossible even for the Commission to inspect the product. Similarly, there would be no opportunity for the Commission to follow up with the consumer under those circumstances. The manufacturer is not entitled to the contact information of a product owner who chooses to remain anonymous.

A company required to respond in a short period of time to a large number of reports about its products would presumably either divert resources to the task or risk the long term publication on the database of inaccurate information about its products.

9. How would something like last year's Pampers investigation be affected by the database? You could have children's medical records and photographs in there forever couldn't you? Even once the agency has exonerated a product like Pampers DryMax diapers, the medical records and pictures would stay because the agency's rule does not require their removal, does it?

It is my understanding that inflammatory or inappropriate photographs will not be included with published web postings. However, there is no mechanism for the redaction of photographs or medical information published on the database, except where the entire posting is removed following a determination of material inaccuracy. The Commission's evaluation of a report's accuracy does not entail consideration of whether the product actually *caused* the harm that a submitter has associated with the product. There is therefore no plan or procedure for removing postings linking particular products with harm, regardless of any conclusions the Commission may reach regarding causation.

Your Pampers example is therefore an apt one. Were the Database an available conduit for consumer complaints at the time of the DryMax scare, it would presumably have been inundated with reports of diaper rashes attributed to the product. Notwithstanding the Commission's failure to find any link between the diapers and the rashes experienced by some children, those reports would have remained on the Database. Notably, it took the Commission months after it initiated an investigation to state publically that it found no link between the new DryMax product and an increase in diaper rash cases, and that public statement also inconclusively reported that the CPSC was still studying the question. The Commission's DryMax experience is not anomalous. Indeed, if history is any indication of the future, it would be rare for the Commission to conduct any investigation and resolve it in ten or fewer days.

10. Will the agency adjudicate accuracy based on claims of causation? If not, won't there be lots of false causation information on the database to mislead consumers?

As noted in response to Question 9, the Commission will not consider implied or direct attribution of causation in its evaluation of claims of material inaccuracy. As a result, it is reasonable to expect that there will be a substantial number of reports that expressly or implicitly attribute an injury or illness to a product defect where no imputation of causation is warranted under the facts. This is one more reason that I believe the database being built by the majority will mislead consumers and mistakenly hurt the reputation of quality products and safety-conscious manufacturers.

11. Does the soft launch show that the database will be successful? If not, why not? Does the fact that only 4 reports of harm out of 1000 were claimed to be materially inaccurate necessarily mean that the other reports were accurate? Or did many of those reports fail to contain enough information for the companies to even assess whether the report was accurate or not?

12. Did the agency learn about any unsafe products during the soft launch that it would not have learned about anyway? Will it recall anything faster than it would have anyway?

It is premature to read much into the numbers, content and outcomes of the reports submitted during the soft launch. Generally, it is my understanding that the numbers of reports coming in have not exceeded the totals traditionally received during a similar time period through other available portals, such as the 1-800 hotline. There is therefore no reason to believe that the agency has learned through the Database of any unsafe products about which it would not otherwise have learned. Similarly, I can think of no obvious reason why the source of a report would impact the speed with which the Commission investigates and, where appropriate, recalls a product. In fact, when the database is launched, the Commission intends an aggressive public campaign to increase its use. If the campaign succeeds in soliciting a greater number of incident reports, the Commission will likely be unable to investigate them at the current rate.

I agree that it is reasonable to assume that there may be few claims of materially inaccurate information because many reports contain insufficient information to permit an assessment. However, no data has been reported to me that either proves or disproves the assertion.

Another potential explanation for the small number of claims of material inaccuracy is that the reports received on the database during the soft launch will never be made public. Some manufacturers may have chosen not to expend their resources challenging as materially inaccurate reports that will never be made public.

13. How much of the agency's recent budgets have been devoted to wasteful spending like designing a new logo or hiring an editor? How much of a cut in the agency's budget would be justified in these economic times?

The Commission has spent $5,329 on a contract for the design of a new agency logo. Once the logo is finalized, it is likely that the Commission will incur additional costs to replace business cards, stationary, signs and other on-going items which typically bear this logo.

The agency hired an editor as a GS-14 at a salary of $105,211. Given the large amount of regulations, guidance and other public documents we issue on a regular basis, I would not consider this to be a waste of agency funds.

More importantly, I am concerned with the ability of our agency to utilize all of the funds it has been given, and believe that the funding we are unable to spend should be cut in the next Continuing Resolution or returned to the U.S. Treasury. The Commission already faced such a dilemma in fiscal year 2010. In June 2010, our agency determined it had $7.1 million in extra funds for the year (including approximately $5.7 million unspent for salaries). This amounted to six percent of our entire annual budget.[3]

[3] http://www.cpsc.gov/pr/northup06042010.pdf

I opposed the majority's decision to reprogram this funding for other purposes and instead requested that it be returned to the Treasury to help pay down the deficit. Our agency was on a steady clip to fulfill its hiring goals, but I did not believe that the Commission's inability to spend its *entire* annual budget (all $118 million) as originally planned required it to invent other ways to spend the money mid-year. Given our massive national debt and a clear desire by the American people to reduce federal spending, returning $7.1 million to the Treasury seemed like a straightforward request.

I have the same concerns with regard to fiscal year 2011 and thereafter— not only for the CPSC but for all federal agencies who do not complete all of their new hiring at the beginning of each fiscal year. Agencies generally are provided funding for new FTEs (full-time equivalents) for the *entire fiscal year*, but may not bring those new employees on board until mid-year or later. The resulting unused salary funds could be recouped in the following ways:

1) In the next Continuing Resolution, Congress could provide only 5.5 months worth of salary funding for any *new* FTEs that have not begun their employment with the agency – and only the exact portion of salaries necessary to fund all other FTEs hired during the middle of the fiscal year.

2) In the next Continuing Resolution, Congress could simply prohibit the Commission and all agencies from reprogramming any money, such as unspent salaries, for other uses—and ensure that this money is returned to the Treasury.

In the midst of a recession and our on-going fiscal crisis, it would be prudent to ensure that all agencies spend only the money they need—and only for the purposes originally appropriated.

14. I understand you voted against the agency's rules treating vinyl plastic film, carpets and rugs, small carpets and rugs, wearing apparel, and mattresses as children's products. Is that because you believe, as I do, that Congress did not intend every consumer product safety rule to be treated as a children's product safety rule?

The Commission, by a 3-2 vote along party lines, decided to ignore the distinction between children's product safety rules and consumer product safety rules, and to require third party testing of children's products to all the rules. Thus, general "consumer product safety rules," such as our flammability regulations for carpets and rugs, are now also "children's product safety rules" under the CPSIA. Manufacturers of carpets and rugs (as well as vinyl, wearing apparel and mattresses) already must adhere to a strict testing protocol for their products. This decision means that whenever they create a ***children's version*** of a product, they will have to do additional **third-party tests** to certify the agency's flammability standards. I opposed this decision, because these new third-party testing requirements were never part of the original standards promulgated by the Commission, and will not address a known risk. In fact, this was another area of the

statute where the Commission ignored the flexibility in the CPSIA to prevent unnecessary new testing requirements and costs in a struggling economy. The Commission easily could have distinguished between "children's product safety rules" and more general consumer product rules of the Commission, and thereby avoided additional third-party testing requirements, where they are neither required by the statute nor risk-based.

Of all of the votes we have taken at the Commission, I had hoped that this would be an easy one. After all, it is unlikely that Members of Congress were anticipating adding new third-party testing requirements to the 2007 mattress standard, the 1970 standard for carpets and rugs, and others when the CPSIA was passed. Unfortunately, due to the makeup of the Commission, I believe it will now take an act of Congress to reverse these requirements and to prevent future "consumer product safety rules" from being caught up in the CPSIA's third-party testing regime.

I would also note that due to the Commission's vague "children's product" definition, it is likely to be difficult for manufacturers to distinguish between a "children's rug" or "children's carpet" and a general-use carpet or rug. This difficult distinction also illustrates the absurdity of requiring carpets and rugs with children's decorations to be sent to a third-party, CPSC-accredited lab for testing (beyond the normal testing requirements of the standard), when the carpet and rugs in the hallway or in the living room of a home, where children also play, are no less safe without these added third-party testing requirements.

15. How do you answer the statement: "There is no safe level of lead"?

I believe it is important to clarify the risks associated with lead. Some advocates say that "there is no safe level of lead", implying that we can never spend enough time and money to reduce or eliminate lead everywhere. But there is, in fact, an *unsafe* level of lead that has been established by our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.[4] The Safe Drinking Water Act declares "zero lead" to be the objective for the amount of lead in water, but pipes carrying the water are permitted to be 80,000 parts per million (8 percent) lead allowing for negligible, trace amounts to exist

[4] "Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children", Food and Drug Administration, November 2006 (http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Metals/Lead/ucm172050.htm).

in the water we drink.[5] California Proposition 65[6] as well as the European Union[7] allow for a negligible amount of absorbable (or soluble) lead in children's products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)[8] is then taken into the body every day through the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at greater than minimal levels. The experts at the CDC and NIH have found that lead paint in old houses and lead in dirt[9] near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high.

In the same vein, a heavily lead-laden metal charm or piece of jewelry that can be swallowed presents a danger, because such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument or a vinyl lunchbox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Consider the CPSIA's lead requirements in comparison to these known lead hazards in the environment today. The CPSIA's arbitrary lead content limits (currently 300ppm, and moving this August to 100ppm or the lowest achievable level between 100ppm and 300ppm) remove the ability of the Commission to assess risk, or the *absorbability* that exists for a particular product. Thus, the law's lead content levels dictate that the metal handle bars of a bike that pose ***no health risk*** to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children's jewelry that actually is dangerous.

The CPSIA has led to a ban on children's books published before 1985, because the ink in them is likely to contain lead above the allowable level. Some at the Commission and many Members of Congress have expressed dismay that books have been affected, because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles

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[5] Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: http://www.epa.gov/safewater/sdwa/basicinformation.html

[6] California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65 - http://www.oehha.org/prop65.html; Children's Health at OEHHA - http://oehha.ca.gov/public_info/public/kids/schools041707.html.

[7] European Committee for Standardization (CEN), EN 71-3 Safety of Toys-Part 3: Migration of certain elements, CEN, Brussels, Belgium, 1994; http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/toys/

[8] Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead; http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22

[9] Although lead in dirt is a proven hazard for small children nearby to old gas stations that used leaded gasoline or certain pesticides, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. See http://www.epa.gov/lead/. This safety standard is less strict than the current lead content standard provided in the CPSIA for children's products, which is 300ppm and scheduled to fall to 100ppm in August of 2011.

are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

Finally, children do not live cooped up inside of their rooms surrounded only by "children's products." Children live throughout the house, run around outside, and play with adult products such as pots, pans, furniture knobs, door handles, appliances and TV remotes. For example, the new costs associated with this law will affect a young child's lamp (usually turned off and on by the parent) but not the lamp in the den or the living room that a child is as likely to turn off and on. These products do not threaten a child's health due to their lead content, because the lead in them is not absorbable. This further illustrates the absurdity of the CPSIA's requiring the unnecessary reengineering of children's products with lead, while children are just as likely (if not, more likely) to play with everything else in the house.

16. If we amend the law to eliminate third party testing and certification, how will we be sure companies and other manufacturers comply with our laws?

Thanks in part to the CPSIA, the Commission today has enforcement tools vastly improved over those available even a few short years ago. Today, the Commission intercepts non-compliant toys through its extensive border control efforts, application of x-ray technology to identify violative lead content and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance through the threat of confiscated and destroyed violative products at the border, by authorizing the Commission to impose higher penalties of up to fifteen million dollars, and by streamlining its authority to seek criminal penalties. Notably, even prior to these improvements, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The company responsible faced a class action lawsuit and a massive fine. Today, retailers, private labelers, importers and manufacturers are collaborating to insure against violative products to protect themselves from lawsuits, damage to their reputations, the cost of recalls and loss of inventories.

It should also be noted that the requirement that all children's products be third party tested and certified irrespective of risk is an extremely wasteful way to promote compliance, and draws both industry and public resources away from more effective means. The CPSC is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products—but we cannot fulfill this mission if our time is spent primarily enforcing the CPSIA, including its complex, non-risk-based, testing and certification requirements.

Because the CPSIA's new requirements are not risk-based, manufacturers are spending time and money simply on "compliance", rather than on improving their products to the benefit of consumers. In fact, many of these requirements amount to massive new paperwork and tracking systems, rather than actual modifications to the products themselves. The American Home Furnishings Alliance writes in a letter to Commissioners:

> "...there has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008....The testing is simply being done to attempt to prove a negative."[10]

Similarly, some industry associations have had very few, if any, safety violations and yet have to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in their public comments on the Component Parts rule:

> "As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product's, production of the product's and the manufacturer's unique circumstances. These programs ***are effective and do not need to be changed.*** To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information *not* lack of testing."[11]

17. Would you support the functional purpose exemption? If not, why not?

The functional purpose exemption proposed by Chairman Tenenbaum and Ranking Member Henry Waxman would grant to the Commission the authority to exempt from the CPSIA's lead limits products in which the lead content serves a "functional purpose" so that it is "not practicable or not technologically feasible" to remove the lead in each product or component, and provided that such lead "will have no measurable adverse effect on public health or safety." Notably, this formulation was designed to exempt certain products from lead limits that were arbitrarily set by Congress without regard to risk in the first place.

First, this exemption would be complicated and costly. To implement the exemption, the Commission would need to promulgate regulations defining "functional purpose" and "measureable adverse effect," and to establish standards to govern its review of

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[10] November 8, 2010, Letter to Commissioners from the American Home Furnishings Alliance.

[11] American Apparel and Footwear Association, Request for Comments, Docket No. CPSC-2010-0037 & CPSC-2010-0038 (August 3, 2010).

manufacturer petitions seeking the exemption. Once in place, the exemption would require the Commission to make product-by-product determinations in response to petitions filed by manufacturers. Petitioning a government agency requires substantial resources, including legal and technical assistance to make the necessary showing. Thus, this petition process likely will be available to only the largest manufacturers that could afford it. Small businesses, again, would be at a real disadvantage.

Commission staff has expressed the view that such an exemption could generate a large number of complex petitions. As a result, substantial Commission resources would be directed toward the pre-approval of a potentially unlimited number of products whose lead content does not have a measurable adverse effect on public health or safety. This pre-approval regulatory role is neither one previously assumed by the CPSC, nor one for which it is currently funded. The Food and Drug Administration is charged with pre-approving products before they are marketed, and it is responsible for a much smaller universe of products than is the CPSC. Yet the FDA's annual budget is in the billions of dollars, whereas the CPSC's FY 2012 budget request is $122 million. It is safe to assume that adding an FDA-like pre-approval function to the CPSC through a functional purpose exemption would turn the agency's safety mission on its head and require unnecessary, expansive resources to pre-approve products that do not even pose a lead risk to children.

I am also concerned that this exemption will be applied subjectively and with prejudice. This concern is reinforced by statements other Commissioners have made that seemingly prejudge the application of the functional purpose exemption to particular products, such as bicycles, without any supporting analysis. Ironically, this would result in arbitrary, non-science based exemptions to a lead limit and a restrictively construed absorbability exclusion that are themselves without a scientific, risk-based foundation. For example, the lead in crystals on a child's jacket serves a "functional purpose" because it makes the crystals shine, but the crystals pose no risk because the lead is not soluble (that is, absorbable or bio-available). However, no matter how low the level of lead in such crystals, it is clear that the majority of Commissioners would not support a petition for a functional purpose exemption to permit crystals on children's jackets. Without even seeing a petition and/or having the benefit of a company's cost analysis, substitute materials evaluations, etc., those supporting the "functional purpose exemption" routinely assume that only specific industries would be helped.

There is something contradictory about the Majority Commissioners' casual attitude toward the need to award "functional purpose" exemptions while also interpreting the law's absorbability exclusion in the strictest manner possible, prohibiting any product with accessible lead from meeting this exclusion. It begs the question: "Are metals that contain small amounts of lead that are not bio-available dangerous to children?" If the answer is "yes," then clearly there should be no exemptions regardless of the functional purpose of the lead in the product—including no exemptions for ATVs or bicycles. If the answer is "no" because, in fact, such small amounts of lead do not pose a risk to children, then all metals where the lead is not soluble or bio-available should be permitted. This would allow manufacturers to continue to achieve the benefits that lead brings, such as strength, machinability, shine and other uses. This effort to construct a new exemption

that does not take into account the science behind the risks of lead reinforces my concern that science will be less of a guide in granting a petition than a preconceived notion of who should or should not be granted such an exemption.

For example, one of the criteria in the Waxman proposal for granting a functional purpose exemption is that it would not expose a child to risk, that is, the inclusion of the item in the product would not raise a child's blood lead level. If a component does not pose a risk to a child on one product, then why would that same component not be acceptable on any other item? The very argument at the basis of the functional purpose exemption is that there are many materials where the lead does not pose a risk to a child that are currently banned Why not acknowledge this and fix the law so that we only ban materials that are actually risky?

That is why I have argued in my testimony that the Absorbability Exclusion in the law be amended so that it is meaningful. This exclusion can be amended so that products that do not contain lead that is absorbable, or bio-available, to a child in any amount that could be harmful would be exempt from the law's requirements—and such an exclusion could be drafted in a way that the agency would not need to review or approve such products before they are sold. Lamps, school desks, children's sizes of brass musical instruments, books, ATVs, bicycles, toys and all other products that do not contain lead that is absorbable in harmful amounts would be able to be produced and sold. The same industries envisioned to be assisted by the functional purpose exemption will achieve relief under this provision, as will any other industries that produce safe products. Of course, such a change would still not allow the sale of products containing dangerous amounts of absorbable lead, such as those with lead based surface coatings and solid-lead children's jewelry.

18. Do you think that the agency's pre-existing rules governing vinyl plastic film, carpets and rugs, wearing apparel and mattresses were already doing an effective job of ensuring the safety of consumer products in these categories? Will treating them as children's product safety rules disrupt the pre-existing (effective) testing requirements?

These rules have been in place for decades and have done an effective job without third-party testing. For example, there have been no recalls of youth carpets and rugs in the last 36 years of the agency's existence. There is absolutely no reason to change a system that has worked. Carpets already have to meet the flammability standard, they already get tested in house, and they can obtain general conformity certificates on that basis. Third-party testing will not improve children's safety. Nor does it make sense to treat so-called youth carpets differently. No child stays entirely in his own room and crawls or plays exclusively on his own rug. Children's rugs do not need different flammability protection than adult rugs. Indeed, every other rug in the house is more likely to have a cigarette dropped or candle tipped onto it than the carpet in a child's room. If this testing made sense, why would we not also require third-party testing for all carpets being laid in elementary schools, day care centers or in babies' rooms? If a wall-to-wall carpet installer arrives at a job to find a crib set up in the room and a mother far along in pregnancy, why

should third-party testing turn on whether the carpet has a juvenile design or not?

There is no doubt that CPSIA regulations treating clothing textiles and mattresses as children's products disrupts a preexisting effective testing regime. The clothing textile rule involves a long-standing and successful guarantee program that is unlike any of the rules promulgated under the CPSA. That regime effectively splits responsibility for determining the compliance of certain fabrics in a way that is not readily amenable to third-party testing.

In particular, the agency recently revised the mattress rule in a painstaking process that carefully weighed the benefits and costs entailed in that regulation. As part of that process, the agency determined that the rule would have an impact of greater than $100 million on the economy, making it the rule with the single greatest economic impact in the history of the agency up to that time. Requiring third-party testing based on an overly literal interpretation of a part of the CPSIA—for which there is absolutely no evidence to suggest it applies to the mattress rule—upsets the careful balance that the mattress rule's design struck. The oddity of overlaying third-party testing and certification on this rule can be seen from the fact that the rule will now require the burning of a queen-sized prototype mattress in an accredited third-party lab to prove the inflammability of a crib mattress several times smaller.[12]

19. Do you think the agency's overreach in treating rules as children's product safety rules has caused job losses and other harm to the economy? What about other rules the agency has promulgated under CPSIA? Which other rules that the agency is still working on pose the greatest threat to jobs?

In March 2009, Commission staff reported that the economic cost associated with the CPSIA is "in the billions of dollars range."[13] Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards, certify based on those tests, attach tracking labels that correspond to all the cohort data regarding testing, and maintain complicated data for years.

Small businesses without the market clout to demand that suppliers provide compliant materials have been hit the hardest. Many report that the new compliance and testing costs have caused them to cut jobs, reduce product lines, leave the children's market completely, or close. A sample list of businesses impacted by the CPSIA, as well as other economic data was attached to my testimony.

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[12] Note that twin-sized mattresses would not require third-party testing, because they are not primarily designed or intended for children 12 years of age or younger. As clarified in the definition of a children's product, a twin-sized mattress is an example of a product typically purchased for a child under 12 but that would continue to be used all through the teenage years and even beyond.

[13] March 20, 2009, Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell.

This anecdotal data does not reflect the full breadth of the law's requirements, because the most onerous provisions of the law have yet to go into effect. The law's widest reaching mandate—third-party testing and certification of all children's products for lead content – is stayed until December 31, 2011. In addition, the Commission has yet to implement the law's mandate to third-party test to the phthalates or toy standards. When the CPSC is fully implemented, the entire process companies must go through to produce a toy or children's product will have drastically changed. Under the law, all toys must be tested at third-party labs for lead and phthalates, as well as to the toy standard, ASTM-F963, which the CPSIA made mandatory. As a result, a doll maker will be required to send to a third-party lab to be tested for lead, phthalates and any applicable rules under the toy standard, every component part, including each paint color used on the eyes, each button, the hair, and all of the accessories. After the components are fully assembled, the finished product will need to be sent back to a third party lab for additional testing and certifications related to the toy standard. Companies tell us that these requirements stifle innovation and product variety by erecting significant cost barriers to adding to toys new accessories, new colors, or other variations. For example, a large toy manufacturer told me that his company has had to "de-spec" certain toys in order to afford the law's new costs, which means removing accessories, moveable pieces or other parts – or, in the manufacturer's words, "taking the fun out of toys."

According to a brief small business analysis by our agency, the cost to test one toy could range from $3,712 to $7,348—not taking into account that the toy will likely change to stay competitive for the next Christmas season, or sooner, and every material change triggers a whole new set of tests.[14] And these costs do not include the cost to certify to these third-party tests, to add a tracking label, or to maintain the data and paperwork so that every component and material can be traced back to its specific test and lot number. All of these steps are required by the CPSIA without any regard for whether the product presents a safety risk.

In fact, while the costs to companies of reengineering products to meet the lead limits has been steep, many tell us that the ongoing costs to third party test, label and track every component have been and will continue to be much higher—all without any measurable benefit. A company making furniture for children's rooms would need to: 1) determine if its product is "primarily intended" for children 12 and under—an issue for which the Commission has provided ambiguous guidance; 2) submit for testing to a third-party lab every part of every piece of furniture that may be accessible on a children's product, including nuts, bolts, and varnishes (one piece of furniture may have fourteen different coats of finish); 3) certify each component based on each of these tests; 4) add to each piece of children's furniture a tracking label containing a lot number that can trace each component to its specific certification and test; 5) maintain records for all tests and certifications for all parts of each children's product; and 6) start this process all over again, if they decide to make a material change to the product, including a change of color or manufacturing process.

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[14] Regulatory Flexibility Analysis: Testing and Labeling Pertaining to Product Certification, 16 CFR Part 1107, Notice of Proposed Rulemaking, CPSC Docket No. CPSC-2010-0038 (May 20, 2010).

One furniture manufacturing company reported that it spent approximately $13 million putting together a testing, tracking, and labeling system for its children's furniture, even though not one of its components exceeded the new lead limits or otherwise needed to be replaced. There was clearly no safety benefit, yet the company has faced enormous costs. Large and small companies alike must hire a lawyer or other outside expert simply to ensure they understand the extent to which their products are impacted by various provisions of the law.[15]

The CPSIA fails to make any distinction between large and small businesses, or foreign and domestic manufacturing, thus giving an obvious competitive advantage to large manufacturers who produce items overseas, where manufacturing and testing costs are cheaper. Meanwhile, the backbone of our economy, small businesses—from screen printers to manufacturers of chemistry sets for schools—are being forced to cut jobs or take other drastic measures due to the cost of compliance.

The CPSIA third-party testing requirements and lead content standards are far more stringent than the requirements governing products sold in the EU, Japan and other major markets. As a result, preexisting rules governing the export of domestically manufactured products that do not satisfy United States product safety standards erect a significant barrier to domestic manufacturing growth. A company wishing to sell in a foreign market a product that is in compliance with foreign standards but not CPSIA standards, can only manufacture it in the United States for export if the product has never been in commerce before, and if it undergoes a lengthy pre-approval process by both the CPSC and the receiving country. The CPSIA's new onerous requirements, combined with the difficult process for exporting products not meeting United States product safety standards, will encourage more businesses to move their manufacturing operations overseas. The CPSIA thereby undermines the economic imperatives of increasing both employment and exports, and is inconsistent with President Obama's exhortation that American companies relocate their manufacturing to the United States.

20. Should rules promulgated under the CPSIA be evaluated under a cost-benefit analysis? Is it too late to do that?

The Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs that will result from the upcoming Public Database. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA. Moreover, the CPSC may lack the expertise to do so for complex regulations like our Testing and Labeling Rule, and such analyses should therefore be performed by qualified contractors.

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[15] "Mattel Finds CPSIA to be a Challenge", *Product Safety Letter*, November 9, 2009.

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence suggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm lead content or the interim-banned phthalates pose a safety risk to children. And until directed to do so by Congress in the CPSIA, the Commission did not make ASTM-F 963 a federal standard, nor require all toy manufacturers to third-party test to this standard, because the Commission did not believe such actions would reduce the risk to children. Regarding lead, the Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.[16] Similarly, 2007 data indicates that nationwide, one percent of children selected for testing (and only high risk children were selected) showed an elevated blood lead level as established by the CDC. This number was down from nearly eight percent in 1997,[17] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Because the CPSIA's new requirements are not risk-based, manufacturers are spending enormous amounts of time and money satisfying arbitrary standards, rather than on improving the safety of their products to the benefit of consumers. In fact, many of these requirements amount to massive new paperwork and tracking systems, rather than actual modifications to the products themselves. The American Home Furnishings Alliance writes in a letter to Commissioners:

> [T]here has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008....The testing is simply being done to attempt to prove a negative.[18]

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in their public comments on the Component Parts rule:

> As the CPSC continues to issue specific compliance requirements, manufacturers

[16] http://www.epa.gov/opeedweb/children/body_burdens/b1-graph.html

[17] http://www.cdc.gov/nceh/lead/data/national.htm

[18] November 8, 2010, Letter to Commissioners from the American Home Furnishings Alliance.

> become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.[19]

The law imposes on small businesses onerons requirements that are hurting the economy, without any evidence of a safety benefit. The CPSIA's lead content standard, interim-ban of phthalates, and all third-party testing requirements are not based on risk. The CPSC has the authority to impose these types of requirements on any product or industry, if it determines that a risk exists and these costs are necessary to reduce or eliminate the risk.

Finally, there is a cost to consumers—not only in the loss of jobs in a struggling economy, but the loss of choice. Many manufacturers can afford the costly mandates of the law only by reducing their prodnct lines, leaving the children's product market, or "de-specing" their toys – with no offsetting improvement in safety. The costs of complying with the CPSIA will discourage newcomers to the market and choice will be reduced, even as prices increase. Some international toy makers have even decided to leave the American market due to the costs imposed by the CPSIA, although they are still offering their products to European consumers.[20]

There is thus overwhelming anecdotal evidence suggesting that the costs, both economic and intangible, to the economy, businesses and consumers far outweigh any minimal improvement in safety that could be attributed to the CPSIA. Congress could prevent further harm by prohibiting the Commission from expending any funds for the purpose of undertaking any further regulatory action without first performing a full cost-benefit analysis and making a finding that the cost of the action is justified by its expected benefits.

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[19] American Apparel and Footwear Association, Request for Comments, Docket No. CPSC-2010-0037 & CPSC-2010-0038 (August 3, 2010).

[20] One American importer of toys lists on its website the European brands that it no longer offers for sale in the United States due to the CPSIA: http://www.eurotoyshop.com/getEndangeredToys.asp

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Memorandum

Date: March 8, 2011

TO : [redacted]

FROM : [redacted]

COPY : [redacted]

SUBJECT : Estimated Costs of Public Database Development

The purpose of this memorandum is to describe the major cost components of the Consumer Product Safety Risk Management System program (CPSRMS) in both functionality and cost including our estimate of the costs for the public database.

Background:

Section 212, Section 6A of the Consumer Safety Improvement Act consists of two major requirements: 1) the implementation of the public facing database, and 2) the modernization of the Commission's information technology systems.

Prior to the completion of the modernization, most of the CPSC's business processes use many, small, disconnected information systems. Commission staff are unable to efficiently and effectively pull together required, available data because of these "stove piped" systems. Staff must store and manually maintain too much critical information outside of the legacy systems; A situation that places an unwarranted dependency on a small number of key program area staff with expert knowledge in a particular field and supporting data.

IT Modernization Scope:

The modernization will improve our ability to make effective use of all of our available information. It will enable Commission staff to receive data from and communicate with consumers, businesses, retailers, and professionals (e.g., fire marshals, medical examiners) with unprecedented speed and effectiveness. It will improve data quality, reduce or eliminate manual and redundant processing, and make better use of the collective knowledge of the staff in a way that helps the Commission learn about emerging hazards quickly.

During the initial CPSRMS phase we have improved how we collect reports from consumers and professionals. The quality of those reports has improved because of a better incident report process and forms on SaferProducts.gov. Since soft launch, online consumer reports, hot line calls, press clippings, and death certificates go in via the same "front end" and are coded

consistently regardless of their ability to be published in the database. We have eliminated many of the redundant and inefficient steps required to code and share this information with businesses. And, we have begun to improve the way that that the information is analyzed by providing better tools to make more data available.

We have also improved how we interact with businesses. Prior to this modernization, too much staff interaction with consumers and businesses was transacted by U.S. mail. For example, incident reports requiring 6C comment are batched and mailed to businesses for comment once a month. The businesses correspond by U.S. mail in a slow process not conducive to time-sensitive safety related work. With our recent soft launch, businesses and Commission staff are able to securely exchange information electronically regarding potentially publishable reports. Businesses may provide general comments and make claims of material inaccuracy or confidentiality. In future releases, we plan to expand the business portal to cover Section 15, 6C, and other common correspondence.

We are bringing the Commission's home page, CPSC.gov, in line with the times to improve public outreach and education. A critical component of this project is cleaning up the thousands of published documents to help the consumers and businesses find what they are looking for much faster.

Finally, business and information technology changes have significant risk of failure. We have implemented IT governance improvements including improvements in contract management, IT budget management, Capital Planning and Investment Control, Enterprise Architecture, Information Assurance, Project Management Office, and Independent Verification and Validation. Most of these efforts are focused to improve the CPSRMS program.

Public Database Scope:

The major IT functionality unique to Section 6A includes 1.) replacing our pre-CPSIA online incident reporting form with 6A compliant form (e.g., requires mandatory questions), 2.) providing businesses with a portal where they can register, view reports, and comment, and 3.) providing public search that includes reports that meet the 6A criteria for publication. Because modernizing the Commission's business processes and supporting IT systems is required in conjunction with deploying the public database, it is challenging to draw a bright line between these efforts. Three examples illustrate this.

First, regardless of whether a report is a candidate for publication, we want to drive the public from reporting incidents via the hot line or U.S. mail to an online form that will, as far as possible, pre-code information to make it more accurate. Second, regardless of whether a report is a candidate for publication, we want to change our standard communication method with businesses from paper forms sent in via U.S. mail to cheaper, faster, and more accurate online forms via the business portal. Third, the CPSC has a lot of good information to share with businesses, consumers, and professionals. Our website, search engine, and currently published information should be cleaned up and redesigned to improve this information sharing regardless of 6A's requirement to make certain reports of harm publically searchable.

Cost Breakout:

The Office of Management and Budget released funding for the CPSRMS program in September 2009. CPSRMS has been executing for three fiscal years and is on schedule to shift largely to operations and maintenance in fiscal year 2013. The table below is from our most recent OMB Exhibit 300 and summarizes CPSRMS spending by fiscal year.

CPSRMS Costs

(Includes IT Modernization and Public Database)

Table 1: SUMMARY OF SPENDING FOR PROJECT PHASES
(REPORTED IN MILLIONS)
(Estimates for BY+1 and beyond are for planning purposes only and do not represent budget decisions)

	PY-1 and Earlier	PY 2010	CY 2011	BY 2012	BY+1 2013	BY+2 2014	BY+3 2015	BY+4 and Beyond	Total
Planning:	1.473	0.503	0.840	0.400	-	-	-	-	3.216
Acquisition:	7.167	8.818	2.717	5.234	0.846	-	-	-	29.672
Planning & Acquisition Gov. FTE Costs:				5.424	0.846	-			32.887
Subtotal Planning & Acquisition (DME):	8.640	9.321	3.557	5.424	0.846	-	-	-	32.887
Operations & Maintenance:	-	1.244	2.064	2.913	3.594	2.748	2.748	2.748	18.060
Disposition Costs (Disposal):	-	-	-						-
Disp. Disposition Government FTE Costs:									
Subtotal O&M and Disposition Costs (SS):	-	1.244	2.064	2.913	3.594	2.748	2.748	2.748	18.060
TOTAL FTE Costs:	0.314	0.813	1.360	1.910	3.000	3.036	3.097	3.097	16.695
TOTAL (not including FTE costs)	8.640	10.565	5.620	8.336	4.440	2.748	2.748	2.748	50.947
TOTAL (including FTE costs)	8.955	11.476	11.980	10.336	7.440	5.784	5.845	5.845	87.643
Number of FTE represented by Costs:	2	4	7	11	17	17	17	17	

The CPSRMS program described in the spending table above includes several components. Below are some common questions and answers.

Q: How much money have we spent on the CPSRMS program as of the public database launch in March 2011?

A: We have obligated approximately $23.2 million from the end of FY 2009 to now for the entire CPSRMS program.

Q: How much IT money has been spent on the public database and what are its future projected IT operations costs?

A: We do not breakout the costs of the public database from the other CPSRMS phase 1 project costs (much of which have to do with IT modernization). The estimate below of the work within CPSRMS to develop the public database has been done in hindsight according to the scope of the public database scope above.

CPSRMS Costs for Public Database

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	Total
Development	$1.450	$1.000				**$ 2.450**
Operations and Maintenance		$0.400	$0.050	$0.050	$0.050	**$ 0.550**
Total	**$ 1.450**	**$ 1.400**	**$ 0.050**	**$ 0.050**	**$ 0.050**	**$ 3.000**

Please note that the costs (in millions) above include contracted goods and services by fiscal year. Costs in fiscal years 2009 and 2010 are based on actual obligations. Costs in fiscal year 2012 are for planning purposes. Costs in fiscal year 2011, while currently under continuing resolution, are a mix of the two.

Q: When are you finished with CPSRMS development and what will this development cost?

A: CPSRMS development ends in fiscal year 2013 at an estimated cost of $32.887 million. The program completes shifting to operations and maintenance with continued costs of approximately $3 million per year.

Q: What are you working on in the CPSRMS program after the public database is launched in March 2011?

A: When we comply with 6A in March 2011, we shift the remainder of our work to improving the operational processes and supporting IT systems described under "IT Modernization Scope" above.

Questions for the Record

Wayne Morris, Vice President

Association of Home Appliance Manufacturers

Questions on the U.S. Consumer Product Safety Commission

Public Incident Database

March 21, 2011

Questions from the Honorable Mary Bono Mack:

Question 1: **How could the database provisions be revised to make them more workable without giving manufacturers the ability to game the system and block all complaints?**

We believe that the database could be revised in several ways that would ensure greater accuracy and would not allow manufacturers to "game the system."

a. Manufacturers should be allowed more time to respond to the initial incident. It is extremely difficult to gather and analyze the necessary information from a variety of sources relating to a consumer's complaint in 10 days.
b. The initial reports should be restricted to those individuals that have direct information on the incident or a care-giver for that individual. CPSC should not have created the opportunity for non-involved parties such as trade associations, consumer activist groups, or trial lawyers to add information to the database.
c. We have already seen, during the soft launch, instances of consumers stating mere opinions about whether a product is safe, unrelated to an alleged incident, and CPSC doing nothing to restrict from the database highly inflammatory comments without merit or even any evidence.. CPSC should be required to limit database postings to actual reports of harm or of near-harm situations and not someone's mere opinion on a product.
d. Information and reports should not be released to the public database until claims of material inaccuracy are settled. At present, CPSC has said it will "try" to resolve these claims but feels bound to publish a report 10 days after the manufacturer has received it. The CPSC Chairman said in her testimony that out of over 700 reports in the soft launch only 4 have resulted in claims of material inaccuracy. This indicates that, as AHAM testified, there likely will be relatively few reports about which manufacturers will claim material inaccuracy but those are critical to resolve fairly and expeditiously. CPSC

should be required to finalize those determinations before publishing the reports.

e. CPSC should require the reporting of model numbers or other distinct identifiers where applicable and available. In this manner, reports can be linked together, information can be made specific to the item in question, manufacturers who may not be allowed to have customer identification may have some opportunity to evaluate the allegation ,and consumers ultimately will be better served with itemized information on the products. As it stands now, consumers could register an incident about a Brand X dishwasher, when the issue probably resides, if at all, with only one model or model type. Without this critical information, the database will serve no useful purpose to the consumer or to the manufacturer trying to search for like incidents and to discover what a root cause may be.

Question 2. **You indicated at the hearing that retailers may sell brands of the same product made by different manufacturers. Does this pose a problem for manufacturers under the CPSC's rules for the database?**

Yes, we believe that consumers will likely report on a Brand of a product, without the necessary information on the model or model type. As we mentioned above, without that specific information manufacturers may often not be able to ascertain if the alleged incident even applies to a product they manufacture and ultimately the database loses its original purpose of assisting consumers and manufacturers in tracking down and evaluating safety issues. Likewise, Brand owners may choose not to make the effort to timely send the reports to the actual manufacturer. We believe that both Brand owners and the manufacturers associated with that Brand by model or platform of models should be able to register with CPSC which should transmit that information to both parties. If multiple manufacturers are building two or more models under a particular product type, it is important to identify the specific model and manufacturer where feasible. Time is of the essence in this reporting sequence. It is important that manufacturers have the information about potential problems as quickly as possible so that they may search and evaluate, other similar reports, for example. Without the specific model information, the database truly becomes just a "complaint" forum, which we are already seeing in the soft launch.

Rick Woldenberg's Responses for the Record
February 17, 2011 Commerce, Manufacturing, and Trade Subcommittee:
"A Review of CPSIA and CPSC Resources"

Congressman Mike Pompeo

1. **Did your company have to buy a copy of the F-963 standard? Why? How much did that cost?**

   Our company has purchased several copies of ASTM F963 over the years. According to the ASTM International website (http://www.astm.org/Standards/F963.htm), the current cost of F963 is $62, or $74 (redline version). [This means that the ASTM literally charges companies EXTRA to figure out what changed in this legally-mandated standard.] To my knowledge, this standard is only available from the ASTM. Ironically, even the CPSC is unable to provide access to this document (as acknowledged in this CPSC Powerpoint presentation http://www.cpsc.gov/BUSINFO/intl/toyweb2_en.pdf) which casts doubt on its ability to guide companies attempting to comply with the law. The lack of access and cost of access to this standard certainly makes compliance burdensome for small businesses.

   The F963 standard has been updated regularly over the years, and we need to have access to the current version of the standard at all times. Until the CPSIA was enacted, the F963 standard was the tacit equivalent of a mandatory standard because the toy industry adopted it as a "voluntary" standard with the encouragement of the CPSC. At one time, voluntary standards were the preferred way the agency regulated many industries, including our industry. We have always used the F963 standard as a reference in product development and safety administration and frequently tested for compliance with the standard.

2. **You've been dealing with all of the agency's rules for the last few years. By my reckoning, an entrepreneur with, say, a good idea for a board game would have to pay to buy a copy of F-963 from ASTM (not a small price to pay for some small or start-up toymakers). Then, because the standard is literally dozens of pages long of densely spaced text, he'd have to hire a lawyer to tell which parts of the standard apply to his product. Then, he'd have to find a third-party test lab to test and certify a random sample of his actual production line for compliance with all of the F-963 requirements. And, if any product fails, you are basically back to the drawing board. And, of course, he'd have to do all this before ever selling a single toy. Do you think the next board game entrepreneur (e.g., Trivial Pursuit) might have a hard time getting off the ground under this regime? Has this agency effectively killed entrepreneurship in the toy market? Does a start-up company stand any chance of being able to navigate the CPSC's new rules and regulations on its own?**

The CPSIA has had the effective of creating new barriers of entry in the children's product market, once one of America's most entrepreneurial industries. The burdens are heavy in the toy industry but even worse in related industries like juvenile products. Large companies with steady cash flow enjoy considerable and valuable advantages over entrepreneurs who must put large sums of money at risk in their initial investment in compliance costs before receiving their first dollar of revenue. The effect of the CPSIA is one of picking winners and losers in affected markets. I question whether this is the appropriate role of the federal government in our markets.

We believe that these heavy costs will discourage investment in new products, by new entrants, by existing players and especially by small businesses. Recently, at the CPSC's hearing on the looming 100 ppm lead standard, representatives of the bicycle industry noted that in the wake of the 300 ppm lead standard, many small bicycle manufacturers have already left the market and large companies cut their product lines considerably. I have long predicted a reduction in product diversity as a necessary consequence of the CPSIA. Other evidence of market contraction exists, as well. At this year's ICPHSO, CPSC Acting Director of the Office of Compliance and Field Operations Robert ("Jay") Howell noted the CPSC's challenge in identifying a test lab that has or will agree to equip itself as a certified test lab for ATVs. Why? So many ATV manufacturers have stopped producing youth model ATVs under the effective ban by the CPSIA's lead standards that testing labs can't justify the capital investment to provide CPSIA compliance testing. Product diversity is declining all over the children's product market.

Toymakers will experience the same depressing effect and yes, that means that the next Trivial Pursuit inventor may be washed out. We may never know because the absence of a new toy or novel game will be hard to detect in the ad-driven, promotional toy market. It is clear, however, that entrepreneurs are free to deploy their capital wherever they want – they are seeking returns on their capital - so the combination of high CPSIA compliance costs, high regulatory risk, high legal costs and a generally hostile regulatory environment seems unlikely to attract new entrants to the toy market. War stories will also discourage new entrants – the well-known experience of toymakers who have suffered under this regulatory regime.

As a practical matter, the rules and regulations put out by the CPSC to implement the CPSIA for toys are incomprehensible, not to mention incomplete. We are now 31 months into the CPSIA era, yet the CPSC has yet to promulgate a final phthalate standard or certify even one phthalates testing lab. EACH and EVERY toy must be "phthalate-free" but the CPSC has yet to tell us how to know it has achieved this goal. This means we are subject to the risk that they will invalidate all the work we have done since 2008. While this regulatory delay is simply outrageous, it is more likely proof of the defects in the CPSIA than a sign of failure by the CPSC. Even the largest companies have complained to the CPSC about the blizzard of rules and interpretations. One of great frustrations in attempting to comply with the new rules is that many CPSC legal interpretations have been given in private letters, orally in speeches or even in the form of voicemails. Access to such information may be critical but is obviously inaccessible to anyone not obsessively watching every minute of every video, reading every letter,

attending every meeting or hearing and talking to every stakeholder in an attempt to master the breadth of this ever-morphing regulatory scheme.

3. Does the existence of a small business ombudsman at the agency solve the compliance problem?

The office of the Small Business Ombudsman serves a useful purpose as a friendly point of contact and possible advocate for small business within the agency. That said, there is no evidence that the office has power to make decisions, change policy or offer its own definitive interpretation of rules. For small businesses totally at a loss, the ombudsman is a good place to turn to for plain English answers to basic questions about rules. Notably, the office is not permitted to make decisions on behalf of the agency. The Ombudsman does not have the authority to make problems "go away". For this reason, the ombudsman function appears to be the regulatory equivalent of a shoulder to cry on. The current ombudsman, Neil Cohen, has been a good friend to the small business community, but unfortunately, he doesn't write the rules.

4. What problems do you anticipate occurring as a result of the public database?

We know that the public database will be administered on a post-it-and-forget-it basis. Based on our dealings with the agency, I believe that the agency will post all incidents unless a mistaken identity can be proven. As a consequence, we anticipate that the database will be allowed to be filled up with "incidents" that are conjectural, misleading or even proven WRONG. In the first and only filing against our company, an anonymous complaint accused one of our products of posing a small parts hazard. That accusation was based on an image viewed on a website – there is no indication that the filer had ever handled our product. Consequently, the filer had no reasonable basis for the small parts claim. As a matter of fact, we routinely test for small parts and have done so for years, and when we presented a valid CPSIA test report under F963 (and EN71, the European standard), we were told by the General Counsel of the CPSC that the claim would nevertheless be eligible to be published under current rules. Thus, we KNOW that the false and misleading filings will KNOWINGLY be published by the CPSC even if PROVEN false. *We believe this flagrantly violates our basic right to due process and creates the potential for damaging "feeding frenzies" that can consume our products and brands.*

Other claims may relate to "hazards" which affect a wide swath of products already well-known by regulators and industry. This presents many risks to industry and to brands. What will a consumer make of a "report of harm" relating to a general hazard and only one particular product? Is this a minor incident or a harbinger of a real risk? Should they stop using the product? Should they stop using the particular model or brand which is subject of the complaint? Given that many products may present the same hazard (for instance, that an electrical cord could pose a strangulation hazard), how does this information help consumers? Will consumers actually understand the issue and be able to put it into some sort of perspective? And when incidents accumulate, as they are likely to do, presumably the brands and models with the largest numbers in distribution will have more incidents even though, ironically, they may be better constructed and "safer"

than the alternatives. Will consumers falsely conclude that the models with more incidents are less safe and turn to something that really is?

Responding to this type of complaint obviously creates a new and terrible dilemma for manufacturers. Should they expend resources to respond? Do they need to lay out "a brief" about the nature of the failure and why their product is named? Will people just view whatever they say as unreliable, self-serving information or will they really be able to internalize the data? As noted above, most people will not be able to put these incidents in any kind of perspective. The only thing we know for certain is that brands and companies will be the losers.

The public portrayal of the database belies the unverified nature of the filings. Notwithstanding the disclaimers made by the agency, even esteemed media outlets like *The New York Times* refer to the database as a "database of unsafe products". Unsafe? That label presumes some kind of judgment or filter prior to filing, which even *The New York Times* must assume is being provided by the CPSC. Ironically, the CPSC is doing everything possible to avoid providing that service. The result may be disastrous for American manufacturers, importers, private labelers and retailers of children's products. It will be yet another self-inflicted economic injury.

5. **What can Congress do to return the agency to one that regulates on the basis of risk?**

Congress should mandate that the CPSC use principles of risk assessment to make all decisions relating to regulation of children's products. The legislatively-mandated use of judgment and proportionality will likely lead to better rulemaking and more regulatory common sense. It is the legislative banishing of the exercise of judgment that led to the devastation of the bicycle industry, the elimination of youth model ATVs from the market (even though those products owe their very existence to a concerted effort by the CPSC to protect children from injury on adult-sized ATVs), the banning of all products made of brass, the senseless and almost neurotic banning of rhinestones as embellishments on children's clothing, shoes and jewelry, and so on. NONE of these changes in rules have been tied to even ONE avoided injury.

Congress should also mandate the use of principles of cost-benefit analysis by the agency in its rulemaking processes. Under the CPSIA, all considerations of economics have flown out the window with predictably disastrous results. We can operate our government better according to basic common sense notions of cost-benefit analysis.

KID

Responses to questions from the Honorable G.K. Butterfield
Commerce, Manufacturing and Trade "A Review of CPSIA and CPSC Resources"
From Nancy A. Cowles, Kids In Danger
March 21, 2011

Can you please explain the mouthing behaviors of infants, toddlers, young children and not so young children and how lead in zippers, snaps, and other non-textile closures or embellishments can be ingested by infants, toddlers and other young children?

The main pathway for lead ingestion is getting lead on the hands and then putting hands into the mouth. Lead can be transferred from a surface to the hand and then to food or other objects put into the mouth or the hand directly put into the mouth. One particularly good quality study involved observation of children playing in a yard and video-observed their hand-to-mouth behavior and evaluated relationship of oral behaviors to children's blood lead levels. Children with higher hand-to-mouth occurrences had correspondingly higher blood lead levels. Investigators video-observed children ages 1-5 years putting a hand in their mouth 7 times hourly (maximum 67 times/hour) and an object or food in their mouth 17 time hourly (maximum 125 times/hour).[i] Embellishments on children's clothing are very likely to be handled by the child in dressing, playing, admiring the outfit's embellishments, etc.

Can you please discuss any science-based studies showing increases in children's blood lead levels from mouthing or hand to mouth contact?

A review of reports that describe children's mouthing was published by the U.S. Environmental Protection Agency in 2009.[ii] The EPA report has a significant quantity of similar data, with frequency of oral behaviors and minutes/day of mouthing. The amount of lead that would be transferred to a child may depend on mouthing behavior (times/hour and minutes/day) and the transfer rate of lead from the object to the hand (if the object is touched and not directly mouthed). Children as old as 10-12 years put their hand in their mouth an average of 4 times hourly. This rate is much higher among younger children, and exposures from mouthing behaviors can occur for several hours daily per child. Even for adult workers, hand lead is associated with blood lead level.[iii]

In addition, the Centers for Disease Control and Prevention's Mortality and Morbidity Weekly Report (CDC MMWR) has published cases of lead

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poisoning not related to ingestion of objects. Most recently, the MMWR published a case study of a toddler poisoned by a metal charm on a necklace he wore and mouthed regularly.[iv] The MMWR has also published cases of lead poisoning from eating off lead-tainted dishware;[v] lead dust contamination of family vehicles;[vi] and exposure to led at a firing range among adolescent members of a shooting team.[vii]

Can you provide any information regarding the extent to which lead has been found in zippers, snaps, and other non-textile closures or embellishments used on children's products?

From 2002 to present, KID indentified 19 examples of clothing products or accessories recalled by CPSC because of lead in the fasteners or embellishments[viii]. It should be noted that prior to passage of the CPSIA in 2008, testing for lead in products was not required – therefore it is likely that many products might have contained lead, but only these were discovered. In addition, the testing requirement in CPSIA has been stayed, so even current clothing may still have lead-tainted fasteners or embellishments that have gone undetected.

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[i] Ko S, Schaefer P, Vicario C, Binns H, Safer Yards Project. Relationships of video assessments of touching and mouthing behaviors during outdoor play in urban residential yards to parental perceptions of child behaviors and blood lead levels. *J Expo Sci Environ Epidemiol*. 2007 Jan; 17(1):47-57.
http://www.ncbi.nlm.nih.gov/pubmed/16941017

[ii] U.S. Environmental Protection Agency. Child-Specific Exposure Factors Handbook. August 2009. (EPA/600/R-08/135).

[iii] Rodrigues E, Virji M, McClean M, Weinberg J, Woskie S, Pepper L. Personal exposure, behavior, and work site conditions as determinants of blood lead among bridge painters. *J Occup Environ Hyg*, 2010 Feb;7(2):80-7.

[iv] Lead Poisoning of a Child Associated with the Use of a Cambodian Amulet – New York City, 2009. *MMWR*, January 28, 2011. 60(03);69-71.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6003a2.htm

[v] Childhood Lead Poisoning from Commercially Manufactured French Ceramic Dinnerware – New York City, 2003. *MMWR*, July 9, 2004. 53(26);584-586.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5326a4.htm

[vi] Childhood Lead Poisoning Associated with Lead Dust Contamination of Family Vehicles and Child Safety Seats – Maine, 2008. *MMWR*, August 21, 2009. 58(32);890-893.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5832a2.htm

[vii] Lead Exposure from Indoor Firing Ranges Among Students on Shooting Teams – Alaska, 2002-2004. MMWR, Jnne 17. 2005. 54(23);577-579.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5423a1.htm

[viii] CPSC Recall Database at http://www.cpsc.gov/cpscpub/prerel/prerel.html?tab=recalls.

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Date	Manufacturer	Product	Location of lead	Units
7/26/2010	Brine	VIP Lacrosse Gloves	Screen printing ink on triad logo	7,000
6/17/2010	Target	Children's belts	Belt buckles	190
12/16/2009	The Timberland Co	Classic Scuffproof Boots	Logo stamped into insoles	21,000
3/17/2009	Nordstrom	Girl's shoes	Surface paint on the outer sole	31,000
3/11/2009	Pronto Sports Inc	DBX Glide Boys Ice Skates	Surface paint on the ice skates	600
3/3/2009	Alpargatas USA Inc	Children's flip flops	Paint on the sole of flip flops	210,000
1/15/2009	Axiom International Inc	Children's Sunglasses	Surface paint on sunglasses	5,300
8/12/2008	Chelsea & Scott Ltd	Sun Smarties Children's Board Skirts	Paint on the skirt grommets	600
6/10/2008	The Children's Place Retail Stores	Camouflage Pajama Sets	Screen print on shirt	28,000
4/3/2008	StyleMark Inc	Children's Sunglasses	Orange lettering on the temples	144,000
12/7/2007	FGX International Inc	Children's Sunglasses	Surface paint	260,000
11/8/2007	Dollar General Stores imported by Dolgencorp Inc	Children's Fashion Sunglasses	Yellow surface paint	51,000
10/9/2007	Kahoot Products Inc	Cub Scouts Totem Badges	Surface paint	1,600,000
5/16/2007	Troy-Bilt imported by MTD Products	Budding Gardener Complete Gardening Set (Gloves)	Stamp-painted logo on gloves	80
2/13/2007	Samara Brothers	Heavyweight Jackets	Snap closures	8,000
1/5/2007	Samara Brothers LLC	Starting Out Shirt and Overalls	Coating on snaps	200
9/1/2005	Walt Disney Parks and Resorts LLC	Red Sunglasses/Toddler Cap Set	Paint	12,900
2/15/2005	HIS International	Denim Jumper Set	Paint on buttons	6,700
12/20/02 (Revised 2/4/04)	Wear Me Apparel Corp	Infant Girls' Garments	Paint on "smiley face" zipper-pull	3,000

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2012

HEARINGS

BEFORE A

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COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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JOHN MARTENS, WINNIE CHANG, KELLY SHEA, and ARIANA SARAR,
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PART 5

Printed for the use of the Committee on Appropriations

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PART 5

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FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2012

FRIDAY, FEBRUARY 11, 2011.

U.S. POSTAL SERVICE INSPECTOR GENERAL

WITNESS

DAVID C. WILLIAMS, INSPECTOR GENERAL

Mrs. EMERSON. We will come to order. And I want to thank everybody for being here. Good morning.

Good morning, Inspector General Williams. Thank you so much for being here today. We are happy to have you.

And I want to welcome my colleagues, our ranking member, Joe Serrano, from the Bronx, New York.

And you haven't been here to hear our repartee about the Yankees and the Cardinals. We will refrain from that. We did a little bit yesterday. And, actually, I have a Kansas City Royals fan down here, but I do have another Cardinals fan, so that is pretty nice.

Mr. SERRANO. The Cardinals are still in the league?

Mrs. EMERSON. That is a good one, Joe. We are going to have to have running bets on Pujols, all right?

And Mr. Diaz-Balart.

So, anyway, thank you so much for being here. And you have a tough job, a really tough job. And I know that a lot of my colleagues are not familiar with the way that the Postal Service works and don't know that it is the largest civilian Federal agency, with 599,000 career employees and operating a total of about 37,000 facilities nationwide.

The Postal Service has annual spending expenses of approximately $75 billion and, in fiscal year 2010, had an $8.5 billion deficit.

With few exceptions, the Postal Service operations are self-funded and not in our jurisdiction on the Appropriations Committee. We only provide $75 million for mail for the blind and people with disabilities and for overseas voting. An additional $29 million is provided in our bill for reimbursement of insufficient appropriations to the Postal Service for fiscal years 1991 through 1993.

While the committee has limited jurisdiction over the Postal Service, it does provide $244 million for the Office of the Inspector General, of which $98 million is for audits to improve USPS operations and $147 million is for investigations into waste, fraud, and abuse.

With one of the largest inspector general budgets in the Federal Government, we do want to understand how you all are using your resources. Additionally, with the Postal Service facing long-term fi-

nancial challenges, we also want to know how you all are using the resources we give you to improve Postal Service operations and identify inefficiencies.

I look forward to your testimony.

And, with that, I would like to recognize the subcommittee's ranking member, Mr. Serrano, for any opening statements you wish to make, Joe.

Mr. SERRANO. Thank you so much.

I would also like to welcome you, Inspector General David C. Williams, to this hearing of the Financial Services and General Government Subcommittee. I am looking forward to hearing your testimony and having the opportunity to ask questions about your ongoing investigations.

The Postal Service plays, as we all know, a very important role in the lives of all of us who are dependent on timely mail delivery. I also understand that, because of declining mail volume, the Postal Service is now facing a significant budgetary shortfall.

In 2010, the postal OIG published a report addressing questions of whether there were possible overpayments made by the Postal Service to the Civil Service Retirement System pension fund. I look forward to discussing the results of this study and other issues with you at today's hearing.

I also want to mention how pleased I was with the 2009 report entitled, "U.S. Postal Service Electrification of Delivery Vehicles," which concluded that the use of electric vehicles would be operationally feasible, but requires a way to address the significant front-end cost issue. I will discuss this issue with you further during our question period.

So we thank you for the testimony you are about to give us. We thank you for your service. We know that the Postal Service is one agency we all want to be supportive of; we just, in all honesty, don't know how to deal with this major problem. But something will have to be done unless we just wrap it up, and I don't see that happening. So it continues to be one of the most dramatic challenges that we have around here.

So, once again, thank you for being before us today.

Mrs. EMERSON. Thank you, Joe.

I also want to recognize Ms. Barbara Lee from Oakland, California.

Now I will recognize you, Inspector General Williams. If you wouldn't mind keeping your statement to 5 minutes so that we have as much time as possible for questions and answers. Thank you.

Mr. WILLIAMS. Thank you, Madam Chairman, Mr. Serrano, and members of the subcommittee.

The Postal Service's situation is serious. Its leadership anticipates running out of money in September. Mail volume has dropped by 20 percent since 2006. And the monopoly no longer finances universal mail service for the Nation.

The situation is the product of an oversized postal networks, crippling payments for benefit funds, the lingering recession, and the disruption of the digital age. Lastly, the Postal Service's mission to bind the Nation together through a common communication infrastructure is evolving faster than the Postal Service can adapt.

Burdensome and flawed benefit payments have contributed to almost 90 percent of the $20 billion loss in the past 4 years. This has raised the cost of the infrastructure, postage rates, and forced the Postal Service to incur debt. My office has produced a series of reports highlighting the exaggerated estimates, enormous overcharges, and excessive prefunding levels that plague the retiree pension and health-care systems.

To continue contributing to funds that now appear to exceed the 100-percent funding levels is even more egregious when compared against benchmarks in the public and private sector and OPM's levels. I agree with Senator Susan Collins's call in September 2010 for OPM to change, under the current law, its calculation of Postal Service CSRS pension fund payments.

In the near term, the Postal Service and Congress should consider halting further payments to benefit funds until the surplus is used, funds restructured, and mistakes corrected. The Postal Service can use this time to learn how to live below or within the Consumer Price Index, shed its debt, and find its role in the digital age.

The Postal Accountability and Enhancement Act incentivizes the Postal Service to adopt a leaner, volume-driven infrastructure to assure readiness for the 21st century. This will require optimization of the network of post offices and plants; conversion to evaluated letter carrier routes to allow effective management; flexible work rules to match the ebb and flow of mail; a comprehensive delivery point strategy that maximizes curbside delivery and cluster boxes; simplification of mail acceptance and pricing; and evaluating the need for 74 districts, 7 areas, and 2 law enforcement agencies.

I mentioned earlier the disruption of the digital age as contributing to the Postal Service's instability. The digital age and globalization have put America on the cusp of a new age. Technological advances have given America low-cost instant communications, sophisticated data organization, search engines, hyperlinks, impressive mobility, and more.

However, the twin forces of the digital age and globalization grew at an unbridled pace. And as they leave their infancy, we see insecure platforms for financial transactions, a lengthening trail of American digital refugees, lack of confidentiality for communication content, predatory practices in the conversion of digital cash to currency, patterns of invasive digital profiling by infrastructure operators, emerging issues associated with Net neutrality, and a shocking loss of privacy.

These practices and others are unwelcome by many Americans. The Nation has not fully explored the respective roles of the private sector and governmental entities in addressing these issues.

Additionally, substantial elements of the Nation's communications infrastructure have passed from governmental to corporate hands. This transition has important positive aspects, but such sweeping change suggests the need for thoughtful examination to ensure that segments of society are not excluded and America's leading edge continues to advance.

Postal products and technological solutions are imperfect, but joining the two together might address some of the shortcomings

of each and provide a set of solutions and serve as a bridge to the 21st century.

I have outlined the need for substantial change to increase the readiness and recognize the Postal Service's role in positioning America in the communications revolution. The engine for this transformation is innovation, and the Postal Service needs to strengthen its systems for innovation. Innovators collaborate with customers, take risks, make mistakes; stop failures quickly and replicate successes. The Postal Service's success depends on embracing this environment.

Federal financial raids on the Postal Service have to be halted; and the Postal Service should be taken back off-budget as originally designed, and the benefit funds restructured. We will need strong collaborative efforts to enable the Postal Service to serve Americans in the 21st century.

Thank you, Madam Chairman.

[The information follows:]

Hearing before the Subcommittee on Financial Services and General Government, Committee on Appropriations House of Representatives

Oral Statement

Postal Service Inspector General Budget Hearing

February 11, 2011

David C. Williams
Inspector General
United States Postal Service

Madam Chairwoman and members of the subcommittee, the Postal Service's situation is serious, its leadership anticipates running out of money in September, mail volume has dropped by 20 percent since 2006, and the monopoly no longer finances universal mail service for the nation. This situation is the product of oversized Postal Service networks, crippling payments for benefit funds, the lingering recession, and the disruption of the digital age. Lastly, the Postal Service's mission to bind the nation together through a common communication infrastructure is evolving faster than the Postal Service can adapt.

Burdensome and flawed benefit payments have contributed to almost 90 percent of the $20 billion loss in the past 4 years. This has raised the cost of the infrastructure, postage rates, and forced the Postal Service to incur debt. My office has produced a series of reports highlighting the exaggerated estimates, enormous overcharges, and excessive prefunding levels that plague the retiree pension and health care systems. To continue contributing to funds that now appear to exceed the 100 percent funding levels is even more egregious when compared against benchmarks in the public and private sector and OPM's levels. I agree with Senator Susan Collins' call in September 2010 for the OPM to change, under current law, its calculation of Postal Service CSRS pension fund payments.

- In the near term, the Postal Service and Congress should consider halting further payments to benefit funds until the surplus is used, funds

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- Evaluating the need for 74 districts, 7 Areas, and two law enforcement agencies.

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However, the twin forces of the digital age and globalization grew at an unbridled pace and as they leave their infancy we see:

- Insecure platforms for financial transactions,
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These practices and others are unwelcome by many Americans. The nation has not fully explored the respective roles of the private sector and governmental entities in addressing these issues. Additionally, substantial elements of the nation's communications infrastructure have passed from governmental to corporate hands. This transition has important positive aspects, but such sweeping change suggests the need for thoughtful examination to ensure that segments of society are not excluded and America's leading edge continues to advance.

Postal products and technological solutions are imperfect, but joining the two together might address the short comings of each, provide a set of solutions, and serve as a bridge to the 21st century.

I have outlined the need for substantial change to increase readiness and recognize the Postal Service's role in positioning America in the communications revolution. The engine for this transformation is innovation and the Postal Service needs to strengthen its systems for innovation. Innovators collaborate with customers, take risks, make mistakes, stop failures quickly, and replicate successes. The Postal Service's success depends on embracing this environment.

Federal financial raids on the Postal Service have to be halted; and the Postal Service should be taken back off-budget as originally designed, and the benefit funds restructured. We will need strong collaborative efforts to enable the Postal Service to serve Americans in the 21st Century.

United States Postal Service
Office of Inspector General
1735 North Lynn Street,
Arlington, VA 22209-2020

Officer Biography

DAVID C. WILLIAMS
INSPECTOR GENERAL
U.S. POSTAL SERVICE

David C. Williams was sworn in as the second independent Inspector General (IG) for the U.S. Postal Service on August 20, 2003. Williams is responsible for a staff of more than 1,100 employees — located in major offices nationwide — that conducts independent audits and investigations for the largest civilian federal agency that has $67.1 billion in annual revenues, a workforce of 671,687 employees and contractors and nearly 32,528 facilities.

The office is under the general supervision of the nine Postal Service governors and is not subject to any other Postal Service supervision.

In his last position, Williams served as the Deputy Assistant Administrator for Aviation Operations at the Transportation Security Administration (TSA) from August 2002 until August 2003, where he managed the Aviation Inspection Program at federalized airports.

Williams has served as IG for five federal agencies. He was first appointed by President George Bush to serve as IG for the U.S. Nuclear Regulatory Commission from 1989 to 1996. President William Clinton next appointed him IG for the Social Security Administration from 1996 to 1998, and then as IG for of the Department of the Treasury in 1998. In 1999, President Clinton named him as the first IG for Tax Administration of the Department of Treasury, where he directed a staff of 1,050 to detect fraud, waste and abuse. In 2001 President George W. Bush named Williams the Acting IG for HUD, while he was also serving at the Department of the Treasury.

Williams served in the U.S. Army Military Intelligence and began his civilian federal career as a special agent with the U.S. Secret Service. Moving up the career ladder, he served as Director of Operations in the Office of Labor Racketeering at the Department of Labor; the President's Commission on Organized Crime; and as Director of the Office of Special Investigations at the U.S. General Accounting Office. Williams is the recipient of the U.S. Bronze Star and the Vietnamese Medal of Honor for service in Vietnam.

A native of Illinois, Williams graduated from Southern Illinois University, Edwardsville, Ill., and received his Advanced Degree in Education and a Masters in Education from the University of Illinois in Champaign, Ill. He also attended the U.S. Military Intelligence Academy, the Federal Law Enforcement Training Center and the U.S. Secret Service Training Academy.

BACKGROUND: *The Office of Inspector General was created by Public Law 104-208 and passed by Congress in the fall of 1996. The Inspector General reports to the Postal Service's nine Presidentially appointed Governors and serves for a maximum term of seven years. To ensure accountability, the Inspector General keeps Congress, the Governors and Postal Service management informed of his office's work and alerted to potential areas where the Postal Service could be more economical and efficient.*

Mrs. EMERSON. Thanks so much, Mr. Williams.

There are lots of questions to ask and lots of different areas to cover, but let me start with an easy one, perhaps an easy one, at the beginning.

As you are well aware, we are doing our very, very best to find ways to reduce Federal spending. And we have to, in our Financial Services and General Government Subcommittee, at least try to get our numbers back to 2008 fiscal year levels.

Your Office of Inspector General is the largest civilian IG office and has the largest budget, at $244 million. So, have you all actually scrubbed your budget to identify savings and efficiencies that we will see in the next round, in the 2012 budget proposal?

Mr. WILLIAMS. We have in the past, and I promise you that we will in the future. And if I may, I will give you a couple of highlights.

Cuts to our office have not begun recently. It is something we have taken seriously from when I stepped on the property. We have never had a budget that matched inflation; it has always been lower than inflation.

In 2006, we took over enormous new jurisdiction from the Inspection Service. Seven hundred people were supposed to travel with that. We left 387 on the table for savings to the Postal Service and tried it with a much smaller number, and it has succeeded so far. We have been able to pick up the slack on that.

In 2008, we cut $5 million; in 2009, $10 million. And then last year, we cut 60 more positions, and that had $8 million associated with it.

Probably the thing that is coming up next, and I alluded to in the testimony, was whether or not the two law enforcement agencies should come together. That would eclipse all of the savings that have occurred in the past.

Mrs. EMERSON. Why don't you describe for my colleagues, some of whom are new to this subcommittee, precisely what those two law enforcement agencies do.

Mr. WILLIAMS. The postal IG is targeted toward internal kinds of problems at the Postal Service. Our largest areas of investigation, for instance, that takes the bulk of the resources, as you pointed out in your opening statement. Embezzlement and financial fraud and health-care fraud, both on the part of claimants but also on the part of providers, which is big business at the Postal Service. Mail theft, unfortunately, is something where we need to have a nationwide presence to combat.

And contract fraud has been—we have delivered some of the largest cases in the Federal Government in the area of contract fraud because of the huge portfolio that the Postal Service has. We do about $13 billion of new business every year, and the ongoing portfolio is closer to $50 billion.

The Inspection Service looks outward, and they look more at the victimization of people by fraudsters that are using the mail in order to complete the fraud. And they also look at mail theft not done by postal employees or postal contractors but by criminal groups in the neighborhoods.

So they are more focused outward, we are more focused upon the Postal Service.

Mrs. EMERSON. So, do you think it is possible to merge these and perhaps do more with less?

Mr. WILLIAMS. What I see in terms of—the early experiment, the one where we lost all those hundreds of people and still maintained a level of service, gives me hope. We are trying to migrate more toward automation and data-mining and the kinds of things that make the investigations shorter and richer. So I am hopeful that there is still more out there for that.

I think that having two law enforcement agencies in a department whose mission is not law enforcement is, in my mind, a little unusual. I was also the inspector general at the Treasury Tax Administration. And there, the law enforcement agency, the Inspection Service there, became the IG. So that, I have to say, is in my mind, that it is a possibility for achieving economies and efficiencies.

We do have two sets of offices and of the managers and of mission support functions that could be made more lean. And we could focus a bit more resources on postal-related matters. Some of the mail frauds tend to stray a bit from the mission of the Postal Service. We could curtail those.

Mrs. EMERSON. Okay. I appreciate that. And this is a portfolio that most people wouldn't anticipate that comes underneath you. So that is why I wanted you to explain it. And I really do appreciate it.

So then, as part of your mission, how are you using your resources, to identify waste and fraud and abuse in the Postal Service? And you were very general about the types of crimes and fraud that you all are encountering, but give us a few more examples of that.

So, two separate questions.

Mr. WILLIAMS. Thanks.

One large area for the auditors is the preparation of the financial statement. We work with Ernst & Young to do that. We provide most of the fieldwork, and then they examine that and come up with an opinion. So we end up doing the lion's share of the hours that are expended, which is a good deal for them, the government. We are far less expensive.

It is an unusual financial statement, too. For most departments, it is just the execution of the budget, but we are watching the money come in as well as go out. So it is a large effort.

We have aligned the rest of the audit resources to each of the major enterprises of the Postal Service, whether it is the delivery of the mission and the plants and post offices and delivery, or mission support, such as engineering the new automated tools that are coming in.

So we have those aligned—we have fairly small audit teams aligned to each of those that are normally headed by a postal vice president. And that has been very useful. They undergo the learning curve. And they have it when they walk into the audit; they can begin quickly.

On the investigative side, we have to have a nationwide presence. You mentioned the 37,000 locations. So the auditors can be aligned to the issues, but the investigators have to be geographi-

cally aligned to where the crimes are occurring, the space in which the crimes are occurring.

In the contract area, which has been very large, we have done a number of investigations that have focused on—a particularly vulnerable area is a multitude of transportation contracts with small firms. There has been a lot of dishonesty that we have discerned.

Mrs. EMERSON. These are third-party contractors instead of Postal Service employees who deliver mail from point to point to point?

Mr. WILLIAMS. Yes, ma'am. They move the mail across the country, and then the postal workers largely take over once it arrives for local distribution.

Mrs. EMERSON. And that would either be—well, I guess it could be by rail, by plane, by truck?

Mr. WILLIAMS. Increasingly, it has been migrating more and more to truck. And I think there are some concerns on the homeland-security side with regard to air cargo, including mail. So there has been a fairly substantial migration to trucks.

Also, trains tend not to go to where we have the mail distribution places. So trucking is a very attractive alternative.

Mrs. EMERSON. Don't you share resources with Federal Express, though, in a lot of the delivery? I mean, as a matter of fact, in my district, I have a person who owns, a regional air carrier, I guess you would call it, who works for FedEx, but they actually carry USPS mail.

Mr. WILLIAMS. Much of what remains in the air, we have worked with FedEx and others to transport that. They are in the air cargo business as opposed to passenger, which is much less of a concern for the area of terrorism.

Mrs. EMERSON. Okay. Thanks.

Mr. Serrano.

Mr. SERRANO. Thank you.

Can you take a moment to explain to us in some detail how you reached the conclusion that there was $75 billion of overpayment by the Postal Service to the Civil Service Retirement System pension fund and your thoughts on how this can best be resolved?

And, secondly, this is clearly a complicated issue with huge budgetary impacts on both sides. In the current economic environment, what is your advice for getting this matter resolved?

Mr. WILLIAMS. Thank you, sir.

We began studying the funds early on after my arrival, and we began to see things that didn't make sense. One of them was the moment in which the Postal Service received its own health funds and own pension funds.

They were shifted over in 1970 and 1971. At that point, the Office of Personnel Management said that, "In the future, you ought to collect these fees. We will pay for everything in the past; you pay for everything in the future."

What we discovered had happened is that, in 1971, when that began, the exact same contribution began to be made. But OPM decided that they would pay—your final pension is a product of the number of years you work and your final salary. They decided that they were going to cut off that salary at the 1970 levels instead of the retirement levels.

Now, they were collecting fees in order to pay at the final salary, so there was a huge windfall from them when they stopped. We began looking at that and realized, for example, if someone worked 15 years for the Postal Service and 15 years for the Federal Government, the Postal Service would pay 70 percent of the retirement and the Federal Government only 30 percent. Obviously, that ought to have been 50-50 given the provisions of the plan.

So we looked at that and issued that report. And we worked with actuarial firms for that expertise.

The Postal Regulatory Commission came in and looked at it a second time, working closely with the committees on the Hill. They came up with a very similar conclusion, that that ought not to have occurred. OPM collected a full contribution and only paid a partial benefit. That, over those years, resulted in a $75 billion overpayment.

I think it is going to be difficult to know how best to return those funds where they ought to have been. It is commingled Postal money and people's private money. But what I would recommend is that the money be used—until the surplus is gone—and there is a large surplus—they be used to make our annual payments until they are gone. That would result in relief to the Postal Service——

Mr. SERRANO. And the annual payments are how much?

Mr. WILLIAMS. The annual payments, all together, are over $10 billion. So that would pay that entire amount for some years.

That $75 billion is the largest of the segments, but there are other segments of overpayments that have occurred. And they——

Mr. SERRANO. By the Postal Service or by other agencies?

Mr. WILLIAMS. By the Postal Service. For instance, our FERS is overpaid by $6.8 billion. And we really need to stop doing that. It is causing the infrastructure that is intended for businesses and people to be clogged up with extra expenses.

Mr. SERRANO. Mr. Williams, tn your knowledge—and I know that you are here to answer questions about the Postal Service, but, to your knowledge, have other agencies overpaid, other departments in the Federal Government?

Mr. WILLIAMS. We took a look in the FERS area, which is the one I mentioned, the new retirement system that we have overpaid in, and it appears as though they collected exactly the right amount of money. And we have been unable to solve the mystery of how it is that we overpaid and others paid about the right amount.

Mr. SERRANO. And yet, if we were to, say, arrange the fair thing, which is return that $75 billion, or use it at this rate to pay dues, if you will, the premiums for the next 10 years, it would probably then break the system, because other people are living on that, I mean, so to speak.

Mr. WILLIAMS. Both systems were intended to ride separately, primarily because, at the moment that they did it, the administration was fearful that the Postal Service would be using Federal employees' money.

Mr. SERRANO. Right.

Mr. WILLIAMS. It turns out that that is not the case. Actually, the reverse is more the danger today.

They are not supposed to be commingled. They are both supposed to stand alone and be collecting and expending responsible amounts. The Federal side, something is going on there, and I think the IG over there is studying it now. But it ought not to be commingled with this other fund. It was set up so that it not be commingled.

Mr. SERRANO. Right.

I have one more question, Madam Chair, in this round.

Without significant intervention, the Postal Service will hit its statutory borrowing ceiling of $15 billion and will not be able to borrow or pay this year's contributions to the Retiree Health Benefit Fund.

What is the impact this September 30th of this impending insolvency? I mean, we keep talking about doomsday, but what will doomsday really look like? Do they have to close shop?

Mr. WILLIAMS. We are anxious to see what that looks like ourselves. No one has ever experienced it before.

But come September, when we make those payments to funds that appear to be overfunded, we won't just be at zero, we will be in the hole by $2.7 billion. And all of the money will have been borrowed. So it becomes very serious at that point.

I think discussions have occurred and probably need to occur with regard to whether to make those payments or not. If they are not made, it will allow time to resolve the issue. If they are made, it gets very serious.

I am sure that the Postal Service will try to pay its people for as long as possible, but payments to vendors—and, predictably, if you look at other companies, payments to vendors begin to get stretched out and all sorts of measures begin to occur once that level of catastrophe occurs.

Mr. SERRANO. Thank you.

Mr. WILLIAMS. Yes, sir.

Mrs. EMERSON. I am sure we are going to have lots more questions about this, Mr. Williams.

I am going to call on Mr. Womack to start the next round.

Mr. WOMACK. Thank you, Madam Chairwoman.

And thank you, Mr. Inspector General, not only for your service to the Postal Service, but the litany of other high-ranking, high-achieving positions that you have held, including service to our country through the United States Army. So thank you very much for your service to our country.

Mr. WILLIAMS. Thank you.

Mr. WOMACK. And I may have some other questions later, but there are a number of things that rush through my mind when we are talking about the fiscal condition that you articulate. And I suppose that, at that 30,000-foot level, I think of the impact of this new technological age on, say, the use of landline telephone service and how it is diminishing over time with cell phone usage. And I look at the impact of the media, the new technology on a lot of other issues. And, certainly, I believe that this technological impact is showing up in your business, as well.

Maybe this question is more appropriate for Mr. Donahoe or another person in the administrative chain of command, but what are we doing to get ahead of change so that—it is almost like we are

fighting old age. You can fight it and you can fight it and you can fight it, but at end of the day it is going to happen.

So what are we doing to get out ahead of change so that we can reverse the trend that not only plagues the U.S. Postal Service but also plagues every other agency in the United States Government?

Mr. WILLIAMS. That is probably the area that I care most about and I am most excited about.

There has been a hesitancy, and it has been a good bias on the part of the government, not to interfere with the technological advance, the march of advance through things. And it has been tremendously disruptive but also tremendously promising and exciting.

I can't answer for all those other enterprises. I know a lot of industries have been devastated and changed and evolved. With regard to the Postal Service, though, as I said, I think there are—we need to understand this. And we need to become part of that. It is not the enemy. The future is not our enemy. But it is misunderstood. And it has been disruptive to date.

I think there are a lot of things we can do to develop a symbiotic relationship between digital technology and physical networks and infrastructure of the Postal Service and of others. We need to explore that, though. And we have been standing back for fear of inflicting harm on—and that is a good bias to have. But, at this point, somebody needs to begin to study, what is the role of the Federal Government in looking out for Americans? We can sort of figure out where it is headed now, and we need to do something about it.

At the Postal Service, we haven't been very good with innovation. Our customers have some great ideas, and people that are in the digital business have some great ideas. We need to sit with them, and we need to make space for innovation. It has been very difficult for someone with an idea to come to the Postal Service. They have been rejected. And if they can somehow get in the system, it has been lost. We need to make space for innovation.

And we need to imagine how best—I can give you a couple of examples—how best to work with the digital age to make—this really isn't about whether the Postal Service survives. It only matters what America needs. And I think they have some needs in the digital age. I mentioned a few of the problems. We can address some of those at the Postal Service, if we will engage with them.

Debt collection would be an easy one. Debt collection is very time-sensitive. If you don't collect it in the first 100 days, you may not collect that debt. Bills are being sent out digitally. It would be a good strategy if someone would understand that the best combination, the most effective, is to send out a bill digitally, and if there was a delay in the payment, to send it out by letter. Because we know that is much, much more effective than digital billing, in terms of causing debt to be paid.

Hybrid mail, where you send it digitally to the point of delivery rather than transport it, with all of the problems associated with that, and have it printed and delivered locally would save so much and be so good for the United States.

This is not quite that, but right now we have—we made a decision a long time ago that every train would not have its own rail-

road tracks in the United States. There would be a set of railroad tracks, and it would do so much good. We probably should consider last-mile delivery as a decision like that, where all of the deliveries go on a single truck. We shouldn't be taking huge trucks into every neighborhood of the United States every day. It is dangerous, it is wasteful, and it serves no end.

So there is a lot that can be done. There is nothing more exciting than what is coming at us. But we haven't been ready for it, and we need to suddenly become ready for it. Our entire organization is set up for physical mail. We need to make some space for the arrival of the digital age. It is late, but it isn't serious if we will do it.

Mr. WOMACK. My other question is related to the people nature of your business. Obviously, with—I think the number is 590,000, almost 600,000 employees, it is an extremely expensive enterprise, from a people perspective.

And this question may, indeed, show my ignorance on the subject, and if that is the case, then so be it. But my experience has been, when an organization that has a lot of people, particularly those that are represented in collective bargaining agreements, begins to hemorrhage, that there are renegotiations or discussions about benefits.

And I have always held the position that, boy, it is best to have a job, as opposed to trying to maintain some level of benefit that you are used to having, and to run the risk on losing that job as a result of some kind of default or fiscal peril.

Are we renegotiating some of our benefit programs, and are we appealing to the people in your organization to help us achieve some of the solutions that go right to the heart of our fiscal gap, if you will?

Mr. WILLIAMS. Currently and next year, the labor contracts are being negotiated. It would be a very unusual role for me to enter into that picture, and I have not done so. But I know that there are some exciting ideas being brought to the table by the unions and by management.

With regard to making the infrastructure smaller, that has been a huge part of the recent past. We have 112,000 fewer employees than we did a couple of years ago. Eleven billion dollars has been cut out of the budget.

And I would say much more of that—we are poised to engage in a lot more of that, where we make sure that the plants are carefully aligned to volume and the post offices are carefully aligned to demand within the post offices. We know that if you do that, we are too large. And I know that there is aggressive planning under way to right-size that, to make that a lighter, leaner infrastructure.

And I know that that is probably going to be the most dramatic, visible sign of Postal Service action on that front. But I know the labor leaders. One of the gentlemen is here today. And I know that they care a lot about this, and they are committed to giving the Postal Service and the American public the very best they can.

Mr. WOMACK. Well, later this month, I will attend a hearing in Fort Smith, Arkansas, regarding the consolidation of mail-sorting operations to another area. And it becomes a major turf battle. And that concerns me, that we should applaud an organization that

looks for efficient ways of doing the same amount of work with perhaps fewer people so long as you do not disrupt the timeliness of delivery or some of the guarantees. And I know the Postal Service has certain guarantees for overnight delivery, this sort of thing.

So I truly appreciate and respect those. But I do worry about the turf battles that we seem to want to fight every time we try to consolidate and become a more efficient organization, which I believe gives government the bad name.

Mr. WILLIAMS. Thanks.

That has been difficult. And that is a very human instinct. This isn't about good people and bad people. I think that those interests need to be expressed and put on the table. But we do need to go forward, and we haven't always done that, with the action that is best for the American people.

I know that people locally feel very strongly, but you are absolutely right, that, to some degree, we have to be resistant to anything other than serving the Americans. And that is going to call for some tough decisions with regard to consolidations and creating the proper structure and the right-sized structure.

Mr. WOMACK. Thank you for your response.

And, Madam Chairwoman, I may have additional questions, but I yield back. Thank you.

Mrs. EMERSON. Thanks, Mr. Womack.

Ms. Lee.

Ms. LEE. Thank you very much, Madam Chair.

Good morning.

Mr. WILLIAMS. Good morning.

Ms. LEE. First, let me just say, my grandfather was the first African American letter carrier in El Paso, Texas. This, of course—I saw pictures of him—this was before my time, I mean, when he was carrying mail by horseback. And he was——

Mrs. EMERSON. The Pony Express days.

Ms. LEE. Pony Express, yeah. And he spoke fluent Spanish.

And I remember—of course, when I was born, he was retired. But I remember his retirement checks coming. And I remember how happy we were, I think it was the first of the month, once a month—I don't know how often they come now—because that retirement check helped take care of our family. And so, I shudder to think of what would happen or what could happen if the health and pension benefits somehow get stuck in this mess, the budget mess.

And so I hope that at the top of your priorities, the top of all of our priorities is to make sure that pensions are preserved, health benefits are preserved, and that people get their due when they retire.

Having said that, let me say a couple of things. One is, tough decisions are going to have to be made, but I certainly hope we don't talk about cutting back hours and cutting back staff. Given the economic crisis and the job crisis we have, we need to keep that really, I think, off of the table.

You know, and as we move into—and I know we are behind in terms of the digital age, but—and I think about grocery stores now. As we move into this new age of technology, you know, they have now the computerized checkouts.

Mr. WILLIAMS. Right.

Ms. LEE. Well, I refuse to do that, because I know that is a job or two or three that is gone. And so, as we talk about computerizing and coming up into the 21st century, I think we have to make sure there is that balance and that we don't get to the point where we are wiping out all of our postal workers and employees because we have so embraced technology that people don't matter anymore.

And so, I know that is a delicate balance, and I know we have to get to where we need to get in terms of technology. But I hope there are other ways to do that than to shortchange, you know, our postal workers and our letter carriers and our employees.

I wanted to ask you about—well, first of all, stamps keep going up, the cost of stamps. I mean, I still go to the post office and I buy stamps, because I want to make sure I support the Postal Service. But I think the public wonders and I am wondering every time I am in the post office, how in the world are we——

Mrs. EMERSON. Would the gentlewoman yield?

You should buy Forever Stamps. Then they stay forever at 44 cents.

Ms. LEE. But I am trying to support the Postal Service, though, so a few more pennies I am willing to pay.

But I think the public is going to get to that point, where they are going to say, we keep paying more and more and more for stamps, and we keep hearing all of these stories about the budget deficit and the budget crisis at the Postal Service. So, somehow you all are going to have to figure out how to let the public know what is really going on as the price of stamps continues to rise.

And so let me ask you about how you see preserving, though, as we move forward, postal services for the most vulnerable populations. There is still a huge digital divide in our country. And we can't forget about these people, because these people who don't have computers, many senior citizens, you know, many low-income individuals, many people in communities of color, they just haven't had the resources yet—schools haven't been able to catch up.

Mr. WILLIAMS. Right.

Ms. LEE. So how does the Postal Service intend to preserve the valuable services for communities based on what we now are witnessing in terms of the digital divide?

And then my second question is, in terms of minority vendors and minority contractors, how are you doing? Do you have a plan? I know Congressman Fattah had requested a diversity plan, in terms of the advertising contracts as it relates to minority subcontracting opportunities. I know you do a lot of that. And I would like to get some information on how you are doing in terms of contracting with companies—African American, Latino, and Asian Pacific American companies.

Mr. WILLIAMS. I am sorry, I just had a senior moment, I think. Can you give me the first question again?

Ms. LEE. Regarding the digital divide.

Mr. WILLIAMS. Thanks.

Ms. LEE. How are you going to preserve services for the most vulnerable populations, who are still stuck with the problems around the digital divide?

Mr. WILLIAMS. Thanks.

I think the Postal Service might be best situated. Today, I do worry about people in small towns and rural areas and also in large cities, in neighborhoods that are underserved by banks and by digital kinds of services. I think the Postal Service might be the best hope for making—well, I am sorry, I worry about them today. Tomorrow I worry about a much larger group of people. We are not sure where this is all headed.

But the Postal Service's primary mission of binding the Nation together and remaining inclusive and making sure nobody is left behind is going to become very, very important. It has always been important, but I think it is going to be crucially important.

Increasingly, I think people in service jobs and at the lower end of the income spectrum are going to be paid with value-stored cards. There is not capacity, particularly in those areas, rural and urban areas, for turning those into cash. I would love to see the Postal Service expand its current money-order enterprise in order to make banking available to people that have no banking.

I also think that it is important that we remain——

Ms. LEE. As long as we don't charge 20 or 30 percent like payday loan scam artists do.

Mr. WILLIAMS. In my statement, I alluded to predatory practices that are seen now. I think those are going to seriously expand if something is not being done. If there was an alternative and we were that alternative, that would serve—efficient market forces would cause that kind of predatory practice to disappear.

With regard to multichannel communications, I think, as the digital age begins to shut down and darken the possibility of receiving your bills in the mail and so forth, it becomes important for the Postal Service to be there to make sure that people have choice, and also, particularly where their choices are limited, that we are there for them.

And so I think we are about—I hope we have always been important, but I think we are about to serve a very important role with that lengthening trail of digital refugees. It is just in its infancy. We don't know where it is going. And I love the leading edge, but I care about the people that are left behind. And that could be something that we are important in helping.

Ms. LEE. And minority contracting?

Mr. WILLIAMS. Minority contracting, I know that the Postal Service is not subject to either small business or minority contracting. I know that voluntarily they have turned to that, they have adopted some of the practices that the departments have with regard to attention on that.

I know that they have a fairly good record, certainly with regard to the other departments, with regard to our hiring and promotion practices. We focus mostly on that. The——

Ms. LEE. But you spend a lot of money in advertising.

Mr. WILLIAMS. Yes, there is. There is a tremendous amount. And it hasn't always been a competitive process. So there is progress that ought to be done there.

If we may, so that we understand better, we would like to come and meet with your staff, and we will engage in a body of work that focuses on your question. I have to admit that it hasn't been

an area where I have gained a lot of knowledge. It is also possible someone in my office knows more about it than I do, and we will send you a note. But I have a feeling that what we really ought to do is a body of work for you. And, if we may, we will contact your staff.

Ms. LEE. Okay. I would love to work with you on that. And thank you very much. Good to meet you.

Mr. WILLIAMS. Yes, ma'am. Good to meet you, too.

Mrs. EMERSON. Thanks.

Mr. Yoder.

Mr. YODER. Thank you, Madam Chairman. I appreciate the opportunity to have a chance to have this conversation with the inspector general.

I do want to note, Madam Chair, that I was just sitting here for a second reminding myself of 1985 and the World Series. If you will recall, the Kansas City Royals and the St. Louis Cardinals played a seven-game series. And I don't quite remember the outcome——

Mrs. EMERSON. I was going to say, how old were you?

Mr. YODER. I don't quite remember the outcome, but I wondered if the chair could remind the committee what the result was.

Mrs. EMERSON. I know. I do have a husband who is from Kansas City, so I hear it all the time. Yes, the Cardinals lost, and barely lost, but that is beside the point.

Mr. YODER. Thanks for reminding us of that, Madam Chair.

Mr. SERRANO. That is one way of making money, if you do a stamp for the Kansas City Royals.

Mr. YODER. There you go. We will do it.

Sir, I appreciate your comments and your testimony today. And I have been listening to the dialogue from the members of the committee. And I take particular note of the debt that the Postal Service is under. And it appears, in 2010, there is a deficit of $8.5 billion.

I guess I would like a little bit more information on how this deficit—how it works, what the process is, what the accumulation is, is there an overall debt that is accumulated over time, what the procedure is for having that paid back, and who is ultimately liable for that debt——

Mr. WILLIAMS. Yes, sir.

Mr. YODER [continuing]. As we go forward.

Mr. WILLIAMS. In a word, the entire debt was accumulated because of the mischarges made against the Postal Service to its benefit funds. I believe 90 percent of the $20 billion came directly from having to pay those funds, which were not owed.

Here is how the debt accumulated. It began in earnest in 2008, where we went $2.8 billion; in 2009, $3.7 billion under; 2010 was the worst, $8.5 billion. And we are looking at a shortfall of $6.4 billion this year. Our payments into that fund are $10 billion, so I think you can see how I got there.

It is important to try to maintain some sort of a liquidity, as well. The Postal Service's aim is to try to have 30-day liquidity, which is $7 billion. The leading experts—and J.P. Morgan did a great study on this—is about 50 days. So it is quite modest. We haven't had that for a while, and it is going to get very serious.

We have a lending limit of $15 billion. We are going to hit that. We are over $13 billion now, and during the year we are going to hit the max. We can legally borrow no more money.

If somehow you closed your eyes and opened them on a Postal Service that was gone, we would easily be able to pay that back. In fully depreciated property, we have $20 billion. So the money is not at risk, but it is very, very serious with regard to continuing the operation as a going concern.

Mr. YODER. Well, how does it get paid back going forward? We are not going to liquidate all the property of the Postal Service.

Mr. WILLIAMS. No, no.

Mr. YODER. So, clearly, it is secured by those assets. But how do those last few years actually get paid back? Are you looking for congressional legislation that would fix the overpayment of benefits? Is that what we need to do here?

Mr. WILLIAMS. There are a number of pieces of legislation, some from your committee, that are aiming at correcting this.

The Postal Service needs to be saved from the Federal Government. And I can't imagine anybody except you that is going to do that. We are being victimized. We have to get out from under it. It has now caused the price of stamps to go up, it has caused the system to break down. We can't borrow any more money. And it is all about that.

Mr. YODER. Well, and that is interesting, because we had some dialogue here about the innovation and the efficiencies that need to be gained. And it sounds like, regardless of the $8.5 billion deficit, there are going to be moments in the future where, regardless of the pension situation, that the Postal Service is going to have to change how it operates. Is that correct?

Mr. WILLIAMS. Yes, I strongly believe that. I talked about some of the measures that need to occur in my testimony. Optimization, right-sizing the organization for the amount of mail coming through and the number of people coming into our Post Offices are important also.

Mr. YODER. But is there a projection, unrelated to if the pension overpayment was fixed, are there projected deficits moving forward?

Mr. WILLIAMS. The new Postmaster General is working on a plan now that will allow the cuts to zero out the losses that are occurring. It can't occur tomorrow, though. I think his efforts are directed at a further horizon. It is very timely, it is very strong action. The early actions he has taken are very decisive. So that is all going to help.

But, really, what we need is for that infrastructure to be as lean as possible. Regardless of whether we are making money or losing money, we need to get that down as lean as possible for the sake of the businesses and the citizens.

Mr. YODER. I guess that is what I am trying to understand. We have the pension deficit, or the deficit that is created by the pension overpayment. But if that matter were to be fixed, what are the projected deficits that require the post office to innovate?

Because my assumption is, if their books are balanced, that there is not going to be a necessity that would create the need or the de-

sire to change how business is done. So is there a projected deficit after this retirement concern was fixed?

Mr. WILLIAMS. If the retirement issue was fixed, there would be no deficit. As a matter of fact, for some time there would be additional funds available to address the debt. And then, beyond that, I think you need to combine it with some other actions, just because we want to be the best that we could possibly be. But correcting the benefit fund overcharges and raids would remove the problem in the near term and allow us to pay back the debt.

We do need to optimize. We need the right number of post offices and plants. We need a delivery point strategy in the United States where, instead of all these historic accidents with regard to how your mail is delivered, if there was a strategy for either delivering mail to the curb or in collected housing areas to a cluster, that would be several billion dollars. There are all kinds of levers we could pull, and are in the process of beginning to pull, that would make this much better.

But we also need that last digital piece. We need to come into the 21st century.

Mr. YODER. Well, as the Postal Service looks to reduce expenditures, you know, there have been closures in our community of postal offices. The chairwoman noted the 37,000 facilities nationwide and the 590,000 employees. What do you see as the optimal amount of facilities and the amount of employees?

And is that 590,000 and are those 37,000 facilities, where do those rank in terms of—you know, how has this gone over time? Are we at a high point, or have we eliminated facilities over time and that is a lower point?

And the same thing with the postal employees. Is 590,000 a high point, or have we been higher than that? And what does the future hold for the amount of Federal employees we need to disseminate the mail service in this country?

Mr. WILLIAMS. It was much higher than that. There was a time in which I believe I am right in saying there were 800,000 employees. So it has come down. I would say, by the time we arrive at the proper number, it will come down further, almost certainly.

With regard to the reduction of the plants for sorting, there has been a fairly vigorous removal of the small facilities that surround our large sorting facilities, which are called P&DCs. There hasn't been much progress in closing P&DCs, but I would say that that is coming. We have done many studies of the throughput of the mail. We know how many that is going to require. And I would say that there is plenty of room for further reduction of those plants, while assuring that the service to the public remains the same or better.

With regard to the post offices, we think probably about a third of those need to be validated with regard to whether they ought to continue or not. Generally, in the smaller areas, it appears that we have too many in certain places. They are stacked a mile away from one another. In the cities, there appears to be about the right number, but they need a few more windows.

So we need to make some adjustments, but, at the end of the day, it is going to be smaller. It ought to be. If you look at other

people in the business—drug stores, grocery stores—it is very instructive, and it is a much more compact infrastructure.

Mr. YODER. And lastly—and I appreciate you, sort of, helping us understand this—there has been some concern or there has been discussion about 6-day delivery. People ask me about this issue a lot, or it comes up from time to time, I guess.

Is that being actively discussed in the Postal Service, moving to a 5-day delivery? What is the prognosis on that? And what would be your recommendation?

Mr. WILLIAMS. They are looking at it right now at the Postal Service, but we stood back from looking at it because it has gone to the Postal Regulatory Commission for examination. The kind of examination that we would normally do is by legislation given to the Postal Regulatory Commission.

They are very close to issuing their report on the issue of 5 days, whether to allow it or recommend against it.

Mr. YODER. And do we know what their report is going to be?

Mr. WILLIAMS. We do not.

Mr. YODER. And who ultimately makes that decision? Is that a decision that Congress has oversight over, or is that a decision that the Postal Service makes?

Mr. WILLIAMS. I am going to have to refresh my memory with regard to whether there is a final congressional approval required. But I know that the Postal Rate Commission—a lot of deferral is being made to the Postal Rate Commission's decision on this. And I would say that a lot of the action is going to surround that.

After that decision—I have a great staff here—after that decision, it will require congressional action.

Mr. YODER. It will require congressional action to change from a 6-day to a 5-day delivery?

Mr. WILLIAMS. And if I may, I will send you kind of a detailed note concerning that and exactly what would be required.

Mr. YODER. I would appreciate that. Thank you, sir.

Thank you, Madam Chair.

Mrs. EMERSON. I might inform our colleague from Kansas that, traditionally, our bill contains a rider preventing the Postal Service from going to a 5-day from a 6-day. And your chairperson is in favor of keeping it 6-day for the moment.

And I am going to interrupt, because I know it is Mr. Bonner's turn. But here is a problem. There are so many ways, in looking at the organizational chart of the Postal Service—and I want to go over this with you—there is so much room for efficiency. Too many high salaries, too many layers of management, that does not impact your customers and should be addressed before any kind of reduction in service, particularly when you think about the fact that there is so much mail-order pharmacy, for example, that if there is a 3-day holiday and you all aren't delivering mail on the Monday for that holiday, and I am a senior citizen and I am waiting to get my 90-day supply of medicine, we got big trouble here because I can't get it if I am going to run out on that Monday.

And so, how do you deal with those types of issues? And, unfortunately, there is no other way other than through the Postal Service.

But, anyway, I want to ask you about those, and I will let Mr. Bonner go. Thanks.

Mr. BONNER. Thank you, Madam Chair.

Mr. Williams, I think we all associate with Mr. Womack's earlier comments, in reading your bio, not only for your distinguished service, Bronze Star in Vietnam, but I think, by my staff's unofficial count, some 10 different Federal agencies and departments that you have worked in, many in senior positions, as you are in today. Thank you. It was incredibly impressive.

Mr. WILLIAMS. Thank you, sir. That is kind of you.

Mr. BONNER. I am going to try to focus on three quick questions that I would just like your experience on.

Having been at these different departments and agencies, and now in the senior position that you are in with the Postal Service, how do the problems and the challenges of the Postal Service differ from some of the other government agencies and departments that you have served in? And are these differences of kind or differences of degree, or are they both?

Mr. WILLIAMS. There were two departments that are very like the Postal Service, in my mind: the Social Security and the Internal Revenue Service.

They both have ranks of senior people that have been with them their entire careers. I think all of them could probably benefit from the introduction of new people into their ranks. Now, true, there is a very difficult learning curve also, particularly at the IRS and at the Postal Service, for newcomers. But the infusion of new ideas, I think, would be something that would help all three of those departments very much.

There is a surrogate for that. You can begin active dialogue with the stakeholders and bring them in and get ideas from the entire world. It has never been easier. And the digital age is part of the reason. You can have blogs and forums; you can have people come in. You can have a very strong, clear way of inviting outsiders in to bring in new ideas and the best ideas.

And I think that probably the Postal Service is in that category of depending too much on "if it is not invented here, it can't be worth anything," and of throwing their arms open to other people in the digital business and among our own customers, in looking at new product lines. It would make things a lot better.

We are not in the business of protecting and defending the existence of the Postal Service. We are in the business of taking care of Americans. And if we forget for even a second, we have missed the entire point of our existence.

Mr. BONNER. Well, that is a great lead-in to my second question. How receptive has the Postal Service been to your and your staff's suggestions and recommendations over the years?

Mr. WILLIAMS. They have been more receptive than any place I have ever been. Usually, there is sort of an arm's length; here I am sort of being dragged behind the rapidly moving vehicle.

When we complete studies of the plants and we look at closures and consolidations on the part of Congress, the Postal Service takes it to the bottom line before we can put it in writing. And they are constantly demanding that we look at important issues. I have never been so close to the heartbeat of an organization.

And I think it is probably because of the crisis. I don't think those other people were bad and these people are angelic or anything, but they do business here. They can't spend any money if they don't make that money. And so, there is a very different feel here with regard to its auditor. They want to cut costs; they want to look for new opportunities.

And I have enjoyed it here, I obviously have. I have stayed for a while, and I never do that.

Mr. BONNER. Well—and I don't mean to cast a blanket critique. That is not fair when people do that of Congress; it is not fair to do it of the Postal Service. I would love, though, for the tone upon which you have responded just to this panel's questions, the assurance you gave Ms. Lee about getting back in touch with her, and other Members, I would love to think that that customer service, that we exist but for the taxpayers of this country, were more readily noticeable.

I will give you a quick example. And, again, this isn't fair. It certainly doesn't fall under your purview. But my wife and I were going to take our children on a trip overseas. I am from Mobile, Alabama, the greatest city in the world, other than the great cities that are also represented at this table.

And so my wife took the passport applications to the Postal Service window at the downtown post office in Mobile. And after waiting in line for 45 minutes, there was only one other person in front of her. The clerk took a break, came back, and said, "Well, where is the father of these children?" And she said, "Well, the father is not here today." And she got into about a 20-minute argument about the fact that I needed to physically be there to sign a piece of paper or to vouch that the children were there. Well, guess what? I was here. I wasn't there.

So the answer that the postal clerk gave to my wife was, "You know what, ma'am, you just need to call the congressman." And she said, "Well, actually, I sleep with him, so I will be happy to." I am not trying to embarrass anyone back in Mobile, I am not trying to embarrass my wife on Valentine's weekend.

But the point is this. I spent a day with one of the other package delivery firms—I won't call their name. As unpopular as Congress is, they might not want us saying that we spent a day with them. But it was fascinating, unloading that cargo, those packages, off the plane at 5:00 in the morning, getting in that truck, putting on the uniform with shorts and brown socks——

Mrs. EMERSON. I did that, too. It was fun.

Mr. BONNER [continuing]. And driving all over. But down to the point of knowing how many right turns they are going to make so that they can more efficiently manage their gas and make sure that their timing is right and that they get back in.

I would love to think that, both from a customer service spirit and also an efficiency, when you have the kind of deep hole that the Postal Service is in financially, that there would be a new esprit de corps that would be coming from the top down and from the bottom up that would say, this is a really—as you noted in your testimony and in answers to the questions, the challenges of the digital age and coming into it, the Postal Service can either embrace it and lead on it and become a vibrant part of the fabric of

this country for the next 100 years, or it can go the way of the dinosaurs down at the Smithsonian Institute. I think we all hope that it is the former, not the latter.

But I really do salute you for the example that you have shown today. And I hope that others in this room and others around the country see that this is not an individual, but this is a reflection of an attitude that needs to be adopted at all levels of government, not just the Postal Service—certainly here in Congress, as well.

I promise you one thing. If my staff told a constituent who called, "Well, you need to call the Senator's office; we can't help you," then these 2-year terms would end much sooner for us than they do for—anyway, thank you very much.

Mr. WILLIAMS. Yes, sir.

If I might very quickly, that is a very disturbing story. The new Postmaster General has set out the customer experience—he set out as a goal to substantially improve the customer experience. And it is problematic in places.

And there are many other instances where the opposite is the case. During Katrina, postal workers from their own funds fed and made sure water was supplied to elderly customers and things. It is all over the board.

But he is committed to make that steadfast and much improved.

The other thing is, we have too many post offices. As those come together, we want them to be more full-service. We don't want postmasters to go to lunch together and close the place down for 2 hours. So that is a goal, too.

With regard to the trucks that—Pat Donahoe has just asked that we begin looking at smart trucks, ones that can be part of the digital age and can operate with unparalleled efficiency. Someday, we hope our competitors come and compare themselves to us in that area.

Mrs. EMERSON. Thank you all. You did do a great job, I must say, on the Christmas commercials with the flat-rate boxes, I must say.

Mr. WILLIAMS. Thanks, I liked those, too.

Mrs. EMERSON. Hopefully the advertising agency did not charge too much, but it really was quite good.

Let me ask you one question and then I want to get back to the whole management structure within the Postal Service. So, on the retirement fund issue, your office says that it is a $75 billion problem. And the Postal Regulatory Commission says it is a $50 billion to $55 billion problem, and that is a fairly significant difference. Are you all basing those on different actuarial bases? Why is there such a discrepancy?

Mr. WILLIAMS. The regulatory commission acknowledged that the way we computed it, they could see how we would get there. I think they were trying to adopt a middle ground and one of moderation. That is—I think that the Postal Service is trying to do that as well. And so a lot of the savings are revolving around the Postal Rate Commission's more moderate figure of the 55.

I do want to point out, though, that that is not the only problem that exists. FERS, as I mentioned, is overfunded by some $6 billion. And then the rate of inflation we believe that OPM has set is much more aggressive than the private sector and other govern-

ment entities. The delta is 5 versus 7 percent, which is another $6 billion. There are a lot of corrections that need to be made.

What I would most like to see is that the Postal Service make a proposal to Congress with regard to its pension and health funds, rather than have it imposed by OPM. When we benchmarked pensions, we discovered that the gold standard was 80 percent, not 100 percent prefunding. And for health, it was 30 percent, not 100 percent. And if you look at OPM's own prefunding, it is only 40 percent. It is far below the gold standard for pension and it is zero for health. I am always suspicious of someone saying I have a fabulous idea for you, but I don't want any part of it. That is basically what we are suffering under.

Mrs. EMERSON. I am going to play the devil's advocate and ask you this question. That is, I believe, that the Congress has passed legislation twice within the last decade—2003 and 2008—to address obligations, health benefits funding and the like, but yet here we are back again. So what promises could be made that hypothetically if we were to—okay, arrive at some figure of overfunding and it was fixed, how can you assure us that is not going to happen again, since we have already dealt with this twice in the last 10 years?

Mr. WILLIAMS. Actually, what we are seeing are a series of errors on the part of OPM that are quite serious and congressional action earlier addressed those errors. We hope they were errors. We hope they were not intentional. But we were seriously overcharged earlier. When I arrived, those had already occurred. But we saw that things still weren't right.

I don't know if there is more there or there is not mnre there, but no one is asking for—no one is asking for relief or a bailout or a penny to be given to us. The Postal Service is trying to look for a competent way to run its benefit plans, which we care very much about, as does Congresswoman Lee. That has not been the case. I am wondering if it is time for OPM to step away from the plate and let someone come in here that is able to construct a model of a world-class pension and health care fund, because I know it would be much more reasonable than it is today.

Mrs. EMERSON. Do you believe that OPM actually has the authority to recalculate? Because OPM does not think they do. But you all believe that they can do this without legislative action?

Mr. WILLIAMS. I do. I don't know if they ever said they didn't have the authority. They said they didn't want to; that there are lots of ways to do those things and they are doing it one way, and if someone wants them to do it differently, then they should be told. Not to try to do it on their own. They are awaiting instructions from legislation. I believe they do have the authority.

Congress has now, based on this bad information that they had received, the Postal Accountability and Enhancement Act did structure payments, and that would require congressional action to stop those once we realize that an error has been made.

With regard to correcting the error, I think all of us feel that OPM can—I believe OPM does, too. The difference is whether they will and should. They are telling us they would rather be told to do it rather than do it on their own.

Mrs. EMERSON. Okay. That is something we need to explore more fully with the authorizing committee.

Back on the whole management structure, I was pleased to hear in your testimony that the Postal Service was going to reduce the number of regional offices from 74—I don't know how many they plan to have, but I still don't understand why we don't have one per State and one for each of the territories. I just want you to notice that I have begun to use "the territories" every time I mention the States for the last 2 years.

Mr. SERRANO. And I appreciate that, really.

Mrs. EMERSON. You really do get used to it and that, I think, is a very important distinction that we all should make, Joe.

Mr. SERRANO. Yes. And let me say publicly that you were very supportive the last 4 years when it really started. We started pushing that in the last 4 years. We have all of these folks, and when I look at——

Mr. WOMACK. I didn't know the Bronx was a territory.

Mr. SERRANO. And here I was going to praise you. I was going to say that no one more than those who have been in the military understand and respect the folks in the territories, because they served side by side with folks from the territories. So that is one thing, you know, that we always ask around here: How are you treating the territories? Because they seem to be an afterthought.

But I am still praising you. The Bronx is a State all by itself.

Mrs. EMERSON. So anyway, the idea of having 74 offices to me is ridiculous. And somehow I think that there are much more efficient models. For example, we have two in Missouri. I have one in Kansas City and one in St. Louis, and even though my district is closer to St. Louis, Kansas City has jurisdiction over all but one of my counties. It is ridiculous, it is stupid, and it is inefficient.

And just the management structure at the local level, it is crazy as far as too many different people trying to tell people what to do, instead of having just much more defined reporting assignments. I spent a lot of years in the private sector so I am sensitive to that sort of thing.

And then at the D.C. headquarters, I am aware that a lot of the senior management folks who are out in the field have been brought back to management so that senior management at the D.C. headquarters will say, yes, we have reduced the number of people out in the field. And so it just seems to me—I wanted to ask, have you all actually looked at organizational structure?

Mr. WILLIAMS. We did a study of the areas and districts. And also if you looked at this structure, it is going to remind you of the government. And it did go back to a time when we were part of the government, particularly with the area structures.

We did a study and we said that the number of districts ought to be—the districts are the lower level, the areas are the higher level—that the number of districts needed to be looked at, and we recommend that we have sort of a modest and increasingly aggressive reduction in those numbers.

With regard to the areas, those are a bit of a historic artifact, and we recommended that some thought be given to whether those could all be brought back to Washington and joined together for messaging. For one thing, it invites fiefdoms, and everybody does

it in a different way, which is as expensive as it can be. And it is personality based, where based on somebody's code of ethics, they are treated differently than they ought to be.

So the reason for them has been, of course, command and control. It is a huge organization. It is still 600,000. But we see that a lot of the messaging that goes down and that goes up could be automated, and we think that if the data, the performance data were automated, many of the physical things that occur, and the meetings that occur, and the time that it takes from postmasters and from plant managers would be reduced if it was an automated environment.

Mrs. EMERSON. Well, and certainly with the digital age, if you will, and the sophisticated machinery that you use for sorting and the like, certainly I believe those area offices are probably obsolete.

Do you happen to know how many people work in the Government Affairs Department of the Postal Service headquarters here in Washington, D.C.?

Mr. WILLIAMS. I am going to look to the staff and ask them. It is about 50 people.

Mrs. EMERSON. And how many—and what do those 50 people do?

Mr. WILLIAMS. The job of the office is to manage correspondence and then visits to the——

Mrs. EMERSON. And how many pieces of correspondence does the Government Affairs Department average a year?

Mr. WILLIAMS. I don't have that information.

Mrs. EMERSON. Can anybody tell me?

Mr. WILLIAMS. We can't tell you today, but we will do—if we may, we will come and sit with you and look at that. We have not looked at it and we would be happy——

Mrs. EMERSON. I would appreciate it, given the fact, just to give you an example, I think we are pretty lean and mean in our offices and we average 1,500 e-mails or letters a week. And I have three people and a quarter to do that, to answer them within a turnaround time of, I don't know, 3 to 4 weeks, because sometimes we get backed up. And all of those people attend all of my committee meetings.

I guess my point is 50 is outrageous, because I bet you you all don't have as much mail as I have in my office on a monthly base—on a yearly basis. I would bet that. So I would really appreciate you getting back to me on that. It is a little thing, but it is annoying, because to me your face is out there, out in the public in our communities. And I love my post offices, and I love most all of the people who work at them, and the people who deliver the mail, et cetera. But that is where you really need to be. Obviously, you have got—but I think you are real heavy here, and I would certainly like to see much more management efficiency here to start helping to reduce costs there. And go ahead.

Mr. WILLIAMS. We will be happy to undertake and will meet with your staff right away to do that. To be fair, I should say in the early hours of the new postmaster general's time after coming on board, he reduced the number of direct reports that he had. He reduced the layering of Senior Vice Presidents overseeing Vice Presidents. He did away with that. And he also tried to, in addition to making the place more lean, he did try to align the place more to

the mission and to the customers, to make it clear that that alignment was strong. So it has been started.

Mrs. EMERSON. That is good. And he is a very nice man and I know he has got a tough job to do. But there was a job I think advertised—you have a head of Government Affairs, and suddenly somebody was going to get hired above her at $250,000 a year.

Mr. WILLIAMS. That is true. That is——

Mrs. EMERSON. She was perfectly good at what she did.

Mr. WILLIAMS. That clearly is a piece of the solution to this.

Mrs. EMERSON. That is why a very, very detailed and close examination. And I know at one time PriceWaterhouse or somebody came in and tried to do something to make it more lean and mean, and I thought it was still excessively bulky. But that is from personal experience.

I also recommend, and I know that Steve will be happy if I say that, if you look at the way that Wal-Mart does its distribution system and it moves things around this country. They do it in a very cost-effective way, but a lot of what they do is what you do. And so there are some lessons to be learned that to me would make good sense just for purposes of trying to save money.

Because the easy things are, yeah, we will go to 6-day delivery. Okay. We will close all of these rural post offices that are the heart and soul of a community, when, quite frankly, if it cost $100,000 a year to run, you got people making 800,000 bucks a year at the Postal Service, and so let them take a pay cut and leave a post office open. I just don't think the decisions—you are picking easy—not you specifically, but easy things are being picked; but the hard decisions are it is way too top-heavy with management, just from what I have seen of your organizational charts.

Mr. WOMACK. If the gentlelady would yield for just a minute. Good point, Ms. Emerson.

A few years ago, while serving as a mayor of a city of about 50,000 people, we had a catastrophic failure on an automation platform system involving our courts. It was a serious issue. And rather than being tempted to throw a lot of money at the problem from my job as a mayor into a major IT fact-finding mission and potential solution, I turned, as the gentlewoman has just recommended, I turned to the private sector. And in this case it was J.B. Hunt Trucking, not because of the heavy computer assets involved in a logistical perspective, but I turned to the J.B. Hunt Corporation, to people in that entity, and asked them if that was their problem, how would they solve it. And I was able to fix a problem a lot faster because the private sector knows how to do this stuff in a much more efficient way than we in government ever hope to be able to do that.

And that is why I think that she is on to something here. That when we are looking for solutions, are we indeed looking into the private sector to people who have these logistical frameworks already established that do some of the same things you do? And are we, shall we say, plagiarizing some of that effort?

Mrs. EMERSON. No need to reinvent the wheel. Stealing good ideas is smart business in my opinion. You know, not intellectual property, but rather if somebody has a good idea, it saves me from having to think about the idea.

I want to ask you one more question. And—oh, I want to know if it is true. Is it true that the Postal Service actually has vehicles made specifically for it, as opposed to buying platforms from General Motors or Chrysler or Ford? Does it actually design and have trucks and/or other vehicles made for it, as opposed to—not anymore? Okay.

Mr. WILLIAMS. The idea is to build the box on top of an——

Mrs. EMERSON. Of an existing platform?

Mr. WILLIAMS. Ford or General Motors.

Mrs. EMERSON. When did they stop actually having them made? Do you all know?

Mr. WILLIAMS. About 20—I arrived after that occurred. As long as I have been there they have used——

Mrs. EMERSON. They have actually used the existing platform. All right. That is good. Mr. Serrano.

Mr. WILLIAMS. If I may, I would like to say that my office—and a lot of it has been at the request of Pat Donohoe, having engaged in benchmarking, and UPS and FedEx have both been great about joining in that. Target department stores have some fabulous inventory techniques along with Wal-Mart. There is a lot to be learned, and they have done great stuff and we are trying to understand it.

Mrs. EMERSON. That is good to know. Seriously, it really is easier, because they will give you advice for free and you don't have to pay an expensive consultant to do it.

Mr. WILLIAMS. They have, and sometimes they are more real world than the consultants are.

Mrs. EMERSON. Consultants just want your money.

Mr. WILLIAMS. Yes, I think you might be on to something there as well.

Mrs. EMERSON. Mr. Serrano.

Mr. SERRANO. The good news is that President Mubarak has stepped down. I don't know whether to believe that or not. He steps down more times than Jack Benny celebrated his 39th birthday.

Mr. WOMACK. He is probably scuba diving in Sharm el-Sheikh.

Mr. SERRANO. Yes, probably. Every so often in these hearings, we say something which brings about another discussion. And so after hearing you and after hearing Mr. Womack comment on the private sector, I guess it is my duty to say, yes, I think we have to always consult with the private sector. I mean, be supportive of it so it grows. And we have to consult with academia and make sure that they are included.

But I think what we have to be careful about, especially in the next couple of years as we get more and more folks who say that the private sector is the way is that while the private sector has played a major role in building the country that we have today, it wasn't the private sector that said that children should not work; it was government who said that there should be a child labor law.

It won't be the private sector that will care at times too much about whether the rivers are clean or who is dumping into them. It was government that stepped in. It was not the private sector, for the most part, who said you shouldn't work more than 40 hours a week and you should have certain pay. It certainly wasn't the

private sector who, on their own, volunteered to treat minorities and women better; it was government.

So I think it is important, perhaps more than ever, to say the private sector and our universities have to play a role. But you know, there is something for government to do. And which invites me to say something I have been rehearsing recently, I want to try it on you. I am sick and tired of hearing TV reporters saying, Go up to a businessman and say if you ran your business the way the government runs theirs, what would you have? And then they would say, We would be bankrupt.

Well, if they ran their business the way we run ours, they would have a business that has been around since 1776, that has been the envy of the world, that played a major role in stopping Hitler and the Nazis from taking over the world, that every so often checks on itself, looks back and corrects past injustices, and whose doors are still being knocked on a daily basis by people who want to come into this place.

So government has problems. But you know, for a couple of hundred years now, we have created a pretty good place that a lot of people want to be a part of. In the process of making it better, let's not throw out government. Because if you let the other guys do it alone, it could be a mess.

Mrs. EMERSON. Will the gentleman yield?

Mr. SERRANO. Sure.

Mrs. EMERSON. Please note that I was not at all talking about changing the governmental function of the Postal Service. I was suggesting that they get free advice from a distribution system that actually works as to how to make themselves more efficient. So it was not replacing the government with the private sector.

Mr. SERRANO. I understand that. And I understand Steve Womack's statement, which I take very seriously, that he had the ability and the vision to say it doesn't have to be government; let me go see how they do it. And he accomplished it. I just know that there is a sense in this country right now, by a small group but a very vocal group, that we don't need a government.

Mrs. EMERSON. Well, I disagree. I agree that there is a group that are——

Mr. SERRANO. There are people that are asking a President to step down because they want a government that looks like ours. Trust me.

Mrs. EMERSON. Joe, I don't disagree with your statement. You did a nice job on that statement. I liked that. You practiced it well.

Mr. SERRANO. I did. I have a Spanish version of it, too.

Mrs. EMERSON. Let's see, we are willing to listen to that too.

Mr. SERRANO. Before I ask my last round of questions here, in defense of the Postal Service, my understanding is as to Mr. Bonner's statement, my understanding is that the Postal Service basically carries out the instructions given out by the State Department on how to handle it. That is my understanding. They set the rules for how you get a passport, and then the Postal Service just does what they are told. That is my understanding.

Anyway let's get to one of my favorite issues. This report that came out about electric trucks. I know again it is a small thing, small in the sense that it may take a while to go to that point of

having a full fleet. And not everybody in this country is sold yet on the idea of moving in that direction. Lastly, that they are not $10,000 trucks. They are quite expensive.

So what can you tell us about that report? And what can you tell us about the possibility and the feasibility of the Postal Service moving in that direction?

Mr. WILLIAMS. We were very—actually, you asked us to do that. We were very excited at the results though. I am not sure we would have thought of it on our own, which is not good. We should have thought of it. Today—the technology is getting better all the time, but today an electric truck that could carry our load could go 40 miles very, very reliably. That covers all but 3 percent of our routes. Only 3 percent would begin to test the outer limits of that.

So it would seem that we would be a very good candidate for that, in addition to, of course, there not being fuel consumption and there being exhaust in all the neighborhoods of the United States. It seemed to be a very forward-looking, great initiative to undertake.

The Nation is also about to go, as you told us and we verified, to taking the electric grid and reducing it—or expanding it, rather, to allow vehicles to be plugged into it, the batteries of vehicles to be plugged into it. There is a requirement that electric utilities maintain a certain margin of excess in order to assure that we will all receive electricity when we need it.

With vehicle-to-grid, V-to-G, it allows, rather than us to manufacture more of that by burning coal or oil or nuclear solution, it allows them to rely on the dormant batteries of vehicles. We are really well positioned for that because we don't drive our vehicles at night. That could be a huge fleet of vehicles that would take care of a national issue and allow for a national economy. It would also jump-start a new technology and create new jobs and it would allow those—the price of those vehicles to come down, as all technologies do when they are finally embraced.

We were tremendously excited about what you did and what we found.

Mr. SERRANO. Thank you. And just for the record, to remind the chairwoman that this was something that we asked for in the committee, and this report came back. And I understand that part of the problem is you have 146,000 delivery vehicles which average 10 miles per gallon; am I right?

Mr. WILLIAMS. That is correct.

Mr. SERRANO. Is that a huge problem? And we always talk about our dependency on foreign oil and we seem to do little. Although I see more happening, certainly in the last 5 to 10 years. Where is this at? You did your report. Is there any desire on the part of the Postal Service to move in that direction?

Mr. WILLIAMS. It is also a fleet at the end of its life. So to introduce this, whether it is in our trucks now or whether we would do new vehicles—I ought to have added that at the end—I think there was concern on the part of postal management, but I never had a clear statement of how they received this. But there was some concern that the technology was new and they wanted to select a vendor that they were confident would be around, because the vehicles

last a very long time. I think that was the things that concerned them. And I think there was also interest in this.

I think with each year that passes, as you said, sometimes progress is slow. But the arc of the progress seems to suggest that this is a very promising direction and route that you have embarked the Postal Service on. We have a new postmaster general. I will be glad to express to him—remind him of what we have done, and express your desire and interest in the area.

Mr. SERRANO. I have, Madam Chair, just one more question and then we can submit some for the record. Under the heading of innovation, is there anything you think or that has been suggested that the Postal Service could be doing to sort of help themselves acquire more revenue? I am not suggesting that they sell T-shirts in the lobbies of the Postal Service. But you wonder if e-mail—and we are all guilty of it—if e-mail has taken away from the Postal Service—I am not trying to be funny, but should the Postal Service get into the business of being another AOL where it provides e-mail service to the public? I know that sounds crazy, but you know—no, nothing that I say sounds crazy.

Mr. WILLIAMS. No, it does not.

Mr. SERRANO. What could they be doing? Is there, you know, are there five people sitting in a room somewhere at the Postal Service trying to figure out where we could go?

Mr. WILLIAMS. At this point I would say all the near-term efforts are the ones that I outlined. And I think there is an openness to this idea, but we need there to be an excitement about it and we need to run to it.

I think some of the time was lost dreading it and fighting, and some in the past were chagrined over its arrival. There are some wonderful opportunities. There could be a symbiotic relationship between the various communication vehicles, whether they are physical or digital, that could be combined, that would place American businesses and American people in a much stronger position than they have ever been.

And there are all of those difficulties I said that need to be addressed with regard to the digital age, too. The Postal Service could be part of that solution. We need to aggressively engage with the other players in the digital area and our own customers, and also the people who are not our customers but they ought to be. And we begin to need a very vigorous dialogue with regard to that. And we need a very disciplined process with regard to inviting innovation, triaging the ideas and designing them, and then implementation.

I have seen some really great ideas that we stumbled on on implementation of them in the field. But there are wonderful ideas for products out there. I think people would love to see an integration of their digital mail and their physical mail on the same list, for instance. Sort of a reverse hybrid. Hybrid mail is clean, fast, and it is the future. I would love to see us be a part of that.

I think we need to guard against giving middlemen money for nothing. It isn't just hard to the Postal Service. It is picking winners and losers. And that is not something that is a very American idea for an infrastructure. There is a ton to do. We need to create

processes for that. We need to clear out some space to meet the future and to embrace it.

Mr. SERRANO. One quick question. Do we make money, does the Postal Service make money on those commemorative stamps every time we honor someone? And please understand that I am not knocking it. I attended the Frank Sinatra stamp ceremony in New York and it was wonderful and what a great ceremony that was. And there were people from all over the city, stamp collectors and fans. Does it make money? I know that a lot of these things just kind of tap a little bit into the problem.

Mr. WILLIAMS. I think the idea behind the commemorative stamp—there have hardly been any. Of course, the breast cancer stamp was certainly the most dynamic and important of those initiatives. The Postal Service makes the usual amount of money, and the charity receives anything above and beyond the Postal Service's normal income. So it is split.

Mr. SERRANO. It is split?

Mr. WILLIAMS. It is, sir. Yes.

Mr. SERRANO. Okay. All right. Just in closing, let me thank the chairwoman for reiterating our position. And it was our position before, and I am glad it is still going to he our position this year that sometimes it is easy when you look at the Postal Service to take the easy shot. And the easy shot is 5-day delivery, without thinking of what that does for service and, in all honesty, what it does for jobs, even part-time jobs. And this is not the time to be cutting jobs anywhere.

So I think the message that she is sending is the message that I try to send. Let's focus on the hard decisions and not go after the easy one, which is 5-day delivery. I thank you for that. And I thank you for your testimony and your service, and that concludes my questions.

Mrs. EMERSON. Thank you. Mr. Womack?

Mr. WOMACK. I have nothing further, Madam Chair.

Mrs. EMERSON. Are you certain?

Mr. Williams, thank you. I do want to ask you one more question and that has to do with closing and consolidating post offices. I know as part of the Postal Service's action plan, they want to close or consolidate I think about 2,000 retail facilities. You alluded to that in your opening statement.

I understand that the Postal Regulatory Commission is actually investigating whether the Postal Service has been improperly using reasons such as lease expirations to suspend service. And obviously this impacts us, and it would be more in Mr. Womack's and my districts rather than Joe's, just because we have very rural populations. So have you all examined this issue as well?

And then my follow-up question would be, do you think the Postal Service is taking responsible steps in its efforts to restructure those operations?

Mr. WILLIAMS. Actually, early on—I am unfamiliar with the PRC's work in the area. It is actually early on. There haven't been many that, of course, closed that I am aware of. But we are obviously right at the edge of an aggressive initiative in the area of the 2,000. And there are also about 400 that are in process, so it is actually a bit larger than that. I am unaware of those, but I talk and

interact with the PRC all the time. I would be glad to find out what concerns they have. And I will also keep an eye out for it with regard to that.

The process around this is new. They recently developed a way that is far more expedited than in the past. We are about to review on that and the moment we are done with it, we forward it—if we find something disturbing——

Mrs. EMERSON. I would be appreciative. I am sure all of us would.

Mr. WILLIAMS. It is a new process. We will be glad to watch that and report back to you.

Mrs. EMERSON. "New" meaning it just started or "new" meaning it is a different type of process than what you have done?

Mr. WILLIAMS. It is going to be an aggressive effort. I am certainly not against that effort. As I indicated, I think probably the network is too large. But 2,000 is more than we have ever done. And there is also a new process with regard to expediting and putting it in a more automated environment. That is the one that we have embarked on studying, now that it is complete.

Mrs. EMERSON. Any information that you can get to us as soon as possible would be great.

Mr. WILLIAMS. We will.

Mrs. EMERSON. Especially any in conversations with the PRC as well.

Mr. WILLIAMS. I will meet with them before they are out of the room.

Mrs. EMERSON. Terrific. Thank you so very much for being here today and for your patience. You did a great job answering questions and we will look forward to working with you in the future.

Mr. WILLIAMS. I do as well. And thank you so much for having me.

Financial Services and General Government Subcommittee
FY 2012 Budget Hearing for the Inspector General of the U.S. Postal Service

Questions for the Record From Chairwoman Jo Ann Emerson

REDUCING COST/IMPROVING EFFICIENCY AT USPS

Mrs. Emerson: Delivery is the Postal Service's largest cost segment—accounting for about one-third of total costs. Your office has issued several reports about how the Postal Service could improve efficiency and reduce costs in this area.

Has the Postal Service taken action on your recommendations and what more needs to be done to reduce delivery costs and improve efficiency?

Mr. Williams: The Postal Service has taken action on many of our recommendations involving standardization of operations, optimizing and elimination of routes, reduction of office time for carriers, supervision of carriers, and mail address hygiene. In FY 2010, the Postal Service reduced workhours in city delivery by over 16 million hours (nearly 4 percent), and rural delivery workhours by almost 4 million hours (about 2 percent).

The Postal Service needs to continue to reduce delivery costs and improve efficiency in the following areas:

- Pursue workforce flexibility to better match workload with the workforce, including evaluating increased use of flexible and part-time workers to better address declines in mail volume.
- Consider changes to service standards in cases where customer needs could be met at lower costs.
- Centralize delivery modes – develop and implement a strategy to move from door to curbside delivery and, where practical, from curbside to cluster box, which could result in multi-billion dollar savings annually.

Mrs. Emerson: In your view, Mr. Williams, what are the major elements needed by the Postal Service as a solution to their financial problems?

Mr. Williams: I see the critical points of a Postal Service solution as three-fold:
1) address the overpayments and punitive prefunding into the retiree benefit funds,
2) optimize and simplify current operations, and
3) innovate for the digital age.

First, in the near term, the Postal Service and Congress should consider halting further payments to benefit funds until surpluses are used, and mistakes are corrected. The Postal Service can use this time to learn how to live below or within the Consumer Price Index, shed its debt, and find its role in the digital age. The Postal Service should be taken back off-budget as originally designed. Otherwise, scoring makes it impossible to correct errors in retirement funding.

Second, the Postal Accountability and Enhancement Act incentivizes the Postal Service to adopt a leaner, volume-driven infrastructure to assure readiness for the 21st century. This will require:

- Optimization of the network of post offices and plants;
- Conversion to evaluated letter carrier routes to promote more effective management;
- Flexible work rules to match the ebb and flow of mail;
- A comprehensive delivery point strategy that maximizes curbside delivery and cluster boxes;
- Simplification of mail acceptance and pricing; and
- Evaluating the need for 74 districts, 7 Areas, and two law enforcement agencies.

Finally, the Postal Service needs to strengthen its systems for innovation. Innovators collaborate with customers, take risks, make mistakes but stop failures quickly, and replicate successes. The Postal Service's success in the new digital age depends on embracing a culture of innovation.

WORKER'S COMPENSATION

Mrs. Emerson: Your office recently reported on the Postal Service's workers compensation liability of about $12 billion at the end of fiscal year 2010 and has issued numerous reports on Postal Service safety and workers' compensation issues.

What more can the Postal Service do to reduce the risks and costs related to workers compensation— and in doing so reduce these major costs?

Mr. Williams: The Federal Employee's Compensation Act (FECA) provides a variety of benefits to employees injured in the performance of duty. As currently structured, FECA provides disincentives for employees to return to work. For example, the base rate for FECA compensation is 66 2/3 percent of the injured employees' salary for employees without dependents or 75 percent for those with dependents. FECA compensation is tax-free and there is no age or time limits on benefits as long as a physician certifies the work related condition or the disability continues.

Between 2003 and 2006, we issued several reports covering workers compensation issues, and reporting thousands of dollars in overpayments and underpayments in the program. The Postal Service, using a database we developed to identify potentially fraudulent billing schemes, identified more than $3 million in duplicate medical payments. Additionally, in 2005, we issued a whitepaper identifying broader issues that if addressed, could result in significant savings. Subsequent to our issuance of that paper, the Department of Labor notified the OIG that they took exception to the OIG auditing these programs on behalf of the Postal Service, and our access to Postal Service data held by the Department of Labor was restricted.

Significant improvements and savings could be achieved if the Postal Service were permitted to make broader reforms to its workers' compensation program, such as moving from the Department of Labor to a third-party administrator to administer its workers' compensation program, selecting physicians for injured employees, and providing offers of settlement for more permanent cases. All of these solutions would require legislative changes, but would likely result

in significant savings from reduced administrative fees, improved service, better case management, and reduced fraud in the workers' compensation program.

We are currently working on a project to further evaluate issues with the workers' compensation program at the Postal Service and update prior work conducted in this area. We can provide your staff a copy of that report when it is issued.

Mrs. Emerson: Additionally we have heard that employees well past retirement age continue to get worker's compensation benefits. Is this appropriate?

Mr. Williams: Although allowed by the current law, we do not believe this is appropriate. Disabled retirement-eligible employees have a choice between FECA benefits and federal retirement benefits. However, neither the employee nor the Postal Service paid into the retirement system while the employee was on workers' compensation. Consequently, most employees choose to remain on workers' compensation because it results in a higher payment and significant tax incentives, and there are no age or time limitations in the current law.

FECA was never intended to be a retirement program. We issued a report covering this area in 2003, and we are currently working to update the results. We can provide you a copy of this report when it is issued.

EXPANDING PRODUCTS AND SERVICES

Mrs. Emerson: In your testimony you mentioned the long-term challenges facing the Postal Service as mail continues to shift to electronic communication in an increasingly digital age. The Postal Service's action plan proposed introducing new products and additional services for customers. The Postal Service is asking Congress to allow them additional flexibility in their ability to introduce new products. Currently, every new potential product requires review by the Board of Governors and the Postal Regulatory Commission.

In your view, should Congress seek to amend the current regulatory framework, broadening the definition of postal products, to give the USPS added flexibility to innovate and incorporate new products and services?

Mr. Williams: The exploration of non-postal products should be considered once the latitude currently allowed under the existing regulatory framework for ancillary products is fully explored. Ancillary products could move the Postal Service into the digital age and allow for an update of the mission within existing legislation. This may provide a great deal of flexibility for innovative products and services to allow the Postal Service to be a product platform for government, postal, and commercial services available to all.

New ancillary products should reflect the evolving universal service obligation to "bind the nation together" in a new world where people are increasingly communicating digitally. For example, the Postal Service could provide digital currency exchange to complement its existing money order business. Another possibility is a digital platform that facilitates communications

and commerce, that could provide a physical address linked to an electronic mail box for every resident and business.

Both the digital and physical worlds are imperfect; they each have their own shortcomings. A digital platform provided by the Postal Service could bridge the physical-digital divide and help address some of the privacy, security, and confidentiality issues associated with the current digital age.

Mrs. Emerson: Should USPS be allowed to offer new nonpostal products and services that compete with private-sector firms?

Mr. Williams: Certain non-postal products could prove useful in providing additional sources of revenue to keep unprofitable post offices open for universal service. These products could also serve the underserved segments of society that the private sector may not be currently interested in serving. These products could be limited to rural areas, thus reducing the likelihood of competition with businesses and providing welcome and needed products for more remote populations.

Mrs. Emerson: How would the Postal Service finance such initiatives?

Mr. Williams: If the retirement fund overpayments are solved, a portion of the no longer needed annual retirement benefit fund payments could be used to finance initiatives. Otherwise, the Postal Service would have to cut off old investments to fuel new investments and redirect less profitable investments to more profitable investments. To the extent possible, these initiatives should be self-financing, so that the return on investment will cover the costs. In many cases, funding already being expended to pay for the current workforce could be leveraged to provide these additional services.

FLEET MAINTENANCE

Mrs. Emerson: The Bowles Simpson Fiscal Commission recommended large reductions to funds budgeted for travel, vehicles and printing. I am aware that the Postal Service must maintain a large delivery fleet as part of its day-to-day operations.

In your view, are there steps the Postal Service can take to reduce costs spent on its delivery fleet?

Mr. Williams: The most effective way to minimize fuel costs for postal owned trucks and contract carriers is to optimize volume capacity per trip and reduce the number of transportation trips. Additionally, providing the correct incentives (such as cost and risk sharing arrangements) to its large fleet of contracted carriers also creates the potential for significant savings. Finally, the Postal Service can reduce fuel costs through development of, and compliance with, national acquisition and consumption strategies aimed at reducing the cost and use of fuel, such as an expansion of mobile fueling for city and rural delivery units.

When considering the acquisition of trailers, cargo vans, and other transportation vehicles, the Postal Service should perform a comprehensive lease versus buy analysis, to compare the total cost of leasing to the total cost of ownership. The Postal Service should also establish schedules for its internal drivers that match employee work hours with workload and increase overall utilization and combine or eliminate unnecessary trips. Additionally, once facilities are optimized for mail volume there could be savings from reduced inter-facility transportation routes. Finally, the adoption of alternative fuel vehicles, such as electric vehicles, should help reduce delivery costs for fuel and maintenance.

Mrs. Emerson: What is the Postal Service doing to make its delivery fleet more green and efficient, and improve the longevity of its fleet?

Mr. Williams: The Postal Service has the world's largest fleet of alternative-fuel vehicles with over 44,000 alternative fuel vehicles, including compressed Natural Gas, Propane, E-85, Hybrid, Electric and Fuel Cell vehicles.

- The Postal Service is testing differing models of hybrid vehicles to include sport utility, mini-vans and step-van vehicles. Test results indicate that until hybrids become more competitively priced and replacement batteries are more affordable, it is not recommended as an option for carrier vehicle replacement
- Engineering is working with potential suppliers on prototypes to convert five existing carrier vehicles to run on electricity. Data is currently being collected on range, maintenance costs, and other general diagnostics. These vehicles will be tested for one year and the results of the tests will be published.
- The testing on two hydrogen fuel cell delivery vehicles ended in February. Fuel cells present several challenges such as:
    - Hydrogen production
    - Hydrogen storage
    - Infrastructure, and
    - Fuel Costs

In 2009, at the request of Representative Jose E. Serrano, Chairman, Subcommittee on Financial Services and General Government, Committee on Appropriations, we conducted a study of the potential for electric vehicles within the Postal Service. Our report suggested that the Postal Service could offer a unique test-bed for a broad implementation of electric vehicles in the delivery environment. Significant fuel cost savings could be achieved through such a program, but initial investments would have to be made to support such a strategy.

Regarding fleet longevity, the Postal Service has maintained their carrier vehicles in safe working condition for over 20 years. This is attributed to a robust preventive maintenance program. Vehicles are serviced and repaired at USPS vehicle maintenance facilities and in many commercial garages throughout the country. Vehicles are kept in a safe and operable condition, while meeting established standards and requirements. However, we have found instances in which the cost to maintain a subset of the vehicle fleet is more than it would cost to replace them.

Questions for the Record From Representative Barbara Lee

Ms. Lee: Mr. Inspector General, it has been reported that mail volume is rising slightly from the lows caused by the recession.

Would any disruptions or abrupt price hikes at the USPS caused by a failure to solve financial shortfalls at the Postal Service interrupt this recovery in mail volume?

Mr. Williams: A natural disaster such as a hurricane or terrorism event could have a significant impact on mail volume recovery. In addition, the financial shortfall could limit capital expenditures that if made, might have decreased future costs or provided for revenue generating opportunities or additional services in high-growth areas.

REPORTING ON DIVERSITY

Ms. Lee: Are you able to provide the Subcommittee with information regarding the diversity of professional full time employees at the Office of the Inspector General, broken down by job title or GS level?

Mr. Williams: The chart below shows the diversity of professional full time employees at the Office of the Inspector General.

- Column 1 identifies the job title and the GS equivalent level.
- Columns 2 and 3 break down the total workforce by gender.
- Columns 4 through 14 break down the total workforce by Race, and each of these categories is broken down by gender.

The totals and percentages for each workforce category are shown at the bottom of the report.

1	2	3	4	5	6	7	8	9	10	11	12	13	14
USPS OIG Title - Ideal Pay in Terms of Pay Band	Total By Gender		Native American		Asian		Black		Hispanic		White		Total
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	
Inspector General Executive Service (SES Level)	57%	43%	0%	0%	0%	4%	7%	18%	11%	0%	39%	21%	100%
	16	12	0	0	0	1	2	5	3	0	11	6	28
Director & Senior Specialist (GS-15 Equivalent)	58%	42%	2%	0%	4%	0%	6%	13%	4%	2%	42%	27%	100%
	30	22	1	0	2	0	3	7	2	1	22	14	52
Manager (GS-14 Equivalent)	73%	27%	0%	0%	5%	1%	6%	8%	8%	3%	53%	15%	100%
	95	36	0	0	7	1	8	11	10	4	70	20	131
Specialist (GS-14 Equivalent)	62%	38%	1%	2%	3%	3%	5%	8%	3%	2%	51%	24%	100%
	73	45	1	2	3	3	6	10	3	2	60	28	118
Journey (GS-09 thru GS-13 Equivalent)	60%	40%	0%	0%	5%	2%	8%	14%	5%	4%	42%	20%	100%
	446	295	1	0	39	16	57	105	38	29	311	145	741
Administrative (GS-05 thru 12 Equivalent)	7%	93%	2%	2%	0%	0%	2%	35%	0%	7%	2%	49%	100%
	3	40	1	1	0	0	1	15	0	3	1	21	43
% of OIG Labor Force	60%	40%	0.36%	0.27%	4.58%	1.89%	6.92%	13.75%	5.03%	3.50%	42.68%	21.02%	100%
Total OIG Count	683	450	4	3	51	21	77	153	56	39	475	234	1113

RECRUITMENT AND HIRING

Ms. Lee: What is your office doing to ensure that it is recruiting and hiring a diverse staff? Does your office recruit or have an internship program at any Historically Black College/s and University/ies?

Mr. Williams: To ensure that the OIG recruits and hires a diverse staff, the agency currently advertises positions through the following sources:

- Historically Black Colleges and Universities
- Historically Asian Colleges and Universities
- Colleges for the Hearing Impaired.

The OIG routinely recruits at Women in Federal Law Enforcement conferences, and participates in local and national job fairs for the National Society of Hispanic Professionals.

We also support the following law enforcement organizations through individual memberships and attendance at sponsored events.

- Federal Hispanic Law Enforcement Officers Association
- Hispanic American Police Command Officers Association
- National Organization of Black Law Enforcement Executives
- Women in Federal Law Enforcement

Further, the OIG ensures that a dedicated telephone line is available for applicants requiring handicap accommodations.

PROCUREMENT AND CONTRACTING

Ms. Lee: Are you able to provide us with information regarding the amount and percent of contracts with small, disadvantaged businesses that are female or minority-owned?

Mr. Williams: The Postal Service, as an agency that does not operate on appropriated funds, does not have to set and report on goals for contracting with small and disadvantaged businesses. However, the Postal Service has a program supporting small, minority owned, and women owned businesses (SMWOB) that has won awards. These awards include America's Top Government Agency for Multicultural Business Opportunities in 2006 – 2009, 2011, and in 2010 they were rated second.

The Postal Service has a supplier outreach program that participates in over 25 outreach events annually. The Postal Service also has memberships and/or partnerships with advocacy groups and councils.

The Postal Service Supplier Diversity Program established goals for providing contracting opportunities to SMWOB in 2006. The goals currently set are comparable to those set in the Federal sector. The Postal Services achievements against its goals are noted in the chart below.

SMWOB Category	Goal	Goal Achievement	% of Change	Value $(M)
FY 10 Small	36.3%	40.64%	↑4.34%	2,991.7
FY 09 Small	35.0%	39.05%	↑4.05%	3,016.8
FY 08 Small	35.8%	31.39%	↓4.41%	2,798.2
FY 07 Small	31.2%	34.30%	↑3.10%	3,464.3
FY 10 Minority-Owned	4.1%	4.87%	↑0.77%	358.2
FY 09 Minority-Owned	3.5%	4.80%	↑1.30%	370.8
FY 08 Minority-Owned	3.6%	3.49%	↓0.11%	304.6
FY 07 Minority-Owned	3.1%	3.50%	↑0.40%	349.7
FY 10 Women-Owned	7.5%	7.63%	↑0.13%	561.4
FY 09 Women-Owned	7.1%	9.02%	↑1.92%	696.5
FY 08 Women-Owned	5.8%	5.97%	↑0.17%	520.9
FY 07 Women-Owned	4.6%	5.60%	↑1.00%	565.0

WEDNESDAY, MARCH 2, 2011.

U.S. ELECTION ASSISTANCE COMMISSION

WITNESS

CURTIS W. CRIDER, INSPECTOR GENERAL, U.S. ELECTION ASSISTANCE COMMISSION

Mrs. EMERSON. Thank you so much for being here, Inspector General Crider. We look forward to hearing your testimony. As you may know, this committee is committed to reducing nonsecurity discretionary spending to fiscal year 2008 levels, and so we have asked several Inspectors General to meet with us so that you all can help us identify savings where we can, in fact, achieve it.

Your oversight is valuable, not only to ensure that taxpayer dollars are used in the most cost-effective manner possible, but also to determine whether the Commission is contributing to the integrity of our Federal elections. While the Election Assistance Commission has taken on a number of roles, it was specifically established to help States meet new voting standards and the overall enhancement of election administration called for under the Help America Vote Act.

In order for our democracy to thrive, people must be able to place complete confidence in the integrity of our Federal voting system. In general, I am interested in hearing your perspective on the Commission's operating expenses, the necessity of having so many high-level administrative staff, as well as the Commission's overall management practices. While it appears that the Commission has matured since it was first set up, my observation of some of its decisions and activities suggests that the EAC still has a lot of work to do.

In addition, I continue to find it interesting that so many of the States that received grant funding under HAVA have yet to spend significant amounts of the funding provided to them in spite of the fact that it has been available for a number of years. I would like to hear your views on the Commission's management of those funds.

I look forward to your testimony and to gaining a better understanding of your efforts to hold the Election Assistance Commission accountable.

I would now like to recognize my good friend, Ranking Member Jose Serrano.

Mr. SERRANO. Thank you so much.

I would also like to welcome Inspector General Crider to this hearing today. The Inspector General's Office has the important job of reducing waste, fraud, and abuse not just at the Election Assistance Commission but also among the States and territories that have received and used Help America Vote Act funds.

As you know the Help America Vote Act was passed in the wake of the 2000 elections. The goal of the act was to help States to upgrade their voting equipment and election administration, to help develop an ongoing series of testing standards and best practices in these areas, and to create a clearinghouse of information for States to use. I am looking forward to hearing more about how well the EAC has done this job and what they can do to improve their efforts. In addition, I am interested in learning more about how States have used their Help America Vote Act funds to improve their voting systems and election administration.

From your testimony, I understand that you are concerned about the amount of money the Election Assistance Commission spends on management activities. While I think this should be an area of concern, I would like to point out that many of these activities, in particular, the public meetings and advisory board activities, are mandated by law. These are activities that improve the EAC's transparency and accountability to the States it provides assistance to and to the public as a whole. As we move forward with the fiscal year 2012 budget request and as we continue to work on the continuing resolution for 2011, I would hope that we remember that.

I always like to say that the Election Assistance Commission is a small agency with a big job: to help ensure that our elections are open, accessible, and secure. The IG's Office plays an important role in ensuring that the EAC performs its work to the best of its ability. I look forward to your testimony.

Thank you.

Mrs. EMERSON. Thank you, Joe.

Mrs. EMERSON. Mr. Crider, we will now recognize you for your opening statement. If you would be so kind as to try to keep it to 5 minutes, that will give us more time to ask questions. Thank you.

Mr. CRIDER. Good morning, Chairwoman Emerson, Ranking Member Serrano, and members of the subcommittee. Thank you for inviting me to come today to talk to you about the U.S. Election Assistance Commission and our operations in the Office of Inspector General.

My office is an independent office in the EAC. Our role is to review EAC programs and operations with an eye toward helping the agency be more efficient and more effective. We also audit the funds distributed by the EAC to ensure the money is spent for the right purposes and in keeping with Federal rules.

A large portion of our resources have been dedicated to auditing the Help America Vote Act grants that have been given to the States. The EAC has distributed $3.3 billion in funding to the States for election equipment and procedures. To date, we have completed 31 audits of 28 States covering $1.3 billion. We examined State expenditures to determine if they were made for appropriate purposes, were properly charged to HAVA grants, and were supported by appropriate and sufficient records.

Our audits have shown that, by and large, States use HAVA funds for appropriate purposes and that they have the needed documentation to support those charges. We have identified $31.3 million in questioned costs and additional program income in our 31 audits.

The EAC has also distributed $50.9 million in discretionary grants in the six smaller programs. We have only audited a few of these smaller grants. However, those audits have raised some concerns about these funds and the manner in which they were used.

In 2009, we received a congressional request to audit two small grants under the Help America Vote College Program. We began what we believed would be a very simple, straightforward audit of $33,000. What we found was that the grantee did not have records to support his charges to the grant. We questioned all of the costs charged to the grant, and the grantee is in the process of repaying those funds now.

The second major focus of our work was on EAC operations. We oversee the annual audit of the EAC's financial statements and fiscal compliance reviews which is done by outside contractors. In addition, we have issued seven reports covering six reviews and one investigation of EAC operations.

Our reports have revealed the good and the bad about EAC operations. Not all of our reports are negative. We conducted reviews of the EAC's Internet usage and the use of appropriate funds for settlement. We determined the EAC had proper controls to prevent access to adult content, gambling, and shopping sites. That is what our report says. We also found that the EAC followed the laws in using its funds to settle a prohibited personnel practices claim.

Our reports have also identified areas where EAC can improve its operations. For example, in 2008, we issued a major report on the assessment of EAC's financial and program operations. We found that the EAC did not have internal controls or policies and procedures in place to guide its programs and operations. We made 29 recommendations related to needed policies and procedures. The EAC has implemented the vast majority of these recommendations and adopted policies and procedures in most of its programs.

We also found a situation where EAC did not violate law or regulation, but where better choices could have been made in the use of Federal funds. One such example was our review of the EAC purchase of T-shirts. While this was only a $7,000 purchase, the EAC bought 5 shirts for each of its employees as an employee incentive award, and they still had about 200 shirts in inventory. While this purchase was not illegal, it was just not a good use of taxpayers' funds.

Our investigation in the EAC's operating environment also showed no violation of Federal antidiscrimination laws or whistleblower laws but did reveal employees fear retaliation for making complaints or identifying wrongdoing. It also showed that employees believe that it was an "us versus them" atmosphere at the EAC.

In the failure of the EAC's employee service in 2007, 2008, and 2009, they showed that an information divide exists between management and staff. The 2010 survey results are now in, and the EAC is in the process of evaluating those. Those results should be available the middle of March, and we are hoping that there is significant improvement in the results of the survey.

The EAC's fiscal year 2012 budget request seeks $13.7 million, with $3.25 million being transferred to the National Institute of Standards and Technology. The EAC proposes the operating budget

of $10.45 million. This is a 27.7 percent reduction from its operating budget in 2010. The OIG takes its fair share of that cut. Our portion of the EAC budget will be $1.56 million. While this is a sizeable reduction from our previous budgets, we will continue to conduct audits and investigations, albeit just a few less than we have done in previous years.

We know that members of this committee have previously raised concerns about EAC's overhead and management costs. This budget would appear to verify those concerns. More than 51 percent of the EAC's fiscal year 2012 budget is dedicated to overhead and management charges. The EAC should take a hard look at its management and overhead costs to determine if savings could be achieved to bring management costs more in line with program costs.

The EAC has committed to doing this analysis. In their transmittal with the budget justification that was provided to Congress, they have indicated they are willing to do a study and make the necessary changes to bring the costs in line. We think this committee should hold the EAC accountable to its word, make sure this analysis is conducted and whatever changes that need to be made are made by the EAC.

Our role is to make recommendations that improve the EAC and to protect the taxpayers' investment in our Nation's election process. We will continue to work with the EAC and this committee to make the EAC's programs and operations economical, effective, and efficient.

It is my pleasure to be here today, and I will be more than happy to answer any questions you have.

Mrs. EMERSON. Thank you so much, Mr. Crider.

[The information follows:]

March 9, 2010

Testimony of Curtis W. Crider, Inspector General, before the U.S. House Appropriations Committee, Subcommittee on Financial Services and General Government

Curtis W. Crider, Inspector General
U.S. Election Assistance Commission

Chairwoman Emerson, Ranking Member Serrano, and Members of the Subcommittee, thank you for inviting me to testify today. I am pleased to be here this morning to discuss the activities of the Office of Inspector General (OIG) and to provide insight into the economy and efficiency of the programs and operations of the U.S. Election Assistance Commission (EAC).

INTRODUCTION

The EAC is a bipartisan Commission created and authorized by the Help America Vote Act of 2002 (HAVA). The OIG is an independent division of the EAC required by HAVA and the Inspector General Act of 1978 (IG Act) and created by the EAC in 2005. Our office is comprised of three full-time staff: the Inspector General, the Assistant Inspector General for Audits, and Counsel to the Inspector General. We also contract with two independent accounting firms for audit support and use the investigative services of other Federal agencies, when necessary.

The OIG's mission is to promote economy, efficiency and effectiveness in the EAC programs. To accomplish this goal, the OIG conducts regular audits of recipients of grant funds distributed by the EAC, annual financial audits of EAC's operations, and periodic reviews and audits of EAC program operations. In addition, the OIG helps to identify waste, fraud, abuse and mismanagement in EAC programs and operations by conducting investigations of complaints against the EAC, its grant recipients, or third parties involved in EAC programs.

GRANT AUDITS

The EAC administers several formula and discretionary grant programs. The EAC has distributed $3.2 billion in funding under the formula grants established in titles I and II of the HAVA. In FYs 2003, 2004, 2007, 2008 and 2009, the Congress appropriated funding to these programs totaling $3.3 billion. Approximately $56 million is left to be distributed. In addition to these grants, the EAC has distributed $14.9 million in discretionary grants under the following grant programs: Help America Vote College program, Parent Student Mock Election program, Election Data Collection grant program, and Military Heroes Initiative. Last, the EAC has $11 million in funding yet to be distributed under two discretionary grant programs: the Pre-election Logic and Accuracy Testing and Post-election Audit Initiative and Accessible Voting Technology Initiative.[1]

[1] HR 1 would rescind $5 million from the funding available for these programs.

Over the past five years, the OIG has focused on auditing the large sums of money distributed to and spent by the states to improve the election infrastructure and procedure. These grants were available for limited uses. The uses of these funds include:

HAVA Section	Approved Uses
101	Comply with title III of HAVA; improve the administration of elections for Federal office; Voter education regarding voting procedures, voting rights, and voting technology; training election officials, poll workers, and election volunteers; develop the state plan required in title II of HAVA; improving, acquiring, leasing, modifying or replacing voting systems; improving accessibility of polling places; and establishing a hotline for voters to use to report voting fraud and voting rights violations, obtaining election information and information about the voter's status, polling place location and other relevant information.
102	Replace punch card and lever voting systems that were in use during the November 2000 election
251	Purchase or lease voting equipment that meet standards established in Section 301 of HAVA; implement a program of provisional voting; provide specified information to voters at the polling place; develop and implement a single, statewide list of registered voters; and identify first-time voters in keeping with the requirements of HAVA.

Section 102 funds were available for a limited period of time.[2] At the end of the period of availability, states must return any unspent funds or funds associated with precincts that still use punch card or lever voting systems. Section 251 funds required states to submit a state plan and to appropriate matching funds equal to five percent of the combined state and Federal shares. All funds must be deposited into an interest bearing account ("election fund") wherein earned interest could be used for the types of activities allowed under Section 251.

We audit the HAVA funds expended by the states. Our audits examine whether the funds were spent for approved purposes, whether expenses were made in keeping with HAVA and Federal guidelines for the use of grant funds, whether expenses were properly documented, whether the state met its matching requirement, and whether state and Federal funds were timely deposited into the election fund. We have completed audits of 28 states. These audits covered $1.3 billion and resulted in $31.3 million in questioned costs or additional program costs. Some common audit findings were:

[2] The deadline was originally the November 2004 election. However, states were permitted to request a waiver until January 1, 2006. This deadline was subsequently extended. The most recent change made the deadline November 2010.

- Failure to maintain adequate time records for persons whose wages/salaries are paid from grant funds;
- Failure to maintain property control/inventory records for equipment purchased with Federal funds;
- Failure to appropriate sufficient matching funds;
- Failure to timely deposit matching funds or interest earned on HAVA funds; and
- Errors in reports filed with the EAC.

There have been state and/or Federal investigations in three states regarding the use of HAVA funds. In one instance, former state officials and contractors have been indicted on charges of money laundering, kickbacks and tax evasion.

We have ten state audits in progress.[3] Those audits cover $800 million in HAVA expenses. Final reports on these audits will be available by the end of the current fiscal year. Approximately $1.3 billion of the $3.2 billion distributed by the EAC under the HAVA grant programs is yet to be audited.

Below is a chart detailing the HAVA funds that have been subject to audit by the OIG. The chart aggregates the amounts received and audited under the three HAVA grant programs. The amount audited also includes interest earned on HAVA funds as of the date of the respective audit.

State	HAVA Funds Received	Required State Match on HAVA Funds Received	Total HAVA Funds Available Excluding Interest	Total HAVA Funds Audited	Unaudited HAVA Fund Balance
Alabama	$40,907,194	$1,887,711	$42,794,905	$30,330,539	$12,464,366
Alaska	$18,021,803	$685,358	$18,707,161	$0	$18,707,161
American Samoa	$3,319,361	$0	$3,319,361	$0	$3,319,361
Arizona	$52,532,244	$2,395,615	$54,927,859	$0	$54,927,859
Arkansas	$30,396,569	$1,275,456	$31,672,025	$28,205,912	$3,466,113
California	$380,356,043	$15,562,763	$395,918,806	$213,941,386	$181,977,420
Colorado	$45,784,267	$2,039,309	$47,823,576	$0	$47,823,576

[3] These audits cover some states that have previously been audited. The OIG selected these states for re-audit due to the large amount of money that had been spent since the states' prior audits.

State	HAVA Funds Received	Required State Match on HAVA Funds Received	Total HAVA Funds Available Excluding Interest	Total HAVA Funds Audited	Unaudited HAVA Fund Balance
Connecticut	$34,081,608	$1,530,611	$35,612,219	$34,168,003	$1,444,216
Delaware	$16,596,803	$610,358	$17,207,161	$0	$17,207,161
District of Columbia	$16,596,803	$610,358	$17,207,161	$0	$17,207,161
Florida	$170,641,293	$7,611,176	$178,252,469	$110,187,888	$68,064,581
Georgia	$83,231,168	$3,719,705	$86,950,873	$63,562,054	$23,388,819
Guam	$3,319,361	$0	$3,319,361	$0	$3,319,361
Hawaii*	$16,596,803	$610,358	$17,207,161	$11,331,064	$5,876,097
Idaho^	$18,021,803	$685,358	$18,707,161	$0	$18,707,161
Illinois†	$155,480,687	$5,818,213	$161,298,900	$148,093,384	$13,205,516
Indiana	$70,193,158	$2,865,278	$73,058,436	$61,430,159	$11,628,277
Iowa	$31,633,492	$1,401,763	$33,035,255	$28,834,907	$4,200,348
Kansas	$29,022,045	$1,264,318	$30,286,363	$24,666,652	$5,619,711
Kentucky	$42,070,094	$1,942,192	$44,012,286	$20,349,296	$23,662,990
Louisiana	$49,051,620	$1,936,238	$50,987,858	$50,673,813	$314,045
Maine	$16,596,803	$610,358	$17,207,161	$0	$17,207,161
Maryland	$53,646,392	$2,440,634	$56,087,026	$27,683,205	$28,403,821
Massachusetts	$65,115,060	$3,000,273	$68,115,333	$0	$68,115,333
Michigan	$104,274,292	$4,659,773	$108,934,065	$69,309,457	$39,624,608
Minnesota	$49,254,670	$2,312,678	$51,567,348	$42,303,899	$9,263,449
Mississippi	$30,603,916	$1,323,814	$31,927,730	$0	$31,927,730
Missouri	$62,262,661	$2,363,929	$64,626,590	$52,632,344	$11,994,246
Montana	$18,021,803	$685,358	$18,707,161	$15,380,563	$3,326,598
Nebraska	$20,021,034	$790,581	$20,811,615	$0	$20,811,615
Nevada^	$23,144,727	$954,986	$24,099,713	$19,631,090	$4,468,623
New Hampshire	$16,596,803	$610,358	$17,207,161	$0	$17,207,161
New Jersey†	$84,904,403	$3,582,505	$88,486,908	$45,136,106	$43,350,802
New Mexico	$20,599,671	$821,035	$21,420,706	$14,123,471	$7,297,235
New York	$238,095,934	$9,052,510	$247,148,444	$140,722,926	$106,425,518
North Carolina	$82,203,337	$3,864,304	$86,067,641	$59,042,030	$27,025,611

State	HAVA Funds Received	Required State Match on HAVA Funds Received	Total HAVA Funds Available Excluding Interest	Total HAVA Funds Audited	Unaudited HAVA Fund Balance
North Dakota	$18,021,803	$685,358	$18,707,161	$0	$18,707,161
Ohio	$143,076,059	$5,369,656	$148,445,715	$114,741,683	$33,704,032
Oklahoma	$35,200,723	$1,589,512	$36,790,235	$0	$36,790,235
Oregon	$36,421,250	$1,599,722	$38,020,972	$19,937,966	$18,083,006
Pennsylvania†	$147,009,727	$5,935,242	$152,944,969	$159,099,053	$0
Puerto Rico	$9,004,545	$308,074	$9,312,619	$0	$9,312,619
Rhode Island	$18,021,803	$685,358	$18,707,161	$17,078,956	$1,628,205
South Carolina	$43,185,727	$1,913,989	$45,099,716	$35,165,678	$9,934,038
South Dakota	$18,021,803	$685,358	$18,707,161	$0	$18,707,161
Tennessee	$54,714,608	$2,433,481	$57,148,089	$27,601,101	$29,546,988
Texas†	$203,631,823	$9,481,879	$213,113,702	$168,206,340	$44,907,362
Utah	$26,804,496	$946,669	$27,751,165	$28,076,877	$0
Vermont	$16,596,803	$610,358	$17,207,161	$0	$17,207,161
Virginia	$69,121,820	$3,025,756	$72,147,576	$33,270,545	$38,877,031
Virgin Islands	$3,319,361	$0	$3,319,361	$0	$3,319,361
Washington	$65,825,930	$2,785,687	$68,611,617	$42,474,187	$26,137,430
West Virginia	$22,043,424	$879,836	$22,923,260	$21,340,794	$1,582,466
Wisconsin*	$54,013,843	$2,474,263	$56,488,106	$44,043,079	$12,445,027
Wyoming	$18,021,803	$685,358	$18,707,161	$7,967,787	$10,739,374
Total	**$3,195,253,076**	**$133,620,789**	**$3,328,873,865**	**$2,030,744,194**	**$1,304,609,467**

* Audit in progress
†Second audit in progress
^Audit planned for FY 2011

The OIG has completed an audit of two of the Help America Vote College Program grants. Both grants were given to a single grantee and totaled $33,750. Due to a lack of supporting records, we questioned all costs and the grantee is in the process of repaying all $33,750. The OIG also has an ongoing audit of one of the five grants distributed under the Election Data Collection grant program. That grant is in the amount of $2 million. The audit is expected to be completed in 2010.

AUDITS, EVALUATIONS, AND INVESTIGATIONS OF EAC

The OIG oversees annual audits of the EAC's financial statements and compliance with the Federal Information Security Management Act (FISMA). These audits are conducted by an independent public accounting firm. The EAC received an unqualified opinion on its FY 2010 financial statements. The EAC has shown dramatic improvement in its financial management processes since its first financial statement audit in FY 2008, which resulted in a disclaimer. The FY 2010 audit of EAC's FISMA compliance also demonstrated vast improvement and substantial compliance with FISMA. Prior audits had noted significant deficiencies in meeting FISMA requirements.

In addition to these annual reviews, the OIG has conducted six reviews of EAC programs and operations and one investigation into the working environment at EAC. Two of those reports found favorable conditions at the EAC and resulted in no recommendations. In each of the other reports, we made recommendations to improve the efficiency and effectiveness of the EAC programs.

These reports form the basis of our annual report on the EAC's top management challenges. For FY 2010, the OIG reported on five management challenges facing the EAC: performance management and accountability, financial management and performance, information technology and security, human capital management and records management. We resolved the financial management and performance challenge as the EAC had taken steps to implement all of the recommendations that had been made in the past financial statement audits and obtained an unqualified opinion on its current audit. The other four challenges remain open as EAC has yet to implement all recommendations made in various reports to improve its internal control structure, information technology and privacy act information security, working environment issues, and records management.

We consider the performance management and accountability and human capital management challenges to be the most significant. In 2008, the OIG issued its Assessment of the U.S. Election Assistance Commission's Programs and Financial Operations. In that report, the OIG issued numerous findings related to the need for documented policies and procedures. These recommendations touched nearly every division then existing at EAC, including communications, research, testing and certification, finance and administration, and programs and services (grants). While the EAC has made significant progress in developing policies and procedures, work remains to be done to complete policies and procedures for all of EAC's operations.

The absence of documented policies and procedures has created and exacerbated other problems at the EAC. One example is the disclaimer that EAC received in its first financial statement audit. Also, failure to implement policies and procedures has left an information gap and a lack of understanding of expectations on the part of EAC employees. This information divide is evidenced in EAC's employee surveys. In 2007, 2008, and 2009, the employees reported a lack of understanding of the goals and priorities of the organization as well as the expectations on them as individual employees. Based on the 2009 survey, less than half of respondents believed that:

- Managers communicate the goals and priorities of the organization (45%);
- Leaders generate high levels of motivation and commitment in the workforce (42%);
- Employees have a feeling of personal empowerment with respect to work processes (34%);
- Promotions are based on merit (34%);
- Employees understood what they had to do to achieve a certain performance rating (41%); and
- Pay raises are dependent on how well a job is performed (28%).

Employee Survey 2009, questions 15, 18, 20, 26, 29, and 31.

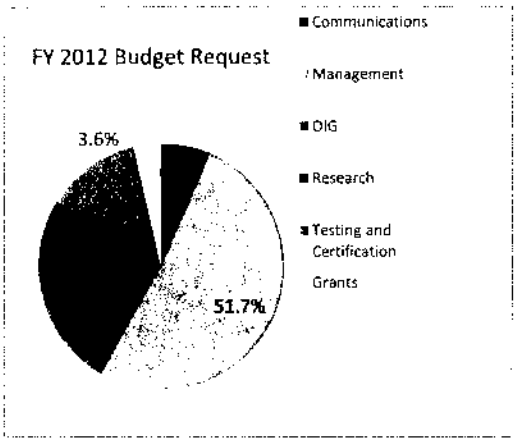
These employee concerns were echoed in our 2010 investigation into the EAC's working environment. The investigation was spurned by 15 complaints from confidential and anonymous sources alleging infractions from cronyism to retaliation. The investigation was conducted by another Federal Office of Inspector General on our behalf. It revealed that the EAC did not have a hostile working environment as defined by Federal statute and no actual retaliation occurred. However, it did open a window in to the fears and concerns of EAC employees, the existences of an "us/them" environment, and potentially inappropriate activities at EAC events.

We referred the investigative report to EAC management for follow up under our human capital management challenge. As a part of that challenge, we admonished the EAC to address expressed concerns with performance measurement. Employees who are performing should be rewarded, and those that are not should be disciplined. In addition, we noted that EAC must ensure that people with appropriate skill sets are tasked to perform critical functions. The EAC has hired a number of competent and trained personnel to assist with its financial and other administrative needs. The EAC has significantly increased the total number of employees and its corresponding administrative costs. In these tight economic times, the EAC must take a hard look at its workforce and resources to ensure that needed skills are retained.

EAC'S OPERATING BUDGET

The EAC's FY 2012 budget request totals $13,715,665, which includes a transfer of $3.25 million to the Department of Commerce National Institute of Standards and Technology. EAC is left with an operating budget of $10,465,665. This is a significant reduction over its FY 2010 and FY 2011 continuing resolution operating budget of $14,459,000. In its submission accompanying the President's budget request, the EAC disburses the $10,465,665 as follows:

	Amount
Management†	$5,406,718‡
Communications	$669,583
OIG	$1,562,346
Research	$1,137,025
Testing & Cert	$1,307,493
Grants	$372,500



†Management includes expenses for the following offices and activities: Commissioners, advisory boards, Executive Director, public meetings, General Counsel, Chief Operating Officer, and Chief Financial Officer. We believe that the management allocation also includes infrastructure costs such as rent that could be allocated to the programs.
‡The $5,406,718 proposed by the EAC for its management expenses is understated by $10,000. The sum of the line items in the management section total $5,416,718. For purposes of this testimony, we will use the numbers as presented by EAC despite their errors.

The OIG's portion of the FY 2012 budget is proposed at $1,562,346. With these funds, the OIG expects to continue to audit states and EAC programs, albeit at a reduced level. We will continue to work with three full-time staff and contract auditors.

The FY 2012 allocations result in reductions to all programs but at different levels. Below is a chart showing the amounts allocated to the EAC programs in FY 2010 and the percentage reduction to the programs in the FY 2012 proposed budget.

EAC Program	FY 2010 Allocation	FY 2012 Request	% Reduction in FY 2012
Management	$6,520,094	$5,406,718	17.1%
Testing and Certification	$1,861,008	$1,307,493	29.7%
Research	$1,544,817	$1,137,025	26.4%
Communications	$848,752	$669,583	21.1%
Grants	$1,914,069	$372,500	80.5%
Office of Inspector General	$1,770,259[4]	$1,562,346	11.7%
Total	**$14,458,999**	**$10,455,655**	**27.7%**

We believe that the EAC's FY 2012 budget request demonstrates a continuing concern that this Committee has voiced regarding EAC's operation: that the EAC's overhead is too high. EAC uses $5,406,718 to manage programs totaling $3,486,601.[5] In its FY 2012 budget submission, the EAC stated a commitment to developing structural reorganization scenarios that would allow the agency to meet its statutory obligations with fewer resources. We would urge the EAC to take a hard look at its overhead and infrastructure in comparison to its program costs. We believe that there are cuts to be made and efficiencies to be accomplished in its administrative operations, winnowing away at what has become a bloated bureaucracy. We also would urge this Committee to hold the EAC to its word. The EAC must be accountable to this Committee and thereby the taxpayers of the United States as to their use of Federal funds.

However, we must caution that change may come slowly at the EAC. The EAC is operating with only two of the four Commissioner positions filled. With only two Commissioners, the EAC lacks a quorum and cannot vote or act to make policy and strategic changes. We hope that the Administration and Congress will act swiftly to fill these vacancies.

CONCLUSION

As you are aware, some of your colleagues would propose to do away with the EAC. Representative Harper has filed a bill to abolish the EAC. While the Office of Inspector General functions as a part of the EAC, it is neither our job nor our prerogative to urge the abolishment

[4] The FY 2010 President's budget request for the EAC included $1,888,960 for the OIG, while the EAC allocated $1,770,259. The $1,562,346 requested in the FY 2012 President's budget is actually a 17.3% reduction from the FY 2010 President's request.
[5] The program total excludes the funding for the OIG as the EAC provides no management function over the OIG.

or the salvation of the EAC. Rather, it is ours to work with EAC and this Committee to make EAC operations more effective and efficient and to ensure that the money dedicated by Congress for election reform is spent for its intended purpose.

I appreciate the opportunity to come before the Committee today and share with you our work and our thoughts on how to improve EAC programs and operations. I would be pleased to address any questions that you may have.

Curtis Crider
Inspector General
U.S. Election Assistance Commission

Curtis Crider was appointed as the Inspector General for the U.S. Election Assistance Commission in August of 2006. Mr. Crider has 35 years of auditing experience in the Federal government. Mr. Crider is a 1975 graduate of Clemson University. He is a certified public accountant and a certified internal auditor.

Mrs. EMERSON. As you are well aware, our country's debt is about $14 trillion, and we in Congress are soon going to have to face the hard decision of whether or not to raise the debt limit. Our committee has a responsibility to address the unsustainable debt by reducing spending, and certainly I intend to do my best to make sure that the reductions we make in our budget are reasonable and sustainable. We are looking for any cost savings we possibly can find.

While I am pleased to note that the EAC requested $4 million less for fiscal year 2012, which is a 24 percent reduction—and it would be good if all agencies could reduce their request by that much—I wonder if you believe that they could reduce costs by operating more efficiently; and, if so, what specific areas of their operations would you highlight?

Mr. CRIDER. The management administrative costs in particular are something that need to be looked at. It is that they have a very large management staff at EAC, and that is an area where I think that some savings could be generated. As I stated earlier, the EAC is committed to doing that type of an analysis, but I would think this committee should hold them accountable for that, to make sure that it does in fact get done.

There are opportunities to contract certain activities out to other Federal agencies such as human resources, accounting; procurement to other Federal agencies, such as the Bureau of Public Debt. Now, there will need to be resources on the EAC side to manage those functions or to make sure those functions are performed properly. But there are agencies that do this for other Federal agencies; like I said, the Bureau of Public Debt. That might be an area where we could take a look at in terms of okay, what do we need to do in-house and what can we let somebody else do for us?

When we have a contract in the IG's Office that needs to be let, we use the National Business Center to do our contracting because I don't have a contracting officer. We used the EAC to do one contract for us, but for all intents and purposes, we contract that function out to another Federal agency.

When we need an investigation done—I don't have an investigator on staff, and for a small agency like EAC, that may not be practical—I contract with another Federal agency to perform those services for us. So there may be areas like that that they could take a look at in terms how we can conserve some funds there.

Mrs. EMERSON. I appreciate that. The Bowles-Simpson Commission Report—I don't know whether you have read the whole thing or not—recommended significant reductions in government travel, printing, and other administrative costs. I believe the EAC should be able to achieve reductions or savings in those areas.

There have been some reports that the EAC has sent numerous representatives to conferences around the country, where simply a few staffers or perhaps one might have sufficed. Do you believe that the EAC could further reduce its costs in areas recommended by Bowles-Simpson?

Mr. CRIDER. It is my understanding the EAC is taking a very hard look at that. In terms of the printing costs, there was a proposal put forward in terms of not printing the State plans in the Federal Register, which would save a fairly significant amount of

money in terms of the EAC. And it is my understanding from talking to staff at the EAC, that they are taking a very hard look at the number of people that are going on this travel and trying to see whether they can reduce it. But I do think those are areas that need to be looked at. Like we don't travel. We do everything by conference call that we possibly can in order to cut our travel costs, and I think that is something the EAC should be looking at also, and I believe that they are looking at that.

Mrs. EMERSON. I appreciate that, and I also appreciate the fact that you are finding significant savings within your own office by using other parts of the government who have expertise in those areas.

It is my understanding that the EAC actually determines how much funding your office should request in the annual budget process, and I find that troubling given the fact that you are an independent office, given your oversight of the Commission. Do you find that that arrangement limits your ability to seek the level of resources you all need to accomplish your mission?

Mr. CRIDER. I put my budget in separately in terms—I submit a separate budget package to the EAC detailing how much money that we need. The cut that we are taking this year is at the direction of OMB. The cash drawer is empty, and we all have to conserve money. We all have to understand that there is not near as much money as we would like to have necessary for operations.

We are not a line item in the budget. The budget is then allocated back by the EAC, back to my office. We have not had any major problems in the past in terms of getting those funds back, but it is an area that could—it is just a matter of time before I irritate the agency again because that is just the nature of my work. They could take that out and say, okay, we are not going to give you any finding, or we are going to cut your funding. And my only recourse at that point in time would be to go to OMB and then to appeal to our oversight committee saying, they are doing this to us. But if nobody stepped up and said, okay, you can't do this, then they could, in fact, do that.

So we are concerned about it. We would like to be a line item in the budget to protect that funding, and I think that would give us—that would help our independence. It is just something we would like.

Mrs. EMERSON. Are there any other agencies whose IG budget is not a separate line item?

Mr. CRIDER. Yes, there are a number of them, okay. We are small. We are considered a DFE, a Designated Federal Entity IG, and a number of us are very small. And like I said, we are not necessarily line items. We would like to be a line item.

Mrs. EMERSON. Okay. I appreciate that. Mr. Serrano.

Mr. SERRANO. Thank you.

Before I ask you a couple of questions, something comes to mind that I just think we need to remember. You know, if we are thinking only about cutting budgets—and that is what we are doing now—this statement could be true for every agency that we face on any subcommittee, which is that we have to try to balance what we do with the services that are rendered by those agencies.

One of the characteristics of human beings is that we tend to forget—and we are looking now at the EAC—it is a small agency that may have problems and that a lot of people are not ready to stand up and support during difficult budget times, and it may disappear in the future. The law may be one of those that also doesn't get fully implemented, unfortunately.

We forget HAVA came about because in 2000 we had a very, very, very difficult election result; and when I say difficult, that count that went on and the uncertainty and the pain, and the gentleman's State went through a very difficult time, and it doesn't matter what side of the equation you are on, Bush or Gore. It was painful for our country, and HAVA came about because of that, to try to remedy that.

And I think as we move forward we have to remember that. We shouldn't forget that that was the reason the EAC was created, to hope that in the future we never have a situation like the one we had. Because when you see folks all over the world clamoring for systems that look a lot like ours, then you have to make sure you keep reinforcing ours and give everyone a chance. It is not enough to say we have the greatest system on Earth of any kind. The question is, is everyone participating equally? Is everyone getting the opportunity to participate? And that is what HAVA is supposed to accomplish.

Inspector General, the last page of your testimony sums up what I believe is one of the biggest challenges facing the EAC today. Only two of the four commissioner positions are filled. Without a full Commission, the EAC cannot vote or act to make policy and strategic changes. Understanding that these vacancies are not the most pressing issue before Congress right now, what can the EAC do to address your concerns right now? Without the other two commissioners, what is realistic?

Mr. CRIDER. The agency can function, according to the General Counsel's Office. They can perform a lot of their duties and responsibilities. While they cannot set policy, they can undertake some of the other actions that might be warranted at this point. We agree we would like to see the commissioners appointed. I think that would be a very beneficial thing for EAC to stabilize the organization, get the new commissioners in, and let the agency move forward if it is to continue to exist.

But we do agree with you, we would like to see the two commissioners appointed, but they can still do a lot of stuff. They can award grants. They can conduct oversight. They can continue with their testing and certification programs. Their research projects can continue. So the EAC can continue to function on an operational level.

Mr. SERRANO. And you don't feel that not having the commissioners fully in place may leave open challenges where people say, well, the Commission was not fully put together when it made that decision?

Mr. CRIDER. I would—there is that possibility. Like I said, we would like to see the two commissioners appointed, because I think that would be best for the organization, and it would forestall anything like that. There was another small commission that had only 2 commissioners. They continued to operate, and the Supreme

Court basically set aside a lot of the work that they had done because they did not have a quorum. And like I said, we obviously want to make sure that doesn't happen at the EAC.

Mr. SERRANO. Okay. We all want our tax dollars to be used efficiently and effectively. That is not an issue of disagreement, and we all want open, fair, and accessible elections. With that established, what are the most important steps that you believe the EAC should take to increase efficiency?

Mr. CRIDER. We would like to see them not only to take a look at the administrative and management side to see, okay, can we streamline this, can we move some of the money back into the program side to help the programs perform their mission and objective? That is the issue in the human capital management at the EAC, or areas where we would like to see aggressive—things being addressed aggressively so that the EAC can move forward.

The EAC is a very good organization. I think it has a mission to perform, but it needs to be managing itself efficiently and effectively.

Mr. SERRANO. Now, how does that balance with my comments in my opening statement that some of these decisions, if not all, are mandated by law?

Mr. CRIDER. There are only a few positions mandated by law.

Mr. SERRANO. Okay. And the rest you think are just fat that could be removed in some cases?

Mr. CRIDER. I don't want to use the term "fat". This is where they need to do their analysis to determine what resources level they need and what skill-sets they need. We are not necessarily talking here about numbers of bodies, we are talking about skill-sets. What skill-sets are needed by the agency and do we have those skill-sets, and can we then trim in terms of anything that we don't feel is a success at this point?

I realize we are talking about human beings and their jobs, but in the tight budgetary times that we have, we have to be efficient and effective.

Mr. SERRANO. But your suggestion is, trim it and then use it for programmatic——

Mr. CRIDER. If there are ways we can trim it, and can we move the funds now to the program side?

Mr. SERRANO. One last question for this round. The President's budget for the EAC for fiscal year 2012 is $13.7 million, of which 3.25 million will be transferred to the National Institute of Standards and Technology. This leaves EAC with $10.5 million for fiscal year 2012, which is $4.2 million below the fiscal year 2010 level in terms of operating expenses. Isn't the reduction in budget for the EAC proof that this agency has, in fact, found efficiencies already? Are you advocating for further reductions in the budget?

Mr. CRIDER. The budget reductions have not—are just now starting to occur, and the EAC has got to look at its operations in terms of how much money we are going to have and how we are then going to get the work done. And this is where we think they need to look at the administrative side, because they are still operating at $17.9 million in terms of the continuing resolution. So this is going to be a very drastic reduction in 2012, and we think that

they need to start planning for that now, looking at their administrative side and determining what resources they do need.

Mr. SERRANO. Thank you.

Mrs. EMERSON. Mr. Diaz-Balart.

Mr. DIAZ-BALART. Thank you very much, Madam Chairwoman. How are you, sir? Thanks for being here.

Do you know approximately how many States that have HAVA grants, how many of them are yet to be audited?

Mr. CRIDER. There are 55 jurisdictions, and we have completed audits of 28 States.

Mr. DIAZ-BALART. Any idea what the timetable is of the completion of those that have not been completed?

Mr. CRIDER. There is still a fairly significant amount of money out in the States that has not been spent; in excess of $800 million. So a lot will depend upon, in terms of how fast the States spend those funds. I mean, they control how fast they spend it. So a lot will depend on how fast they spend it.

We are able to do—this year, we have 10 audits underway right now and covering another $800 million in costs, which will bring our total audit up to about $2 billion, and that will leave about 1.3, $1.4 billion still out there to be audited at that point.

Mr. DIAZ-BALART. Eight hundred million dollars that still has not been spent. That is quite a substantial amount of money. Do we know why is it——

Mr. CRIDER. I don't know the answer to that, sir. The EAC may have a better understanding of that. When we go out, we just look at how much they have spent.

Mr. DIAZ-BALART. Great. It is my understanding that your office did an audit of two EAC project vote grants——

Mr. CRIDER. Yes, we did.

Mr. DIAZ-BALART [continuing]. Which funds subsequently went to ACORN?

Mr. CRIDER. Yes, sir.

Mr. DIAZ-BALART. And it is also my understanding they provided no records of where the money went. Is that correct? Is my understanding correct?

Mr. CRIDER. Yes. Yes, it is.

Mr. DIAZ-BALART. Any ideas of how to prevent similar situations like that one from happening in the future?

Mr. CRIDER. Well, audit is one. By going out and doing audits is how we find this stuff, so I think audits are very important. But I also think oversight—is that when we looked at the records at the EAC, is that we found they should have had some additional records that they did not have, and I think that would have helped them. But you know, when you go out and grantees do what they do, and usually you find out after the fact in terms of whether or not the records are adequate or not. Like I said, that is where audit comes into play.

Mr. DIAZ-BALART. Absolutely. That is why it is crucial you are there to do your job. Is that an unusual situation, where no records are found to follow the money?

Mr. CRIDER. Unusual. Like I said, we thought we would be in and out in a couple of weeks. It is not that much money involved. So we were a little bit dismayed when we found that they had no

records. I hope I don't find we are in that situation again. Now, we run into problems with States periodically where their records are inadequate, but usually we work through the issue with the State. But in this particular case, like I said, there were just no records.

Mr. DIAZ-BALART. Who is responsible so that that doesn't happen? You know, are the States the ones who are responsible for that? Who is supposed to be tracking that at the time? Obviously you go back and you do audits afterwards, but at the time, who is responsible? And the reason for my question is: Is there any accountability for those who are responsible; or is there a clear, you know, chain of responsibility in a case like that?

Mr. CRIDER. The grantees are required to maintain their records. So that is where that responsibility lies. As the grantor, the agency has limited ability at times to go—because that is what audit is all about.

Mr. DIAZ-BALART. True. I think I know the answer to the next one, but I have to ask it. In the fiscal year 2012 budget request for your office, I believe it shows 50 percent of your proposed funding will go to management expenses compared to 10.9 for research and 12.5 for testing and certification. You know, in a vacuum, one would say, wow, that is a lot of money for management. I think you have kind of addressed that, but I think it is important that we hear it from you as to why those numbers look like that, because obviously if you looked at it in a vacuum, it wouldn't look that good.

Mr. CRIDER. There is no doubt we are concerned about the amount of overhead at the EAC, and as Ranking Minority Member Serrano indicated, it is a small agency and there are certain functions the EAC has to perform. They need to look at ways to be more efficient and more effective, and that is what we are asking them to do. Like I said, as a part of their budget package, they have indicated their willingness to do that. I talked to the person doing the analysis this morning. They are doing the analysis, and hopefully we will have some results here shortly in terms of what the analysis shows.

But I think it is important for this committee to also monitor that to make sure, in fact, it does get done; and if reductions are identified, that those reductions, in fact, do occur.

Mr. DIAZ-BALART. Right. Because, again, in a vacuum, if you looked at an agency where it is 50 percent management and then, what, 12.5 and 11 for testing and certification and research, it gets to the point where you think, again, they are small—I understand that—but it gets to the point if they are that small and they are spending this little on research and testing, and then are they really even doing what they are charged to do? It may not be their fault because they don't have enough budget, but the fact may be the same that they are basically spending all their money, in essence, on management and not doing much else.

Mr. CRIDER. And that is what our concern is, okay, and that is why we think it needs to be looked at.

Mr. DIAZ-BALART. Thank you, Madam Chairman.

Mrs. EMERSON. This is interesting because when we had the Commission members, or at least the Chair, before us last year, and we brought up the management issue, we were told that they

needed all the management staff. Of course, now we know that other agencies, whether it is GSA or the Debt Commission or whomever, can perform those functions for the smaller agencies, and it is an interesting contrast.

Mr. CRIDER. What happened was they were over here and then they got over here. The answer is somewhere in the spectrum here in terms of where they need to be, and I think they are starting to recognize that themselves and they are willing to look at it. And I think it is a very positive step on their part that they are willing to look at it. We just need to make sure they do it.

Mrs. EMERSON. I appreciate that. Ms. Lee.

Ms. LEE. Thank you, Madam Chair. Good morning. Thank you for being here.

Let me ask you how the EAC carries out its core mission of ensuring the voting systems are in place and are accessible for everyone; also, to count both quickly and accurately and to ensure that any contested elections can be resolved so that we don't face the uncertainty of the 2000 elections again.

I don't believe, and correct me if I am wrong, that you asked detailed questions about the specific failure of electronic machines. And so if you don't do that, how do you measure the performance of voting systems that you certify if you don't ask States how the voting systems are performing or failing to perform in actual elections? I think all of us know the difficulties and some of the problems with voting machines in the past, and so we thought that probably the EAC would be able now to assess their performance and know what the States are doing as it relates to these machines.

Mr. CRIDER. Congresswoman, I am going to have to punt back to the agency. The EAC is the best one to be able to answer that question for you. I am not in a position to provide that information. So I think you need to go to the EAC for that.

We have put an audit in our work plan for 2011 to go out and try to do an operational review of the testing and certification program. We will have to contract that audit out because we do not have the wherewithal internally to do it. The IG's Office is only three people, and it is a fairly technical review. We have actually had some conversations with GAO about the review and actually tried to get GAO to do it because they have already done—they did two policy reviews of the EAC testing and certification program. We are not going to be able to do that audit in 2011. Due to budgetary situations, we can't award a contract. Like I say, we have to contract the review out. We won't get it done this year, but we do agree that the program should be looked at. So if you guys would like to request GAO do that, we would be more than happy to help GAO on that.

Ms. LEE. So you think it should be looked at?

Mr. CRIDER. It should be looked at, okay. The program is moving now into actually testing equipment, certifying equipment. Now is the time to do operational review and say, okay, is it working properly? In order for us to get the voting public confidence in this equipment, we have to make sure the certification program is working properly, and I think that will help people get some confidence in our voting process, and like I said, we just don't have

the wherewithal to do it right now, but we do think it needs to be done.

Ms. LEE. Well, have you requested that it be done or requested us to ask for it to be done?

Mr. CRIDER. Well, this is our first opportunity to testify before this committee. So, like I said, you know, we have talked to GAO and they have indicated that they don't have—they have got a lot of requests, too, and we did talk to House Admin last year about maybe trying to get them to get it done, but it hasn't been done yet. Like I said, it is something that needs to be done, and if you would like to get a letter from us indicating——

Ms. LEE. I would like to do that because we have been asking for quite a while. There seem to be roadblocks and we would like to get a letter.

Mr. CRIDER. Okay.

Ms. LEE. And then I would definitely pursue how we can get that done.

Mr. CRIDER. Okay. Thank you very much. We appreciate the help.

Ms. LEE. Thank you again. Can I ask one more question? When you do these audits, do you do them—when you contract out with minority women-owned audit companies and accounting companies—or how do you make sure that the audit functions are inclusive of diversity in the industry?

Mr. CRIDER. The first contract we awarded for our grant audits was a straight competitive procurement, and we tried to make sure that the solicitation was sent to some minority firms. The firm that was selected to do the financial audit is a minority firm. We targeted small businesses, minority firms for that particular award, because it is perfect. And so like I say, we had it split.

But we are very cognizant of those goals and we try to make sure that we do make sure that when we do have a solicitation it goes to all appropriate problems.

Ms. LEE. Do you use the 8A program through SBA?

Mr. CRIDER. No, we do not. We have not used it in the past. We use the GSA schedules, and like I said, we did target this one for a——

Ms. LEE. Well, if you have a breakdown of the money that you use, the money that is spent on audit services and the breakdown of the contracts or the companies, I would like to see that.

Mr. CRIDER. Sure. We can provide that to you.

Ms. LEE. Thank you very much. Thank you, Madam Chair.

[The information follows:]

U.S. ELECTION ASSISTANCE COMMISSION
OFFICE OF THE INSPECTOR GENERAL
1201 NEW YORK AVENUE, N.W., SUITE 300
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(202) 566-3125

March 9, 2011

The Honorable Barbara Lee
Congresswoman
United States House of Representatives
2267 Rayburn House Office Building
Washington, DC 20515

Via U.S. Mail and Electronic Mail

RE: Contracts awarded by the U.S. Election Assistance Commission Office of Inspector General

Dear Congresswoman Lee:

During a recent hearing before the House Appropriations Subcommittee on Financial Services and General Government, you requested additional information regarding contracts awarded by the U.S. Election Assistance Commission (EAC) Office of Inspector General (OIG). Specifically, you requested information concerning OIG contracts awarded to minority firms.

The OIG has two major contracts in place. One is for contract auditors to perform audits of states. That contract was begun in 2009, was for one year with four option years, and will expire in July of 2011. That contract was awarded to Clifton Gunderson, LLP, a large, regional audit firm. To our knowledge, Clifton Gunderson, LLP is not minority owned or a small business. The annual value of that contract averages approximately $642,000. The second contract is for contract auditors to perform annual audits of the EAC's financial statements and compliance with the Federal Information Security Management Act (FISMA). That contract was begun in 2009, was for one year with four option years, and will expire in 2013. The financial statement and FISMA audit contract was awarded to Leon Snead and Company, a small, minority owned business. The annual value of that contract averages approximately $163,000. Both of these contracts were competed using the General Services Administration's Federal Supply Schedule (GSA schedule) of prequalified vendors. In both instances, we were able to negotiate rates below those set on the GSA schedule.

If you have any further questions related to procurements by the OIG or wish to discuss either of the contracts in more detail, please contact me at 202-566-3125.

Sincerely,

Curtis W. Crider
Inspector General

Mrs. EMERSON. Mr. Womack.

Mr. WOMACK. Thank you, Madam Chairwoman, and I apologize for my late arrival.

You are a CPA?

Mr. CRIDER. Yes, sir.

Mr. WOMACK. So numbers mean something to you. When I look on the management side—and I know in response to Mr. Balart's question a minute ago, you talked about that—I want to drill down just a little bit further on it—$5.4 million to manage programs totaling $3.4 million; is that correct?

Mr. CRIDER. Yes, sir.

Mr. WOMACK. How do you justify that?

Mr. CRIDER. That is something you need to talk to the EAC about, okay, in terms of what their justification for that is. We share your concerns.

Mr. WOMACK. Now, I heard you use the "hope" word just a minute ago in response. I think it was to some audits or accountability. I was taught a long time ago in my military service that "hope" is not a method. And I think from hearing colleagues here talk about these very problems, that we are looking for solutions, real solutions, and more importantly than that, we are looking for some benchmarks and for some timelines, suspense dates, when certain things are going to be fixed or this can gets kicked down the road. And so I am hopeful, hopeful, that the words actually mean something and they are not just an appeasement to us at the committee level. So, your response.

Mr. CRIDER. I agree with you. That is why I would think this committee's oversight in terms of making sure the EAC does what it needs to do is very, very important. One of the reasons is that—we got the recommendations implemented from our assessment report that we issued in 2008—was that Congresswoman Zoe Lofgren, when she was the chair of the Subcommittee on Elections as part of House Admin, required that the EAC report to her on a monthly basis in terms of where they were at in implementing those recommendations. That congressional oversight I think was extraordinarily valuable and critical in terms of getting those recommendations implemented. And I think that is a very valid approach for this subcommittee is to request that type of information from the EAC to make sure they do what they are supposed to do.

Mr. WOMACK. What would happen if there is a bill pending that you reference in your testimony from Representative Harper about abolishment of the EAC. And I realize, you know, you can't speak to do that, but what would be the net effect in America if the EAC and its programs went away?

Mr. CRIDER. I can't speak necessarily to the EAC side of the house in terms of their programs and operations. But I can speak to my operation in terms of what it would mean for us, or what it would mean, is that those funds would not be audited that are sitting out there unless the audit function was to move to another Federal entity, which is possible. That is doable, okay. It happens. So we would like to make sure that those type things and make sure that there is an opportunity for States to draw down their money. The States need to know where to file their financial reports. And the audit function, whether or not that should continue,

whether or not it is moved to another Federal agency or stays in the EAC is somebody else's decision.

But in terms of the implication on the rest of the Nation, they are talking about moving the testing and certification program to another Federal entity. I think the EAC would be in the best position to address your concerns, sir, in terms of what impact that would have.

Mr. WOMACK. That is fair. Thank you for your testimony.

Mrs. EMERSON. I want to go back to the grants just a little bit, if you don't mind. While I understand the funding has left the Federal Government coffers and is being held by the States, is there any realistic way that you can see for us to return some of that money to the U.S. Treasury since the States aren't using it?

Mr. CRIDER. No, ma'am. I don't think so. Chairwoman Emerson, GAO issued an opinion on this matter last year or the year before. These are considered formula grants, and that the money is obligated based on law, and that the States have a legal right to those funds at that particular point. So getting the money back does not seem to be a legal, viable option, in my view.

Mrs. EMERSON. Okay. So, in light of that, what is your assessment of the EAC's management of that funding?

Mr. CRIDER. They really don't—they send the funds out. The funds go out up front. The States have to put up their match and they have to file their certifications, and then the States are able to draw down their funds. They then file annual financial reports to the agency in terms of what they spent the money on. The States then are allowed to—the States do come in and request periodic guidance and things of that nature, but we have never really looked at their management and administration of those funds. Like I said, we have been focusing on the States at this point.

The EAC has just now developed policies and procedures for most of its operations as of September 2010. So we have somewhat held off on issuing the same report over and over again until they got their structure in place. And we couldn't see making the same recommendation multiple times: You need policies and procedures.

Mrs. EMERSON. Okay. So to what degree have you examined the manner in which the States are spending this funding? Have you uncovered any instances where the funding has been spent in a manner inconsistent with the intent under HAVA?

Mr. CRIDER. We have questioned $31 million in costs that we have audited, which is not a huge percentage of the amount of money we audited.

Now, we have had a situation down in New Mexico where the Attorney General's Office of the State of New Mexico is actually prosecuting four individuals related to a contract that was awarded by the State for educational training and advertisements of the public media campaign, and the Attorney General's Office is prosecuting, like I said, four individuals, and two of the individuals have been indicted for Federal income tax evasion charges.

So, I mean, we do have situations, like I said, and we have had two inquiries from the FBI on two grants in two localities. With the FBI, they get information from you and they don't always tell you what they do. But like I said, we have a couple cases where things have happened.

Mrs. EMERSON. Have you actually found fraud in looking at the grants yourself, or has the FBI found out separately. How has that worked?

Mr. CRIDER. The New Mexico situation came out of one of our audits, okay. We had been requested by the new Secretary of State to come down several years ago and take a look at that program. And based on the results of the audit is that the State then picked it up from where we finished and followed the money all the way through. We went to the contractor. They took the money from the contractor after that point, and that is where it seems to be most of the activity occurred according to the indictment. That could have come out of one of our audits.

We have actually been very impressed with the States. I mean, they want to do the job right. They want to make sure the money is spent properly. They want to make sure they have adequate documentation. So, I mean, we are very impressed with the States. They have a very—they are very dedicated to the program. Like I say, they want to make sure they do it right, and we have had I think a fairly good working relationship with most of the States.

Now, one of the things they do do is sort of an interesting—is that when we publish a report, they all read that report and say, okay, do we have this problem? So a lot of times when we go out there, they have already fixed things that they had done that might have been questioned, and we welcome that. We think that is a wonderful mechanism in terms of trying to make sure the program is run properly.

We also publish a semiannual newsletter where we try to put out results so people are aware of what is going on. So, you know, if they have a problem in their program, they can fix it.

Mrs. EMERSON. That is good. Let me shift gears for just a minute to some contracting issues.

Chairman Lungren of the House Administration Committee and I have both raised concerns in the past with regard to the Commission's contracting practices and, specifically, we raised some questions concerning the EAC's practice of awarding contracts noncompetitively or in instances where they received only one bid. Additionally, we questioned the degree to which EAC contracted out positions that contain inherently governmental roles. Have you looked into their contracting practices; and if so, what recommendations have you issued in response?

Mr. CRIDER. We have had that particular view in our work plan for 2 years running now, but because of resource limitations, we have not been able to get to it. But we do think it is a review that needs to be done, but we just haven't had an opportunity to get to it. We looked at, well, should we contract the review out in order to get it done? That is something we are looking at this year in terms of possibly contracting it out, but due to budgetary situations we have not been able to get there yet.

Mrs. EMERSON. I guess that begs the bigger question, then: do you think it is more cost effective for EAC to hire contractors for many of the missions it is responsible for, including you?

Mr. CRIDER. You have to look at each situation specifically in terms of what is being done and what is inherently governmental and what the results—what their accomplishments are. There is no

blanket answer to that one because there are certain things that are inherently governmental that you can't contract out.

Mrs. EMERSON. All right. I appreciate that. Mr. Serrano.

Mr. SERRANO. Thank you so much. You know, we talk about budget cuts and budget cuts, but I see from the proposed budget that you are asked to take an 11.7 decrease, your own office, from fiscal year 2010 to 2012. How will this affect you? What are you planning to do? Will you reduce the number of contractors that you use?

Mr. CRIDER. Yes, that is exactly it. We won't do a couple of audits, possibly. That is how we will do it. We will absorb it through our contracting.

Mr. SERRANO. You still feel confident that you can do the job, accomplish your mission?

Mr. CRIDER. Well, we contract our grant audits out, and that is where we will take the cut. We just won't do a couple grant audits. Will it extend the audit cycle? Yes, it will, but I have to live within the parameters of the budget that we are given because, like I said, the money is tight.

Mr. SERRANO. Now, in your testimony, you point to the fact that the EAC has made strides in several areas. They showed improvement in financial management processes and in compliance with the Federal Information Security Management Act. Can you tell us about these improvements?

Mr. CRIDER. Yes, sir. Whenever we did the first financial in 2008, the EAC received a disclaimer which is not unusual for a first-year audit, but they were not able to produce the records that the auditors needed to conduct their audit. There were a lot of internal control issues identified. There were a lot of problems in terms of their financial reports. They actually had to hire somebody, a contractor, to come in and help them figure out how much money they had left to spend. So there were a lot of issues involved.

They have subsequently gotten an unqualified opinion. They received an unqualified opinion on their financial statements last year, which is extremely good. So they made a tremendous amount of steps and improvements in that area, and I do want to give them compliments for that. They went from being in total disarray to having an auditable financial system.

In terms of the FISMA, they actually had no FISMA—they had no IT security program at all when I first got there, and we were issuing reports on an annual basis: You have no IT security program. They now have an IT security program. They are starting to address the PII data in terms of security. So they have made a lot of steps in that area, also. Like I say, they should be very pleased and very proud of what they have accomplished.

Mr. SERRANO. Let me ask you a quick question. Our chairwoman was asking you whether those dollars that went to the States and are not being used, can they be returned, and you said no.

Mr. CRIDER. Right.

Mr. SERRANO. I don't know if you answered this part or if she asked. Why would the States not be using the money or what is the problem locally?

Mr. CRIDER. I don't know the answer——

Mr. SERRANO. And you are hearing this from a person who represents a State that we almost had to drag into submission at one point. Probably will not go well back home that I said that. But you know, folks, there is money here, can we get it going, you know; and I think we were the last ones to use the scanning machine and so on, which I thought was kind of cool because you could see the whole ballot.

You know, I don't know how it is in your State, but in New York, you are placed on the ballot based on the size of your district. So if you represent the whole borough of the Bronx at a local level, you will appear on top of a Member of Congress because that is a smaller district. So on election day when you look at our numbers and you see lower numbers than the other parts of the country, some of the reasons are I have one of the youngest districts in the Nation, I have a lot of, as you know, a lot of immigrants, poor folks at times, but it is line number 24 to find Serrano. I mean, it is very——

Mrs. EMERSON. So, small physically. Is that what they are talking about?

Mr. SERRANO. Yes. So, for instance, we have a position called Bronx borough president—I am not mocking that. It is like county executive, except it really isn't. So that person represents the whole county of the Bronx. If we got on the ballot the same year, that person would be higher than the Member of Congress. Yet the Senator goes on top. So you see Schumer and Gillibrand, and then you have to go through a thousand judges and everybody else to get to your local Congressman. You know, very painful and very difficult for your ego, you know. Don't you know I am a Federal official, Federales, you know?

I don't know, I don't know what the question was, but if you can answer it.

Mr. CRIDER. Well, Ranking Member Serrano, I think you have a valid question, but I don't have an answer for you in terms of why the States are not spending their money. Maybe the EAC would be able to give you some perspective on that, but I don't know. But it is a good question, and I wish I had an answer for you.

Mr. SERRANO. Thank you. Incidentally, nothing—a great sense of pride in the Balart family who would understand this, but my son is a State senator. So, in addition, try in a primary Jose Serrano for Congress and then you have underneath Jose M. Serrano for State senate. You have a heart attack until they count the votes.

Mrs. EMERSON. You ought to try running twice in the same election like I did the first time in two different parties. That was even more interesting.

Mr. SERRANO. Thank you.

Mrs. EMERSON. Mario.

Mr. DIAZ-BALART. I am fine.

Ms. LEE. Well, I do have to follow up on this whole issue of unexpended funds in the States. I am just looking at my State, for example. What is it, $181 million California has not——

Mr. CRIDER. Right.

Ms. LEE. What precludes States with budget deficits from using this money? And I know there are Federal strings attached that

have to do with, you know, HAVA; but what precludes them from back-filling, using this to backfill budget deficits?

And then, secondly, if they are not using the money, why don't we give them a waiver to use it for other efforts? If they don't use it for—if everything has been completed as it relates to HAVA, then what is the problem?

Mr. CRIDER. Well, what prevents them from using the money for other purposes is me.

Ms. LEE. Is what?

Mr. CRIDER. Is me. When I go out and do the audits, that is what we look for: Are you using the money for its designated purposes; are you using it for HAVA purposes, and of course with the law? That is what we do, and so that is where the benefit of audit comes into play.

Now, there are always activities related to some improvement of Federal elections in terms of there are always things that probably can be done. Now, if the Congress wanted to give them waivers to allow them to use the money for other purposes, that would would be up to the Congress. That is a legislative thing but that is a congressional initiative.

Ms. LEE. But if they are not using it for HAVA, are they given suggestions on—maybe they haven't completed the work. Is that a possibility why these funds haven't been expended? Are they holding it for the next election, or what could be some of the reasons? I know you haven't had—goodness, if we cut your budget, how are you ever going to find out?

Mr. CRIDER. Like I said, that is something you try to direct to the EAC and see if they have any knowledge as to why these States are not expending their funds, but they are facing, as you pointed out, tough budgetary times, too, and some of this equipment at some point in time will have to be replaced. This is electronic equipment, and we are seeing some States are now having to replace some of the equipment.

I think Florida did it, and they were allowed to use the Federal funds for that. So, I mean, there will be a point in time where this equipment has to be replaced. It is electronic. So there are future expenditures that may be required.

Ms. LEE. So they could be holding them for future kinds of efforts?

Mr. CRIDER. The money is in an interest-bearing account, and the interest can be used by the State for program purposes. Now, that is a unique aspect of the HAVA law is that most States, when we have Federal funds in an interest-bearing account, the interest goes back to the Federal Government. HAVA was unique. It allowed the States to use those funds.

Ms. LEE. Only for program purposes relating to HAVA, though.

Mr. CRIDER. Yes.

Ms. LEE. That is good. So the States that haven't expended their funds, we don't need to assume they are using it for other purposes.

Mr. CRIDER. Right.

Ms. LEE. Also that they don't need it; they probably do need it for future expenditures.

Mr. CRIDER. Like I say, maybe the EAC will have a better perspective on that than I do. Okay, I am sorry I am not really able to address that for you.

Ms. LEE. Well, is there a way we can find out?

Mrs. EMERSON. We can have a meeting with the EAC commissioners if you would like. We could do a hearing, but we might get more out of a meeting.

Ms. LEE. I think that would be a good idea.

Mrs. EMERSON. Okay. I am happy to do that.

Let me ask you, Mr. Crider, you have investigated a number of questionable management practices within the EAC. Would you do me a favor and elaborate on some of the issues and the recommendations that you have offered to address them?

Mr. CRIDER. When you go back and read our assessment report in 2008, like I say, it contained 29 recommendations about policies and procedures and changes and strengthening internal controls. And that was a very significant report.

In the financial audit in 2008, we issued a number of recommendations there in terms of how to tighten the financial management system, how to improve the internal controls over the financial management.

The investigative report, we did not make any recommendations in the investigative report that was done by the Department of the Interior for us on the hostile work environment, because that was something that I think I should be held responsible for. We should have made recommendations in that report, and I did not. There are a number of issues in that report I think the EAC needed to address in terms of how its employees felt about managers, the employee appraisal system, things of that nature, that we should have made recommendations to them that we did not.

We just did a little review on an incident that happened at the Christmas party. We made recommendations in that report for additional EEO training for all of its employees, make sure supervisors were aware of their responsibilities regarding EEO, and if they see something that happens, how they needed to address it.

Mrs. EMERSON. Have you seen any cultural or management changes in the past several months that have been made there at the EAC?

Mr. CRIDER. They have a new general counsel on staff, and I think that he brings a perspective to the organization that will be very beneficial to the organization. He is the one that is doing the analysis of the administrative workload at the EAC, and I think that he recognizes that certain things need to be done at the EAC in terms of EEO training and EEO processes. And I am very hopeful that his leadership will be very beneficial to the EAC in helping them move forward in some of these areas.

Mrs. EMERSON. Will you be able to report back to us in about 3 months and let us know how that is going?

Mr. CRIDER. We will do that, yes, ma'am.

Mrs. EMERSON. All right. I would appreciate that very much. Mr. Serrano.

Mr. SERRANO. See, here is the concern that I have. Again, I think the EAC is an easy target for people who want to cut budgets, and when I say "people," everybody wants to cut budgets, some people

want to cut more than others. And at what point do we know if the States are set up to conduct elections with less or perhaps none of the concerns that we had in 2000 that brought us to create the EAC to begin with?

Mr. SERRANO. As I said before, these discussions go across the government. You know, I just came from a hearing of the Interior Subcommittee with the EPA. And you know, the discussion by one side, or 1½ sides of both aisles, will be when you cut, you know, how much do you cut EPA's ability to look after our water and our air and so on? What is the future going to be?

So, what is within your mechanism, within your setup, to tell Congress, you or someone else in the future, you know, States are doing what you wanted them to do or what you hoped would be accomplished by these grants and by this kind of oversight and this involvement? Because, you know, we—and again, this is just a statement for the record; everyone in this room can make the same statement.

We speak about the budget. We speak about the system. We speak about the future of the country. But at the center of all of that is this great ability we have to go to the polls in November and pick the people who will lead us at the local level or at the Federal level. So, to me, this agency is small but extremely important. Is there a setup, an ability to tell the Congress, to tell the American people we have reached a point where things are going well at the local level?

Mr. CRIDER. It is a changing target. A lot of these officials at the local level are elected. Most secretaries of state are elected. So there is turnover there. There is change. So I am not sure how you will ever get to that point where you are saying, yeah, everything is going to work perfectly, because it probably won't. Elections are a very complicated, very difficult process. There are going to be problems periodically. And whether or not those problems rise to the level of a national crisis, I don't know the answer to that. I don't have a good answer for you, Ranking Member Serrano. I don't.

Part of it is a political decision on the part of the United States Congress: Do they feel like we have gone far enough or not gone far enough or whatever they think needs to be done? I don't have a good answer for you.

Mr. SERRANO. Just for the record, the reason I asked you, because I don't have an answer at all. So don't feel bad.

Madam Chair, I have a couple more questions that I would like to submit for the record.

Mrs. EMERSON. Absolutely.

Mrs. EMERSON. Mr. Diaz-Balart, do you have any questions?

Mr. DIAZ-BALART. No, Madam Chairman. I am looking forward, though, to getting some answers on the other issue of the unspent funds.

Mrs. EMERSON. I think it is a great idea for us to have a meeting with the Commission members.

Mr. Crider, just to follow up with what Joe asked you, are you in a position to tell us whether or not the EAC actually provides States with useful information on voting technology and on administration?

Mr. CRIDER. Not at this point. We have not looked at those particular programmatic areas. And like I said, we would like to take a look at the testing and certification program because I think that is the linchpin program of EAC. That is their flagship.

Mrs. EMERSON. Well, I certainly think this does warrant us to have a meeting.

You touched on this in your testimony and this is my last question, and I have a couple to submit for the record as well. We didn't pursue it, but you said the secretaries of state and State election officials are, they are calling for the dissolution of the EAC, and it confounds me. Do you have some thoughts on this?

Mr. CRIDER. We have talked about it. We don't have an answer as to why they want to have EAC abolished. You know, it would be nice to know if there was an inherent problem or an issue that we need to address internally at the EAC or whether or not it is just a political decision or what it is. I don't have an answer for you. EAC may have a better feel for that than I do.

Mrs. EMERSON. All right. Well, certainly we have given the Commission these funds, and perhaps it is just "you have given us the money and now let us do our job" attitude. Who knows? But it certainly is something that we need to pursue. It is just puzzling to me, if nothing else.

With that, we will submit the rest of our questions for the record.

Mrs. EMERSON. And we thank you so very much for being here today.

[The information follows:]

U.S. ELECTION ASSISTANCE COMMISSION
OFFICE OF THE INSPECTOR GENERAL
1201 NEW YORK AVENUE, NW - SUITE 300
WASHINGTON, D.C. 20005
202-566-3100

March 9, 2011

The Honorable Jo Ann Emerson — Via U.S. Mail and Electronic Mail
Chairwoman
House Committee on Appropriations
Subcommittee on Financial Services and
General Government
B300 Rayburn House Office Building
Washington, DC 20515

RE: Review of U.S. Election Assistance Commission's Procurement Process

Dear Chairwoman Emerson:

In a March 2, 2011 hearing before the U.S. House Committee on Appropriations, Subcommittee on Financial Services and General Government, you requested some information related to a future review of the U.S. Election Assistance Commission's (EAC) procurement process. This is a review that the Office of Inspector General (OIG) has been interested in conducting for some time. It has been listed on several of our work plans. However, due to budgetary constraints we have not been able to conduct this review.

We believe that the best use of resources would be for the OIG to contract with an independent auditing firm to conduct this audit. The audit should encompass a review of EAC credit card purchases, purchase orders, and contracts. The audit should examine the extent to which the EAC has used sole source and other than full and open competition. The audit should further examine the contract awards, administration, modification, and any subsequent work or contracts awarded to a prior vendor. The audit should also consider whether the EAC is using contractors to perform work that should be done by Federal employees. Last, the contract should examine the EAC's goals for contracting with small, disadvantaged firms and whether the EAC is meeting those goals.

We have not conducted an initial survey to identify the number and types of procurements that would be involved in the audit. We would anticipate that a sampling of the total procurements conducted by the EAC. Without a full understanding of the possible scope of the audit, it is impossible to provide an exact or tailored cost estimate for the audit. However, based upon the information discussed above, the OIG believes that it could procure a contract with an outside firm to conduct this audit for somewhere between $90,000 and $110,000. The administration and oversight of the contracted audit would be included in the OIG's then current salaries and expenses allocation.

We appreciate the opportunity to provide you with additional information concerning our plans to review the EAC's procurement process. If you have any questions or we can provide any additional information, please contact me at 202 566-3125.

Sincerely,

Curtis W. Crider
Inspector General

TUESDAY, MARCH 8, 2011.

SMALL BUSINESS ADMINISTRATION

WITNESS

KAREN G. MILLS, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION

Mrs. EMERSON. The subcommittee will come to order. Good afternoon to my colleagues, especially good afternoon to you, Administrator Mills, and welcome to our subcommittee. We appreciate your being here and greatly appreciate all the work you do on behalf of our small businesses around the country. We all know because of our districts—whether Joe's or Rodney's or mine—that small businesses are critical to improving the health of our economy. And with unemployment a wee bit better but still almost at 9 percent, job creation is the most important goal that we have.

America's small businesses account for half of the country's Gross Domestic Product, and we are responsible for creating 65 percent of net new jobs between 1993 and 2009. And I believe very strongly that the Federal government must find innovative ways to assist small business development and expansion. And I think you all are doing a good job.

And because of the critical role you play in assisting small businesses through capital—giving them opportunities to compete for government contracts and for all the work that you do with regard to technical assistance, I know that without SBA, an awful lot of businesses in my district would probably not even be there, so we are grateful to you.

The President's fiscal year 2012 budget request for the Small Business Administration totals $985 million, $161 million, or an approximately 20 percent increase over fiscal year 2010. This includes a $132 million increase in the 7(a) lending subsidy, and a $90 million increase in administration for the disaster loans account. And I am worried about flooding. Heaven knows we are going to have some real challenges with regard to the whole disaster loan account.

I do understand that carryover from prior year supplementals previously supported costs associated with administering the disaster loan account and that this funding has run out.

I would like to see the administration find better ways to use the SBA to provide small business assistance instead of burdening entrepreneurs with additional tax and regulatory hurdles. And I am also concerned that in implementing massive new regulations on the health care and financial industry, the administration is overregulating our small businesses and slowing their ability to expand operations and create new jobs.

With that being said, I am very interested and I know my colleagues are too in really listening to your ideas on how to stimulate job growth. I look forward to your testimony. I know you all are working tirelessly to help all American small businesses and we are grateful for your efforts.

Let me recognize our ranking member, Mr. Serrano, for his remarks and then we will go to you. Joe.

Mr. SERRANO. Could you do me a favor? Could you bang that gavel once?

No, no, no. Bang it. Elections have consequences for the chairwoman, and I want you to use that gavel with all your strength.

Mrs. EMERSON. I have been using it on the House floor quite a bit.

Mr. SERRANO. Yes, you have. If you have analyzed what I just said, in some weird way, it is a compliment.

Mrs. EMERSON. Well, I appreciate that. And it helps get rid of my frustrations, because I actually was thinking about who I was smashing.

Mr. SERRANO. Once I got the gavel I used it well.

Mrs. EMERSON. You did indeed, I agree.

Mr. SERRANO. If it comes back again, I will use it very hard.

Mrs. EMERSON. We will do our best to make sure that doesn't happen.

Mr. SERRANO. I am sure.

Mrs. EMERSON. As much as I love you.

Mr. SERRANO. You and a lot of other folks. Thank you and we welcome you, Ms. Mills, to this hearing today. Because of the crucial part that small businesses play in job creation in our continued economic recovery, the SBA has a very important role in promoting job growth. SBA facilitates small business development, training, technical assistance and company programs, government contracting programs and advocacy. The agency also helps businesses and homeowners affected by disasters through its disaster loan programs.

The agency's budget request for fiscal year 2012 is $985 million in new budget authority. And I look forward to discussing this request with you during our questions. I am disappointed, however, that once again, this budget request underfunds some small business assistance programs that specifically help low income populations.

For example, Microloan Technical Assistance, a program that assists our smallest business owners, would be cut by $9.2 million from fiscal year 2010.

Zero funding was requested for the Program for Investment on Micro Entrepreneurs, or PRIME. This program provides grants to help with training and technical assistance for disadvantaged business owners, particularly those in very low income areas. Particularly during difficult economic times these are not the programs we should be targeting for cuts.

I look forward to talking to you today about these programs and learning more about the progress you are making in some of your newer efforts. Again, we welcome you and we thank you for your service to this agency and to our country, thank you.

Mrs. EMERSON. Administrator Mills, please go ahead.

Ms. MILLS. Well, thank you very much, Chairwoman Emerson and Ranking Member Serrano and members of the committee. I am pleased to testify before you. Small businesses, as the chairwoman said, are the backbone of the economy, they create two out of every three jobs. And more than half of working Americans own or work for a small business. The SBA is a small agency, but we have a big mission. We put the maximum possible resources directly into the hands of small businesses, focusing on the 3 Cs, capital, counseling, contracting.

Last year we helped over 50,000 small businesses get the capital to grow and hire. We helped put about $100 billion in Federal contracts in the hands of small businesses, and we counseled more than a million small businesses across your districts and throughout the country.

We put these resources in their hands while providing taxpayers a big bang for their buck. For example after credit froze in 2008, the Recovery Act and the Small Business Johs Act supported more than $42 billion in SBA loans at a subsidy cost of $1.2 billion. Many small businesses suffered greatly from the recession. Our job is to support them as they grow and create jobs, and this job is not done.

The President's proposed fiscal year 2012 budget for the SBA of $985 million, will support up to $27 billion in loan guarantees, as well as many other tools and resources to help our small businesses across the country.

At the same time, this budget reflects a commitment to tighten our belts, to streamline our processes, and to eliminate duplication. This includes some of your ideas. For example, we looked hard at our technical assistance programs, and as a result, we do propose eliminating the PRIME program that the ranking member referenced.

With the work of our microlenders and some new efforts to recruit community-based lenders, we can continue to provide technical assistance just in a more cost effective way. In addition to the process reengineering, our disaster loan operations are now much more efficient. We can preserve our level of preparedness, with steady state core staff levels of 850, instead of 1,000, along with our 2,000 reservists.

The largest increase in our budget reflects the fact that we have reached the statutory limit of fees that we can assess. We request additional subsidy because losses, including those from loans approved when collateral such as real estate was inflated, have pushed up subsidy costs. We also request a legislative fix to return to near zero subsidy. We also request incremental increases for our new women's contracting program, and continued efforts to remove fraud, waste and abuse in contracting.

Overall, our priorities are twofold. We placed a focus on SBA programs that put money and support directly into the hands of small business owners in the places where they live. And we will continue to invest in oversight, to preserve the integrity of these programs, and to protect the interests of taxpayers.

I look forward to working with all of you, to continue to insure that small businesses are succeeding, because as you know, when they succeed, America succeeds.

Thank you very much, I would be happy to take your questions.

[The information follows:]

U.S SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

TESTIMONY OF KAREN G. MILLS
ADMINISTRATOR
U.S. SMALL BUSINESS ADMINISTRATION
BEFORE THE
SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT
HOUSE COMMITTEE ON APPROPRIATIONS
MARCH 8, 2011

Chairwoman Emerson, Ranking Member Serrano, and members of the Committee. I'm pleased to testify before you.

Small businesses are the backbone of our economy. They create nearly 2 of every 3 new private sector jobs. And more than half of working Americans either own or work for a small business.

The SBA is a small agency but we have a big mission. We put the maximum possible resources directly into the hands of small business, focusing on the three "Cs" of capital, contracts and counseling.

Last year, we helped over 50,000 small businesses get the capital to grow and hire; we helped put about $100 billion in federal contracts in the hands of small businesses; and, we counseled more than a million small businesses across your districts and throughout the country.

Over the past two years, we provided taxpayers with a big bang for their buck. One example: Since credit markets froze in 2008, we supported more than $42 billion in small business lending.[1] We still have work to do to help small businesses create the jobs we need, and the President's proposed FY12 budget for SBA is $985 million.

Many small businesses suffered greatly from the Recession. Our job to support them as they grow and create jobs is not done.

The President's proposed FY12 budget for SBA of $985 million will support up to $27 billion in loan guarantees as well as many other tools and resources to help them do just that.

[1] For more information about SBA's credit programs, see the 2012 Budget's Credit Supplement.

At the same time, this budget reflects a commitment to tighten our belts, streamline our processes, and eliminate duplication. This includes some of your ideas. For example, we looked hard at our technical assistance programs. As a result, we propose eliminating the PRIME program. With the work of our Microlenders and new efforts to recruit community-based lenders, we can continue to provide technical assistance in a more cost-effective way.

Also, we reduced the request to support Small Business Development Centers by $10 million. This was a tough choice, but we believe it is reasonable due to additional funding in the Small Business Jobs Act.

In addition, due to process reengineering, our disaster loan operations are now much more efficient. We can preserve our level of preparedness with a steady-state core staff level of 850 instead of 1,000, along with our 2,000 reservists.

The largest increase in this budget reflects that we have reached the statutory limit for fees that we can assess. We request additional subsidy because losses – including those from loans approved when collateral such as real estate was inflated – have pushed up subsidy costs. We will also request a legislative fix to reduce or eliminate the need for credit subsidy.

We also request a sustainable level of support for administrative costs in our disaster loan program, as well as incremental increases for the new women's contracting program and continued efforts to remove waste, fraud and abuse in contracting.

Overall, our priorities are twofold. We have placed a focus on SBA programs that put money and support directly into the hands of small business owners where they live. And, we will continue to invest in oversight to preserve the integrity of these programs and to protect the interest of taxpayers.

I look forward to working with all of you to continue to ensure that small businesses are succeeding. Because as you know, when they succeed, America succeeds.

SMALL BUSINESS ADMINISTRATION

Funding Highlights:

- Provides $985 million, a 45 percent decline from 2010 enacted funding, which included $962 million in supplemental appropriations. Excluding supplemental funding, the 2012 request is $161 million higher primarily due to increased estimated credit subsidy costs. Funding for administrative costs and Small Business Development Centers will go down as a result of fiscal restraints.
- Supports $27 billion in loan guarantees for small businesses to enable them to invest, expand, and create jobs.
- Promotes impact investment in economically distressed regions.
- Helps innovative small businesses obtain early-stage financing.
- Encourages business development and economic growth through funding for technical assistance, including competitive grants to develop business leaders in underserved markets and to help businesses benefit from regional economic strategies.
- Continues implementation of Small Business Jobs Act initiatives, promoting technical assistance and small business exporting.
- Provides long-term disaster recovery loans for homeowners, renters, and businesses of all sizes.
- Strengthens lender and procurement program oversight to protect taxpayer dollars.
- Upgrades the Agency's financial management systems to improve the financial integrity and efficiency of SBA credit programs.

Small businesses play a vital role in job creation, economic recovery, global competitiveness, and the long-term strength of the Nation. The Small Business Administration's (SBA) mission is to help Americans start, build, and grow businesses. To deliver on this promise, the Administration proposes $985 million, a substantial decline from 2010 enacted funding, which included significant supplemental appropriations for fee reductions and credit programs. Small business loan guarantees are funded in 2012 at historical fee and guarantee levels, but reflect higher estimated loss rates. As part of the Government-wide effort to reduce spending, funding for administrative costs and Small Business Development Centers will decrease.

Invests in America's Businesses to Foster Economic Growth and Competitiveness

Spurs Job Creation by Enhancing Small Business Access to Credit. Small businesses are the engine of economic growth and job creation. That is why the Administration is taking a series of steps to improve the access to capital for small businesses. First, the Administration supports $16.5 billion in 7(a) loan guarantees, which will help small businesses operate and expand. This includes an estimated $14.5 billion in term loans and $2 billion in revolving lines of credit; the latter are expected to support $48 billion in total economic activity through draws and repayments over the life of the guarantee. The Administration also supports $7.5 billion in guaranteed lending for commercial real estate development and heavy machinery purchases; $3 billion in Small Business Investment Company (SBIC) debentures to support new businesses and new jobs through early-stage and mezzanine small business financing; and $25 million in direct Microloans, for intermediaries to provide small loans to emerging entrepreneurs and other borrowers unable to receive credit elsewhere.

Promotes Impact Investment in Economically Distressed Regions, for Disadvantaged Groups, and in Sectors of National Significance. Beginning in 2012, SBA will be leveraging the SBIC debenture program to support $200 million annually over the next five years in impact investments that are "place-based" (located in or employing residents of economically distressed regions); "people-based" (owned or managed by women, veterans, or a member of a socially or economically disadvantaged group); or "sector-based" (sectors that have been identified as national priorities). Two other initiatives—the Small Loan Advantage and Community Advantage programs—will increase the number of SBA 7(a) loans going to small businesses and entrepreneurs in underserved communities.

Helps Innovative Small Businesses Obtain Early-Stage Financing. SBA will also create within the SBIC debenture program a new vehicle—the Innovation Fund—to address the capital gap many start-ups face between "angel investor" financing and later-stage venture capital financing. Over each of the next five years, up to $200 million in guarantees for matching funds will be available to investors aiming to support innovative companies seeking to ramp up their operations and create new jobs.

Helps Small Businesses Grow Smarter. Entrepreneurs can be found in every part of the Nation. However, some need assistance to develop their idea fully into a growing business and start hiring new employees. That is why the Administration includes $15 million for competitive technical assistance grants to support SBA's Emerging Leaders initiative and to enhance small business participation in regional economic clusters. The Emerging Leaders initiative provides intensive technical assistance to companies that have high growth potential and are located in distressed economic areas, such as inner cities and Native American communities, and connects them to regional business networks to accelerate economic and job growth. SBA will also promote small business participation in regional economic clusters by awarding competitive grants to facilitate greater coordination of resources such as business counseling, training, and mentor-protégé partnerships.

Fully Funds and Reforms Long-Term Disaster Recovery. The Administration supports $1.1 billion in direct loans, the normalized 10-year average, for homeowners and businesses whose property is damaged by natural disasters. The Administration also proposes $167 million for disaster-loan administrative expenses. SBA will streamline staffing and operations to use administrative funds in the most effective and cost-efficient manner, which is expected to provide savings relative to operating levels in recent years.

Improves Cost-Effectiveness

Prioritizes Resources by Reducing Overlapping Funding and Extending Tax Breaks. In 2012, small businesses will continue to benefit

from technical assistance funded by the Small Business Jobs Act, which for the 2011 and 2012 period provided $50 million to Small Business Development Centers (SBDCs) and $60 million for grants to States and localities to help small businesses export. Given the availability of these funds and fiscal constraints, the Budget proposes modest reductions in the level of additional SBDC funding requested for 2012. The Act also provided a variety of other credit program expansions and tax changes that are significantly benefiting small businesses, and the Administration proposes to permanently extend the Act's provision eliminating all capital gains taxes on investments in small business stock in order to enhance the flow of capital to small businesses.

Helps Make the Guaranteed Loan Program Self-Sufficient. Due to the economic downturn and higher defaults on prior loans, SBA's guaranteed loan programs are recording in 2011 a $3.7 billion increase in losses and subsidy costs on their outstanding loan portfolios, excluding interest, particularly on guarantees made between 2004 and 2008. To strengthen these programs' long-term economic foundation, the Administration will submit a legislative package to provide SBA the flexibility to adjust fees in these programs to enable them to be self-sustaining over time. These changes in the program's fee structure would become effective for loans originated in 2013.

Strengthens Core Agency Capabilities. The Administration provides the resources needed to upgrade the agency's financial management systems in order to improve the financial integrity and efficiency of its loan operations. SBA is also modifying its procurement strategy for the Loan Management and Accounting System to better ensure the system delivers results.

Small Business Administration
(In millions of dollars)

	Actual 2010	Estimate 2011	Estimate 2012
Spending			
Discretionary Budget Authority:			
Salaries and Expenses	434		427
Business Loans:			
Loan Subsidy	83		215
Loan Administration	153		148
Subtotal, Business Loans	236		363
Disaster Loans:			
Loan Subsidy	2		—
Loan Administration	76		167
Subtotal, Disaster Loans	78		167
Office of the Inspector General	16		18
Office of Advocacy	—		9
Surety Bond Revolving Fund	1		—
Unrequested Projects	59		—
Total, Discretionary budget authority	824	993	985

Small Business Administration—Continued
(in millions of dollars)

	Actual 2010	Estimate 2011	Estimate 2012
Memorandum:			
Budget authority from supplementals	962	—	—
Total, Discretionary outlays	1,453	1,504	1,212
Mandatory Outlays:			
Business Loan Subsidy Reestimates	4,472	4,530	—
Disaster Loan Subsidy Reestimates	211	192	—
Liquidating Credit Accounts	–8	–8	–7
Total, Mandatory outlays	4,675	4,714	–7
Total, Outlays	6,128	6,218	1,205
Credit activity			
Direct Loan Disbursements:			
Direct Disaster Loans	388	1,100	1,100
Direct Business Loans	32	37	33
Total, Direct loan disbursements	420	1,137	1,133
Guaranteed Loan Commitments:			
Guaranteed Business Loans	14,156	23,900	23,900
Guaranteed Disaster Loans	—	19	63
Total, Guaranteed loan commitments	14,156	23,919	23,963

Karen G. Mills, Administrator
U.S. Small Business Administration

Karen Gordon Mills was sworn in April 6, 2009, as the 23rd Administrator of the U.S. Small Business Administration. She leads a team of more than 2,000 employees whose mission is to help entrepreneurs and small business owners grow and create jobs by providing greater access to capital, counseling, and federal contracting opportunities. The SBA also provides loans to business owners, homeowners and renters affected by disaster.

Mills earned an A.B. in economics from Harvard University and an M.B.A. from Harvard Business School where she was a Baker Scholar. Since then, her career has involved counseling, managing, mentoring, and investing in businesses of all sizes across a number of U.S. states.

During the recession of the early 1990s, Mills helped several small manufacturers increase efficiency in order to improve their competitiveness and ultimately survive the downturn. This included producers of hardwood flooring, refrigerator motor manufacturers, plastic injection molding companies, and more. More recently, she worked in management consulting for businesses in sectors such as consumer products, food, textiles, and industrial components.

In 2007, she was appointed by Maine Gov. John Baldacci as chair of the state's Council on Competitiveness and the Economy, where she focused on attracting investment in rural and regional development initiatives. She also served on the Governor's Council for the Redevelopment of the Brunswick Naval Air Station.

She is a leading voice for American competitiveness and an expert on new approaches to business growth such as "regional innovation clusters." Before becoming Administrator, she worked to form a cluster of boatbuilders in Maine, helping them compete around the world by leveraging composite technologies at a local university.

Already, at the SBA, Mills' has helped strengthen SBA lending, increase small business' share of federal contracts, and reinvigorate the SBA's network of about 14,000 affiliated counselors.

She has also served as a member of the Council on Foreign Relations and has been vice chairman of the Harvard Overseers.

Mills and her husband, Barry Mills, president of Bowdoin College, live in Brunswick, Maine. They have three sons.

Mrs. EMERSON. Thank you, very, very, much. I will go ahead and start the questions, and welcome to Mr. Womack too.

As you have heard, as you have seen, at least with the continuing resolution that was passed a couple of weeks ago, the House majority is committed to reducing non-security discretionary spending to fiscal year 2008 levels. And for this subcommittee, that represents a 17 percent reduction. Though I will readily admit I am not sure that a reduction to 2008 levels is good for the SBA with employment at 8.9 percent, we are still asking agencies to tell us what it would look like to live at that 2008 level. So hypothetically, hopefully hypothetically, what is the impact of a 17 percent reduction to your agency's operations?

Ms. MILLS. Well, that would be a tremendous impact if we went back to 2008 levels. As you know, we are a small agency, and as I described, we have a big mission, and it is a most difficult time to this day because small businesses have not recovered completely from the recession.

So it would have an enormous impact. For instance, we would run out of money in our loan program. Because of the subsidy issues that I described, we would not be able to make loans after the money ran out, and that would curtail what has been a very, very effective program to provide access and opportunity to small businesses as the capital markets froze.

In addition, we would curtail the tremendous progress that we have been making, or reduce the level of the progress we have been making in curtailing fraud, waste and abuse. And finally, of great concern, is our preparedness would go back to Hurricane Katrina levels which is unacceptable for the level of preparedness that we need to support our small businesses and homeowners in times of distress and disaster.

Mrs. EMERSON. So——

Ms. MILLS. From the point of view of small business, it would be a real setback.

Mrs. EMERSON. And if you couldn't reduce the budget or we didn't feel that it was appropriate to reduce the budget by the 17 percent to go back to 2008 levels, the cuts that you all have self directed, do you think that you have gotten to the bare bones at this point in time, in order to fulfill your mission? We talk about the subsidy levels and that is why you have asked for an increase, et cetera. I mean, because if we can actually come up with a figure that works, I mean, we can sell it on our sides of the aisle. Joe has the luxury of—isn't that the luxury of supporting increases from 2011 levels?

Mr. SERRANO. I have the responsibility of not destroying government.

Mrs. EMERSON. Well, in this case we are leveraging for the private sector so this is kind of one of those in between agencies as far as I am concerned. I think 17 percent impacts your mission, I will readily admit that. My other colleagues may not agree, I think it does.

You know, I was at—on Friday, at a small business that is owned by a 23-year-old woman who started this clothing store in a place where there were no sort of fashions for the 25- to 40-year olds. She had this dream, 21 years old, she saved a lot of money,

then she was able to get some help through an SBA loan and cosigning. I think the grandparents may have cosigned.

However, she is making a lot of money, she is 23 years old, and a half, I think. And were it not for that SBA loan—I mean, it is remarkable, and I can't imagine being and being willing to take the risk, especially because she kind of started in a down economy, but by God, she has got it figured out. So I am obviously a huge fan. Nonetheless, we really have to be realistic. I am not going to make you answer that question.

But Bowles Simpson recommended lots of reductions for things like travel, and vehicles, and printing. Do you all think that you can make savings, at least in those types of categories? Does that impact your mission very much?

Ms. MILLS. Well, as you know we are a small agency and much of our activity happens on the ground helping small businesses one by one. You have described, I think, the great joy of this job, which is supporting entrepreneurs because it is the entrepreneurs and the small businesses that actually create the jobs.

When we have looked through our budget, we have submitted a budget that has difficult cuts in it for us, that streamlines operations, that eliminates duplication and that really tightens our belts. And we are trying to do that while preserving the two priorities. The priority is to get the money into the hands of the small businesses, through our system out where it is helping them, either as a loan or counseling or a government contract or disaster assistance. When we do spend money, we want to make sure that it is to oversee taxpayers interest in terms of oversight and eliminating fraud, waste and abuse.

Mrs. EMERSON. When your staff travels to visit with small businesses around, people who are trying to either expand their business and perhaps need an SBA loan guaranteed, for example, or something to just make the bank feel a little bit more comfortable and others. I mean, I have to believe that your staff gets faced with the same questions that we get faced with with regard to regulations and more and more government, not necessarily regulations through the SBA, but rather other types of policies, whether it is greenhouse gas emissions, financial regulatory reform, health care. And how does your Office of Advocacy help them, or does it, because I think that is what their mission is to navigate through endless regulations. How exactly does it work?

Ms. MILLS. Well, we share a goal, I think, that is very much a bipartisan goal, which is to reduce the regulatory burdens on small businesses. And that is part of the agency's goals and activities across the board and through our ombudsman activity, and also part of the Office of Advocacy which is our independent operation that is highly focused on that.

As you know, the President has issued a memorandum in January on regulatory flexibility, small business and job creation where he says that reinforcing the need for Federal agencies to consider ways to reduce, to reduce regulatory burdens on small business. And talks about requiring agencies to provide justifications when those flexibilities are not included in the proposed regulations.

So across the administration, the President has led the charge that we have long been fully committed to, which is to reduce the

unintended consequences of regulation on small business. We are active in a day-to-day manner, both through advocacy and our own internal ombudsman on that front.

Mrs. EMERSON. So how does that information get fed into like the Domestic Policy Council or people at the White House? Do you feed through OMB, for example? You have your SBA regional person for region 7, which I think is me. Anyway, that person is out among lots of different businesses, and they are talking and they are hearing, 75 percent of the people say this isn't going to work and this isn't going to work, or this really is going to make doing business far too expensive. So they feed that into you, somehow I am sure. But then how does that get fed into the White House decision-makers? Is it through OMB? I mean, I am just curious more than anything.

Ms. MILLS. Yes, it is through the OIRA function of OMB, and we have a series of ongoing roundtables conducted by our ombudsman and our regional network where we invite small businesses and talk about these regulatory issues on an ongoing basis. And we have just announced, an eight-city tour, I believe it is, on regulatory issues and barriers to entrepreneurs and high-growth businesses. And we kicked off the first one of those in Durham last week on Thursday.

Mrs. EMERSON. Well, hopefully I think you all have the appropriate sensitivity to all of this. I hope that it is appreciated and/or understood by the folks at the top who are making decisions like at OMB. I mean, because even when we were in charge of the White House, we were driven crazy by OMB.

Ms. MILLS. There is a top-level commitment behind this.

Mrs. EMERSON. Okay. I appreciate that. Joe.

Mr. SERRANO. Thank you so much. And you are right the minority party gives you—the status gives you the ability to say let's do this and let's do that, and you have to come up with the final decisions. But it is a joint thing, joint decision.

My concern is exactly as you said that there's a contradiction when you set out to cut, cut, cut, cut without analyzing. Maybe there isn't enough time to analyze as much as I want. Two things come to mind, when you say to the Small Business Administration, we are going to cut you 17 percent perhaps, if we do everything across the board, you devastate an agency which is then a contradiction to the majority party's and the minority party's claims that we want to help small business.

If they are overregulating, that is one issue. But to cut them where they can't help people help set up a small business and create jobs, that is a contradiction. There is something else that is happening in this Congress and has been happening for the last 10, 12 years, which is a dangerous thing for me to say. I hope it doesn't affect anybody on this panel, but there seems to be a movement in the country of electing people, and you take great pride in electing Members of Congress who have never held public office before, that is a great thing. I think that is a terrible thing.

I believe you were a mayor, right? We may nnt agree, Mr. Womack, on cuts exactly where they go. But when you tell me the Federal Government treats mayors this way or the Federal Government treats localities this way, I have to listen because you were

there. I was in the State legislature for 16 years, you were a mayor. We understand each other before we got here. Some folks who got here, with all due respect to them, in the last couple of months, have never served before and that is why we are different, and we are going to cut everything. Well, you just can't cut everything, you have to think, stop for a second. We are not going to cut everything. There are some places that we are just never going to touch.

I want to say something, I speak for myself, I don't speak for my party. I am a believer that if you get into a little debt because you are saving the people after Katrina and trying to put them back on their feet, so be it. If you have to get into a little debt to build the best school system in the world again, so be it. Do you have to get into debt looking for weapons of mass destruction that never existed? I am not sure. But certainly in supporting the troops, you get into debt, and so what? Some things you have to do.

So the word "debt" sounds horrible, but not all debt is bad. After all, we have to behave like the American people who balance their checkbook every month. Not true. They all have a mortgage or they have a car payment that they are going to pay for a long time. They are borrowing too. I am not suggesting that we continue to get into debt the way we have been, but I am suggesting that we can't just cut, cut, cut. And we certainly can't contradict ourselves. If we are going to create jobs, then you have to be supportive, your agency has to be supportive.

If it is about overregulating, I am open for discussion, but just cutting across the board and enjoying this statement that I never served in public office before, therefore I am the greatest. No, he is a better Congressman because he was a mayor, you know. And when you used to come here without public service before, you didn't brag about it, you just kind of kept that to yourself. Now it seems to be like a badge of honor. Well, I did 16 years of budgets in New York State and I think that helps me on this committee. That is my speech for the day. Now a question.

What are you seeing in terms of lending to small businesses? Has the Recovery Act and the extensions of its funding been effective in unfreezing the credit market for small businesses? And what do you think has been more helpful, the fee reductions or the guarantee increases?

Ms. MILLS. Well, thank you to this Congress and to this committee for its support in the timeframe where really all credit had frozen, October 2008. We were able to step up, thanks to the Recovery Act and the multiple extensions that you granted with $42 billion in money that went into the hands of small business. The subsidy cost on that was $1.2 billion. So a pretty good, as I said earlier, bang for the taxpayer's buck.

We were able to raise our guarantee to 90 percent and reduce or eliminate our fees. I spent a lot of time traveling all over the country and I asked that question many times, and I got both answers. To some, it was a 90-percent guarantee that allowed the bank to step up and take the risk because they only had to put up 10 percent of the capital and this was a business they wanted to fund. And other times it really was that people saw, well, there is an incentive here, and maybe I will invest in that next piece of equip-

ment and hire that next person, and maybe this is enough incentive to get that economy rolling. So both were very, very critical.

We had the largest quarter in SBA lending in the quarter ending in December. We did $11 billion in loans, and those were just critical in filling the capital gap. We now know that there is some recovery, but that there are still holes, there are still gaps that exist. One is in underserved areas, and the other is in smaller loans, and that is why we introduced our Small Loan Advantage program and our Community Advantage program, two things that operate within, without incremental funding, but they are targeted to fill the continued gaps, particularly in underserved markets where the access and opportunity is the last to return.

Mr. SERRANO. Now you said this was your largest quarter ever, or in the last year or so?

Ms. MILLS. Largest quarter ever.

Mr. SERRANO. Now we get unemployment numbers, we get economic recovery numbers, we get all those numbers. What do those numbers tell you if it was the best quarter that people feel free to set up a business to invest? What does it mean?

Ms. MILLS. We are seeing the rate of business formation and entrepreneurship go up. We know that some of the best businesses were actually started in recessions looking back. We see encouraging signs from our small businesses in that they are taking advantage of things like accelerated depreciation to buy that piece of equipment and hire someone, but they are not out of the woods yet. The economy is still fragile. Small businesses took a tremendous hit, and they still very much need to be supported with access to capital, which the capital markets are not fully functioning and not fully back beyond the SBA, the traditional capital banking markets.

And they need the opportunities to provide access to government contracting, and they very much need our counseling and advice because that shows that there are greater success rates when you have a long-term counselor and you hire more people.

Mr. SERRANO. May I ask one more question?

Mrs. EMERSON. Sure.

Mr. SERRANO. You are requesting a $161 million increase over the fiscal year 2010 level for the SBA and of this amount, $131.6 million, to a 7(a) loan program to cover subsidies which has not been the case in the past. Now in the past, as you know, it was zeroed out and then we would kind of force you guys to take the money in a way. What does this funding cover and why is it needed now? What is the difference this time? And how much of the regular 7(a) appropriation for fiscal year 2010, which was $80 million has been spent thus far?

Ms. MILLS. The request, the largest increases as I said in our budget, go to subsidy. And the reason is that we have fully used our fees and brought them to the fee caps. The subsidy rates are up because of losses that we are seeing from the 2005 to 2008 cohorts. In that time period, as you know, small business owners used their real estate as collateral, and their house or their building had inflated values in that time period, 2005 to 2008.

So as we look now, we see that those values are not there, and they are creating loss rates that have gone up as have rates for tra-

ditional lenders, our subsidy rates and our loss rates have gone up. Those subsidy rates calculations, when applied to the 2012 budget, require incremental funding that we cannot cover with our fees because we have maxed out to our statutory fee limits. We have asked for the ability to adjust fees and have flexibility in 2013, because we believe that if we can, we should move our loans to zero subsidy.

Mr. SERRANO. Thank you.

Mrs. EMERSON. Thank you, Joe. Mr. Alexander.

Mr. ALEXANDER. Thank you, Madam Chairman. Ms. Mills, it is good to see you. You mentioned something about preparedness program, and you mentioned something about Hurricane Katrina. Can you tell us what that means?

Ms. MILLS. I am sorry, I didn't quite hear the last part.

Mr. ALEXANDER. Preparedness program, you said something about it in relation to Hurricane Katrina, and you were hoping to do better than we were prepared during Hurricane Katrina.

Ms. MILLS. As you know, we have completely revamped our disaster loan program in the post-Katrina era to significantly elevate our state of readiness, and our commitment has been significant. In Hurricane Katrina era, we had 366 seats at our processing centers. And it took us 70 days to process loans.

Right now, we have 1,750 seats, and it takes us 7 to 10 days to process loans. We operate a new technology system that allows us to have 10,000 concurrent users on it versus 800 in the Katrina level. And we have 2,000 ready reservists, they are not on payroll, but they are on call. So actually, when we call them up, following a disaster, they will go from the ice storms in Maine, and then they will travel to the wildfires in California, and then the flooding in the Midwest, and then the tornados, and then the hurricane, and then they do it again. So our staffing levels fluctuate up and down depending on the need.

Our commitment is to maintain that level of preparedness. And what we have done is look for cost savings. In this budget, we deliver to you $8 million of cost savings by taking our steady state of readiness down to 850 permanent staffing or steady state staffing versus 1,000. And we have done that by process engineering and streamlining our centers, not by reducing our level of readiness.

Mr. ALEXANDER. Okay. In your opening statement, you said over the past 2 years we have provided taxpayers with a big bang for their buck. The Transportation Department argues that for every dollar spent, we benefit by $3. Can you compare what you mean by big bangs for their bucks compared to the Transportation Department?

Ms. MILLS. In the one example I gave there, the subsidy costs of our SBA loans was $1.2 billion, and the amount of money that actually went into people's hands, because we provide guarantees, was $42 billion. But this is true across our various programs. We have partnered with the private sector and others in our Small Business Development Centers, in our SBIC programs, so that we really try to give a lot of activity off of a smaller budget number.

Mr. ALEXANDER. Okay, out there in the public when some of the banks that we hear about who are denying loans, there is an ap-

peals process that one can go through. Do you all have a similar process? If a loan is denied, is there an appeals process?

Ms. MILLS. Yes, and we do review loans, multiple times. We have lots of ways that small businesses can get help. I will give you one statistic which is in our North Carolina center. We were able to take those who were denied loans, and we got 60 percent of them funding by working with them in counseling and on their business plan and then bringing them back and introducing them to banks who, you know, were interested in making loans in their particular area.

Mr. ALEXANDER. Thank you, Madam Chairman.

Mrs. EMERSON. Are you finished for this round?

Mr. ALEXANDER. I am.

Mrs. EMERSON. Mr. Womack.

Mr. WOMACK. Thank you, Madam Chairwoman. It is good to see you, Ms. Mills. I appreciate the work that your agency does and continues to do for small business and job creation. I just have a couple of questions, and then I have to step out; I have got to go to the floor here in just a minute.

But one of the things that the gentleman from across the way, Mr. Serrano, has indicated that I am a former mayor and a former small business man. So I think my background is pretty unique in terms that I have seen it from virtually every side.

I think I would look at it this way; one of the things that I have always been in favor of is the capacity to leverage public dollars, that too often we get caught up in the notion that we are going use someone else's money in total, and to try to accomplish some desired outcomes in small business or whatever the case is. I am huge on the leveraging piece of it.

In other words, I like to see more than one person, i.e. Our Federal Government, have skin in the game when we are talking about making major investments in small business. I certainly agree the facts speak for themselves, that our way out of this economic mess is through the creation of jobs in the private sector.

So what are you doing to encourage the leveraging of the support that comes through your agency in the public-private arena to ensure that the Federal Government's not absorbing all of its cost? Instead, that we have our stakeholders in the game? That is a big question, that is a broad subject area, so you can probably go a lot of different directions with it, but I am curious about your response.

Ms. MILLS. We share your objective of using public-private partnerships to get more leverage for the small businesses that are out there. And let me just give you a couple of examples. In our SBIC program, small business investment companies, they actually run at a zero subsidy level because we provide the debenture guarantees for other partners, and we are able to put billions of dollars out into small and growing businesses, all across the country and with zero subsidy cost.

We also have a program we call SCORE, and there we use private sector individuals, 12,000 of them, who are volunteer small business people who have had the experience of growing their own business. And they counsel, for free, small businesses that we put into their network.

A third quick example, we have just announced something called Startup America, which is going to be led in the public-private partnership by Steve Case, a fabulous entrepreneur who started AOL. And a number of companies have joined this public-private partnership to help in Entrepreneurial Mentor Corps and other activities which are going to grow our small high-growth businesses that are really one of the most important job creators for the country.

Mr. WOMACK. How active is your agency, say, in some of the business-directed institutions on campuses of higher education? How do you interact with different schools of business?

Ms. MILLS. We have multiple interactions with different schools of businesses. I was just informed this morning that we have a joint partnership with one of the top, top-tier business schools who is helping us establish an entrepreneurial center in partnership with our small business development center. So we do everything from work with them in our emerging leaders, entrepreneurship education program to our local guidance and counseling and advice.

Mr. WOMACK. It goes back to my question of leveraging, because I really think that all the major stakeholders—health care, education, higher education, government, business industry, I think, there are unlimited opportunities for us to work through a lot of those stakeholders in bringing formations of capital and expertise, counseling, et cetera, to the table. And I would like to see a lot more of that.

The last thing I want to ask, and this is as close to editorializing as the gentleman a few minutes ago was doing and issuing some opinions. You have an impressive background in consulting and management and helping small business. What are you hearing right now about what I believe is one of the single biggest barriers to the growth of jobs, particularly in the private sector, the overreach of our government into areas that just cause the potential entrepreneur to throw his hands up and say, it is just not worth it, it is just not cost effective.

It will cost me a lot more to do this than it is worth. What wonderful opportunities are we throwing away because we just live in such a terrible and inefficient, burdensome regulatory environment?

Ms. MILLS. Well, I thank you for the question and the kind comments. I did grow up in the world of small business, and we travel around the country and listen to small businesses all the time, talk about this issue of the unintended consequences of regulation. I will say I am very, very happy that across the administration in OMB and OIRA, and the President himself have made very strong statements in support of small business and making sure that they don't have unintended consequences from this excess regulation.

We have been proactive. We have our day-to-day operations and our ombudsmen and our advocacy. But we have been even more proactive in recent months by initiating an effort to go around the country and listening to small businesses in the high-growth entrepreneur area, talk about specific barriers that they have.

And it might be regulatory barriers, it might be can they get paid on time. But whatever those barriers are, this forum, which is under the Startup America Initiative, is explicitly designed to lis-

ten and then take action on those kinds of barriers and concerns. The goal is to help entrepreneurs, put some wind at their back, and let them do what they do best, which is grow their companies and create jobs.

Mr. WOMACK. I represent the third district of Arkansas, and once upon time back in the 1960s, there was a very small business, it started ironically enough, the first—and you know where I am going with this probably—the first store happened to be, Mr. Serrano, in Rogers, Arkansas. That is where the very first Wal-Mart store happened to be located. I can take you to the site just around the block from my city hall.

Mr. Walton is not here to confirm or deny this opinion that I will give, but it is in my strong opinion that that small business, which later would become one of America's most famous companies and certainly one the largest in the world, may not have ever survived a regulatory environment quite like we have right now. And if small business people are ever going to be able to live that American dream, I don't know how they survive. A lot of the things that the unfunded mandates and the demands that we are placing on small businesses.

And so with that said, my question for you would be when you make your travels and when you hear back from these organizations—these entrepreneurs—that your agency tries to help. And you hear, I am sure, of many horror stories about the problems associated with developing small business, up-start businesses undercapitalized in a regulatory environment like we are, do you have direct access to the President's ear? Do you—I know you have quoted the President as saying he wants to solve this regulatory burden that we have right now—but do you have direct access? Do you have his ear on these important matters?

Ms. MILLS. Well, first, I have to say that I appreciate your comments about the small businesses born in Arkansas. And I actually have traveled there quite a bit. I have been in Arkadelphia recently with all the loggers, I have been in Bald Knob, I have been in Heber Springs, and I have been in Searay, and really appreciate that we have fabulous small businesses throughout the State.

Mr. WOMACK. Well, if the gentlelady would yield, let me just say, since I mentioned Wal-Mart, let me just throw Tyson and J.B. Hunt Trucking, there are three major ones in my district, three big ones that I don't think would have survived the regulatory environment we are in today.

Ms. MILLS. But the answer to your question about the President is yes, I have had discussions about this with the President. I know he is committed. The memorandum that he issued on small business and regulation is a very strong statement to all agencies on exactly the issue that you described in support of making sure that they produce more flexibility for the smaller business who doesn't have the staff and the time and the money to really deal with those regulatory burdens. And while preserving the health and safety issues to make sure small businesses can also operate.

Mr. WOMACK. Did the Health Care Patient Protection Affordable Care—I never get that right.

Mrs. EMERSON. Patient Protection and Affordable Care Act.

Mr. WOMACK. Patient Protection, yes, thank you. Has that come up in your discussions with small business entrepreneurs?

Ms. MILLS. Yes, and I will say we have supported a very important amendment that I know is under discussion. We are very much in support of the repeal of the 1099 provision which does place an undue burden on small business.

Mr. WOMACK. But stop there?

Ms. MILLS. The other aspects actually provide great benefit to small businesses particularly in the tax credits that are available as we speak. The 2010 tax credits are available to potentially 4 million of the 6 million small businesses. And as I travel, I am seeing small businesses coming to us now for information because they are getting dollars back in their pocket and there is nothing a small business likes better than dollars in their pocket.

Mr. WOMACK. Thank you for your testimony. Madam Chairwoman, I yield back.

Mrs. EMERSON. Mr. Yoder.

Mr. YODER. Thank you, Madam Chair. I appreciate the opportunity to be here. And I, too, have to head to the floor shortly. So I will ask just a couple brief questions. I appreciate your service and appreciate your work here today. And I want to maybe follow up on the questions from my colleague from Arkansas.

Everyone, including yourself, spent a lot of time talking to small business owners. Our focus, I think, my focus and many of my colleagues, is to try to figure out how we get innovators and entrepreneurs back home, creating jobs and expending and growing. I mean, that is the key. We know that no matter how many dollars and trillions of stimulus dollars are spent in Washington or how many rules and regulations or how many new bureaucrats we hire, it is not going to help that American somewhere that has a dream to start a small business if they can't get off the ground and get moving.

So I hear a lot of same things probably my colleagues do. And I guess wanted to trail backward.

Mr. Womack was going here, and related to a word I didn't see, at least in your report, you might kind of discuss your feelings on this, and that is related to uncertainty. Almost every meeting I have been in with the small business, they have brought up the uncertainty in Federal policy uncertainty in tax policy, uncertainty in rules and regulations, inability to borrow money. So many things that are related to, what I believe are poor government policies that the instability and uncertainty that many of them either can't expand, or feel they shouldn't expand because of the risks that are involved.

And so I have been heading down the pathway, along with many others, trying to figure out how we create that stability and certainty for small business owners. And I note the discussion about regulations, and I note that your comments regarding the President's positions of trying to review some of those, but there is a mountain of rules and regulations heading to small business owners. I meet with community banks, and I meet with small business owners; they feel inundated.

And I don't know if this is what you are hearing when you go out and talk to them, but the third district of Kansas they feel

overwhelmed and inundated with so many new things coming their way. They are completely overwhelmed by what the health care bill may mean to their bottom line. I can't tell you the amount of small business owners I have talked to that have said, because of that bill, I am not going to hire anybody until I see what the impact is on our bottom line.

So I see a real bottle neck coming, not from a statement the President might make that we should go review these rules and regulations, but from all the rules and regulations coming from the health care bill, all the rules and regulations coming from the Dodd-Frank Act, all the rules and regulations that are still coming from EPA and OSHA and so many different organizations, that I can't tell you the amount of times I talked to a small business that feels overwhelmed. And they don't say, well, if you could give a little bit more money to the SBA, we would be back at it. They say stop, change the rules of the game. Stop sending so many rules and regulations our way. Let us create jobs.

And so I guess I really want to get at what the SBA is doing or how you are advocating, what is your position on that? Do you agree or do you think the rules and regulations are helpful to those innovators and entrepreneurs who are trying to get their businesses moving?

Ms. MILLS. Well, as you know, we do a tremendous amount of traveling around the country listening to small businesses as well in these roundtables. And explicitly in the roundtables that we have just announced, we are going to be asking entrepreneurs to come and talk about those specific regulations on which they have concerns. So when they talk about specific regulations, they mention 1099, which we have come out to ask for repeal. And when they talk about specific regulations, we have the ability with our ombudsman to go back to those issuing agencies and help work with those small business through them.

Overall, when small businesses talk about uncertainty, which they don't do in a generalized sense, they are referring to the uncertainty they see in the economic environment. Small businesses do feel that the recession is not over. They do feel that they want now to fulfill that next order. They do come to us for counseling and advice on what is available to them. And one of the things I would hope that we might be able to do to help your small businesses is to bring them into our counseling operations.

We have 900 small business development centers, we have 12,000 SCORE volunteers, and they have access to bring a small business owner to those things that will benefit them, whether it is a tax credit. We have 17 tax credits that have been enacted for small business. Now it is tax time, we need to make sure that those small businesses know what is possible for them. And then, I just wanted to mention that those services are free.

Mr. YODER. I appreciate you highlighting that. How many small businesses are there in the United States, do you have an idea?

Ms. MILLS. Yes, just under 30 million small businesses in the United States, of which 6 million have employees.

Mr. YODER. And how many small businesses have received services from the SBA in the last year?

Ms. MILLS. We have many, many ways that we deliver services, but some of the highlights are that we had 50,000 businesses that we gave capital to, and loan guarantees. There are about $100 billion of contracts that we put into their hands. I don't have the exact number of small businesses, and we counseled more than a million.

Mr. YODER. So 30 million small businesses, and you have counseled a million. How many do you think you could reasonably touch? So of all of our districts and all the small businesses that we have talked to who share with us maybe a little different perspective that you are sharing today, that the health care bill is making it difficult for them to feel like they should risk capital right now until they see how that all plays out.

The impact of the Dodd-Frank bill and its regulation of the small community banks and their impact and their ability to borrow money, that those things from the EPA and other organizations or other entities in Washington that are unpredictable that don't go through the democratic process, that are coming through the executive branch, those things, how many small businesses can you sit down with to allay those concerns so that all those things that are coming their way, and all that uncertainty that they talk to me about, how many of those folks can the SBA effectively resolve so they don't have the uncertainty anymore? And what do we do about the other 29 million?

Ms. MILLS. Well, we hope more and more of them will be able to. But I think if you want to help them with some of these issues, we can. And I would just put in a small plug for our redesigned Web site, sba.gov. And we have millions and millions of visitors to that Web site. We are helping everyday provide access and opportunity to things that small businesses need, and what we call the 3 Cs, capital, counseling, contracts, those we help in our disaster operations as well.

Mr. YODER. And then one small question and I have got to move here. But regarding trade, what do you do to help a small business owner in my district that might want to figure out if there are international partners they could trade with? Anything the SBA does or where would I direct a business that brings a question like that to me?

Ms. MILLS. I am sorry you have to go, because this could be a very long answer. We have an intensive program. One of the most important things we can do now is achieve the mission of the National Export Initiative, which is to double our exports over the next 5 years. Small businesses are 30 percent of exports, but they are the fastest growing element. And there are only 250,000 of those millions of small businesses that I described that actually export. And most of them, 60 percent of them, only export to 1 country.

So we are working on two things: We are working on bringing more into the funnel, and this is where there are lots of rules and learning curves on exports. So we have a whole set of how can you become an exporter tools on our Web site and in our district offices.

And if you bring them into us, have them registered at export.gov, and we will send them what the available online and in-person contact possibilities are, because it is our mission to help

them find a way to connect them to all the resources that might be available because that is how we are going to create jobs here at home.

Mr. YODER. Great. Thank you, Madam Chair. I yield back.

Mrs. EMERSON. Thank you, Mr. Yoder. Mr. Diaz-Balart.

Mr. DIAZ-BALART. Thank you, Madam Chairwoman. Madam Administrator, it is good to see you. By the way, I think of some those small business that export probably a lot of them are in south Florida I would imagine. A big chunk of those have to be in south Florida, because I run into them all the time. And I also must tell you that I have been involved a couple of times when people from your outfit have been out there, and you have got some good people that do a good job explaining some of the programs.

The questions that I have are a little bit more limited. And that is that a recent investigation by the GAO identified 14 companies that received, I believe it was $324 million in set-aside contracts through the 8(a) program for small and disadvantaged businesses.

The GAO director of Forensic Audit Investigative Services testified that officials of 13 of those firms, "Misrepresented their eligibility for the program to finally acquire or maintain set-aside status and obtain Federal contracts awarded with limited or no competition."

Now, GAO's investigation showed that the SBA staff allegedly responsible for assessing annually the firm eligibility allegedly allowed three firms to remain in the 8(a) program and receive contracts despite evidence—and they say clear evidence—provided by the company officials during that review period that show that they were no longer qualified. Here are the questions, if that is the case, why were those three firms allowed to remain in the program, first question?

Ms. MILLS. So I am glad that you brought up this issue, because we have a very terrific program. Probably the largest program for small business across government, is our government contracting program. And our goal is to make the goal, which is over $100 billion into the hands of small business. But in order to do that, the program must have integrity. And therefore, we went after fraud, waste and abuse in these programs. This is an issue that the GAO report and other reports had brought up. I believe the report you were referring was issued approximately a year ago.

We took this issue face on and we instituted a three-pronged strategy for getting rid of fraud, waste and abuse in these programs, making sure they bad integrity. The first part of it is effective certification, making sure that the program benefits are getting to the intended recipients. And this, I think, was one of the issues, flagged in that report. We have done a whole series of things across all programs, not just 8(a), to tighten certifications and to ensure that we are screening those potential program entrants.

The second is continued surveillance and monitoring, which is conducting increased exams. And the third is robust and timely enforcement.

To your question on enforcement, we have now quite a substantial record on prompt and proactive enforcement. Every single case

that has been in an IG report or a GAO report we can show you the follow-on activity and documentation.

We will respect due process. There is a due process activity that happens for each of these small businesses. But we will go after the bad actors, and we have now a very strong track record in this front.

Mr. DIAZ-BALART. Good. Now, let me ask you, obviously you have got the bad actors who, you know, who did a fraudulent application. Now, the GAO, I guess claimed that some on staff knew that there were some bad actors potentially that didn't qualify. Is there any disciplinary action to those, the people inside your organization who may have—I am not saying, you know, obviously willingly, that missed seeing this? I mean, you know, because disciplinary actions have to not only be for those that apply, which is a problem, but if there were those who saw it and either missed it or whatever. I mean, what action can be taken or has been taken internally about those individuals?

Ms. MILLS. I am not aware of any staff issues to this regard. In each of those cases, in every GAO report, there were follow-on activities. In addition, there is a new suspension and debarment task force throughout our agency, which has made even more robust activities around the suspensions. We have had over 100 suspensions, debarments and activities throughout our programs, and this is a great acceleration. We are serious about this. All of the staff has come forward and put tremendous effort into the more intensified certification activities, the continued surveillance activities and monitoring and the enforcement.

Mr. DIAZ-BALART. And I understand that. And I appreciate that. And I think it is important. And I commend you for, obviously, your passion on that, which is important, because as you said, without that integrity, obviously we are in serious deep trouble.

However, I just want to make sure that my point is clear, that obviously there is always two sides of this issue. There are two culprits. There is the one who applied and then there are those who may have not caught it when maybe they should have. And I am not saying that is the case. My understanding is that the GAO—and I may be wrong, talked about staff allowed three firms to remain in the program and received contract, despite, I guess, what they claim are clear evidence provided by company officials during the review that show they were not eligible. So I just want to make sure that it is—I commend you for your efforts, I do. And I just want to make sure though that one of the things that people get frustrated about, whether it is true or not by the way, is a lot of people claim or think, well, there are no consequences for those in government who may have either made the wrong choice or just didn't do an adequate job and that is really what I am going to as well, because you clearly answered one very well, but——

Ms. MILLS. Well, in this particular circumstance I would look to, also, the due process activity. And in terms of our personnel, our performance management standards have been augmented to be very clear about what is expected.

Mr. DIAZ-BALART. Good. And if you can keep us informed on just what those actions are and how you are doing that, because I understand that, I guess, are you asking for increased funding for 8(a)

program? I believe you were, or you are. And again, as you were stating before, and I agree with that, we have got to make sure that that integrity is there, particularly if you are going to be asking for any more money.

Ms. MILLS. Yes, we are asking for 24 more positions, largely around, 18 of them, around fraud, waste and abuse and enforcement in our contracting area; 10 for the implementation of the women's business rule.

Mr. DIAZ-BALART. What is that? I am sorry, the last one?

Ms. MILLS. The women business rule.

Mr. DIAZ-BALART. Okay.

Ms. MILLS. Which we just brought forth on February 4.

Mr. DIAZ-BALART. Okay. And lastly, I guess there was a little bit of conversation about the health care bill a little while ago, about, I am not going to ask you to—I am not going to put you on the spot on this. But you must have heard from some small businesses that have some concerns, right, about the health care bill and how it affects them. I mean, because you mentioned that obviously if you hear about specific regulations, and commend you for your support of the 1099 changes. But have you not heard any concerns about the health care bill, about particularly, for example, businesses because I get it all the time from a number of businesses.

I am just wondering if we just live in totally different worlds. Particularly those that are maybe 46 employees, about what happens when they reach 50. And have you, do you not get a lot of concerns about—you explained the positive things. But do you not get concerns from small businesses about the effect of the health care bill on their bottom line or on their future availability to grow, particularly if they are not at 50?

Ms. MILLS. Here is what I hear from small businesses. The number one concern of small business is access to affordable health care. It has been that in the NFIB survey since 1986, number one concern. And small businesses want to provide health care. The first thing that I have heard from them is that they are benefiting from this tax credit. Probably there are 6 million small businesses that have employees. We estimate that up to 4 million may potentially be eligible for this tax credit, which kicked in in the 2010 year.

So that is the first thing that they want to know is, can I get some, you know, money back on my health care, or might this make it affordable, because small businesses want to provide health care. They just can't get a quote. And that is where the second piece comes in. The second piece they ask about are the exchanges. Right now when small businesses want to get a rate quote, they have to call two or three or four brokers before they can get even someone to bid on their business. Small businesses pay 18 percent more for health care, just because they are small and they have a smaller pool. And if somebody gets sick their rates go up. These exchanges will pool those risks and they know that. And the next thing they said is when are they coming? How do I get more access to an affordable quote?

There is no mandate for small businesses who are over 50 to provide health care. There is no mandate in this. So they have not—when they look at the facts of what is in there and what their con-

cerns would be, they have not expressed concerns about those because there is no mandate.

Mr. DIAZ-BALART. So you are not hearing a lot of concern. I just want to make sure that I get this right. You are not hearing—I am sure you are hearing a lot of concerns about a lot of different things. You are not hearing a lot of concerns about the health care bill.

Ms. MILLS. I am hearing—and this is from, you know, small businesses that we go out to talk to about other things, credit. One of them said, you know, when I was able to now provide health care for my employees, that was the day that I considered my business a success.

Mr. DIAZ-BALART. I appreciate that and thank you for being here. Again, I am just wondering, because I do also meet with small businesses, maybe not as many as you meet with, but there seems to be a lot of concern about, as one of my colleagues said, about the uncertainty, if nothing else about the health care. But I am just surprised because I hear it all the time, unsolicited. I recently had meetings with, about, I don't know, 25 manufacturers, Madam Chairman, in my district, by the way, which I was even surprised existed that many in South Florida. And one of the issues that always comes up is concerns about that bill.

So I am just interested that I guess you haven't heard that. But that is interesting. Maybe it is just that they are talking to you and they are talking to me and they will say different things. But I clearly hear it a lot. Thank you so much for being here. Thank you, Madam Chairman.

Mrs. EMERSON. Of course, Mr. Diaz-Balart, she is the lender and they don't want to tell them too much, I mean, I am convinced of that because I hear it all the time too. It is just absolutely nonstop, nonstop.

Let me ask you a question. How does the SBA define a small business? Because we are always having all these arguments about what is a small business. And so, define a small business for me, number of employees.

Ms. MILLS. In the numbers that I quote when I say there are you know, so many small businesses, the general break-off is 500 employees or more. And that is done in the Office of Advocacy data. We actually have different definitions for every industry category because a manufacturer who has 100 people may be small, but an accounting firm that has 100 people might be big.

Mrs. EMERSON. And so, but it is generally employee-driven, number of employees driven as opposed to profit margin or anything like that?

Ms. MILLS. There are actually a number of complicated pieces to it. It can be also some things to do with revenues and net worth as well.

Mrs. EMERSON. It just occurs to me that since we are always fighting among ourselves, whether it is the House, the Senate, the executive branch, whomever, or even the private sector, and I used to work in small businesses myself and larger business, so I have kind of been all the way around. There was never a definite example. The number, you could pick any number to suit your purposes. And to me, that is kind of duplicitous.

I wish we could just arrive at a number, you know, whether it is more specific as you go down through categories or not. But that way, it is not always gotcha. But that is just a pet peeve of mine. Just a second on the business loans because we talked about why are the subsidy costs increasing, should fees be increased, et cetera. Tell me, what is the process that you use to monitor risk to make sure that your loans are going to creditworthy businesses?

Ms. MILLS. Well, we have a complicated and robust, you know, credit process driven largely through our private sector partners, the banks. And banks use their credit processes, and then we provide credit guarantee over them. But the first screen is the banks credit process. There are a number of factors that occur in that underwriting, and it is different by loan product. But I do know that we pay quite a bit of attention to loans and that the loans at issue, as I described earlier, are really coming from the 2005, 2006, 2007, even 2008 cohort where the market was very hot and banks were making lots and lots of loans. And now we see that our credit scores on our new loans since 2009 are actually higher. They are actually higher.

Mrs. EMERSON. Interesting. I am just really curious about that. But then again, the whole drop in real estate prices just had a huge impact on everything. All right. Now that I am very, very concerned about floods, and I live, my whole eastern border is the Mississippi River, so everything that flows from North Dakota, Minnesota on down goes right by our area. And I know that you have asked for $167 million for administrative costs, which is $90 million more than 2010. But you haven't requested a subsidy appropriation for fiscal year 2012. So I know that the administrative increase looks very large, but this is because—if I understand correctly, it is because the fiscal year 2010 appropriation was partially offset by carry-over funds appropriated for prior disasters.

And now there is no more carryover. We are done. So for fiscal year 2011, most of your disaster administration funds, or expenses rather, were funded through reprogramming of $126 million in disaster subsidy. So, what assumptions do you all use to arrive at the requested level of disaster loan administrative expenses? I mean, how do you determine what those are going to be?

Ms. MILLS. In 2012, our request reflects an $8 million savings in disaster loan administration, and this is the result of the re-engineering in our disaster loan centers that I described. So instead of operating at a steady state level, remember, our disasters staffing actually goes up and down, up and down. But on average, the steady state funding that we have been using is 1,000 people. And we are able to provide, by 2012, the same at this time of readiness with a steady state staffing of 850 people. And that is, you know, some efforts that we have done to streamline and re-engineer and improve our processing operation, that is a continuous process that we feel is our responsibility to pursue aggressively and to provide those savings in these tough fiscal times. We believe that we need to be at that level of readiness. We also have 2,000 ready reserve on top of that. So if something happens, we do have those staff that we can bring into the system. But the cost level that we are asking for is that. For subsidy level, we have no year money reserves that we are using.

Mrs. EMERSON. So what do the ready reserve people do on a day-to-day basis? Do they work in banks, or are they small business people, or who are these people?

Ms. MILLS. Well, they are all kinds of people actually. And I have met a number of them. I have been out in our disaster centers when we had the flooding in Nashville. I met a number of them. And when we went to the Gulf in the BP oil spill, a number of them came in. And they are from all walks of life, from all kinds of operations. And we have a system by which, you know, we ping them and say, are you ready, are you available. And they come back. So we try to keep a full complement available.

Mrs. EMERSON. That is interesting, and very nice to have those people who want to help. So what happens if we have a large disaster, say, another Nashville or heaven forbid, a Katrina-like episode? Do you have enough subsidy carryover to support the program level that you need to be able to respond to such a thing?

Ms. MILLS. We have built a substantial capability in the post Katrina era, in our physical activity. So as I said before, we went from 366 seats in the processing center. We have the people. We need someplace to put them. Now we can seat 1,750. We couldn't put them all on the computer system. We could only get 800 concurrent users. Now we can put 10,000 concurrent users in so we could even staff up more aggressively. And we maintain our ready reserve.

We have made an electronic loan application now so that 30 percent of our loans actually come in electronically. We were able, last year, to operate in over 40 regions concurrently because we stay for a bit of time so as we're finishing up, you know, the flooding, we are deploying down in the Gulf. And we can stay for up to 9 months. So we can service numbers of locations concurrently and/or a large location.

The other thing that we have done to prepare for a very, very serious disaster, besides simulating it, is we have engaged our full-time district staff members who do not operate on the disaster operations to be linked on the ground in cases such as Nashville or BP oil spill or any other large-scale disaster so that we have not only our disaster operating people, but we have our core SBA district office people coming to the assistance and lending their support, our SBDCs, our SCORE people, everybody is on the ground.

Mrs. EMERSON. So from the money standpoint, how much in disaster subsidy do you have in reserve?

Ms. MILLS. We can get you an answer to that. But we have a number of years of disaster subsidy in reserve.

Mrs. EMERSON. So presumably then, if, let's just say, you can get us the numbers and it amounts to 5 years or so, then could we possibly look to disaster loan subsidy funds to pay for the 2012 disaster administrative expenses if necessary?

Ms. MILLS. Well, the issue there is the level of preparedness and the level of risk that we want to take on. Our commitment has been to be prepared for intensive disasters, and that was the commitment we made after Hurricane Katrina. Nobody really knows what the future will bring in terms of hurricanes and earthquakes and other issues. And we have seen around the world that they do come. So we have a level of preparedness now that we think we

can handle it, and we want to make sure when we go into the field, that we also have the loan subsidy so that we can execute the loans.

Mrs. EMERSON. I would thank you and appreciate and thank you in advance for getting us those numbers if you could. One quick question, then I will turn it over to Mr. Serrano. Our current continuing resolution is set to expire, I guess, week after this. What day is today, the 8th? Okay. So 10 days. I don't think a shut down will occur, in spite of the hype.

I mean, hopefully we will be able to work out our differences and keep the government running. But do you all have a plan for operating during any kind of government shutdown? And if so, then, can you tell us just generally speaking what kind of activities and which personnel would be considered essential?

Ms. MILLS. Well, everyone is working very hard, I know, on averting a shutdown. The President has said, and we agree, that a shutdown would hurt the economy and would hurt small businesses. Since 1980, every agency has been required to have a plan that would go into effect in case of a shutdown. We are on an ongoing basis updating that plan. We are committed, I know across the bipartisan effort, to work on making sure there is funding for 2011. The activities that would or would not be shut down are actually governed by law. There are rules around it. There is one thing I can tell you, which is that our disaster operation will not be shut down. That is considered an essential operation and it would not be part of an appropriation.

Mrs. EMERSON. I appreciate that. I don't know that it is presumptuous for me to ask, but would it be possible to get a copy of your plan?

Ms. MILLS. Well, we are updating the plans on an ongoing basis, and at this moment, I know that things are so fluid that, you know, we are sort of in the continuous update mode.

Mrs. EMERSON. So would it be possible to get last week's plan?

Ms. MILLS. Well, we know——

Mrs. EMERSON. Just to give us a sense. I mean, it is not to give to the press. It is really for our own, for our own sense. All right. We can have further discussion on this. I will pass it to Mr. Serrano.

Mr. SERRANO. Thank you. Boy, you really want that plan, don't you?

Mrs. EMERSON. Yeah. I do.

Mr. SERRANO. So do I. Wouldn't it be nice if a government shutdown meant a real government shutdown like the war ended, like the troops would have to come home immediately.

Mrs. EMERSON. But you would be stuck here in Washington.

Mr. SERRANO. No. No. I could go for that. I could be supportive of a shutdown if all the troops just had to pack up and leave, the war is over. But something tells me that would continue. We would find money.

Let me ask you a question. The fiscal year 2012 budget calls for a reduction in the small business development centers, $10 million, and proposes to eliminate the prime technical assistance program. For micro loans, the budget proposes a cut citing the funding received in the recovery act. Can you explain your rationale for cut-

ting technical assistance to small businesses, both through micro loans, the prime program and the small business development centers, and how do you intend to serve small disadvantaged businesses without these resources?

Ms. MILLS. Well, as you know——

Mr. SERRANO. I mean, I must tell you that, anticipating what I think you knew, the cuts that would be proposed, why any agency is on their own cutting is beyond me. I know that sounds irresponsible, but if you knew what was coming, why would you propose any cuts?

Ms. MILLS. Well, as a part of being part of this fiscally responsible process, we all are tightening our belts. We are all streamlining our operations. And that really makes us make some really difficult choices, as you just pointed out. We have a program, as you described, prime, which gives technical assistance in communities that are involved with our micro loans. What we have done is try to look at places where we can streamline without losing the value of that technical assistance. So we have initiated a very strong overall activity around underserved markets. In it, we have made some changes to our loan programs and opened our 7(a) program to our micro lenders and CDFIs, (Community Development Financial Institutions that meet certain qualifications that will be responsible to our program). They provide technical assistance for those loans at their own cost.

What they want from us really is the availability of the loan subsidy, the loan guarantees. So we are looking at ways we can do what we do best, open more access and opportunity to the loan guarantees, and encourage our partners to provide the technical assistance which they do best. That set of activities, I think, will give a robust set of help to the small business because technical assistance is a critical part. And we are looking forward to working with our partners to boost their capability to give loans and then also to give that technical assistance from their capability.

The SBDCs you asked about are also very important partners to us. I just wanted to point out one piece, which is that half of the reduction in the SBDC funding does not relate to their base level. We have been able to reduce prior special purpose counseling grants, which takes account of about just over half of the proposed reduction.

Mr. SERRANO. Well, let me just, for the record, tell you that you mentioned the CDFIs. That is part of this subcommittee, and they are being devastated too, so you may not have the partner you think. But the part that confuses me, even after your explanation, is in answer to one of the early questions, you said that if there were a couple of shortcomings in the Agency, it was the inability to do more in low income communities.

So why would you voluntarily cut those programs that affect those communities? I know that I mix my questioning with an attempt at humor at times. I really think that Members of Congress sound too serious. We should be serious, but we don't have to sound serious all the time. But I am very serious when I tell you that all agencies should be aware that the plan here is to cut to the bone. So yes, it is important to be fiscally responsible, but don't give up the house before half the house is taken away from you.

Ms. MILLS. If I might clarify, I think what I was referring to is that the gaps in the market are in the area of underserved communities. The market has not come back to provide access and opportunity to those underserved communities. At the SBA we have actually intensified our efforts around the underserved market. We just actually announced a council that is going to be led by Cathy Hughes, a fabulous entrepreneur who founded Radio One. And we are working, across all of our programs to increase access and opportunity in the underserved markets because that is a really important role that we play and that the markets don't. So as we go forward, we have developed this program called community advantage. And this is going to bring the CDFIs into our activity as lenders in our traditional 7(a) product. This is something that they have been eager to do and asking for for quite a bit of time, and I think will help us get what we want, which is more points of access in these underserved communities with lenders who understand those small businesses.

I don't need to tell you that these are the people who hire in these communities. Across the board, our government contracting programs, our 8(a), our Hub Zone and other programs, our counseling operations also are going to be part of this underserved council and underserved effort that we have. Because the role of government, I think, is to provide access and opportunity. We at the SBA are three to five times more likely to make a loan to a minority-owned business or a woman-owned business than a conventional lender. So this is the place where we see our participation to be critical.

Mr. SERRANO. As an extension of that, how are we doing at meeting the contracting targets for women-owned businesses?

Ms. MILLS. Well, as I say to everybody, the goal is to make the goal. And we had a very good experience in the Recovery Act where we were able to exceed not only our 23 percent goal, we were over 30, but we made every single sub goal. In the past, we have not made our women's contracting goal and we have fallen short. And every percentage point you fall short in government contract is $4 billion that is not in the hands of that constituency. We have been able to implement, this year, the women's contracting rule. This was a rule that was passed in the year 2000, but was never implemented until we came on board and made it a priority.

And finally, through the efforts, fabulous efforts, of a whole set of committed people across the agency and outside and across government, that rule went live on February 4. There are, I can get you the number. It is more than 1,000 small businesses that have uploaded their data, certification data into our certification data bank, and we are hopeful and determined to make sure that this new tool allows us to make the goal.

Mr. SERRANO. Let me ask you something about these regional clusters. I know you received 173 applications and you funded 10. Can you tell us a little about the winning proposals and how you see this program evolving in the years ahead, especially this year?

Ms. MILLS. Well, as you said, this was a very highly competitive process. We had very high demand, huge demand from the small business community. And we were able to fund some really extraordinary initiatives. The closest example to where you are is the

Connecticut Hydrogen Fuel Cell Coalition, which includes New York, Connecticut, Massachusetts, Maine and others. In the Gulf Coast, for instance, a geospatial solutions innovation cluster. I was just in Northwest Ohio, in Cleveland, where Nortech won, which does flexible electronics. That is electronics that you can put on a piece of flexible material, so it has circuits, but it bends and you can put it anywhere, on a helmet, on anything.

We have a Carolina nuclear cluster. We have an agricultural cluster in California for agricultural innovation. We have a defense cluster. What these clusters do is they allow small businesses, who don't have the power individually, to access the resources that big business do. When they cluster together they can access university research, community college curriculum and that gives small businesses in these high growth sectors the ability to transform the region. They are what I call the link, to leverage and align money on a regional basis that create new economies, and therefore transform those economies, create jobs at a pretty good bang for the taxpayer buck.

Mr. SERRANO. I have one last question and then I will submit a couple for the record. How has the emerging leaders program been implemented so far? And again, sounding like a big spender, with $3 million requested, what is it that you do that would have an impact?

Ms. MILLS. Well, this program has an extraordinary impact. This is specialized training for entrepreneurs, largely in the inner city and underserved communities. We have expanded it to the Native American community with great success. And just a couple of statistics. We track and measure the metrics very heavily on this. Half of the participating businesses, after they went through this program, had an increase in revenues. They secured nearly $10 million in financing. They also secured nearly 500 Federal state and local contracts, which were over $100 million. And 60 percent of them have hired new workers.

So we know that this program creates the intended effect, which is to help entrepreneurs learn how to grow their businesses. And that we have an expanded list of cities where we are able to bring this program; it is proven, we have actually been running it for quite a bit of time. And we know that in each of these communities we can really build a new core of successful entrepreneurs.

Mr. SERRANO. Thank you. And actually, I stand corrected here. Myself. There is only one question I am submitting for the record.

Mrs. EMERSON. Perfect. So how would I become an emerging leader if I had a small business? How would I become part of that program? Just because it is fascinating to me so I would like to know how.

Ms. MILLS. Yes. I believe it is a competitive process. We run a curriculum-based program, so you come into a class with a cohort and that cohort is designed to work so there is thought placed on the different kinds of businesses to have together in that cohort. And the trainings are pretty intensive. I will say that we have had some good success also expanding this in the Native American community where there has been significant unemployment and we are doing it in Albuquerque. We are doing it in Phoenix, we are doing

it in Portland, Oregon, in California and Seattle and Oklahoma and Ohio and St. Louis actually.

Mrs. EMERSON. So if you are a small business person, or you own a small business, then you would actually make application.

Ms. MILLS. You would make application in one of the cities. We put out a call for applications.

Mrs. EMERSON. I see. Okay. So would that be advertised in the newspaper or does it go to local Chambers of Commerce? How do you put out a call? I mean, I am just curious since I don't have a small business myself.

Ms. MILLS. I will find out for you, but I would imagine it is all of those, yes.

Mrs. EMERSON. I would love to know because I certainly know a few people who could take advantage of that. But that is why I want you to come to the district so we can tell people about these good programs that you have.

So I recently read a rather scary report, and I am sure that Joe, if you read it too, you would think it was pretty scary, that the GAO did duplicative government programs. As a matter of fact, I was anticipating being, at least having several people yell at me about those sorts of things over the weekend, which surprisingly they didn't. So I was pleased about that on the one hand. But I did know that in economic development, in the economic development category, there are about 80 different programs at four agencies being investigated, with y'all included, I guess, to assess the potential overlap and to the extent to which agencies collaborate to achieve a common goal. And so since you mentioned in your testimony about your efforts to streamline processes and eliminate duplication, tell us how you actually coordinate the SBA's efforts with other economic development agencies to make sure that, number one, everybody knows the opportunities available from the SBA and perhaps other areas or other programs in the government to do economic development. And then, after you tell us that, tell me how do you actually ensure that Federal agencies aren't duplicating one another?

Ms. MILLS. As you know, we operate on the ground. And I will say, I think we have done a really extensive job at collaborating across agencies. The President said, no silos, and we have worked, particularly at the SBA, across numerous agencies to make sure that we are linked, leveraged and aligned and not duplicating effort. Let me just give you two examples, and I could actually give you many. But one is the Veterans Administration.

Early on, we did a collaboration with the Veterans Administration to make sure that every veteran service operation was also telling the veterans about our loan programs. We have special veterans loan programs and counseling operations and we wanted to make sure that they knew about the access to our programs. And we, on the other hand, became more educated as to what was available to veterans through traditional, avenues or at least how to integrate them back, and we have worked to make sure our Web sites are linked, that we have cross links. If you come on our Web site as a veteran you can get back to other VA programs. A second place that we have actually formalized an MOU, as well, is with Tom Vilsack and the Department of Agriculture.

We operate in rural areas and we operate in very close collaboration at our district office levels with the USDA operations, so that we can find out which loan program is right for a particular borrower. And we are always referring back and forth between our programs and their programs to make sure that we guide the small business to that which is right for them. We collaborate extensively across multiple agencies on exports. We coordinate with the Export Import hank. We have joint programs with them. We coordinate with Commerce on a daily basis, on all of these activities. And we coordinate as well in an interagency effort in clusters.

And as I said, I could go on. We are fortunate to represent small businesses and to be, I think, a powerful force now in making sure that those small businesses find their way to the resources that they need.

Mrs. EMERSON. So you had a very successful professional career in small businesses and sort of bringing innovation and the like. So taking off your SBA hat just for a second, and thinking about it from the perspective of an entrepreneur or someone who is helping entrepreneurs, what recommendation do you have to us as Members of Congress, how do we sort of figure out what is duplicative and what is not, and how do we best streamline it? I mean, obviously, y'all should be doing that at SBA, or SBA, you are not working there anymore, just temporarily here, while we're talking about this, so SBA, you know, has the expertise to do small business, anything with regard to small business. And you know, I don't know what other agency, if there are any, who do it. But I do know there are about, at least eight agencies that do renewable energy, including the USDA, I might add. How do we take this program and leverage off each other and streamline it, as opposed to having eight different sets of rules and regulations and therefore, we get nothing done.

So what do you recommend, how can you help us do our job better, having been in the arena yourself?

Ms. MILLS. Well, as you know, there are lots of different kinds of small businesses. And they have different kinds of needs. So Main Street small businesses, they need capital, contracting, counseling, but it is a different kind of capital perhaps than a high impact small business. So I think the first thing that we have thought about, I think quite effectively now, across the Federal Government is what are the needs for the high-growth, high-impact small business. And that is Startup America, the interagency effort around both removing barriers and providing the tools that a small business needs.

So I think the best place to see strong examples of effective elimination of duplication and even more than that, coordination of all the assets that are available, are in some of these interagency efforts, and in some of the electronic information one stops that we have been able to do. If you look on SBA.gov and business.gov, you will see that we leverage other agencies' activities in order to make sure that the small business gets an opportunity to navigate to what is right for them. And we can continue, we plan to continue to do that to make those pathways even more easy to find for small businesses.

Mrs. EMERSON. Are there other agencies that horn in on any of the work that you are doing?

Ms. MILLS. Well, we invite them in.

Mrs. EMERSON. That is different. That is not what I asked. I said, are their agencies who somehow try to get in and do your, do what do you? Because if there is, that is what we need to know because obviously, y'all have the expertise and perhaps other agencies, well, rural development may well actually be one that would horn in, or as you were saying, you should work actually more collaboratively I would think.

Ms. MILLS. We do not find extensive duplication in the respect that we operate on the ground and we tend to be the agency that lives on the ground, helping small businesses one by one by one by one. And I think we are able to bring a tremendous set of assets in the interagency activity, and our role is generally that we do a lot of the groundwork. We do the heavy lift in direct contact with the small business day by day, one by one. And I really have to just take the moment to commend our staff that does that on the ground. They have a real love of small business and that is how we help them.

Mrs. EMERSON. And I would attest to that, working, you know, my staff works extensively with your folks on the ground. But hopefully the other agencies with whom you collaborate will jump as fast as you do so that if there is a whole package and you are only doing part of it, they are doing their piece simultaneous to yours. And that would be my frustration.

Actually having worked in an administration many, many years ago, that was my frustration. It was because there was a lot of interagency work that had to be done and we did our part and the others didn't. I am not asking you to make a comment. But that is a very frustrating reality sometimes of unwieldy government. I have got a bunch of questions that I want to actually, and I also have one from Mr. Walden of Oregon who has asked me to submit a question for him, which I am happy to do. There are things that I want to, questions about 504 loan refinancing, particularly since you all are not actually asking for any subsidy costs, but is there something that we ought to know about in case something happens?

Might there be a cost associated with those 504 loan refinancings? These are the types of questions that we are going to submit. And if we could get an answer back. Some of these are pretty critical. If we could get an answer back within 10 days I would be very grateful. We will rank them many. And Joe, you want an answer back quickly too?

Mr. SERRANO. Yes, to my one solitary question. I do have a question for you. Do you think the Senate is a duplication of the House? Because that would solve a lot of our problems.

Mrs. EMERSON. Well, on the one hand it could solve some problems. On the other hand, sometimes the Senate is able to act—well, they frustrate me a great deal because it takes so long to do things. Sometimes they can, perhaps, bring a little balance.

Mr. SERRANO. Madam Chair. I am joking. I expect them to save us from H.R. 1.

Mrs. EMERSON. I guess that is what I was trying to say in a more diplomatic way, given the fact that this is all on record.

Mr. SERRANO. Listen we have been doing stand up here at times and it is all on TV too.

Mrs. EMERSON. All right. We won't keep you any longer. Thank you. Thanks so very much for all you do.

Mr. SERRANO. Thank you for your service.

Mrs. EMERSON. Thank you for all you do and all that your staff does. You all really are the front lines and we need to keep you in the business of doing just that.

Mr. SERRANO. And you know my mantra, don't forget the territories.

[The information follows:]

The Small Business Administration's Answers to
QFRs submitted by
Financial Services and General Government Subcommittee
Regarding
Hearing on the Small Business Administration FY 2012 Budget

Questions for the Record Submitted by Chairwoman Jo Ann Emerson

DISASTER LOAN PROGRAM

The fiscal year 2012 budget request for the Disaster program includes $167 million for administrative costs which is an increase of $90 million over fiscal year 2010. You haven't requested a subsidy appropriation for fiscal year 2012. While the administrative increase looks very large, I understand this is because the fiscal year 2010 appropriation was partially offset by carryover funds appropriated for prior disasters and that all of this carryover has been expended. For fiscal year 2011, much of your Disaster administration expenses were funded through a reprogramming of $126 million in Disaster subsidy.

Do you have enough subsidy carry-over to support the program level that SBA needs to be able to respond to a large disaster?

It is estimated that SBA will carry over $539 million in disaster subsidy from FY 2011 into FY 2012. This amount of carryover is more than sufficient to cover the estimated subsidy usage of $135 million in FY 2012 which is based on an estimated ten year average program of $1.1 billion based upon "normalized" activity adjusted for inflation.

How much in Disaster subsidy do you have in reserve and how many years of reserve does that equate to?

It is estimated that the disaster subsidy carry over into FY 2012 from FY 2013 will total $414 million. This amount of subsidy equates to a reserve of 3 years assuming an estimated ten year average program of $1.1 billion based upon "normalized" activity adjusted for inflation.

What are your thoughts on looking to the Disaster loan subsidy funds to pay for fiscal year 2012 Disaster admin expenses?

The President's FY 2012 Congressional request does not propose a reprogramming of disaster loan subsidy funds to pay for FY 2012 disaster administrative expenses.

LOAN MANAGEMENT AND ACCOUNTING SYSTEMS

SBA launched a multi-year, $250 million project to create a loan management and accounting system in 2006 to upgrade your outdated IT systems that track tens of billions of dollars in outstanding loans. After much time and cost overrun, I understand that you have halted that plan and have taken a much more incremental approach to addressing these critical IT upgrades. The President's budget requests $14.2 million for this purpose in fiscal year 2012.

What assurance can you give that the project is being properly managed moving forward, is on time, within budget and meeting stakeholder expectations?

There have not been any cost overruns on the SBA's planned projects to upgrade the Loan Management and Accounting Systems (LMAS). The SBA modified its LMAS strategy in order to address its business needs faster and at lower cost with less risk than a traditional long-term, high-cost IT system replacement. Specifically, this strategy achieves more than $113 million in cost-savings and an estimated delivery timeframe of 30 months rather than the nine years initially scheduled.

SBA is confident that this approach will keep the project on time and within budget. Instead of treating LMAS as a single large project whose success or failure depends on a final delivery that is far in the future, the SBA divided the LMAS program into smaller, separately funded projects intended to provide meaningful deliverables and decision points. This approach enables the SBA to adjust project plans in "real-time" and to identify and implement corrective actions, as needed. Additionally, this strategy provides flexibility to incorporate lessons learned, changing circumstances, and funding levels.

Stakeholders have been engaged in defining the incremental improvement projects, which have been prioritized to deliver necessary improvements earlier than had been anticipated under the original LMAS project. A comprehensive communications plan that keeps stakeholders informed and involved in the projects improves accountability for project delivery times and product quality

What activities and upgrades will these resources be used for?

The FY 2012 funding request includes the following projects:

- Accelerate the migration of user interfaces from the legacy platform (Unisys) to the Agency's current application infrastructure (i.e. ColdFusion / Java / Oracle), including additional electronic loan application capability
- Port the batch COBOL systems from the legacy platform (Unisys) to a more up-to-date and platform independent COBOL environment
- Migrate the Agency's legacy Sybase systems to the Agency's current database infrastructure (i.e. Oracle)
- Analyze remaining issues and develop plans to prioritize additional projects to address the Agency's most important business needs.

NEW PROGRAMS SMALL BUSINESS INTERMEDIARY LENDING PILOT PROGRAM

You've proposed funding for a number of new initiatives, while at the same time decrease funding for programs that have a proven track record of helping disadvantaged small businesses (like Small Business Development Centers) and keep many others at flat funding.

Under the proposed Small Business Intermediary Lending Pilot Program 20 intermediaries will be loaned $1 million each to make loans of up to $200 thousand to small businesses. The intermediaries will not have to repay these loans for a period of two years and then the interest payment is one percent. Basically, this program could wind up making loans to exactly 100 businesses (with each intermediary making $200 thousand loans to five businesses) and my understanding is that the purpose of this program is to alleviate the lack of credit availability to small businesses? With some 2B million small businesses, is this a good use of resources?

The Intermediary Lending Pilot (ILP) Program was authorized by the Small Business Jobs Act of 2010 ("Jobs Act"), which was signed by President Obama on September 27, 2010. The Jobs Act directs SBA to establish a program that will provide direct loans of up to $1 million to eligible intermediaries that will use those funds to make loans of up to $200,000 to startup, newly established and growing small businesses.

The SBA will make ILP loans to no more than 20 non-profit lending intermediaries per year. In order to maximize the impact of this program, however, SBA has proposed draft regulations that will require intermediaries to re-lend their SBA funding rather than allow it to lie dormant. Based on similar programs at other federal agencies, as well as discussions with potential participants, we expect that each dollar will be loaned out approximately 2.5 times; therefore, we expect that the program will support significantly more than 100 loans.

The Jobs Act also provided direct appropriations for the program in FY 2011 and FY 2012. SBA believes the program offers an additional point of access to capital for small businesses and entrepreneurs, but will monitor program performance before deciding whether to request appropriations for the program in FY 2013.

The budget proposes to reduce the Small Business Development Center program from $112 million to $103 million and eliminate the Drug Free Workplace program. Why are these reductions proposed and how will they impact small businesses?

Considering the current budgetary environment, SBA has had to take a serious look at our budget and make some tough decisions. The Agency has reviewed all of the agency's non-credit programs in order to ensure that budget reductions are implemented in an appropriate and equitable manner.

It is important to stress that the SBDC program is a fundamental part of the Agency's portfolio as it is on the front line of small business counseling.

Furthermore, SBA is mitigating the effects of reductions in the SBDC program by using the $50M in additional grant funding provided by the Small Business Jobs Act.

The Drug Free Workplace program had uncertain impact and we believe is duplicative of programs carried out by other federal agencies and private sector organizations. SBA is still working with ONDCP to provide support for its efforts/website.

REGIONAL INNOVATION CLUSTERS

In fiscal year 2010, SBA received $10 million to develop regional innovation clusters and the fiscal year 2012 request includes $12 million to expand the existing cluster program. I understand the idea behind a cluster is to establish partnerships between entrepreneurial education programs, industry and training programs to all work collaboratively on a common roadmap to improve a region's economy.

How many jobs have been created to date as a result of this program?

Results from cluster work are typically viewed over long-term periods. We are tracking certain metrics in the short-term and others in the long-term. We will have data on the number of jobs created at the end of the fiscal year. Once the data has been collected the Agency will be able to brief the committee.

Looking at the budget request, it's difficult to say whether those clusters would have formed without any assistance or whether the clusters will continue to exist with or without assistance.

Do communities really need the Federal government to give them money in order to collaborate?

One of the criteria of our clusters initiative was that applicants already be existing clusters. SBA funds are used to augment the small business capacity of these existing clusters.

504 LOAN REFINANCING

I understand that the economic downturn and the subsequent decline in the value of real estate has had a significant, negative impact on many small businesses with mortgages maturing in the next few years. Even small businesses that are doing well and making their payments on time could face foreclosure because of the difficulties in refinancing and restructuring their mortgage debt. You just launched a new initiative last month which will allow small businesses to use a version of SBA's 504 loan program, which traditionally serves small businesses requiring brick and mortar financing, to refinance their mortgage debt.

Can you tell me a little more about this program and how you expect it to work?

The Small Business Jobs Act authorized SBA to approve up to $15 billion in loans for refinancing projects under the 504 loan program over the next two years: $7.5 billion in each 2011 and 2012. The program will require no subsidy as it will be funded through additional fees to borrowers. SBA estimates the new program could help as many as 20,000 businesses.

Debt refinanced under the 504 loan program will be structured as a standard 504 loan: typically 50 percent of the loan is provided by a commercial lender, up to 40 percent is provided by an SBA-approved Certified Development Company (CDC) with funds provided by an SBA-guaranteed debenture, and the remaining 10 percent or more is contributed by the borrower in equity.

Is this program only eligible for small businesses with existing 504 loans or are other small businesses also able to take advantage of this program?

Government-backed loans or 504 third-party loans are not eligible for refinancing under this program.

How has the response been so for to this new program?

SBA began accepting applications on February 28, 2011. It traditionally takes several weeks for new loan programs to see significant lending volume. Industry interest in the program has been high. The trade association for SBA CDC lenders, NADCO, held a web-based seminar in early March that attracted over 2,500 participants—by far the largest training ever held by the organization.

SMALL BUSINESS INVESTMENT COMPANY

To become licensed as a SBIC, an applicant must go through a two phase licensing process. Currently it is taking almost 6 months for SBA to begin the review of the application. Is a 6-month delay reasonable?

Our goal is to complete the initial review within 8 weeks of receipt of an accurately completed Management Assessment Questionnaire (MAQ). With the increased interest in the program, a large number of MAQ's were received within a short period of time, thus creating an instant backlog. We are addressing this backlog by reassigning resources from other areas.

What is the SBA doing to increase the efficiency of the licensing process to address the many new investment funds which are currently interested in the program and applying for a license?

We are now offering a weekly "pre-screening" call for potential applicants that would like an opportunity to speak with our Program Development staff about their qualifications prior to filing a MAQ. In addition, we are using the time after a green light letter has been issued, and prior to receipt of the application to conduct further analysis on the prospective fund.

On January 31st the Administration announced as part of the Startup America Initiative that the SBA will create within the SBIC debenture program a new vehicle – the Innovation Fund – to address the capital gap in the market for early stage investing. How will the Innovation Fund be paid for?

Using existing authority, with no new cost to the taxpayers, the SBA will commit $1B over five years to early-stage funds.

Will it operate at zero subsidy?

Yes, it will operate at zero subsidy.

Will the licensing standards be lower?

No. Licensing standards will not be lower.

What safeguards does SBA have in place to ensure that the Impact Investment Fund will not lower the standard for existing SBIC funds?

Impact fund managers will apply for an SBIC license and up to two tiers of SBA leverage according to the standard requirements of the SBIC program.

SMALL BUSINESS SET-ASIDE

The SBA administers the small business set aside program which ensures that small business lumber mills will be able to buy a fair proportion of the timber sold by federal agencies – mainly the forest service and the Bureau of Land Management (BLM). This program has enobled small business mills to survive in small rural communities.

Recently this program has seen its already small staff reduced further. The program is down to only three field representatives to cover the entire country. There is no longer any field representative in Portland, Oregon, even though Oregon has the largest concentration of federal timber sale programs. The SBA hos eliminated the central director for the program in the national office. We are told that these staff cuts have hurt communication between the SBA and small business mills it is obligated to help.

How is the SBA coordinating with the forest service and BLM?

What are the SBA's plans for communications with small business mills to ensure that they will be able to buy a fair proportion of the timber sold by federal agencies?

How does the SBA plan to address staffing of field representatives and headquarter positions for this program?

The program has had staff reductions due to employee retirements. The Industrial Specialist (Forestry) position in Atlanta (which was vacant before the Portland position) was filled last fiscal year. While we have not filled the position in Portland, we are providing coverage and support using the Industrial Specialist (Forestry) in Seattle.

Recently the SBA HQ Senior Timber Program representative briefed the Under Secretary (Forestry) at the USDA on several issues impacting timber sales, the "Stewardship Timber Sales Program", and "Appraising set-aside sales to the nearest small business mill".

Part of the normal SBA Industrial Specialist (Forestry) duties is to review Forest Service timbers sales, and when small business set-aside sale are warranted, the SBA representative consults with the small business timber community prior to the offering of the sale. Recently the SBA provided consultation to the small business industry on the recent re-computation of small business timber purchase shares (percentages) that will be in effect for the next 5 years. With the current SBA Timber Program staff, we are providing coverage for all of the 148 Market Areas (Forest Service and Bureau of Land Management) , and we coordinate our efforts with each of the Forest Service Regions through their Regional Timber Staff Officers.

SBA has established a headquarters Senior Representative for the Timber Program who is responsible for the day-to-day operations of this National Program and the point-of-contact to the Department of Agriculture, U. S. Forest Service, Bureau of Land Management, Department of the Interior, and the Fish and Wildlife Service (and any other Federal agencies who sell timber on Federal lands) on all issues involving this Program.. The current timber staff is providing coverage for all areas of the program.

Questions for the Record Submitted by Ranking Member Serrano

COMMUNITY ADVANTAGE PROGRAM

The budget proposes that the Community Express program transform into the new Community Advantage Program, which opens up funding to CDFIs and CDCs.

Q. *Please explain how you are changing the old Community Express program and when you expect to be reaching out to CDFIs to make the transition.*

The Community Advantage pilot program makes SBA's traditional 7(a) loan program available to 'mission-based' financial institutions it was not previously open to, including Community Development Financial Institutions (CDFIs). These organizations have a strong track record of lending in underserved communities. Community Advantage will increase the number of places small business owners can go to get an SBA loan, while also ensuring that those borrowers who need it have access to technical assistance and counseling to help better ensure their success.

SBA began accepting applications from organizations interested in participating in Community Advantage on February 15, 2011, and a number of CDFIs have already applied. (The first Community Advantage lender, a CDFI, was admitted to the program on March 16.) In addition, SBA has conducted a number of working sessions with CDFI leadership to discuss the transition, and plans to continue its outreach efforts.

Questions for the Record Submitted by Congresswoman Lee

7(a) COMMUNITY ADVANTAGE

Many Members are committed to maximizing the impact of SBA programs in their local communities.

How is the new Community Advantage program different from Community Express?

Community Advantage was designed around several elements that will allow SBA to avoid the performance issues exhibited in Community Express. First, the Advantage processing method requires documentation and underwriting that, while streamlined from our typical 7(a) loan process, is more detailed than that typically used by Community Express lenders.

Second, the mission-focused lenders participating in Community Advantage have a proven track record of success in underserved communities, including providing quality technical assistance and counseling that borrowers sometimes need to help better ensure that they succeed.

How can the SBA help Members of Congress and community groups in their local Districts inform their local small businesses about new opportunities that the Community Advantage program might provide?

SBA is always interested in working with Members of Congress to promote SBA programs, including Community Advantage. The agency has District Offices in every state that regularly conduct outreach events to encourage lenders to participate in SBA lending; these offices welcome the support of Members or their staffs.

8(a) PROGRAM

I believe that it provides critical business development assistance, management and technical assistance, access to capital and other forms of financial assistance and provides disadvantaged small businesses access to sole source and limited competition Federal contract opportunities.

Given how critical a role that the 8(a) program plays I am concerned about exactly how the new regulations will be implemented and carried forward in the coming years.

The new 8(a) Business Development (BD) program regulations became effective on March 14, 2011. These regulations are now the governing guidance followed by SBA Field and headquarters personnel in the administration of the program. To ensure effective implementation of the changes reflected in these new regulations and improved program administration, SBA will provide training to its 8(a) BD workforce in April and June of 2011. Additionally, to compliment this training and to ensure ongoing consistent application of the regulations, SBA will revise its internal operating procedures manual which will provide the necessary guidance and direction to assist its 8(a) BD workforce in carrying out their day-to-day program administration responsibilities.

What plans does the SBA have in place to ensure the rapid and fair adoption of the new regulations?

As noted above, the new 8(a) Business Development program regulations became effective on March 14, 2011 and are the current governing guidance for the administration of the program. Also as previously noted, SBA will train its 8(a) BD workforce in April and June, 2011, and will revise its internal operating procedures manual, as appropriate.

Is it possible for you to give the subcommittee a sense of the impact of the regulatory changes on the small businesses that qualify for the program?

These regulations are intended to ensure that the benefits of the 8(a) BD program flow to the intended individuals. The impact of these changes on eligible small businesses is varied. While strengthening some program participation requirements, the regulations also enhance business development opportunities. Notable impacts include closing loopholes that have had the unintended consequence of allowing large businesses to inappropriately receive program benefit; ensuring that 8(a) firms that enter into joint venture agreements or Mentor-Protégé Agreements receive the intended benefits of these relationships; and, recognizing the growth in the size of Federal contracts by increasing the levels required for competition in the program and the need for greater personal capital to help sustain business operations.

Has the SBA improved or enhanced data collection around the 8(a) program in the last year?

We have made enhancements to our internal data collections systems as this as an ongoing priority for the SBA as it continues to identify continuous improvement opportunities.

How can members work with the SBA to ensure that businesses in their home Districts are informed and have access to the necessary technical assistance that may be available surrounding the changes to the 8(a) program?

The SBA delivers its programs through its 68 District Offices (at least one in each State) and its extensive network of resources partners (e.g., Small Business Development Centers, SCORE, and Women Business Centers). The SBA District Offices serve as a conduit for the services provided by our resource partners and are the key point of contact for member constituents to learn more about SBA programs and the many training and management and technical assistance opportunities that are available.

Will there be any training or technical assistance available for local small businesses?

As noted before, training and management and technical assistance will be available for all local small businesses through SBA's District Offices and its network of resource partners.

INTERACTION WITH THE NEW OFFICES OF MINORITY AND WOMEN INCLUSION

As the new Offices of Minority and Women Inclusion begin their work across the financial services agencies, will the SBA support their work and share their expertise on how to maximize the impact of Minority and Women Inclusion?

SBA is committed to fostering the development of all small businesses. Minority and women owned companies continue to be some of the fastest growing components of our economy. The Agency is committed to helping those companies succeed.

Will the SBA have a role in establishing best practices for how regulated financial services sector companies do more to ensure fair and equal opportunities for Minorities and women?

SBA is a vocal advocate of minority and women owned small businesses. Expanding opportunities for these companies is fundamental to SBA's mission.

DIVERSITY GOALS IN PRIME CONTRACTS / IMPACT ON SMALL BUSINESS GOALS

Currently diversity and inclusiveness goals in subcontracting that are included in contracting proposals tie any included bonus structure or threat of liquidated damages only to an overall goal of meeting a small business sub contracting opportunity target.

Setting goals that fail to tie financial consequences to meeting minority owned, veteran owned, women owned, or historically disadvantaged businesses in separate and discreet categories allows true diversity targets to go unnoticed and unfulfilled with little or no consequence on the prime contractors.

What can the SBA do to promulgate more effective diversity goals in contracts and apply more refined and disaggregated small business goals in future contracting proposals?

SBA is committed to implementing and running the small business contracting programs designed and put into statute by Congress. This includes providing increased contracting opportunities to small businesses, including those owned by underserved communities. Additionally, this includes working towards achieving the statutorily mandated goals of 23% of eligible federal contracting dollars being awarded to small businesses, as well as the following socio-economic goals for prime and subcontractors:

- 5% for small disadvantaged businesses
- 5% for women-owned small businesses
- 3% for Historically Underutilized Business Zone businesses
- 3% for service-disabled veteran-owned small businesses

Questions for the Record Submitted by Congressman Bonner

INDEFINITE DELIVERY, INDEFINITE QUANTITY

Many experienced acquisition managers question the adverse impact Indefinite Delivery, Indefinite Quantity (IDIQ) contracts have on small businesses -- as the smaller specialized businesses cannot compete with larger firms to be awarded IDIQs and are thus forced to partner with a larger firm to deliver their goods and services when the agency elects to procure using an IDIQ. How does the SBA assess the 'value added' of IDIQ contracts and the impact of IDIQs on small businesses?

IDIQ contracts, also referred to as task and delivery order contracts, allow agencies to award an umbrella contract for a range of products and services and place orders for work as needs arise. They are used when a federal agency cannot predetermine the precise quantities of products or services that will be required over a fixed period of time. Agencies often make multiple awards under the umbrella contract and conduct streamlined competitions among the contract holders before placing orders. Multiple award IDIQ contracts have become increasingly popular over the past 15 years, as have the Federal Supply Schedule contracts managed by the General Services Administration (GSA) (which is a form of a multiple award contract) because all of these vehicles allow agencies to use competition simply and quickly to keep pace with mission demands.

With proper agency leadership, management attention, and guidance, agencies can use IDIQ contracts both to tap into the creativity, innovation and technical expertise that small businesses offer and save resources. There are many examples of agencies combining the benefits of streamlined order competition under multiple award IDIQ contracts with access to a cadre of prequalified small businesses to support ongoing needs for goods and services. The Small Business Alliant contracts managed by GSA are just one example. That said, opportunities for small businesses are being lost because policies and practices regarding the application of set-asides to placing orders under multiple award IDIQ contracts has been unclear.

The President's Interagency Task Force on Small Business Contracting (created in April 2010) recommended that government-wide acquisition policies and regulations be updated to provide clear guidance on when and how set-asides and related tools can be used on multiple award IDIQ contracts to increase opportunities for small businesses. On September 17, 2010, the President signed into law the Small Business Jobs Act. Section 1331 of that Act, when it is implemented in regulation, will give contracting officers the ability to use set asides on multiple award contracts. SBA is working closely with the Office of Federal Procurement Policy and the acquisition community to ensure regulations and policies related to IDIQ contracts appropriately balance the need for efficiency with the need to maximize opportunities for small businesses.

What is the estimated 'pass through' cost of customized & specialized products and services delivered by small businesses through IDIQs and subcontracts that could be directly contracted with the small businesses?

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) revised the Federal Acquisition Regulation (FAR) to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, to minimize excessive pass-through charges by contractors from subcontractors, or from lower tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (i.e., pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value.

The data required to estimate the 'pass through' cost is not collected or maintained by the Government in the contract award data repository, FPDS-NG. In addition, this type of data is not reported by large businesses as part of their subcontracting reporting requirements for their prime federal contracts in eSRS.

What percentage of business would go to small businesses if the government acquisition agents were to directly contract work which is now a 'pass through' to larger firms?

It is not possible to "extract" data relative to what small businesses can supply if those products/services were broken out from a large business prime contractor since that data is not readily available from either federal contract reporting systems or from large business federal prime contractors. Further, FPDS-NG, the repository for federal contract awards does not capture whether a small or large business is the manufacturer or non-manufacturer of the items furnished to the Government. However, the Small Business Administration continues to work in collaboration with the Office of Federal Procurement Policy to ensure there are increased opportunities for small business contracting and to remove barriers to entry for small businesses.

In the professional sports, construction, film and several other complex industries, producers contract directly with specialized firms to deliver specialized sub-systems and services -- and hire an expert small management firm to direct and coordinate the joint efforts of these firms working in concert toward delivering a common complex system. Does the SBA see value in this 'professional team consortium' approach -- and how would the SBA propose establishing 'pilot' programs to prototype and assess the value of this approach across government acquisition programs in the other departments and agencies?

This type of approach described in the question is already in use within the Government, where a prime contractor (large or small) coordinates the delivery of supplies or the performance of services for multiple vendors.

The recommendations that came out of the President's Small Business Task Force as well as the passage of the Small Business Jobs Act has certainly brought to bear the need to focus efforts on maximizing opportunities for small businesses in the federal marketplace. Once regulations are in-place, our continued oversight of agencies achievements in reaching and achieving their small business goals will continue to allow small businesses to increase their footprint in the federal arena.

Two significant events took place in 2010 to increase the number and amount of federal contracts awarded to small businesses. The first was on April 10, 2010 when the President issued his Memorandum on the Interagency Task Force on Federal Contracting Opportunities for Small Business (Task Force). The purpose of the Task Force was to ensure that small businesses, including women-owned, minorities, socially and economically disadvantaged individuals, and service-disabled veterans, have fair access to Federal Government contracting. The Task Force was co-chaired the Secretary of Commerce, the Director of the Office of management and Budget and the Administrator of the Small Business Administration. With the help of our major buying agencies, who were represented by officials from both the acquisition and small business offices in those agencies, the Task Force developed a set of recommendations to clarify small business contracting policies, enhance training of the acquisition workforce on small business issues, and improve the use of technology. Several of the Task Force's recommendations dovetail with ongoing efforts to increase interest in federal marketplace and the potential for competition. For example, all agencies are working to improve their outreach efforts and increase small business awareness and interest in agency contracts that may fit their capabilities. As an additional step, the Administration recently launched the Small Business Central Event Listing on FedBizOpps, where small businesses can search for information on upcoming agency matchmaking, business development and training events. This tool will help small businesses more easily navigate the federal marketplace and participate in more agency competitions.

The second event was on Sept. 27, 2010 when President Obama signed into law the Small Business Jobs Act, the most significant piece of small business legislation in over a

decade. The Small Business Jobs Act contained 19 provisions that will help small businesses compete more effectively for federal contracts and subcontracts. Highlights of the contracting-related provisions of the Act include:

1) Equal treatment across federal contracting programs. The law reaffirmed "parity" among federal small-business contracting programs. When awarding contracts that are set-aside for small businesses, contracting officers are free to choose among businesses owned by women and service-disabled veterans, as well as businesses participating in HUBZone and 8(a) programs;

2) More opportunities for small businesses. The law eliminates the "Competitiveness Demonstration" program, which limited opportunities for small contractors in 11 industries where they excel, such as construction, landscaping and pest control. This will build on the $24 billion small businesses won in these industries in Fiscal Year 2009 (effective January 31, 2011)

3) Focus on unbundling contracts. The law makes it harder for agencies to "bundle" contracts, a practice that makes it more difficult for small businesses to compete

4) Combating fraud, waste and abuse. The law establishes a legal standing of "presumption of loss" when a business misrepresents its ownership status or size in winning a government contract. This allows a federal agency to claim a loss on the purchase, enabling those agencies, including the Department of Justice, to vigorously pursue fraudulent firms

5) Subcontracting accountability. The law holds large prime contractors more accountable to their own subcontracting plans by requiring written justification when plans aren't met and when small business subcontractors aren't paid on time. This helps eliminate "bait-and-switch" tactics that occur when large primes – after winning the prime contract – don't follow through with their own plans to give subcontracts to small businesses.

SBA is in the process of working with the Office of Federal Procurement Policy and its agency colleagues to implement both the recommendations of the Task Force and the provisions of the Small Business Jobs Act of 2010.

Are the quotas for small-business set-asides realistic? If not -- why not?

We believe the goals set forth in the Small Business Act to build the capacity of our nation's small business contractors (which Congress appropriately labeled as goals, and not quotas) are attainable and this Administration is taking significant steps to help the government meet the goal of awarding 23% of federal contracting dollars to small businesses, including:

- 5% for small disadvantaged businesses
- 5% for women-owned small businesses
- 3% for Historically Underutilized Business Zone businesses
- 3% for service-disabled veteran-owned small businesses

An indicator of whether this is an appropriate goal is the historical small business utilization that agencies report into the Federal Procurement Data System. In fiscal year 2008, 21.5% of eligible federal contracting dollars was awarded to small businesses and in fiscal year 2009, that number grew to 21.9%. The fiscal year 2010 numbers are in the process of being finalized and are expected to be over 22%.

What additional support does the Congress need to give the SBA to expand the scope and amount of government program work being done by small businesses?

SBA continues to work collaboratively with Congress to provide updates on changes and improvements to our programs, as well as share ways to increase federal contracting opportunities for small businesses. Additionally, SBA's budget proposal outlines and provides rationale for the resources, funding and support required to provide small businesses opportunities to participate in the federal procurement process, including additional funding to combat fraud, waste and abuse and to effectively run the new Women-Owned Small Business Federal Contract program.

Can you detail the administration's position regarding ensuring adequate funding for all HUB Zones?

SBA has outlined the necessary funding and resources, as well as the rationale, to operate the HUBZone program in its Congressional Budget Justification.

Most contracting officers seem to have their own list of 8 (a) eligible companies and many small businesses have difficulty making inroads to utilized these set asides. What recommendations do you have for new small business owners, who are 8 (a) eligible, for getting a consideration by contracting officers?

SBA is committed to ensuring the benefits of the 8(a) Business Development program flow to eligible recipients. The 8(a) program offers participants many benefits including federal contracting opportunities and technical assistance.. To successfully leverage the benefits of the program, participants should work closely with their local SBA District Office. Through the local District Office, participants can gain access to the many resources available to assist them in their efforts to successfully compete in the federal marketplace, such as gaining introduction to federal contracting officials and Agency program managers; receiving assistance through Procurement Technical Assistance Centers (PTACs); participating in Federal Contract Fairs; receiving direct assistance from SBA's Procurement Center Representatives; and receiving training and assistance through SBA's 7(j) Management and Technical Assistance program.

THURSDAY, MARCH 31, 2011.

CONSUMER PRODUCT SAFETY COMMISSION

WITNESSES

INEZ MOORE TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

ANNE NORTHUP, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

Mrs. EMERSON. This hearing will come to order. I want to wish everybody happy opening day of baseball. Go Cards. Joe.

Mr. SERRANO. It is opening day because the Yankees are playing.

Mrs. EMERSON. And who are the Yankees playing today?

Mr. SERRANO. The Yankees are playing the Tigers. And we are going for number 28. That is arrogance, is it not? If I was not a Yankee fan I would be upset that they can buy every player in the world.

Ms. EMERSON. So now we are trying to find out if I have a Cardinals cap here, and we are going to decorate the dais, do you have one in your office, Steve? Not yet.

Mr. WOMACK. All my Cardinals caps are soiled with sweat and grease.

Mr. SERRANO. You realize the Tea Party is outside listening to all of this, right?

Mrs. EMERSON. All right, anyway, I guess we will get serious. I am hoping that the Yankees and the Cardinals win today, in fairness. And I want to welcome our witnesses, Chairman Tenenbaum and Commissioner Northup. Thanks for being here and testifying on the Consumer Product Safety Commission's fiscal 2012 budget request. You all at the CPSC have the daunting task of overseeing tens of thousands of consumer products. These products are used by all of us daily. It is important that the CPSC lives up to its mission of protecting consumers from unsafe products while at the same time not promulgating rules that are unnecessarily onerous for American businesses and manufacturers.

Of particular interest to me is the Commission's effective and efficient use of its resources. As you know very well, the current spending levels are unsustainable. There has been much interest, and there has been concern expressed to me by many people, about your product complaint database, so I am interested in hearing both of our witnesses' thoughts on that, and particularly because I tried using it myself yesterday, just to see how easy it was to work. But then I realized I did not have a complaint, and I could not submit things that were not true. I have concerns with its tangible impact on dangerous products, and perhaps some of the unintended consequences. I do want to get into that because I did go on it and saw how it worked, and I looked through and saw some

of the complaints that had been made, most of which seemed quite legitimate to me.

But on the other hand I do want to explore further problems that could arise. It just worries me about over-regulating business in a very fragile economy. Certainly we do not want higher prices for consumers, but nor do we want American businesses to close or not even try to grow due to regulations that make it too hard for them to comply. In addition, I do have concerns about the amount of taxpayer money that is going into this database. Hopefully we will discuss this, because as you remember, during the debate on HR–1, there was an overwhelming vote to not fund the consumer complaint database. I suspect that this is not going to be the last we hear about it from colleagues, and perhaps we can work together on trying to figure out how to best make people feel comfortable about it, or changes that need to be made. I want to thank you all so very much, and look forward to your testimony. I want to recognize my very good friend and Yankees patron, Mr. Serrano.

Mr. SERRANO. I wish I was a Yankees patron. I cannot even afford the tickets now.

Ms. EMERSON. How much are the tickets?

Mr. SERRANO. Top ticket to Yankees Stadium is $1,250.

Mrs. EMERSON. To go to a game? Who would spend that kind of money?

Mr. SERRANO. It was built with Wall Street in mind, but that is another story. That was before the crash. Do not get me going. Thank you, Madam Chair, I too would like to welcome Inez Tenenbaum, the Chairwoman of the Consumer Product Safety Commission, and Commissioner Anne Northup, a colleague is always a colleague, to this hearing of the Financial Services and General Government Subcommittee. This agency has a vital role to play in all of our lives, as it is responsible for making sure that the products we use every day are safe. For fiscal year 2012, the budget request for the Consumer Product Safety Commission is $122 million. Your agency has important and ongoing responsibilities in making sure that hazardous products are recalled, imported products are safe, and that our children are protected from dangerous toys and other baby products.

I am particularly interested in learning more about your ongoing efforts to implement the Consumer Product Safety Improvement Act of 2008. I am also pleased that you have launched your new Consumer Products Safety Information Database, which will give consumers an important tool as they use or purchase new products. Finally, I look forward to discussing your efforts to address safety issues with respect to imported products. We must make sure that we continue to provide for a strong Consumer Products Safety Commission, and I am hopeful that today's hearing will give us an opportunity to learn more about your ongoing programs and the progress that you are making in some of your newer initiatives.

Again, we welcome you. And we have a delicate balance, here. And that is that it is obvious that there will be some serious cuts across the board in this year's budget, and in future budgets. That is the mood in many places, and that is certainly the mood in the House. Our challenge is to make sure that as we apply these cuts, especially in this agency, that they are done in a way where we do

not hurt the effort that we should be making on behalf of the American people. Our Chairwoman said we have to be careful that we do not over-regulate. I agree with that. But my statement is we have to be careful that we do not under-protect the American consumer. And there is the balance. Do not over-regulate, do not under-protect. If we can strike that balance, the American people will be well-served. Thank you.

Mrs. EMERSON. Thanks, Mr. Serrano. Chairman Tenenbaum, we will recognize you for your opening statement. If you would not mind keeping it to five minutes, it gives us more time for questions. Thanks.

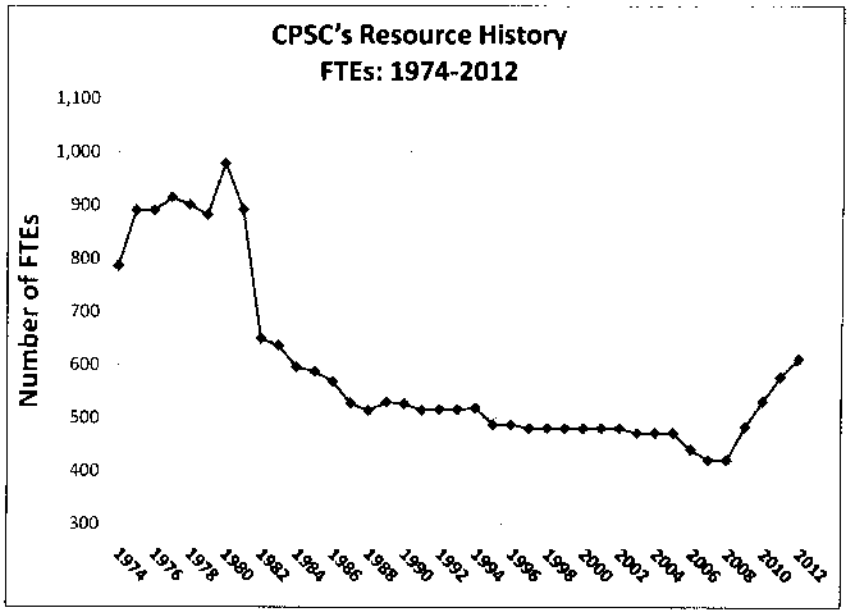
Ms. TENENBAUM. Good morning, Chairwoman Emerson, Ranking Member Serrano, and members of the committee. I am pleased to be here today to update the subcommittee on the positive changes we have made at the agency. Since my last appearance before the subcommittee a year ago, I have focused on three key objectives. First, I have worked diligently to implement the Consumer Product Safety Improvement Act, the CPSIA, and used that Act's new authorities in a manner that is both highly protective of consumers, and fair to industry stakeholders. On March 11, we officially launched our new publicly available Consumer Product Safety Information Database. The database, now available at saferproducts.gov, will empower consumers with information, allowing them to quickly determine which products they already own, or are considering purchasing, are associated with safety hazards or recalls. Second, I have focused on changing the CPSC's internal processes, so that the agency is more proactive and more capable of addressing safety challenges presented by thousands of types of consumer products imported from around the world.

In the last year, the Commission has unanimously adopted a five-year strategic plan that establishes a plan to move CPSC closer to becoming the global leader in consumer products safety. We have established a new office of education, global outreach, and small business ombudsman that has already begun to provide outreach to small businesses and crafters. And we have embarked on a substantial upgrade of our information-technology system, which has formed the backbone of our database, and our new cpsc.gov homepage. Third, I have focused on proactive prevention of consumer harms, identifying emerging hazards and keeping those products out of the stream of commerce. We have taken a number of steps to increase our surveillance of potentially harmful consumer goods by signing several information-sharing agreements with customs and border protection, and increasing our physical presence at the ports-of-entry. The Commission's Safe Sleep team has also made great strides to rid the marketplace of dangerous cribs, usher in a new generation of safer cribs, and educate parents about the importance of maintaining a safe sleep environment for infants and toddlers. A key component of this was the mandatory crib safety standards, which was unanimously adopted by the Commission. In addition, the Commission's staff has already worked very hard to address new hazards, such as the potential use of toxic metals in children's products, and the Commission's continuing efforts to provide information and outreach to homeowners impacted by problem-drywall.

Overall, I am extremely proud of the Commission's talented staff, and the work they do every day to create a safer consumer product marketplace for all Americans. Our proposed fiscal year 2012 budget reflects these priorities, and will give the Commission the staffing and resources it needs to respond to new hazards and keep consumers safe. In fiscal year 1980, the commission had about 100 full-time employees, and an inflation-adjusted budget of over 150 million. By 2007, the commission had fallen to 385 full-time employees and was barely able to fulfill its core mission. Full-time staff now stands at approximately 550 employees. As noted earlier, these resources allow us to staff several ports-of-entry, and leverage cooperation and information sharing with CBP to keep dangerous products out of the country, staff our new lab facility, scheduled to open in May, and test potentially dangerous products, and allow us to respond more rapidly to emerging hazards like toxic metals and problem-drywall. I am highly cognizant of the desire for fiscal restraint that has been expressed by the administration, the Congress, and the American people. Yet I believe that CPSC is, dollar-for-dollar, a great investment to the taxpaying public. There are, however, several areas of critical need that the Commission must address in fiscal year 2012 to maintain our forward progress. Accordingly, the fiscal year 2012 CPSC budget requests $122 million; a slight increase from the $118.2 million funding level the Commission is currently operating under the continuing resolution, and the $118.6 million request for fiscal year 2011.

If enacted, this level would allow the agency to hire an additional 34 full-time employees to fill areas of critical need, such as rapid review of incident reports, and increased defect investigations. These resources will allow us to continue our rebuilding efforts, improve outreach to consumers, and most importantly, prevent injuries and save lives. Madam Chairman, Ranking Member Serrano, Mr. Womack, thank you for inviting me today to provide testimony before the Subcommittee, and for your support of the CPSC. And I would like to share with you a reflection of the statement, a chart that reflects the CPSC resource history from 1974 to 2012.

[The information follows:]


CPSC's Resource History
FTEs: 1974-2012
Number of FTEs
1,100
1,000
900
800
700
600
500
400
300
1974
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
2010
2012

As you can see, in the 80s, we were almost to 1,000 employees, and adjusting our budget to inflation, we had about 150 million. And as the cuts were made in the Clinton Administration and the Reagan Administration, we went down, and this right here is when the year of the recall occurred, when Congress directed us to hire 500 people by October 1, 2010. That was in the CPSIA. And that is when we started climbing, when we got that direction from Congress in the CPSIA. It said, The Commission shall increase the number of full-time professionals employed by the Commission to at least 500 by October 1, 2010, subject to the availability of appropriations. So, thank you, Thank you for letting us use the charts.

[The information follows:]

Statement of
Inez Tenenbaum
Chairman
U.S. Consnmer Product Safety Commission

Before the

House Committee on Appropriations

Subcommittee on Financial Services and General Government

March 31, 2011

Good morning, Chairwoman Emerson, Ranking Member Serrano, and Members of the Subcommittee on Financial Services and General Government. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's (CPSC) significant activities over the past year, as well as the Commission's fiscal year (FY) 2012 budget request.

Since my last appearance before the Subcommittee almost 12 months ago, I have focused on three key objectives at the Commission: fair and effective implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA); reinvigoration of the Commission's business processes; and expanding our program of early interdiction of dangerous products and prevention.

Fair and Effective Implementation of the CPSIA:

Children's Product Safety Provisions: In the last two years, Commission staff has worked diligently and successfully to implement almost all major provisions of the CPSIA, with particular emphasis on infant and children's safety provisions. As part of this process, the Commission has sought to implement certain sections of the law in a manner that recognizes and is responsive to the concerns expressed by some segments of the regulated community. One example of this is the Commission's recent decision to extend the current stay of enforcement for third-party testing and certification for lead substrate in children's products until December 31, 2011.

It is important to note, however, that the majority of CPSIA rules and requirements have been adopted unanimously by the Commission and widely accepted by industry, consumers groups, and families across the country. These provisions include:

- new durable infant and toddler product standards, so that we never again have to hear of an infant who drowned in a baby bath seat or a toddler who is paralyzed by a poorly designed baby walker that tumbles down a flight of stairs;

- product registration cards that now accompany many juvenile products, so parents who register can receive direct notification and respond to recalls; and

- the inclusion of tracking labels, to the extent practicable, on children's products so that parents can identify who made them—even long after the packaging is thrown away.

The Public Searchable Database: On March 11, 2011, we officially launched our new publicly available consumer product safety information database, which was mandated by section 212 of the CPSIA. This database, available online at www.SaferProducts.gov and through the Commission's homepage at

www.CPSC.gov, is a powerful source of information for consumers, allowing them to determine whether products they already own, or are considering purchasing, are associated with safety hazards or recalls. The SaferProducts.gov site also has an enhanced reporting tool, so that consumers can tell CPSC about a consumer product that caused harm or has the potential to cause harm. CPSC has used the launch of the database to encourage more reporting to CPSC. Increased reporting will help our agency respond faster to product dangers and will, for the first time, empower consumers with online access to vital safety information.

I recognize that the rollout of this database has caused concern among some in the manufacturing community. Several incorrect claims have been made about the database, including assertions that the database rules allow anonymous unverifiable reports and that manufacturers do not have adequate time to respond to reports containing "materially inaccurate" information. Let me respond to those claims upfront.

First, the database does not and will not include reports of harm submitted anonymously. Each submitter is required to provide eight pieces of information, including a description of the product; identity of the manufacturer, private labeler or importer; description of the harm; incident date or approximation; category of submitter; submitter's contact information; consent to include the report in the database; and a verification that the information provided in the report is "true and accurate" to the best of the submitter's "knowledge, information, and belief." Any reports filed that do not include the minimum required information—including the submitter's contact information—are not eligible for posting on SaferProducts.gov.

Second, the database rules were designed to provide manufacturers with the ability to challenge any potentially inaccurate information in a report and to post a comment about the consumer's report. For a qualifying report that contains the minimum required information, the Commission has five business days, where practicable, to send it to the manufacturer. For manufacturers registered with the Commission, the reports are sent by e-mail and are received almost immediately by the manufacturer. Once a report is sent to the manufacturer, it has 10 business days to provide, if it wishes, comments on the report, or to make claims of materially inaccurate or confidential information prior to the posting of the report. For those businesses registered with the Commission, they can provide comments or make claims through the SaferProducts.gov Business Portal.

If a manufacturer provides comment within the 10 business day period, the comment most likely will be posted with the incident report when the report first appears on the database. A manufacturer is also allowed to provide an unlimited number of additional comments on a report at any time. If a manufacturer submits a claim of materially inaccurate information, the Commission will endeavor to determine the claim before the report publishes. For example, if a business makes a claim of material inaccuracy stating that it has been incorrectly

identified as the manufacturer, the CPSC will quickly determine the merits of the claim and, if accepted, will remove the business's name from the report. Information identified by a company as confidential within the 10 business day period will never be posted publicly. Overall, I believe this strikes an appropriate balance between due process for manufacturers and consumers' right to know about potentially dangerous products that could cause harm or injury.

Furthermore, I believe it is important to provide a reminder of just how powerful a resource this database will be for consumers. Rather than use my words, I would like to repeat the words of Lisa Olney, whose daughter died in a defective portable crib just after her first birthday in 2002. Ms. Olney posted the following on the *Kids in Danger* web blog:

> *On December 19, 2002, my daughter Elizabeth, just 13 months old, died in a poorly designed play yard. I live my life often looking back through "what ifs" and "should haves," but I've learned to give most of that up in order to save myself from being a horribly miserable individual. Instead, I realize the importance of focusing on efforts to protect our children so that no parent has to suffer what I have, along with too many other victims of unsafe children's products. The CPSC database is going to protect millions of children, because it provides a place to go when considering the choices parents make when purchasing products, especially those products intended to be beneficial to our children's safety.*

This database will prevent injuries and save lives. Congress recognized this when it added section 212 to the CPSIA, and I hope you will continue to support this very powerful, and potentially lifesaving, open source of consumer information.

A Reinvigorated Commission:

New CPSC Strategic Plan: Last year, the CPSC launched a comprehensive strategic planning initiative to update the Commission's outdated 2003 Strategic Plan. As a result of this effort, the Commission unanimously approved the agency's new 2011-2016 Strategic Plan, which lays out five key goals and also details programmatic objectives that will allow the CPSC to move closer to becoming the global leader in consumer product safety.

New Office of Education, Global Outreach, and Small Business Ombudsman: On September 22, 2010, the Commission voted to create a new office to coordinate and provide outreach to various domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, and foreign governments. Within this office, we have a full-time Small Business Ombudsman who is dedicated to serving the nation's many smaller businesses in the area of product safety. In particular, special attention will be given to developing "plain English" information tailored to small businesses and small

batch manufacturers so that they can understand and comply with new and existing safety standards.

New CPSC Website: As part of the Commission's overall Information Technology improvement project, the Commission also launched a new updated CPSC.gov home page last December, and currently is in the process of upgrading the entire website. As of now, the rest of the revised content on the new website is scheduled to go live in September.

These improvements will allow consumers to more easily search for safety information and view videos on keeping their families safe from product hazards. In addition, the new website will provide industry, and particularly small businesses, with increased access to resources on how to produce safe products that comply with applicable safety standards.

An Increased Commitment to Early Interdiction and Prevention:

Import Surveillance: Traditionally the Commission has spent the bulk of its resources investigating harmful products in the marketplace. This will always form a substantial part of the CPSC's activities, but I believe the more effective approach is ensuring that harmful products never even enter the country. To that end, I have taken a number of steps to add additional technological resources and personnel to the Commission's Import Surveillance Division. This Division works directly with the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) to keep dangerous products out of the United States.

On the technological side, the CPSC recently executed two interagency Memorandums of Understanding (MOUs) with CBP that allow us to access more "real time" importer information and target the most dangerous incoming shipments. The first of these MOUs, signed in April 2010, allows CPSC personnel to work at CBP's Commercial Targeting and Analysis Center (CTAC) in Washington, DC, and access real time manifest entry data collected by CBP. This, in turn, allows Import Surveillance Division personnel at the ports to target high-risk shipments prior to their entry into the domestic stream of commerce.

The second MOU, signed with CBP in August 2010, gives the CPSC access to information in the Treasury Enforcement Communications System (TECS). This will assist CPSC Import Surveillance staff at the ports by providing them with additional information to improve local targeting and interdiction of dangerous products.

The CPSC is also actively involved in supporting the Importer Self Assessment – Product Safety (ISA-PS) initiative that is currently being piloted by CBP. The ISA-PS is intended as a partnership among CBP, CPSC, and importers to ensure product safety compliance. It is based on a voluntary approach that provides

meaningful benefits to importers who demonstrate readiness to assume additional responsibility for managing and monitoring their own product safety compliance.

We have also taken steps to increase CPSC's physical presence at ports of entry. In FY 2008, the Import Surveillance Division had only five full-time employees (FTEs), and of those only three FTEs were actually stationed at ports of entry. Through FY 2010, we expanded staffing in the Division to 18 FTEs, with 14 FTEs actually stationed at ports of entry. I am very pleased to note that, as of March 28, 2011, the Division now has 25 FTEs, with 19 FTEs collocated at 15 different ports of entry.

Putting more "cops on the beat" has already yielded substantial positive results. In FY 2010, we performed 6,953 screenings at ports, collected 1,776 samples for testing, and of those found 987 that violated CPSC standards. At the same time, we have also seen the number of recalls start to drop—from 563 in FY 2008 to 428 in FY 2010. Maintaining those positive trends is a key goal for the upcoming year.

The Safe Sleep Team. The overall safety of cribs and the infant and toddler sleep environment is a critical concern of the CPSC and a personal priority of mine. Parents across the country expect cribs to be a sanctuary for their children, regardless of price or size. Unfortunately, that is not always the case. In the past nine years, there have been at least 32 deaths attributed to drop-side crib failures. This number is tragic. The majority of crib deaths, however, are still directly linked to the use of soft bedding and pillows in the crib.

To address this, I directed Commission staff to embark on a two-prong strategy. The first prong was to recall old, dangerous drop-side cribs in the marketplace and promulgate new mandatory crib safety rules that will prohibit dangerous drop-side cribs from ever being sold again in the United States. I am pleased to report to the Members of this Subcommittee that the new mandatory crib safety rule was approved by the Commission in a unanimous vote on December 15, 2010.

The second prong of this initiative is education: teaching parents and caregivers how to keep the inside of cribs free from suffocation risks like stuffed animals, comforters, and pillows. In partnership with the American Academy of Pediatrics and a child advocacy group called Keeping Babies Safe, we have a wonderful new Safe Sleep video that is being shown in maternity wards and pediatricians' offices around the country. This video is currently available on the CPSC's website, and I urge Members of the Subcommittee to view the video and see its powerful message.

Rapid Response to New Hazards:

Toxic Metals in Children's Products: The Commission has increased its efforts to provide a rapid response to new and emerging hazards. One

example of this response is the CPSC's efforts to stop the use of toxic metals in children's products. Earlier this year, it came to our attention that some foreign manufacturers might be using cadmium or other toxic metals as a substitute for lead due to the Commission's lead limits for children's products.

I sent a strong message to Asian manufacturers and regulators that this was unacceptable and that we would not allow there to be an influx of products with cadmium like we saw a few years ago with lead. We have also asked several standards setting bodies – including the committee that oversees the ASTM F963 toy safety standard— to improve safety standards in this area. In addition, Commission staff is closely examining the use of other toxic metals in children's products, such as barium and antimony, and the CPSC will not hesitate to take further action in this area if necessary.

Problem Drywall: I have personally visited several homes and met with a number of homeowners impacted by problem drywall. I am keenly aware of the pain and frustration many families have faced in dealing with this issue, and the CPSC has devoted more resources—over $5 million in the past two years – to investigate this issue than for any other product investigation in the Commission's history. As a key strategy of the investigation, we have worked collaboratively with several other agencies, including the U.S. Department of Housing and Urban Development (HUD) to formulate guidance that potentially impacted homeowners can use to identify whether a home contains problem drywall and, if so, a remediation protocol for repairing the impacted dwelling.

On January 28, 2010, CPSC and HUD issued preliminary guidance on how to identify the presence of metal corrosion as well as other indicators of problem drywall in homes. This was followed on April 2, 2010, by preliminary remediation guidance, which detailed steps that homeowners could take to address potential safety hazards in homes with problem drywall. When the remediation protocol was released, CPSC and HUD staff noted that the protocols would be updated based on further scientific studies conducted by Sandia National Laboratories (Sandia) and the National Institute of Standards and Technology (NIST) to analyze the long-term impact of electrical component, electric wiring, and fire alarm exposure to the gases emitted by problem drywall.

On March 18, 2011, CPSC and HUD released a new remediation protocol based on an in-depth study at Sandia that simulated the long-term exposure of wiring and other electrical components to hydrogen sulfide gas, which is associated with problem drywall. In the study, Sandia staff simulated 40 years of corrosive conditions that could exist in problem

drywall homes, and did not observe any acute or long-term electrical safety events, such as smoking or fire.

The new guidance should prove helpful to many homeowners who wish to remediate their homes. In addition, I also hope that the guidance will continue to provide actionable criteria for other federal, state, and private entities considering possible financial relief for homeowners, as has been the case with earlier versions of the guidance.

CPSC's Proposed FY 2012 Budget:

The past three years have been a period of rebuilding for the Commission, after decades of reduced funding and staff reductions that decimated the agency's ability to carry out its critical public safety mission. In FY 1980, the Commission had almost 1,000 full-time employees and an inflation-adjusted budget of over $150 million. By 2007, the Commission had fallen to 385 full-time employees—and was barely able to carry out its core functions.

As a result of the increased resources provided by Congress over the past three years, we have been able to rebuild. Full-time staff now stands at approximately 550. As noted above, these resources have allowed us to staff several ports of entry and increase cooperation with CBP to keep dangerous products out of the country. They will allow us to increase staff at our new laboratory facility, scheduled to open in May, to test potentially dangerous products that could injure or kill consumers, including infants and young children. And they will allow us to stay on top of emerging hazards, like problem drywall and toxic metals in toys.

The increased funding also allows us to conduct outreach directly to consumers. It ensures that we can get the message out to families after a hurricane or ice storm that the use of a portable generator in a home can result in carbon monoxide poisoning and tragedy. It also allows us to reach out to new mothers—so that they do not place their newborns into an unsafe sleep environment that could result in tragedy.

I am highly cognizant of the desire for fiscal constraint that has been expressed by the Administration, the Congress, and the American people. Yet, I believe the CPSC is a great return on investment to the taxpaying public. In allocating funds, we have attempted to maximize existing resources to the greatest extent possible. There are, however, several areas of critical need that the Commission must address in FY 2012.

The proposed FY 2012 budget requests $122 million – a slight increase from the $118.2 million funding level the Commission is currently operating under, and the $118.6 million request for FY 2011. If enacted, this level would allow the agency to hire an additional 34 FTEs to fill areas of critical need. In addition, it will allow us to shift resources from expenses associated with IT modernization and CPSIA rulemaking to increased investigation and enforcement activities.

Some highlights of these proposed changes include:

IT Modernization Cost Savings: Section 212 of the CPSIA contained two major components: 1) modernization of the Commission's IT systems; and 2) implementation of the searchable consumer product safety information database. Over the past two years, much of the IT spending has focused on infrastructure and staff to support the overall IT modernization. By the end of FY 2011, the bulk of the capital upgrade will be complete, and the Commission's needs shift mainly to maintenance costs.

Accordingly, the FY 2012 budget request includes a decrease of $3.104 million for costs associated with IT capital and development. This decrease is partially offset by an increase of $1.44 million to hire four new FTEs and three contractors to maintain the new IT systems. This results in a net decrease in this area from the FY 2011 proposal of $1.64 million.

Increased Incident Review and Investigation: In recent years, the CPSC has experienced a substantial increase in the number of product incident reports filed by consumers. In 2003, for instance, the Commission received slightly more than 22,000 reports. By 2009, that number had jumped to almost 50,000. At the same time, however, the number of investigations conducted as a percent of total reports received dropped from approximately 20 percent in 2003 to less than 10 percent in 2009.

This is a trend that we must reverse. To address this challenge, the FY 2012 budget proposes an increase of approximately $3.08 million to hire four new FTEs and four contractors to assist with data intake activities, 14 new FTEs to assist with rapid incident review, and six new FTEs to investigate the increasing number of incident reports received. Without this new staff, the agency will see a further reduction in the percentage of incident reports investigated – and this will reduce our ability to respond to emerging hazards.

IT Capital Replacement Funds: Currently, CPSC allocates approximately $1 million each year for capital replacement of equipment and software. However, recent growth in agency personnel and increased reliance on technology has increased the agency's requirements in this area. Accordingly, the FY 2012 budget requests an additional $500,000 (for a total with baseline funding of $1.5 million) for capital IT replacement.

Office of Education, Global Outreach, and Small Business Ombudsman: As detailed earlier in my testimony, the Commission recently voted to create an Office of Education, Global Outreach, and Small Business Ombudsman. Most of the staff in the office will come from existing FTEs transferred from other offices. However, the FY 2012 budget proposes an additional $400,000 to support the addition of two FTEs: a director to develop the office and a senior small business

ombudsman dedicated to assisting small business entities in the area of consumer product safety.

Financial Management, Oversight and IG Support: The FY 2012 budget requests $665,000 for three FTEs (an accountant, a budget analyst, and a senior internal controls officer) to support enhanced financial management oversight and support. The budget also requests $204,000 for the Inspector General's office to hire an independent legal counsel, consistent with the Inspector General Reform Act.

* * * * *

Madame Chairwoman, thank you again for the opportunity to testify on the proposed FY 2012 budget for the U.S. Consumer Product Safety Commission.

I look forward to working with you and other members of the Subcommittee on the budget request, and would be happy to now answer any questions you may have.

Inez Moore Tenenbaum, Chairman
U.S. Consumer Product Safety Commission

Inez Moore Tenenbaum was nominated by President Barack Obama on June 9, 2009 to serve as the ninth Chairman of the U.S. Consumer Product Safety Commission. Ms. Tenenbaum was confirmed by the Senate on June 19, 2009 and sworn into office on June 23, 2009 to a term that expires in October 2013.

Ms. Tenenbaum was elected South Carolina's State Superintendent of Education in 1998 and completed her second term in 2007. Throughout her career, Ms. Tenenbaum has been an energetic and determined advocate for children and families and has extensive experience in administrative and regulatory matters.

During her tenure as South Carolina's State Superintendent of Education, student achievement in South Carolina improved at the fastest rate in the nation, with scores increasing on every state, national, and international tests administered. At the end of Ms. Tenenbaum's tenure, the prestigious journal Education Week ranked South Carolina number one in the country for the quality of its academic standards, assessment, and accountability systems.

She previously practiced health, environmental, and public interest law with the firm Sinkler & Boyd, P.A. Before attending law school, Ms. Tenenbaum served as the director of research for the Medical, Military, Public and Municipal Affairs Committee of the South Carolina House of Representatives. She carried out the Committee's responsibilities for all legislation relating to public health, the environment, child welfare, social services, adult and juvenile corrections, state military affairs, and local government.

Ms. Tenenbaum served as special counsel to the McNair Law Firm in the area of public school finance prior to being nominated by the President.

She has also served on numerous task forces that provide oversight on children and family services in the state.

Ms. Tenenbaum received her Bachelor of Science in 1972 and Master of Education degrees in 1974 from the University of Georgia and her law degree in 1986 from the University of South Carolina. She is the recipient of numerous honorary degrees and has been recognized by several state and community organizations for her civic work on behalf of children and families.

Ms. Tenenbaum is married to Samuel J. Tenenbaum.

Mrs. EMERSON. Thank you so much, Chairman Tenenbaum. I would now like to recognize Commissioner Northup. Try to keep it please to five minutes.

Ms. NORTHUP. Yes, thank you. Is it on? Yes. I am delighted to be here. Congratulations, Madam Chair, for your position as Chairman of this committee, and Mr. Serrano, I am delighted to see you again as you said, Once a colleague, always a colleague. This is an opportunity to come before you and share some of the perspectives that I have since being a Commissioner at the Consumer Products Safety Commission since August of 2009. I appreciate the challenge of this committee to fund essential services, and the trade-offs that occur even in the best of years there were trade-offs that always had be made. And it is with that in mind that I come before you today. As our Chair said, we have grown from 80 million to 118 million since 2008. We have gone from 385 employees to 549. And if we complete our hiring for this year, our targets, and we get the increase that we are requesting, we will be at 600 by the end of the 2012 fiscal year.

With that in mind, I wish I could tell you that all of this money that has been spent has been a good investment. Certainly, our Chair has done a wonderful job at reaching out and looking for better ways, and new ways, to accomplish what the CPSC is required to do. However, the overwhelming amount of time, energy, and money, is being spent on implementing the CPSIA. And while the CPSIA had important, new, good safety requirements that it put in place, some of what we spend our time on, and much of what businesses have been required to do, have absolutely nothing to do with risk. There was never an assessment made that what we were preventing was risky to children in the first place, nor is a lot of the requirements in order to comply with the law based on risk.

However, we get weekly, sometimes daily, information from associations, from individual businesses, from people all across this country that tell us about the fact that they have closed their business, or they have left the child products area of their business. The number of small businesses that we put out of business has to be in the 100s. It was estimated by our agency back in 2009 that the cost to businesses is in the billions of dollars. And when you hear these stories individually, people that come and talk about businesses that they have grown, where they have hired people, the ideas they had, and they are simply unable to comply with this law, and so they are leaving, many of them, trying to sell to a larger company because they just simply cannot absorb the cost and the overhead that it has added. It has really been very sad.

I hope we will have a chance to talk about some of the challenges that they have, but I can tell you on the market that besides the loss of jobs, the loss of businesses, particularly in this country, because small businesses are the ones that have the biggest problems, the biggest companies that make toys do not make any of them here in this country. They make them in China. They make such a large number that they are at least more able to spread the cost of complying with this law over many more products. But it is also the cost in the marketplace, the number of toys and products that are no longer being sold in this country. We used to have the most vibrant market. Now there are Websites to which you can

go, where they say, Not sold in the United States. Whole companies, a Swedish company, a German company that are no longer selling any of their toys in our market; ones that were very popular with parents. There are also people that sell to small markets, to our schools, small number of products that say they simply cannot abide by all the responsibilities of this Act. If it were related to risk, of course, I would strongly endorse these regulations. But in many cases, risk is not even something that we are allowed to consider.

I am here to ask you to do two things as the Appropriations Committee where I think you can make a big difference. The first is simply do not let third party testing and certification go into effect. To the Chairman's credit, she endorsed delaying the implementation of that until December. But businesses tell us that that is a staggering cost to them. Not only the cost to do third-party testing, but also to certify and to track every single component of every single good and the certification number, and label every single product, so that that cohort of information is available is a staggering price. And it is unnecessary.

The Chairman, in my opinion, has been so creative in establishing much better border procedures that ways to intercept violative products, ways to test in a more efficient way. We have companies it is not the same world as 2007. The companies that were violative have all come in and told us about the new production oversight companies that have responded to us, have all talked about their ISO labs that are inside their production facilities all over the world today. And so, they themselves because of the cost of the penalties that increase, the chance of a class-action lawsuit, Mattel settled the class-action lawsuit because of their toys for $14 million, and so the need to avoid those sort of costs, the ability to intercept violative products here, we do not need the old-style command and control formula that was in that bill that is going to stagger the products that fall into under this regime.

And finally, I know we will talk about this more, I beg you to stop the funding of our database. It is a database right now. There are 12 of our top people in our agency. Everybody from the General Counsel, her top assistant, the person in charge of compliance, their top people meet every day Tuesday, Wednesday, and Thursday at 8 a.m. in the morning to incident by incident go over every single one of these, and it is those multi-group teams that you will be funding in the additional request that is just counterproductive, both in terms of fairness to our businesses, fairness to the public, and giving accurate information to the public, which is the only reason Congress stated for the database. So those two things defunding would, I think, not only create a better agency but also be a better expenditure for money. Thank you.

[The information follows:]

Testimony of Anne M. Northup
Commissioner
United States Consumer Product Safety Commission

Hearing on the 2012 Performance Budget Request of the CPSC

Before the

U.S. House of Representatives
Committee on Appropriations

Subcommittee on Financial Services
and General Government

March 31, 2011

Chairman Emerson and Ranking Member Serrano, thank you for the opportunity to provide testimony to this Subcommittee regarding the Consumer Product Safety Commission's 2012 Performance Budget Request. This Commission has a proud history of assessing risk and providing leadership in consumer product safety issues across a variety of industries.

As a Commissioner since August 2009, I now have a tremendous appreciation for the work that goes on in an agency, including the time and effort that agencies expend implementing the laws Congress passes. It is not a simple task, and my colleague, Chairman Tenenbaum, has put in countless hours to ensure that the Commission meets its deadlines and fulfills the difficult tasks it has been given.

As you know, I did not support the Commission's overall 2012 budget request of $122 million, because it calls for an increase in $3.8 million over current funding levels. I believe we can be doing much more with less. Given the imperatives of reducing the national deficit and controlling federal spending, we as Commissioners have a responsibility to cut programs or advocate for reforms that will ensure that we are using our resources efficiently and not straying from our core mission of safety.

In that regard, my testimony today focuses upon the ways in which Commission resources have been wisely spent to improve safety outcomes for Americans, and areas where I believe there could be vast improvement. In particular, my testimony will focus on the Consumer Product Safety Improvement Act (CPSIA), a law that largely is not based on risk and whose implementation has overwhelmed the time and resources of this agency since August 2008. Because the CPSIA's lead, phthalates, and testing and certification standards are not risk-based, the enforcement of such standards diverts the Commission from focusing on real risk. The law has strained the Commission's resources and has had a devastating impact on American business growth and competitiveness, all with little or no offsetting improvement in product safety.

Effective Uses of Commission Resources:

Improved Enforcement Tools

Today, the Commission has enforcement tools vastly improved over those available even a few short years ago. Since the advent of our agency's Import Surveillance Division in 2008, we have continued to grow our full-time presence of CPSC investigators at key U.S. ports. We have also expanded cooperation with Customs and Border Patrol to maximize our ability to screen for products at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts, application of x-ray technology to identify violative lead content, and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance through the threat of confiscated and destroyed violative products at the border, by authorizing the Commission to impose higher penalties of up to fifteen million dollars, and by streamlining its authority to seek criminal penalties.

I support the agency's investments in expanding these emerging enforcement methods because I believe they can grow to become a more sophisticated and technologically advanced method of deterring the entry of hazardous products into commerce. Notably, even prior to the Commission's improved enforcement tools, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The companies responsible faced a class action lawsuit and a massive fine. Today, retailers, private labelers, importers and manufacturers are collaborating to prevent violative products from entering commerce, in order to protect themselves from lawsuits, damage to their reputations, the cost of recalls and the loss of inventories.

Consumer Education and Outreach

Providing safety information to American families is a top priority of the Commission. I have urged the Commission to do more to educate the public on broad-based safety hazards in concert with any new mandatory standards we are required to issue under the CPSIA. Additionally, I have long advocated for broadening the Commission's messaging through non-English language posters, and by working with non-traditional groups, like churches, to increase our outreach to minorities and harder-to-reach populations.

The Chairman's staff has done an excellent job using social media (e.g., online videos, text messaging, Twitter) and other creative ways to broadcast the Commission's many safety messages. In fact, as of last fall, there is now a downloadable "app" available for the Android phone that allows consumers to monitor and search recalls from the CPSC and other agencies: http://apps.usa.gov/product-recalls2/ I continue to support these efforts.

Ineffective Use of Agency Resources: CPSIA

The law's non-risk based requirements

In both 2009 and 2010, the CPSC focused its time and resources principally on implementing the CPSIA. Although the Commission is a relatively small agency (FY 2010 funding of $118.2 million), its budget has grown by nearly 48 percent since the law's passage in 2008, with both old and new resources shifted away from risk-based priorities to implement the arbitrary, non risk-based mandates of the CPSIA, including the lead content and phthalates bans, the Public Database, and the third-party testing, certification and labeling requirements. Over the past two and one-half years, the Commission has issued an estimated 3,500 pages of regulations and guidance documents as a result of the CPSIA—a large portion of which must be read and understood by every affected company in order for them to grasp the law's complex requirements.

The diversion of the Commission's resources to CPSIA implementation reduces our focus on genuine safety hazards. Our agency is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products—but we cannot

fulfill this mission if our time is spent primarily enforcing the CPSIA, including its non-risk-based lead content and testing requirements.

Indeed, since 2008, there has been a significant delay in progress on actions to address many genuine safety hazards, such as promulgating standards to reduce the risk of death and injuries caused by cigarette lighters, table saw blades and portable generators. These issues would be front and center on the Commission's schedule if it were not for the CPSIA.

Small Business Ombudsman

The creation of a new Office of Education, Global Outreach, and Small Business Ombudsman to assist small businesses will also likely end up a waste of Commission resources. This office was created last fall with an unspecified budget and staff size.[1] The stated purpose of the new office is to provide additional information to small businesses and other industry stakeholders through a "coordinated approach to education and outreach activities."

But this purpose could be fulfilled under existing Commission offices, and does not address small businesses' real concerns with the CPSIA. Small businesses are not clamoring for more information about how to comply with this law; they are asking for relief from this law because it is killing them.

The solution for small businesses negatively impacted by the CPSIA is to repeal the portions of the law that impose tremendous costs without increasing safety. Furthermore, no matter how successful this new office may be, small businesses will still need to hire lawyers to understand their obligations under the Commission's far-reaching and complex regulations.

To date, the Small Business Ombudsman has focused on responding to CPSIA-related questions posed by small handcrafters. This limited service to a small minority of manufacturers does not begin to assist the vast majority of small businesses – with greater numbers of employees and a much larger impact on the economy -- suffering under the CPSIA. If the Commission really wanted to help all small businesses, it would use its rulemakings to mitigate the unintended consequences of the CPSIA, and propose meaningful legislative reforms to Congress. It is wasteful and counterproductive to instead create a new Small Business Ombudsman office to perform limited outreach to micro-businesses when an existing agency office could perform the same service.

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[1] The agency has moved around existing employees to fill vacancies in this new office, including an Acting Small Business Ombudsman. The 2012 budget request includes two new FTEs to allow the Commission to hire a Director to develop the office and a permanent Small Business Ombudsman.

Public Database

The new Public Database will also unjustifiably drain Commission resources. According to the Commission's 2012 budget request, by the end of fiscal year 2011, the Commission will have already spent $29 million on IT modernization and to develop the Database—two expenses that are interlinked. But the official $29 million figure understates the real cost of the database. It does not include the hours CPSC staff dedicated to developing the database and preparing for its launch, including managing contracts.

Moreover, the $29 million figure represents only the estimated contracting costs through FY 2011. And while we have not been able to estimate future costs, it is likely that the costs to maintain the Database will continue to strain Commission resources for years. For instance, the agency has yet to estimate the number of new FTEs we may need, year after year, to administer the public database, including new Compliance investigators and lawyers to handle claims of material inaccuracy. The Commission's 2012 Performance Budget Request discounts these expenses. According to that document, the "New and Reallocated Resources" dedicated to "Data Intake, Incident Review, and Investigation" is derived from an extrapolation of the growth trend line for reported incidents and investigations dating back to 2003. If, as is likely, this projection is proved to be too low, the assigned staff will be unable to timely manage all of the information reported through the database. As a result, Commission staff will be even less likely to resolve claims of material inaccuracy within the ten-day period prior to the posting of unverified information. The Commission will then either request and be provided additional funding in subsequent years, or preside over an increasingly misleading database.

Additionally, the Commission did not perform a cost-benefit analysis of their Database Rule. I believe the rule that was passed by the Commission's Majority is tremendously flawed and will result in a public database that is full of inaccurate or unverifiable information and therefore helpful to no one.[2] If this Commission is to have a public database funded by taxpayers, it should be ***different and better*** than any source of information that already exists in the public domain, such as websites like Amazon.com or Yelp.com. Unfortunately, due to the agency's regulation, our public database will be no more useful than similar sites that are already available to the public today, and will, in fact, be more misleading to the public, given the likelihood of inaccurate reports and the lack of ability for anyone to verify them. Many believe the public database, if left unchanged, will be useful only to trial lawyers or advocacy groups that will be able to populate it with unverifiable, second-hand information for their own purposes.

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[2] The Commission Majority's database rule suffers from three major infirmities: 1) It interpreted the statute to allow *anyone* to report incidents to the database – even consumer advocacy groups, trial lawyers, and others with ulterior motives and who may not have firsthand knowledge of the incident; 2) the rule fails to require enough information from submitters so that reports are even verifiable; and 3) the rule requires that all reports will be made public on the 10th day following transmittal to the manufacturer, regardless of whether there's a pending, valid claim of material inaccuracy.

Further, the Commission has limited resources for enforcement. As a result, unverifiable information in the Database will divert resources from addressing genuine risks to monitoring and processing the likely increase in reports to the agency. Additionally, because inaccurate incident reports will be indistingnishable from accurate ones, the media's attention may focus on inaccurate reports, pressuring the agency to prioritize its efforts based on publicity rather than risk level.

CPSIA: Impact on the Economy

The lack of cost-benefit analyses

In March 2009, Commission staff reported that the economic costs associated with the CPSIA would be "in the billions of dollars range."[3] Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards.

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs that will result from the upcoming Public Database. **Attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.[4]

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence suggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm lead content or the interim-banned phthalates pose a safety risk to children. The Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.[5] Similarly, 2007 data indicates that one percent of children selected for testing across the country showed an elevated blood lead level as established by the CDC. This

[3] Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell, March 20, 2009.
[4] Most of the CPSIA mandated regulations are not required to be promulgated under Section 9 of the CPSA, which normally would entail a cost-benefit analysis. However, it also does not ***prohibit*** the agency from doing so, if the Commission recognizes a need for such analyses.
[5] http://www.epa.gov/opeedweb/children_body_burdens/bl-graph.html

number was down from nearly eight percent in 1997,[6] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Burdensome Testing and Certification Requirements

Given the available tools of manufacturers to determine compliance and our own improved enforcement methods, I do not believe the complex, third-party testing and certification requirements of the CPSIA are necessary or helpful in ensuring compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom may be able to comply with the law's lead and phthalates limits but still cannot afford the mandatory third-party testing.

By requiring all manufacturers of children's products to send their products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation. The CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product is entirely unnecessary—and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

The CPSIA also requires the creation of massive new paperwork and tracking systems, often without any safety enhancing product changes. A member of the American Home Furnishings Alliance reported that it spent $13 million dollars on tests, new systems and tracking processes, despite the fact that every single component it used on children's furniture already complied with the current lead standard. The company was therefore not required to change a single material used in its manufacture of children's furniture, and there was no corresponding benefit in the improved safety of its children's furniture to justify the costs.

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in their public comments on the Component Parts rule:

> As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in

[6] http://www.cdc.gov/nceh/lead/data/national.htm

place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations -- a compliance issue that results from lack of information not lack of testing.[7]

The testing and certification requirements of the CPSIA have yet to be fully implemented. This Subcommittee can therefore prevent the law's onerous testing requirements from going into effect by withholding in any upcoming appropriations laws funding from the Commission for the purpose of promulgating regulations to implement the third-party testing and certification requirements of the CPSIA. This would allow the Commission's House and Senate authorizing Committees to fulfill their pledge to reform the CPSIA before it can further undermine the nation's economic recovery.

Recommendations to Reform the CPSIA and Reduce the Budget :

1) Reform the CPSIA's major requirements to be risk-based:

Reforming the CPSIA so that the law's principle requirements are based on risk, would greatly relieve the pressure on agency resources to have to implement, enforce and monitor non-risky products—and allow the agency to use its limited resources more effectively to fulfill its safety mission. This can be accomplished in a variety of ways:

- Amend the law's Absorbability Exclusion §101(b)(1)(A) so that it is meaningful:

The CPSIA included three statutory exclusions from the lead limits. But the Commission has meaningfully interpreted only two of them. The law's third exclusion, based on the absorbability of lead in a product, has not excepted a single product from the CPSIA' scope. The CPSIA should therefore be amended to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

Drawing the line at the level of absorbable lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the CDC and the EPA. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead in dirt that is tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA standard for lead in soil is 400 ppm

[7] American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

(http://www.epa.gov/lead/). This standard for safety is less strict even than the current 300ppm lead content standard provided in the CPSIA for children's products, including bicycle handlebars where any lead is embedded in the metal substrate and cannot be absorbed.

Unlike other Commission rules, the CPSIA, as interpreted by the Majority, has led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, the CPSIA has led to a ban on children's books published before 1986, because the ink in them is likely to contain lead above the allowable level. But children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed in meaningful amounts. Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a bicycle handlebar, the CPSIA treats these items in exactly the same way it treats products that truly could hurt a child by increasing the blood lead level.

If the law is amended to unambiguously exclude products with a level of absorbable lead that is not harmful to a child's health, the scope of the CPSIA will be considerably narrowed, and the Commission can focus its limited resources on real risks to children.

- Lower the age-range of products impacted by the law:

Under the CPSIA, a "children's product" is any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the same products to different age groups, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products which many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcemeot difficulties over marginal products. Producers argue that the products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors tn asses the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children under age six, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose "substantial product hazard" under the FHSA.

- Eliminate third-party testing and certification requirements:

As stated previously, the law's third-party testing, certification, tracking and labeling requirements are the most burdensome for small manufacturers. They are also unnecessary for verifying compliance, particularly given the agency's improved traditional enforcement tools. As a result, Congress could eliminate current third-party testing and certification requirements all together, allowing manufacturers to test in-house and/or in the best way they know how to determine compliance. The Commission would retain the discretion to impose third-party testing requirements on products with a risk that such testing would address.

At the same time, this Subcommittee can also prevent the law's onerous testing requirements from going into effect by withholding funding from the Commission for the purpose of promulgating regulations to implement any further third-party testing and certification requirements of the CPSIA.

2) Eliminate the 5-member Commission and put the agency under one Administrator:

I believe the CPSC could be run more efficiently by one Administrator, rather than a Commission of five or even three. In fact, similar proposals have been considered in the past: http://www.gao.gov/products/T-HRD-87-14. Managing a small agency simply does not require more than an Administrator. Additionally, I have confidence that Chairman Tenenbaum (or a future Administrator) would be able to run the agency much more efficiently without the pressures from her Democrat and Republican colleagues, who wish constantly to influence her actions in one direction or another. Reducing from five Commissioners to an administrator would save the substantial costs of office space, Commissioner and staff salaries, and all other expenses associated with a Commissioner's office.

The Chairman is already solely accountable for all of the agency's core functions, including setting the rulemaking agenda, public relations, human resources duties, and budgeting. The other four Commissioners may be asked to sign off on these things from time to time as a formality or to provide input, but ultimately all accountability lies with the Chair.

Rulemaking involves the participation of five Commissioners. However, I would argue that this "participation" rarely involves more than duplicative analytical efforts—all of which usually result in a 3-2, party-line vote. This also means five different Commissioners, all their staffs (12 people), plus dozens of technical staff and lawyers are reviewing, editing and analyzing the exact same rule-making document. Moreover, despite hours of effort by me and my staff, many of the Commission's largest regulations approved by the Majority have actually become ***worse*** through the process rather than more balanced—simply because at the end of the day, the Majority's vote rules on any contentious, policy votes.

3) Public Database – require reforms to the Database Rule to ensure that incident reports are verifiable and useful.

Finally, the Commission's Database Rule could be revised in order to ensure that incident reports going up on the new, public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information.

Several features of the Majority's rule guarantee a database populated by inaccurate information. The Majority has broadly defined the statutory categories of submitters to the Database to include groups and individuals with no direct knowledge of the incident or the person harmed. Such groups include consumer advocacy groups, trade associations and attorneys, for whom the accuracy of the incidents they report may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

The Database Rule also does not require sufficient information from the submitter to ensure that Commission staff or consumers can tell one type of product from another. Only the minimal amount of information is required, including manufacturer name and a "description of the product" which could include simply "baby stroller." But one company may produce dozens of different models of baby strollers, some of which may no longer be in production. As a result, the limited product information required is insufficient to permit the Commission to investigate the claim, and of no value to a consumer seeking to identify a safe model of baby stroller.

The problems created by permitting inadequate product identification and allowing individuals and groups without firsthand knowledge to report alleged incidents of harm, are compounded by the rule's failure to require the identification of the victim or product owner who experienced the risk of harm. As a result, the Commission's staff may be unable to verify the accuracy of the report by speaking to the only party with actual knowledge of the product and incident. Moreover, because manufacturers' bear the burden of proving a material inaccuracy, the Commission will publish a report that contains the

minimal required information, even where inadequate product identification or the absence of victim contact information leaves the report unverified. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Inaccurate information will likely also be posted on the database - at least temporarily - even when there is sufficient information to eventually confirm the truth. That is because the Majority's rule requires the Commission to publish an incident report on the public database by the 10th day after sending notification to the manufacturer, notwithstanding that a manufacturer has adequately supported a claim that the report is materially inaccurate. Unless the Commission can conclude within 10 days that the report is materially inaccurate, it is published on the 11th day and remains on the Database while the Commission completes its investigation. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely.

Killing Small Businesses:
CPSIA in the News, Letters and Public Comments

A MESS OF A LAW:
March 11, 2011

"President Obama has been on a campaign to shake his antibusiness reputation, so a good place to start would be to revisit the Consumer Product Safety Improvement Act, a mess of a law that has put new burdens on small businesses…"

http://online.wsj.com/article/SB10001424052748703408604576164510202890494.html "Get the Lead Out, Sir," *The Wall Street Journal*, March 11, 2011. Editorial.

HIGHER COSTS FOR SCHOOLS:
January 11, 2010

"NSSEA members sell educational supplies, equipment and instructional materials to schools, parents, and teachers…

… the costs to schools, municipalities, libraries, and others of identifying and replacing such books would be extremely high and there is no reason to impose such costs given the lack of identifiable risk.

…While we applaud the efforts the CPSC has made to find solutions for small businesses…we believe the CPSC could do more if given more discretion by Congress. The alternative is the elimination of many valuable educational toys and products, some manufactured in low volume for niche markets (such as the deaf, blind, or otherwise differently-abled children) and typically not supplied by the huge multi-national toy manufacturers."

Letter from the NSSEA (National School Supply and Equipment Association) to Commissioner Northup, January 11, 2010

HIGHER COSTS FOR PROOUCTS WITH NO LEAD RISK:
October 13, 2010.

"The government wants to regulate Hannah Montana CDs and DVDs. The bureaucrats at the Consumer Product Safety Commission (CPSC) insist that the discs marketed to children be tested for lead, but when the same young starlet churns out raunchier material under her real name, Miley Cyrus, they will escape scrutiny. Never mind that the same 10-year-olds will likely end up buying both products.

"…Never mind that Hannah Montana's fans aren't likely to eat their DVDs, the latest red tape makes no distinction between products where lead is likely to be consumed and those where it isn't."

http://www.washingtontimes.com/news/2010/oct/13/bureaucrats-way-out-of-tune/ "Bureaucrats way out of tune," *Washington Times*, October 13, 2010.

PUNISHING SMALL BUSINESSES, WHILE MATTEL AND THE BIG GUYS SQUEEZE OUT THE COMPETITION:

June 17, 2010

"Now Mattel is testing and making toys without any trouble at all, and those of us who were never the problem are in danger of losing our businesses," says Herizler, who runs EuroSource, based in Lancaster, Pa., with his wife and two sons…

"Nearly two years after the safety law was enacted, Congress and the Consumer Product Safety Commission are still struggling to reduce its burden on small businesses while eliminating the risk of lead and phthalates in children's products."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

BORDERING ON RIDICULOUS:

June 17, 2010

…"What the law should be about is ensuring safe products," says Edward Krenik, a spokesman for the children's product alliance. "We've crossed over into ridiculousness."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

REGULATION FOR REGULATIONS' SAKE

November 8, 2010

"Regulation for regulations' sake, where there is no inherent change to a bill of materials, a process or a product indicated after extensive, statistically significant testing across multiple points of input and verification, is simply wasteful."

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

MATTEL FINDS CPSIA A CHALLENGE – HOW MUCH MORE FOR SMALL BUSINESSES?

November 9, 2009

"Officials of the toy manufacturer, Mattel, met separately with two CPSC commissioners November 3 to talk about how challenging it was for Mattel to comply with the CPSIA…

Peter Biersteker, a lawyer for Mattel with the law firm Jones Day in Washington D.C., said his client is finding the CPSIA difficult to decipher… "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.

Despite Mattel's large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining "cost competitive."

"Mattel Finds CPSIA to be a Challenge," *Product Safety Letter*, November 9, 2009.

COMMISSION ACTION ADDS TO CPSIA'S PROBLEMS:

August 16, 2010

"The latest dictates from the Consumer Product Safety Commission (CPSC) will drive up the cost of manufacturing products intended for children. The agency adopted a pair of new rules in July and August implementing the Consumer Product Safety Improvement Act of 2008, but as drafted, these regulations will force companies to waste time and money on redundant testing programs solely for the entertainment of bureaucratic busybodies.

… The redundant examinations, mostly checking flammability, can be prohibitively expensive. For instance, the regulations could require a manufacturer to build a queen-sized-bed prototype of a baby's crib just so it can be tested in an independent lab. Yet each of the component parts - the crib-sized mattresses, blankets and all other component parts - already are individually tested for the same hazards when manufactured."

Editorial: "The Red Tape Stimulus," *Washington Times*, August 16, 2010
http://www.washingtontimes.com/news/2010/aug/16/the-red-tape-stimulus/

EVEN THE NEW YORK TIMES SPOTLIGHTS THE UNINTENDED CONSEQUENCES OF THE CPSIA:

September 28, 2010

"… a new federal crackdown on dangerous toys has left some in the industry crying foul and not wanting to play."

"…Critics point to provisions in the law that they deem ludicrous. For instance, a paper clip that is included in a science kit for schoolchildren would have to be tested for lead. But a teacher can walk into any drug store and buy a box of paper clips that would not be subject to the same testing.

Similarly, a lamp that is festooned with cartoon characters would have to be tested, but a lamp without the characters would not."

http://www.nytimes.com/2010/09/29/business/29toys.html "Toy Makers Fight for Exemption From Rules," *New York Times*, September 28, 2010

SCIENCE KITS ARE "NOT BANNED" – BUT THE TOOLS USED INSIDE THEM ARE!

October 1, 2010

"The science kit makers had asked for a testing exemption for the paper clips and some other materials. On Wednesday, in a close 3-2 vote, the commission declined to give them the waiver they sought."

"…After the science kit vote, CPSC Chairman Inez Tenenbaum sought to reassure people that, "There is nothing in this rule that bans science kits."

Right. But while the commission vote doesn't ban the kits, manufacturers say it may crimp the supply of kits for elementary school children."

http://www.lvrj.com/opinion/goodbye-to-chemistry-sets-104139059.html "Goodbye to chemistry sets," *Las Vegas Review Journal*, October 1, 2010. Editorial.

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, ZERO SAFETY BENEFIT TO CHILDREN:

November 8, 2010

"…there has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008.…The testing is simply being done to attempt to prove a negative."

American Home Furnishings Alliance

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, FORCED TO CUT JOBS:
November 8, 2010

"The majority of the annual costs will be in the record keeping requirements because none of the companies have the requisite IT infrastructure to handle the tracking of test reports per batch…Hooker estimates that it will cost them from $350,000 to $400,000 per year. Furniture Brands International said this will cost them over $4.5 million per year which is more than the profits from their best quarter in the last 2.5 years. In addition, this company must invest an additional $2 million in start up costs for setting up the production testing, programming computer systems to work with existing systems, and hiring and training employees for the administration of the CPSIA."

To offset these new costs, the company is forced to consider these choices: 1) shut down a small domestic plant which will mean the loss of 64 full time and 30 temporary US jobs; 2) shut down a larger domestic plant which will mean the loss of 384 US jobs; 3) significantly increase prices to offset the loss in revenue making them less competitive; 4) offer a lower quality product… or 5) shut down all domestic production which incorporates any finishing processes, which will mean the loss of approximately 460 US jobs."

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

NO MORE MOM AND POP TOY SALES:
July 7, 2010

"The second program involves making wooden toys that are given to the church and other charitable organizations in the county for distribution to needy children throughout the year especially at Christmas. Last year we created over 700 toys. The idea that we now are required to have these handcrafted toys certified will bring the program to a halt."

Dupage Woodworkers, Downers Grove, IL (July 7, 2010, Public Comment, Testing rule)

ECONOMIC IMPACT OF THE CPSIA - EXAMPLES
2009 and 2010

Costs associated with the CPSIA

1. In a letter from the CPSC to Representative Dingell in March 2009, Commission staff reported that the overall economic impact of the CPSIA would be in the "**billions of dollars range**." The Commission also acknowledged that the testing and certification costs will fall disproportionately on small-volume businesses. (*Letter from Acting Chairman Nancy Nord to Representative Dingell, March 20, 2009*)

2. **"MAJOR RULE"** - CPSC acknowledges in its FY 2011 Regulatory Agenda that its main rule pertaining to the CPSIA's testing requirements (**[PDF] CPSC Docket No. CPSC-2010-0038)** is a "major rule" under the Congressional Review Act, resulting in, or likely to result in: 1) an annual effect on the economy of $100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

3. In an article entitled "Makers Are Pushing Back on Toxic-Toy Law" (*Wall Street Journal*, March 5, 2009 http://online.wsj.com/article/SB123621357629835121.html), Joe Periera reported the following loss statistics:

    - Goodwill Industries to destroy **$170 million** in merchandise.
    - Salvation Army expects to lose **$100 million** in sales and disposal costs.
    - The Toy Industry Association estimates inventory losses at **$600 million**.
    - Members of the Coalition for Safe and Affordable Childrenswear lost **$500 million.**
    - The California Fashion Association estimates troubled inventory at **$200 million**.
    - The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least **$125 million**.

4. On March 11, 2009, *Playthings Magazine* reported updated data from the Toy Industry of America (see http://www.playthings.com/article/CA6643505.html), including:

- From a pool of nearly 400 manufacturers and 220 retailers, the TIA estimates **losses of $2 billion in retail value**.
- More than **$1 billion** in already shipped merchandise has been returned or is being withheld for return.
- More than **$800 million** in compliant merchandise is at risk of return.
- **40%** of all respondents plan to eliminate jobs to pay for the CPSIA, with more than 1200 jobs reported to be in jeopardy.

"TIA: Safety Act puts $2B crimp in toy biz"
3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members' businesses could total **$1 billion**. See: http://www.1st5ive.com/harley-davidson/motorcycles/2009/02/2452/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually

Examples of businesses closed due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Whimsical Walney, Inc. – Santa Clara, CA
2. Fish River Crafts – Fort Kent, ME
3. Kungfubambini.com – Portland, OR
4. Baby Sprout Naturals – Fair Oaks, CA http://www.babysproutnaturals.com/about/
5. Gem Valley Toys – Jenks, OK
6. Angel Dry Diapers – Michigan
7. Abracadabra Educational Craft Kits for Kids – Bend, OR
8. Hailina's Closet – Ellensburg, WA (thrift store)
9. Eleven 11 Kids
10. Perfect Circle Consignment – Bremerton, WA
11. JenLynnDesigns - http://wavtobow.blogspot.com/
12. A Kidd's Dream – Conway, AK
13. Storyblox – New Vienna, OH
14. Phebe Phillips, Inc. – Dallas, TX http://www.phebephillips.com/shopnow.htm
15. Pops Toy Shop - mountains of Tennessee, Virginia, North & South Carolinas

Businesses that have stopped production of children's lines due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Creative Artworks – Greenwood, AK
2. Craftsbury Kids – Montepeliar, VT
3. "Pockets of Learning" *Special Needs Products Being Driven from Market By Testing Costs – Rhode Island*
4. Creative Learning Connection

5. Giverny, Inc / Mini Me Geology
6. HABA
7. Challenge & Fun, Inc. - http://online.wsj.com/article/SB10001424052748703478704574612573263963560.html
8. Hands and Hearts Far East History Discovery Kit – Greenwood, SC
9. Moon Fly Kids – Las Vegas, NV

Businesses that closed and list the CPSIA as one of the factors
Most names provided by the Handmade Toy Alliance

1. Due Maternity – San Francisco, CA
2. Frog Kiss Designs – Fairfield, CT
3. Waddle and Swaddle – Berkley, CA
4. Lora's Closet – Berkley, CA
5. Baby and Kids Company – Danville, CA
6. Baby and Beyond – Albany, CA
7. Obabybaby – Berkley, CA
8. Bellies N Babies – Oakland, CA
9. Oopsie Dazie - http://www.oopsiedazie.com/
10. Bears on Patrol – not a business, but program by police departments to hand out stuffed animals to scared children - http://learningresourcesinc.blogspot.com/2009/10/cpsia-cpsia-casualty-of-week-for.html
11. Simple Treasures

Other companies hurt by retroactivity of the CPSIA's lead content ban:

1. Gymboree – "change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete"
    i. http://www.reuters.com/article/idUSBNG44760220090305

2. Constructive Playthings, Inc – "'We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc.…The banned products include beach balls, inflatable toy guitars and blow-up palm trees.'
    i. http://online.wsj.com/article/SB123621357629835121.html

Businesses no longer exporting to the U.S. due to the CPSIA
Most names provided by the Handmade Toy Alliance

1. Hess – Germany

2. Selecta – Germany http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cspia/
3. Finkbeiner – Germany
4. Saling – Germany
5. Simba – Germany
6. Bartl GmbH dba Wooden Ideas – Germany
7. Woodland Magic Imports – France
8. Brio
9. Helga Kreft – Germany
10. Eichorn – Germany
11. Kapla
12. Kallisto Stuffed Animals

EuroToyShop – On this company's homepage, you will find links at the bottom with a list of "endangered toys" or "extinct toys" that are still sold to children in Europe but which the company will no longer be able to sell in the U.S. due to the CPSIA.

> *Endangered Toys The CPSIA (Consumer Product Safety Improvement Act) has unintended consequences. Now, some European toys are no longer available in the USA.*
>
> http://www.eurotoyshop.com/

Associations that have voiced concerns to the Commission regarding CPSIA's costs (list is not exhaustive):

> Association of Home Appliance Manufacturers
> International Sleep Products Association
> Retail Industry Leaders Association
> Specialty Graphic Image Association
> American Coatings Association
> The Carpet and Rug Institute
> National Retail Federation
> Association of American Publishers
> Consumer Healthcare Products Association
> Toy Industry Association
> Glass Association of North America
> American Honda Motor Company, Inc.
> Society of the Plastics Industry, Inc
> American Home Furnishings Alliance
> Sporting Goods Manufacturers Association
> Handmade Toy Alliance
> Consumer Specialty Products Association
> Footwear Distributors and Retailers
> Fashion Jewelry Association
> Craft and Hobby Association

National Association of Manufacturers
Halloween Industry Association
American Apparel and Footwear Association
Juvenile Products Manufacturers Association
National School Supply and Equipment Association
National Federation of Independent Business
Promotional Products Association International
Bicycle Product Suppliers Association

US Consumer Product Safety Commission

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BIOGRAPHICAL INFORMATION

Anne Meagher Northup, Commissioner
Consumer Product Safety Commission

Anne Meagher Northup served the Third Congressional District of Kentucky, representing the Louisville district in the United States House of Representatives as a Republican from 1997-2006. Before her tenure in Congress, Northup served in the Kentucky House of Representatives for nine years, from 1987-1996.

Soon after taking office in 1997, Northup was appointed to the House Appropriations Committee, the committee that considers all federal spending bills. She sat on the Labor, Health and Human Services, and Education; Transportation, Treasury, HUD and Independent Agencies; and Military Quality of Life and Veterans Affairs Subcommittees.

Throughout her tenure in Congress, Northup was recognized for her straightforward, honest style in taking on tough issues. She is a pro-trade, pro-economic expansion Republican focused on issues that create a better environment for competition, growth, and worldwide commerce. She is a proponent of permanent tax relief for all American taxpayers, expanding affordable health insurance, cutting red-tape and making sure government programs are measured based on results.

Congresswoman Northup is the recipient of numerous legislative awards. In 2003, she received the prestigious "Adam Smith Award," which is presented annually to one federal elected official who exhibits an exemplary commitment to economic freedom.

Congresswoman Northup has been an aggressive advocate for education reform. In March 1998, she founded the House Reading Caucus, a bipartisan caucus that raises awareness about the growing number of children who are failing to learn to read. She introduced legislation commissioning the National Reading Panel, the findings of which were incorporated into the "Reading First Initiative" of the 2001 No Child Left Behind education law.

Additionally, Congresswoman Northup was a member of the Congressional Coalition on Adoption and was an instrumental proponent of legislation promoting adoption. As co-chair of the coalition in 2002, Northup traveled to China to work on eliminating the growing bureaucratic obstacles between the United States and China that were threatening to reduce the number of Chinese orphans available to American families for adoption. In 2003, Northup introduced legislation that resulted in extended paperwork deadlines for families adopting children from China who were impacted by delays due to the SARS epidemic. Northup and her husband are the parents of two adopted children.

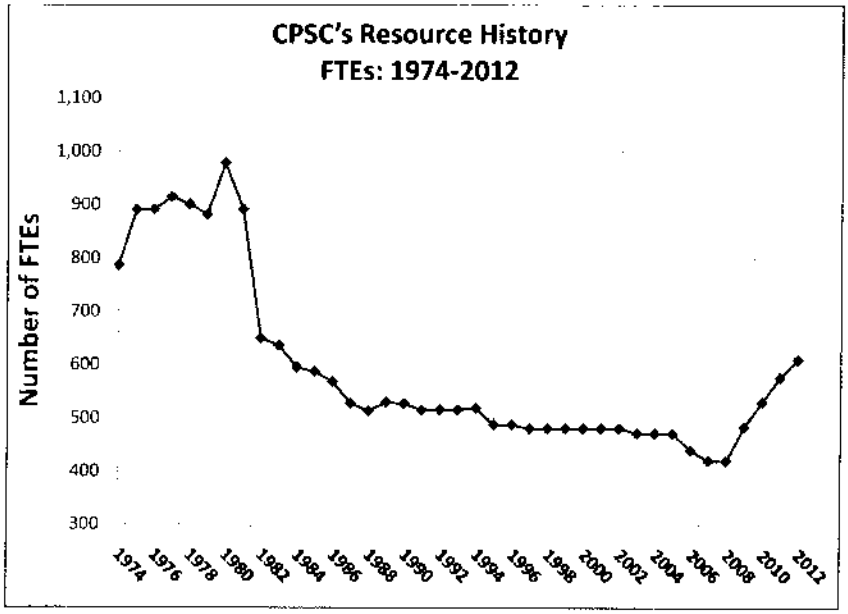
In February 2005, Northup was elected by a committee of her Republican House colleagues to chair the GOP's Retirement Security Public Affairs Team. As chairman of the group, Northup was front and center in the effort to strengthen Social Security for younger generations of American workers.

Congresswoman Northup has been highlighted by the national press for her pragmatic approach to public policy and her ability to effectively communicate the priorities of Congress. She has appeared on such shows as Meet the Press, Fox News Sunday, CBS Evening News with Dan Rather, Larry King Live, CNN & Co., The News Hour with Jim Lehrer and Hardball with Chris Matthews and Lou Dobbs.

Congresswoman Northup graduated from Saint Mary's College in 1970 with a Bachelor of Arts degree in Economics and Business. She has served for years on community boards, is a recipient of numerous civic awards, and is an active community volunteer. She is a member of Holy Spirit Catholic Church, and has been married to "Woody" Northup, a small business owner, for over 37 years. Together, the Northups have six children.

Mrs. EMERSON. Thank you so much, Commissioner Northup. I want to welcome Mr. Diaz-Balart, the Vice-Chair of our committee today. Chairman Tenenbaum, can you do me a favor and have somebody pull that chart up again that you just showed us before.

[The information follows:]


CPSC's Resource History
FTEs: 1974-2012
Number of FTEs
1,100
1,000
900
800
700
600
500
400
300
1974
1976
1978
1980
1982
1984
1986
1988
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
2010
2012

Ms. TENENBAUM. These are full-time equivalents.

Mrs. EMERSON. Okay. Do you have budget numbers?

Ms. TENENBAUM. It was 150, but that is what the equivalent was. I can give you that budget number. We had 978 FTEs. And then, in 2007, when we had the year of the recall which prompted the CPSIA, we had 393 workers. And that is why, in the CPSIA, the language was put in that we had to hire 500 by October 1, 2010.

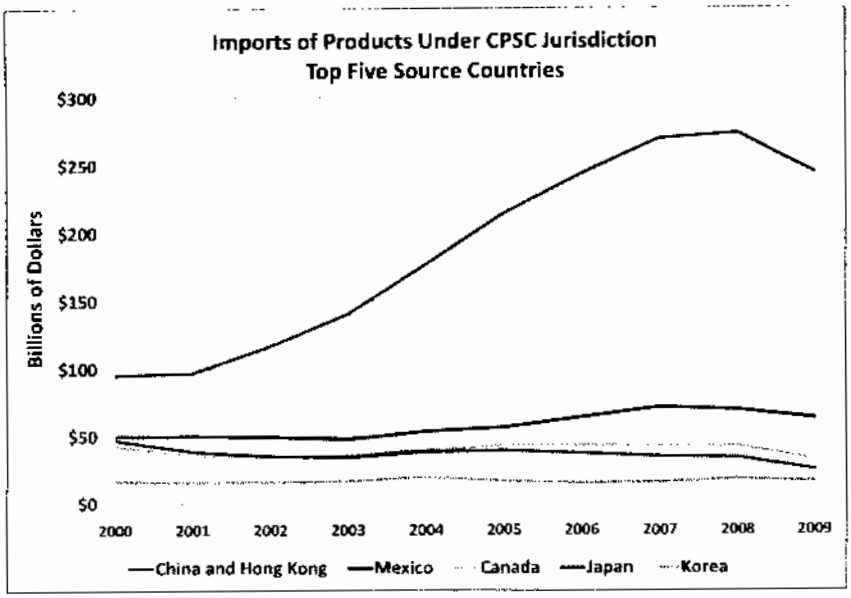
Mrs. EMERSON. Right. Here is what is interesting to me, and now that I think about it, how is it that we ever arrived at having you all having to hire 500 people? How would we have known how many people have had to hire? Do you recall?

Ms. TENENBAUM. I was not here during that.

Mrs. EMERSON. I know you were not.

Ms. TENENBAUM. I think that they looked at the agency, and the second part of that law said, Ports of entry, overseas inspections, as part of the 500 full-time employees required by Paragraph one, the commission shall hire personnel to be assigned to duty stations at United States ports of entry, or to inspect overseas manufacturing facilities. They envision that we go to China, subject to the availability of appropriations. And one of the things that is so interesting, and it affirms what Commissioner Northup just said, is here are our imports.

[The information follows:]


Imports of Products Under CPSC Jurisdiction
Top Five Source Countries
Billions of Dollars
$300
$250
$200
$150
$100
$50
$0
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
China and Hong Kong
Mexico
Canada
Japan
Korea

As you can see, the red line represents China and Hong Kong. So it starts off in 2000 at roughly just under 100 million. And now before the recession it peaks in 2000.

But look at that, 80 percent of all the toys that are imported in the United States come out of China, just like she said, and 42 percent of all consumer products come out of China. Our second largest importer has flat lined, that is Mexico. Canada is the green, and then you have Japan and Korea. We both made visits to China, and we are I am glad to tell you that we opened up our first overseas office in China, and Ambassador Huntsman allowed us to be in the building right next to his residence. In fact, every time I go to China, he has always met with me personally at the residence, because it is so important for him to keep up with our issues. And if you want me to show you these other charts, I can. They have to do with FTE's.

Mrs. EMERSON. All right. Tell me what the impact would be, because I know you all have had to plan for it, or at least noodle ideas around, about what a return to Fiscal 2008 finance levels would mean for the CPSC?

Ms. TENENBAUM. I have that right here. If we go back to 2008, which would put us back at 80 million, and it would be a 32 percent reduction, we would have to furlough staff for 92 days, or four out of the last six months of the year, effectively shutting down the agency. We would have only available 340 FTEs versus the 576 that was planned for 2011. A strict hiring freeze would prevent filling critical vacancies. We would also have to not do our nanotechnology project. We would be stopped from implementing the CPSIA in terms of the durable nursery equipment rules that we are supposed to write. We would have to close the Beijing office, and we would have to stop our hotline where consumers can call and tell us about their experiences. The Virginia Graham Baker Pool and Spa Safety Act, which is about swimming and drowning prevention, would be cut. And we would have to slow down our modernization of our technology overhaul at our agency.

Mrs. EMERSON. Okay, thanks. Mrs. Northup. How would you address those two questions? First, the FTE question, and, secondly, going back to 2008 budget levels?

Ms. NORTHUP. First of all, Madam Chair, I have to ask for a clarification. I thought that the law said we were to go to 500 by 2013, not by 2010.

Ms. TENENBAUM. It was 2010.

Ms. NORTHUP. Was it 2010? If somebody could just clarify that.

Ms. TENENBAUM. It was 2010.

Ms. NORTHUP. In any event, we are of course approaching 600 employees, and I would just say that I think you see what happens when you have a very complex bill, and you have to implement it, and it has a lot of regulations. The regulations are horrendous. Any business, just about any small business, when we talk about the ombudsman, the ombudsman is primarily dealing with micro-businesses, with crafters with people that are one-person businesses. If you are a small business, you are going to have to hire a lawyer to make sure you comply with all the new regulations that we have written.

I would just point out that, when we were at the low point, that is when the recalls happened, and that in a sense you could make the argument the system worked. They caught the toys coming in, the agency was able to do a sweep of all toys, and while it is true that there were somewhere, I think in the area of 78 toys that were recalled, it means that there were thousands upon thousands that complied with all the paint specifications. And so we were able to do that, and to implement a system. We assessed very serious penalties for those companies that broke the law, Mattel was the leading one. They paid about a $1 million, $1.5 million I think, maybe $1.8 million but they also settled the class-action lawsuit for $14 million. And there is no evidence that any child was hurt by those products. Obviously, lead in paint is dangerous, unlike lead in handlebars, I might point out, of a bike, or a peddle or the other things where the law went way beyond what was risky. But the law worked, and we did catch those toys, and they were removed from the market. And the companies were penalized and that is what set into motion these companies establishing far more oversight over their plants in other countries, putting in in-plant labs. So, you could make the argument that the CPS, being out of compliance in 2007 with 380 employees, that the system did work.

Ms. TENENBAUM. I have a correction to make. Commissioner Northup was right, it was 2013.

Mrs. EMERSON. The 500?

Ms. TENENBAUM. Yes, my notes say 2010, but it is 2013.

Ms. NORTHUP. Okay, thank you, so we are already 100 over that. We are going to be 100 over that if you fully fund us, and we are still a year out from 2013. So the bureaucracy that is growing, it is staggering.

Mrs. EMERSON. Okay, I am going to turn it over to you Mr. Serrano, we have lots of questions and I have to let my colleagues have their shot too, thanks.

Mr. SERRANO. So far, Chairman Tenenbaum on the implementation of the Consumer Product Safety Improvement Act, we are talking about numbers. How are you working to educate manufacturers about their new responsibilities under the law, and also with regard to the improvement act, since the commission has delayed until 2011, its enforcement of testing and certification requirements for many children's products, how can consumers be assured that the law is being followed and that children's products are safe? What are you telling the business community about this, and what are you doing about the children's products?

Ms. TENENBAUM. Okay, thank you Mr. Serrano. We have held workshops for the business community as early as 2008, before I came to the commission. The staff pulled together all stakeholders to teach them about the CPSIA and what the requirements are. We also have made a new Office of Education, Global Outreach, and Small Business Ombudsmen. For almost 20 years we have had a small business ombudsman at the CPSC, but it was only part time. And Commissioner Nord and I talked, and she argued that we really need to go fulltime again to a small business ombudsman. We have had a wonderful time young attorney who is working with small businesses, taking the Plain English Act and writing summaries of our regulations of frequently asked questions for the

business community. We frequently go to trade shows, we work with the major manufacturers to tour-businesses.

I think that what we really need to celebrate is the number of American manufacturers that have extremely high-quality quality assurance programs, that they are state of the art. That they are keeping risk away from people. That they have been testing using third party testing for ten years. Many of the people, once they have gone into China, determine that since it was a global market, it was a supply chain they could not keep control of, they needed to test, even before they left China, the raw materials that went into the product before it was sent to the United States. And once it gets to the United States, the manufacturers retest.

I have been to manufacturers who tell me what they do to make their product safe, and it is extraordinary. So, many of the larger manufacturers have been complying with third party testing and testing for chemicals and lead. Recently, I went to the toy fair in China and met with the top five Chinese companies that manufacture probably most of the toys made in the world. And they have worked with their industry to develop a chemical database, so that every chemical that you use in a toy is listed in that database. And you can keep up with every chemical that is in that toy, so that if you have a recall, the batch and the lot number, and you can pull that toy even before it is sent.

In terms of what we have done, we have implemented the Consumer Product Safety Improvement Act. Although we stayed enforcement for some of the products until December of this year, we did not stay compliance. So you still had to comply with the lead limits, the small parts, the phthalates, and F963. We did not stay compliance. And that is why so many people have already complied, because you have to comply with the lead paint limits, 90 parts per million, total lead content, 300 parts per million, limits on phthalates, small parts, and ASTM, which is the major toy standard. We only stayed testing and certification.

Mr. SERRANO. Right.

Ms. TENENBAUM. And most people already do that already.

Mr. SERRANO. Right. Yes?

Ms. NORTHUP. Third party testing and certification is just a giant step different from what is currently being done. When we proposed the rule, we have hundreds of pages of comments coming in from small and large businesses alike, telling us that when we actually go, when they actually have to comply with the paperwork requirements of that, when they have to comply. Third party testing, some businesses use it, many businesses have brought in ISO labs inside their companies. That is my point. They are very eager to make sure that they comply with all of our regulations.

But the command and control requirements of the law in the CPSIA, and the tracking of that information, and the way it is being implemented at the CPSC is a gigantic step in a different direction than what they are asking for. And if it were true that they were all doing it, you would not get, universally, and it is universal, from small and large businesses, saying this is going to be horrific. It is going to be costly and impossible in many cases.

Let me also say that I am glad we have a Small Business Ombudsman. Unfortunately, this office is going now from one to—now

we are requesting two more, which was a reason I did not support it. Small businesses are not asking us for more information. They are asking for changes in the law. They are telling us it is killing them. And they are saying, it is not more information they are asking for, yes, crafters are, but small businesses that have 10, and 15, and 20, and 30 employees? They are hiring their own lawyers en mass. And even people like Mattel told us that they had to hire a huge cohort of new lawyers, internally and externally, because what they had was simply not enough for them to comply with the law. They said in a public statement that was printed, they did not know how a small business could comply with this law.

Mr. SERRANO. Well, when you two speak to us here today, we see what the problem is. And I am in, it must be because it is opening day, I am in a, baseball opening day.

Ms. NORTHUP. You are in a good mood.

Mr. SERRANO. I am in a, let us find common ground and the middle ground here. Now, you walk into, and I hate to mention names. You walk into Toys R Us, staying on the issue of children. Sure, it is a business. And they want to make money. But I do not think they are irresponsible people, the people who own Toys R Us. They know what impact they have on children. So there has to be testing. There has to be some government oversight of those products coming into the country.

But at the same time, since I am in this great mood today, there should not be something that strangulates the economy and the business community. So what is it, to both of you, that the business community is willing to comply with? And what is it that bothers them? Because if you tell me, I mean, let us be honest. You served with us. You know that there are some colleagues of ours who want no oversight of anything, no regulation; they are all good people, and they will take care of the American people. That is not how it works.

Ms. NORTHUP. No.

Mr. SERRANO. Right?

Ms. NORTHUP. And you see that every day when you are at the Commission.

Mr. SERRANO. Exactly. So what is it that is squeezing them too much, and what are they willing to do on their own? Because one of our big complaints, besides, China owns all our economy, or whatever, all our debt, is, all these products come from China. And we cannot just accept them as they are. So just briefly, can you tell me, where is the middle ground here?

Ms. TENENBAUM. Well, last year, we sent a report to Congress saying that we needed four things changed in the Consumer Product Safety Improvement Act. First of all, we needed greater flexibility in granting exclusions for the lead limits. For the lead limit, CPSC only allows three exemptions: one if it is an inaccessible part, two, if it is certain electronic parts, and the third thing is, by use and abuse of the product, any lead is not absorbed into the human body. So we wanted greater flexibility, because we had ATVs and bicycles where the child is not going to mouth the handlebars, and we wanted to be able to give them an exception.

The second thing is we wanted an exclusion for children's books. In August, the lead limits go to 100 parts per million. And we also

said, Do not make this retroactive like CPSC did for the 600 parts per million. Only make it prospective, so people will not have to get rid of their inventory. And we also wanted relief for small manufacturers and crafters. In fact, we are working on a rule called Periodic Testing. We are looking at carving out an exception, that, if you make 10,000 units or less, you do not have to periodically test. You have to initially test, but you do not have to periodically test.

We also came up with a component part rule. So if you made children's dresses, you did not have to test the whole dress, you could just buy buttons that were already tested, from the button maker, and you were compliant. We made rules that say, if you had cotton, untreated wood, if you were a handcrafter and made things out of untreated wood, you never had to test. So those are the things we have done to be creative, to exempt people from testing and certification.

The common ground is that we need flexibility. But to do away with third party testing really goes against what I have seen in the marketplace. And I think that it is to whom you speak. I went to see a major children's clothing manufacturer, and they told me, just two weeks ago, that when they started manufacturing in China 10 years ago, they started doing third party testing because they wanted to make sure they met the flammability standard and that the fabric did not contain toxic metals.

Mr. SERRANO. Madam Chair, I do not want to go over my time, but I would like the commissioner to comment because she did say, she did.

Mrs. EMERSON. Yes.

Mr. SERRANO. I was pleased to hear that you say you see it every day at the Commission. So you are not one of those who says get rid of the Commission.

Ms. NORTHUP. Let me just say that every day we get the overnight incident reports. And there are children that have died, there are cases. We see products that catch fire; we see products that are harmful. There is no question that there is a very important responsibility at this agency. However, what has been a tidal wave of focus of this agency has sort of swamped everything, is the implementation of the CPSIA. I have to tell you, Mr. Serrano, had I been here, and I was not in 2008, I feel sure I would have voted for that bill.

And because in reading it, it seems as though it is logical. But of the three exceptions to the lead limit, the question of inaccessible electronic components, the third one is absorbability. The majority of the commissioners have determined that this is in conflict. But they have interpreted that to not apply to one single thing: not a button, not a snap, not a zipper, not a handlebars, not any part of a toy, not the screw in your crib. None of those things can have 300 parts per million of lead. Now, you could absorb lead in paint. We know what you can absorb lead in. We know if you can swallow a charm that has lead in it, that your body will absorb it.

But we also know that if you lick the handlebars all day or the screw in your crib, that has slightly more than that but has more strength, it has machineability. I mean, lead also contributes certain things that you are not going to—there are just going to be an unregisterable amount in a child's blood lead level.

Europe has had lead levels for years. They are based on the absorbability. They call it bioavailability, whether or not that lead can be extracted out and into a child's body. We should make that absorbability mean something. And then finally, the testing, I would just say that I do not believe that I have heard from one plant that said, I am sure I have not, that said, Oh, yes. We think third party testing, outside of our plant, the way it is written in this law, is going to be good.

Do they use third-party labs? Of course they do, because they care about it. But they do it for their own check and recheck, not so that they then have to change the label every time they have the red paint runs out one day. Now, you have a new set of red paint. It has a new certification level. Now, the final certificate has to change the number on that. Now, the label has to be batch #107 instead of 106. An hour later, the yellow paint runs out. You have to stop the presses. You have to change every single thing all the way through. The next minute, the snaps run out and you have a new batch of snaps. You have a new lot number, so you have a new certificate number. All of that has to be reflected in the label.

This is chaotic and Ashley Furniture came in and told us they had spent $14 million on third-party testing and setting up a system by which they could track all the layers on a piece of furniture and everything. Not one single component of this furniture violated the lead limit. They were in compliance. They still did not know how, once we applied this, once we put in testing, third-party testing, and that they were going to be able to comply. So you got no benefit in safety and 13 or $14 million and cost.

Mr. SERRANO. Thank you. Thank you, Madame Chair, for allowing me to go over my time but it has been quite a while since I have heard this kind of very direct testimony.

Mrs. EMERSON. Oh, and it is excellent.

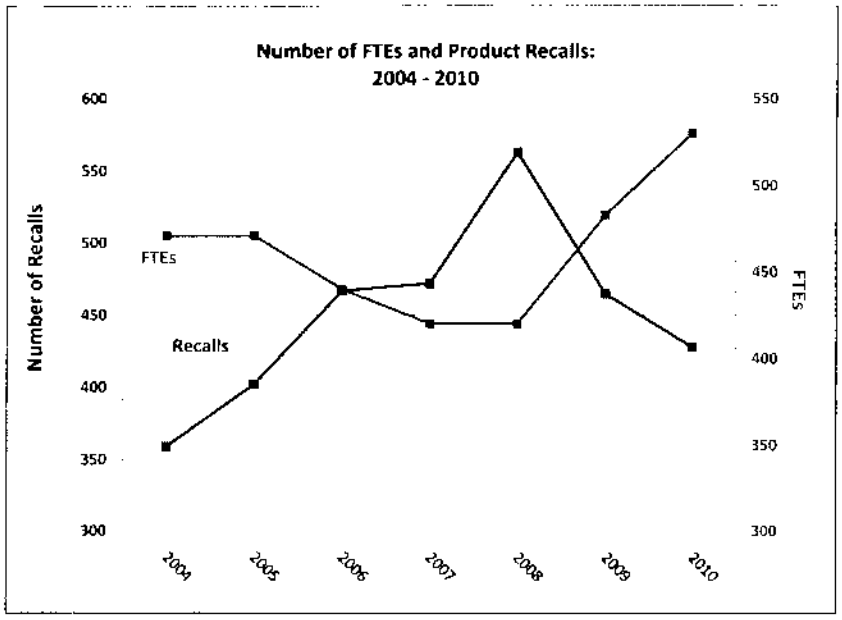
Mr. SERRANO. So informative. Thank you.

Mrs. EMERSON. And it is very helpful, very helpful for us. Mr. Womack.

Mr. WOMACK. Wow. Where do I begin? I was a mayor for 12 years and I spent a great deal of my time fighting my own bureaucracy. And it has been my experience that when you hire a lot more people, those people start trying to justify their existence. And so, my first question is, when the law was passed, that pegged 500 as the number of people, where did we get that number? How did we, all of the sudden, decide 500 employees was the magic number?

Ms. TENENBAUM. Well, I will show you two things that probably prompted Congress to do that.

[The information follows:]


Number of FTEs and Product Recalls:
2004 - 2010
Number of Recalls
FTEs
600
550
500
450
400
350
300
FTEs
Recalls
550
500
450
400
350
300
2004
2005
2006
2007
2008
2009
2010

The blue line are the full time equivalents. As you can see, in 2004 we were a little over 500. And then, in 2005, we were at 500, and then we dipped. And this right in here was the year of the recall. If you look here at the number of recalls, they spiked. They spiked a little around 2007.

So what Congress, in looking at this data, determined, is that with the less people you have doing port surveillance, working in China to make sure manufacturers understand our regulations, the more recalls you are going to have. Recalling costs money for manufacturers.

Mr. WOMACK. Do you have a chart that shows the competency level of those employees?

Ms. TENENBAUM. We hire people who are competent. And we hire really good people.

Mr. WOMACK. I will give you that. I am sure you do on paper. The point I am making is, can we just simply conclude, based on a numerical chart, that the spike in recalls was directly related to the fact that we had a fewer number of people.

Ms. TENENBAUM. Yes, we only had 393 people and we did not have enough people. We had five people at the ports. Now we have 19 people at the ports. We are working with Customs, and have 19 people at 15 ports. We work with Customs and Border Patrol. We were the first agency to sign a memorandum of agreement with them and, we get all the pre-arrival manifest data. We go through all of that data, and we target now shipments before they are even unloaded. Products like fireworks and electrical products, we pull them so they do not get on the store shelves.

Mr. WOMACK. Well, Madame Chairman, everywhere I go in my district and look, I have got a major retailer that is in my backyard. A small five-and-dime named Walmart. And they sell a lot of toys.

Everywhere I go in my district, I hear people telling me about pushing jobs overseas, moving jobs overseas. Is it possible that maybe part of our problems is that we continue, the reason we have so many imports of toys, is our tax policy and our government bureaucracy is so big, so reaching, so much into the private sector that there might be some other quantifiable data that might yield a different conclusion about pegging the number at 500. I am just using that as a thought process because it always bothers me when somebody says, Golly! We are in trouble. We need more people.

Ms. TENENBAUM. I have been in plants in China. And people in China make $1.50 an hour. They live in dormitories and they may or may not get food in those dormitories, and they also do not have air-conditioning in some of the dormitories. So, if you look at textiles, my state, South Carolina, was a major textile state. And now, textiles and toys have moved. And the chart I showed you, 80 percent of all the toys coming into the United States come from China. Forty-two percent of all the consumer products come from China. And they make $1.50 an hour.

Here is another thing that Congress looked at when they passed the CPSIA. Here are the number of investigations. And you can see, in 2003, we were over 50,000 investigations. And we had dropped to below 30,000 by 2009. Here were the number of pro-

jected incidents, and this is before we even implemented the database—the public database that people have been talking about.

So, we are able to only investigate about 10 percent of all the claims of injury that consumers send us. Ten percent. And one reason that we are asking for 24 more people this year is because we have so much data and so many reports from emergency rooms, coroner reports, the newspaper, and we have our public database, that we cannot even investigate because we do not have the people. This is where the majority of the new people were going, is to investigation. And our new employees have gone into our laboratory as well as in Compliance and Enforcement.

Mr. WOMACK. I would like for Ms. Northup to comment.

Ms. NORTHUP. Well, I think your question is, Can we do more with less? And I think I would like to say, first of all, that I have been exceedingly impressed by the people that work at the CPSC. They work hard. They are talented and they are well-trained. They know what they are doing. But they have been given a responsibility to implement a law, and all these rules and regulations are very involved. They are very complicated.

But I would tell you this, all of the new ways of screening things coming in work with the Border Patrol Customs and Border Patrol. That is a new way of doing more with less. And so that is why I have asked, please, do away with the requirement of third-party testing and tracking and certification, because both within businesses and the huge investment they have made and our investments at the port, this is an emerging world where new technologies are available that were not available or were not used previously, and we could do a lot more with less.

And finally, I would just like to say that the rules that we have implemented, the ones that affect businesses the most have been written and there has been division between the majority and the minority. Where we could have made it apply to fewer items, we made it apply to more items. Where we could have allowed fewer tests, we have interpreted it in the most severe manner. And now, yes, much of the regulations and investigations is going to be investigating whether or not people complied with the certifications, whether they complied with the third-party testing, as opposed to whether or not the item is compliant.

And finally, just the very fact that every single lab that uses a third-party test, we have to certify the lab. We have to take in that information. These businesses know what third-party labs they can trust, but you create a bureaucracy that stretches back. It is not just any third-party lab, it is a third-party lab that is ISO certified? No, it also has to be certified by us. And so, even though that seems like it is not a lot of time, everything is incremental. When every single child's product, every component of it has to be third-party tested in a lab that we have certified, you are talking about an enormous process of just doing that.

Mr. WOMACK. That raises costs. And I just want to make this comment for the record, that my question about competency was not related or not in any means directed at the quality of your staff. I realize you have a quality staff. What I am simply asking is, are there other measurable criteria that could point to other factors that may contribute to the incidents, or the investigations, or

the complaints. And that is merely the line of direct thinking I had at that stage.

Finally, let me just ask this. Are we sure that we are doing everything we can to mitigate the impact on small business? As my colleague from the Bronx said just a moment ago, we do not want to under regulate, but we really do not want to over regulate. And I would like to know where that line is in an ideological sense, as to when this organization is going too far, trying to do much, and exponentially raising the price of goods in an attempt to try to remove all risk from the public.

Ms. TENENBAUM. Well, thank you, Mr. Womack. And one thing I want to clarify is we will only have one small business ombudsman. I created this office of Education, Global Outreach, and Small Business Ombudsman, and we put three offices in there together. We put the International office, the Inter-governmental office, and the Small Business Ombudsman. And so, the two new positions in that would be to hire an Executive Director for that office. But let me go back to what we have done for small businesses. We want the full-time Small Business Ombudsman because we are working so that people do not have to hire a lawyer. We are doing seminars, we are going to trade shows. Our Small Business Ombudsman gives his card out to people at seminars, and they call him personally. He answers questions for them. But we also have done other things. When we were debating tracking labels, we decided that one size did not fit all, that the small businesses did not have to have the same compliance as the large companies. We developed component part testing guidance and that is so that the small business, we were hopeful, could buy component parts already tested and would not have to re-test their products.

The third thing we did was determinations, that if you were a small business and you were making children's clothing or handmade toys, that there were certain materials that never had to be tested, like untreated wood, textiles, and gem stones. So those are the kinds of things we look at. We also have the Regulatory Flex Act. We look at how it is going to impact small businesses before we come up with a rule. And so, Reg Flex Act is something we look at and point out the impact. But we are very mindful of small businesses. But, under the Consumer Product Safety Improvement Act, everyone had to test third-party testing, regardless of the size. That is why we were hopeful that component parts would be developed so that people could buy those, could go in a hobby store, or buy them from the manufacturer already tested, and they would not have to re-test.

We also hope that this year, that the House and the Senate will give us more flexibility so we can allow companies, if we do not think there is a likelihood of mouthing the product, or swallowing the product, that we can give them flexibility and they will not have to test.

Mr. WOMACK. I yield back.

Mrs. EMERSON. It seems to me that you are the perfect agency to make sure that the President's call for cost-benefit analyses of regulations actually comes to be, because obviously some things are so onorous. There is no way that you can say they are not. It appears that if we do not understand the impact at the end of the

day in a very fragile economy, we may be cutting our nose off to spite our faces, in which case there is no businesses to have to regulate anyway. I do want to come back and talk about cost-benefit analysis of regulations. So far, I have not seen any federal agency in this government who is capable of doing that.

Mr. SERRANO. Would you yield for a second?

Mrs. EMERSON. Yes.

Mr. SERRANO. I am sorry. I usually do not interrupt. In listening to our new colleague, Mr. Womack, I think the balance here is that we are appropriators. We are not authorizers, although on many occasions we behave as authorizers.

Mrs. EMERSON. And we have.

Mr. SERRANO. We appropriate. And we have to. We keep them in check. This is a law that is in place already. The question is, Do we fund it and to what extent do we fund it? And that is the balance, because if we get back to 2007, and you see people, kids actually being hurt because maybe for insufficient funding, or funded to a point where they function. And that is not how they authorized it. They passed that law. It is on us. That is the delicate balance that we have to reach. So we do not over regulate, but as I said, do not under protect. And that is the challenge.

Mr. WOMACK. Which I think feeds it directly into Madame Chairwoman's request, that a cost-benefit analysis probably fits this agency as well as any in government.

Mr. SERRANO. Absolutely.

Mrs. EMERSON. And thank you all. So with that, it is time for Mr. Diaz-Balart.

Mr. SERRANO. Of the Florida Marlins.

Mr. DIAZ-BALART. Who did beat the Yankees, if I recall, a few years ago in the World Series? My memory is not very good, but did not that happen recently?

Mr. SERRANO. I think that was your moment of glory.

Mr. DIAZ-BALART. Madam Chairman, you see how he cannot admit it. It just hurts him to admit it. It hurts him.

Mr. SERRANO. All right, it hurts me. It hurts me.

Mr. DIAZ-BALART. Thank you, Madam Chairwoman. It is good to see you the both of you. You know, if I may, I have some questions on Chinese drywall. But Mr. Womack really peaked my curiosity. So if that is all right, I would like to submit the ones on Chinese drywall in writing later on, because I do want to go back to what our colleague was asking.

One of the things that we have to be careful in government not to do is get stuck with that kind of weird logic of, Since cheese is round and the moon is round, so therefore the moon must be made of cheese. And I think sometimes, when you look at these charts, it is not always the case, but sometimes we get stuck in that syndrome about, Oh well, if we had a spike and we only had 300 people. So if we have 500 people, we would not have a spike. Is it just because of the products that all of a sudden are manufactured differently, because of technology, because of whatever. And again we just need to be very careful about that. If I may, kind of, follow up on my colleague's line of questioning. By the way, before I do that, when was the hotline created?

Ms. TENENBAUM. We have had the hotline for years. It is the publicly searchable database that was mandated that we created under the CPSIA in 2008. So we just launched it in March.

Mr. DIAZ-BALART. Madame Chairwoman, when you mention about the things that you would have to get rid of or cut if we went back to 2008, you mentioned the hotline. But it was there before. It was there in 2008. So why, all of a sudden, if you could do it in 2008, and it was there before 2008, when we had less money, more money; I am not quite sure.

Ms. TENENBAUM. Because what we are trying to do is increase the number of investigations and increase our rate of compliance in investigations that we are able to do. When we are asked to make cuts, we look at what are some items that are discrete that we can cut. And so that was one of the things that would have to be cut. The fact that we had more money also allowed us to spend the $5 million that we have done on the drywall investigation, which is the most expensive inquiry and investigation we have ever done in the history of the Commission.

Mr. DIAZ-BALART. Okay. Let me go back to what Mr. Womack started talking about. We have heard a lot about some of the issues that may be onerous to business owners. Specifically what are the things that you are doing that are actually helping business be more competitive? Because, obviously, with technology and everything else, there have got to be areas where you look at ways to be less onerous, less expensive to business, and you can go to them and say, Hey, look, right now you are required to do A, B, and C. Let me show you a way that you can do that and you can reach the same level of safety without having to go through the expenses. Are there specific recommendations like that, that you all are going to the private sector on and saying, Here is where we can help you streamline, that you do not have to do certain things that you were doing before because technology has changed. What are some of the specifics that you are doing in order to help business be more competitive?

When I looked at that chart of the number of Chinese toys, and again, now I am going back to the same analysis that really kind of frightened me, was the fact that there was at one time in our history when we manufactured a lot of those toys. There were a lot of reasons why; clearly labor costs is one of them. But if labor cost was the only issue, we would not be doing anything in this country because labor costs are a lot less expensive in a lot of places, and yet we are still competitive in a number of different areas; obviously, toy manufacturing is not one of them, unfortunately.

But what are the areas, specifically, that you all are looking at to be more competitive where you can cut cost for business? Some specific areas like that that you are bringing forward?

Ms. TENENBAUM. Well, education is a service that we can provide, and businesses tell me that helps them tremendously. If we educate them on what our requirements are, then they do not make mistakes. They can build safety into the product. And that is why when I came here I wanted to create the Office of Education Global Outreach and Small Business Ombudsman and put three offices together so that we could have a targeted, standardized approach. We could work with colleges and universities, trade asso-

ciations, other government agencies, so that we can help people understand what the requirements are, thereby saving them money so they do not have their products recalled. Recalls are not the best way; it hurts industry; it hurts their brand. We want to get ahead of that.

Another thing is counterfeiting. We get complaints on counterfeiting. The largest problem on counterfeiting in China that we find is electrical products. And so the good people want us to catch the counterfeiters. And we are constantly working with AQSIQ, letting them know when we find counterfeiters.

Another thing we have is called the 15J Rule, which means if it is a standard that the industry is complying with, and it is visible to the eye, we can then stop products that are not compliant, so that the good people and the compliant people get to sell their products. We have done this on drawstrings, hair dryers—the bob on the end of the hair dryer that is the circuit breaker—if we see one coming in the country that does not have that, we stop that at the port. So one way that we help industry is by helping the compliant have their share of the market and remove the people who do not comply.

And the other day, Diane Sawyer did a piece where she went into a home and took out all the furniture that was made in China and replaced it with furniture made in the United States. And the cost of the furniture was essentially the same. I am going down next week for two days in North Carolina to go to the furniture market. A lot of furniture is still an industry that the United States has a large market share in. Next year we need to go and create an upholstered fabric standard; the industry has asked us for it. We worked on the standard for 16 years.

We also work with standards-making bodies, such as the UL, which are the electrical products bodies, as well as ANSI, and ASTM. We work with them when we see a product that is not working. And with the staff working with industry on these committees, we come up with a standard that improves the product and reduces everyone else's risk. And those are voluntary standards.

Mr. DIAZ-BALART. Let me see if I can give the Commissioner a shot at that, too.

Ms. NORTHUP. Well, first of all, let me just say that there is nobody that wants recalls less than every business. And that is why they are more efficient and better at putting in prevention ways: ways to test their own things, internally; ways to make sure that they are in compliance. For us trying, without manufacturing experience, being in the plant, and knowing what is going on, it is impossible that we could ever provide the sort of expertise that businesses are able to hire and provide for their own businesses.

In the rule-making, first of all, the rule itself, the law itself, said that absorbability would be one of the exclusions. If you could not absorb lead. If that had actually meant something, and I presume when you passed it in Congress you meant for it to mean something, much of our problems would not exist today. But the majority of the commissioners decided that if you rub the handlebars and a fraction of a fraction of a fraction of a molecule comes off, of that, and one percent of it is lead, the fact you could put your hand in

your mouth, that meant that nothing could comply with the absorbability standard. Even though in the world, and in Europe, it is an absorbability standard, if you suck on the handlebars and you cannot get the lead out, it is not what they call bio-available, they exempt all of those things.

So when the Chair talks about, we exempted materials like cotton, it is the smallest, it is a list of about eight things and they are mostly materials.

Mr. DIAZ-BALART. Is there an issue in Europe with lead?

Ms. NORTHUP. No. And more importantly, let's look at our own. We have CDC, NIH, EPA, that all talk about lead issues. First of all, one percent of the children tested in this country reach what we call the tipping point of lead. They are about one and a half years old. They are crawling around on the floor; they are picking up dust that has lead in it; it is either from chipping paint, or it is tracked in from outside because lead was in gasoline, it was in the dirt; it gets tracked in, it gets on the floor.

We do not have to research that; they tell us where children are impacted by lead, and how they get impacted by it. And none of them say, Take away your child's toys; take away their bicycle. None of them say, Change the screws in the cribs. And yes, there are some groups: the American Academy of Pediatric wants us to make it 60 parts per million. But when you look at their website, about what they recommend for children that start to have an increase in blood lead level, and maybe are approaching the tipping point, they do not say one word about it being in their toys, in the furniture. And why would they? Think about it. We are requiring, much to my dismay, and something I think the law would have allowed us to do differently, we are going to say that a lamp in a child's room that has a child's, say a fairy for a little girl's room, every single component of that is going to have to be third party tested: the brass; none of that is going to comply, because it all has lead in it.

But that child is going to walk around the rest of the house and turn on the lights. And no one would say, Do not let your child touch a lamp. There is a ludicrousness in this. And a lack of reasonableness that we could have not required it in carpets. We have a requirement on flammability and testing of rugs and carpets. But we decided that we still had to apply this third party testing requirement to rugs in a child's room. If they have a child's rug, say a star in the middle of it, that would be bought at Pottery Barn, you can go to Pottery Barn and buy the exact same thing with solid color with a yellow outline, and do not have to third party test it. If it has a star in the middle of it, then you have to third party test it. And so, do you think there will be that right? And what is the difference? And in the meantime, the child is going to crawl out of the bedroom, into the living room, into the mother's bedroom, none of which is tested. It does not make common sense to me. In places where I think we could have written the rule so we could have exempted out products where we already have protocols and they are in general use; we did not.

Mr. DIAZ-BALART. Yes, well, that does not pass this.

Ms. TENENBAUM. First of all, when Congress was considering the CPSIA, they heard testimony from scientists, from physicians, who

told them there is no safe level of lead. That is why Congress put it in the statute that you could not let a product be used, or that we could not get an exemption if any lead could be absorbed. So it was not the majority that came up with this ruling, it was the plain language of the statute.

Mr. DIAZ-BALART. Are you going to come back with recommendations to change the statute, then?

Ms. TENENBAUM. We did last year.

Ms. NORTHUP. But not that.

Ms. TENENBAUM. And we also wanted more flexibility in letting out certain products where we knew the exposure was very low. But in August we will go down to one hundred parts per million. Canada already set its lead limit for content in children's articles to 90. So Canada is already below us. We are seeing remarkable progress where industry is getting the lead out. You see lead coming out of zippers for children's clothing, for buttons, for toys, out of vinyl, you see it out of rhinestones and bling. The market is getting the lead out of children's products. And we do not want an amendment to this that will take us back so we have to test every article, because the CPSC does not have the capability.

You are talking about more staff, Mr. Womack? If we had to test everything for solubility, when solubility depends on the child. A child that is deficient in calcium will absorb more lead. Lead is a powerful neurotoxin. There is no safe level. It reduces the brain functions and it interferes with the brain functions and the IQ of children. It is well-documented. So it is something that Congress did hear plenty of testimony about, when they said, we want the lead out of children's products.

Mr. DIAZ-BALART. Let me just, in the interest of time, thank you, Madame Chairman, you are being very generous. Allow me to say that this is, frankly, one of the most informative hearings that I have been in, in my years here because we are actually beginning to talk about the issues.

There always seems to be, and the legislation is part of that, an increase in regulation. Could you tell me what decreases in regulations you are either doing or you are proposing, again, because of changes in technology, because the need is not there, because the cost is too much, or the cost is too much for the gain? Are there any areas where you are looking at decreasing regulation, decreasing activism or activity, in the private sector?

[The information follows:]

Response of Chairman Inez Tenenbaum to Question from the Honorable Mario Diaz-Balart

The Commission is always seeking new scientific approaches and regulatory pathways that can decrease the burden on the regulated community, while at the same time maintaining a high level of health and safety protection for consumers. One very recent example of the Commission's effort to ease regulatory requirements where appropriate involves the testing requirements for determining compliance with the standard for lead (Pb) in paint and other similar surface coatings. *See Third Party Testing for Certain Children's Products; Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies – Lead Paint*, 76 *Fed. Reg.* 18,645 (April 5, 2011).

The previous CPSC staff test method for determining total lead in paint recognized a "wet chemistry" method that involved removing paint from a product by scraping or using a solvent, dissolving the paint scrapings in nitric acid, and analyzing the acid solution by spectroscopic means, such as inductively coupled plasma optical emission spectrometry (ICP-OES), inductively coupled plasma mass spectrometry (ICP-MS), flame atomic absorption spectrometry (FLAA), or graphite furnace atomic absorption spectrometry (GFAA).

These analytical techniques used in "wet chemistry" are capable of yielding precise and accurate results and have low enough detection limits to measure lead in paint at the new limits of 90 mg/kg.

However, this test method is time consuming, and typically requires several hours to prepare and analyze samples, and is sample destructive. Insufficient quantities of paint, such as samples from an item with a thin coating of paint in a small area, also can impact use of this procedure. For example, this test method recommends that a minimum of 5 mg of paint be collected. Collecting at least 5 mg of paint from products with small painted areas can be difficult, sometimes requiring compositing of like paints from multiple items to obtain sufficient material for analysis.

As a less burdensome alternative, the Commission recently recognized the use of XRF technology, in addition to the "wet chemistry" method, to test for lead in paint and other similar surface coatings. The main advantages of utilizing XRF over the current digestion/ICP method are:

1) XRF analysis is often nondestructive, and the paint can be tested *in situ* on the item.

2) Little to no sample preparation is required, which greatly reduces the analysis time and cost. Sample times for XRF *in situ* analysis are typically less than five minutes. It takes several hours to collect, digest, and analyze paint scrapings using the "wet chemistry" test method.

3) XRF has the potential to directly test small painted areas, without the sometimes difficult task of removing enough paint from a small area to quantitatively analyze using the current digestion and ICP method. XRF analyzers equipped with video cameras can be used to analyze spot sizes of a few millimeters.

4) Some XRF analyzers are portable, allowing for field-screening of products.

As resources permit, the CPSC is also considering whether to reinitiate a program, started in 2004, to conduct a systematic review of its current substantive regulations. The primary purpose of the review is to assess the degree to which the regulations under review remain consistent with the Commission's program policies.

Ms. TENENBAUM. I want to go back and talk to our laboratory and our scientists to give you a complete answer. We regularly meet with standards-making bodies. In fact, the law is plain that we cannot write a mandatory rule unless the voluntary rule is shown to be inadequate to protect the consumer. So the great majority of our rules are voluntary standards. The UL writes standards for electrical products, for example, and most of the rules that the industry uses to make products are voluntary. We only make a rule if it is not adequate. So we will get back to you.

Going back to the President's executive order. The order asked all agencies to look at significant rules. Significant is defined as having a certain financial, I want to say, $100 million; is that correct? $100 million?

Mr. DIAZ-BALART. I think it is $100 million.

Ms. TENENBAUM. So it has to have the impact of a $100 million. The only rule that we have implemented that rises to that level, since I have been the Chair, has been our new crib rule. And we worked together to give the industry time to manufacture those, and also public accommodations to purchase those. But I will send you a list of those. But I just want to clarify, the rule-making, mostly, are voluntary rules that industry uses.

Ms. NORTHUP. If I could just correct, Canada left many of their things at 600 parts per million lead. It was the things that were swallowable that they lowered to 90 parts per million. And, again, I think that anything that is risky, we can ban. We have that authority.

Ms. TENENBAUM. Well, and the AAP really wanted 40 parts per million, not 60; so the American Academy of Pediatrics wanted us to set our limits not at 100, but at 40. And the compromise was 100 when they passed the CPSIA.

Mrs. EMERSON. Thank you all.

Mr. Serrano.

Mr. SERRANO. Thank you. Before I start, I will preface my comment. You spoke, Madame Chair, about the cost benefit analysis. And I think it is fine, in some cases, when we talk about paperwork or regulations. But cost benefit analysis can never be acceptable in terms of a child's life or safety. And I think that is where we have to be careful. When we study how much we are spending, it can never be at the risk of having a child, or any person, but certainly children, who were the most affected in 2007, so that is important.

Which brings me to the question of the new product testing lab that is slated to open very soon, compared to the CPSC's current laboratory. How will the new one enhance the work, and how will consumers ultimately benefit?

Ms. TENENBAUM. Thank you, Mr. Serrano. Our lab opens in May, and we would like for all of you to visit the lab with your staff, if you so choose. The lab is going from 37,000 square feet to 63,000 square feet, and we can now perform, in the lab, many more tests than we were able to perform. We have a new testing laboratory for fireworks, for example; we have our own chemical laboratory, toy testing laboratory, and it will be a huge improvement over the laboratory that we have been operating in for so many years. So we appreciate the funding that Congress has provided to us. It is

a $19 million project. We purchased a used building that was already built for a lab, and remodeled it to fit our needs, and we hope that you will come out and see it. It is in Rockville, Maryland.

Mr. SERRANO. Thank you. And that will launch when? In May, you said?

Ms. TENENBAUM. May of this year. And we would love for you all to come out.

Mrs. EMERSON. That would be a good field trip, I think we should do that.

Ms. TENENBAUM. Yes, please do.

Mr. SERRANO. We can bring some Republicans' items, some Democrats' items, have them tested.

Ms. TENENBAUM. You are right.

Mrs. EMERSON. Great idea.

Mr. SERRANO. We could bring the Federal Budget, test and see how much harm the cuts will cost.

Ms. TENENBAUM. Very clever.

Mr. SERRANO. I could not help that. Every so often, you see a perfect example of the differences around here. It seems there are a significant number of Members of Congress who would like to get rid of the searchable database. But the public likes it. What do we need to know about how it is working? What is, in your opinion, the strength? What is, in your opinion, the weakness? Only to be fair, I think there are no weaknesses. But if someone wants to say there is a weakness, we certainly will hear that. But it seems to me that the ability for someone to get on a website and know that there are items they should be looking out for, cannot hurt anyone. We put all our legislation up on the Internet and people comment on it; and some love it, and some hate it; and some love us, and some hate us; and that is fine; that is public information.

First of all, who is complaining about the database, other than Members of Congress? And what is the strength? And to be fair, if you want to comment on its weaknesses.

Ms. TENENBAUM. Well, we had a spirited debate when we were debating the rule on the public database. But I want you to know, even though we televise our debates and we have open and transparent meetings, 86 percent of all of our decisions are unanimous.

Mr. SERRANO. Eighty-six percent?

Ms. TENENBAUM. Eighty-six percent. But this is one where we had different views, and we argue our views passionately; and I think that is a good way to be. And once it is over, a lot of times we go to lunch, and we remain cordial to each other and friendly. But that was a very tough decision. And it was a spirited debate.

Let me give you a little background on the database. First of all, the CPSC has had a website where people report data to us for a number of years. In fact, we receive over 17,000 a year. However, that Website is not searchable by the public, nor do we have a portal so that manufacturers can go on and side-by-side and give us their comment on what someone said about their product. In fact, we are the only federal agency that has a manufacturers' portal. NHTSA does not have one, and the other agencies like Agriculture, who may have a website, do not allow manufacturers or people to comment side-by-side.

But let me give you some numbers, too. The database is a part of a risk-assessment system that Congress mandated that we create under the CPSIA. We have spent $23 million so far to create the risk-management system, and $3 million for the database. All the money that has been given to us has been spent because we launched the database in March.

We receive each year 458,664 reports from consumers. The majority of these come from emergency-room data. We purchase emergency-room data on injuries people sustained from products. That is 397,000 out of the emergency room. Like I said, the website yields about 17,000. We collect mortality data. We get 8,000 death certificates, 550 medical examiners reports or coroner's reports. We look at the newspaper every day. Commissioner Northup spoke about the daily reports; we find out through the newspaper who has drowned or who died because of a product, and that is 6,554 reports.

We also get a little over 163,000 reports on the hotline, but only 5,531 are actually reports of harm from a product. A lot of people just call and ask us questions. Retailers such as Wal-Mart, Target, Sears, Home Depot, Amazon: we get about 23,000 reports from them, because we have got a retailers' reporting program. If they have a problem, they call us and let us know immediately.

We also have a substantial product-entry hazard under Section 15 of our statute. If the manufacturer knows, or the importer knows, that their product has a defect, they have to call us. So we get thousands of reports, about 20,000 reports from them each year. So anyway, to make a long story short, you add all those up together, we get about a half a million reports every year on consumer products.

Now let's go to the publicly searchable database. Remember, I said we get about 17,000 each year from our website anyway, but it is not searchable and it does not have the manufacturers' portal. Since we started in March 11, we have 436 reports of harm in the database. Of those, we have notified 306 manufacturers. Of those, we only had 17 reports that the report was materially inaccurate, and most of the time, 13 of the 17, the manufacturer has said, We are not the manufacturer. We are the private labeler. And we keep a database on labels, so we are working very hard to track down who is the actual manufacturer.

And one thing that Commissioner Northup said was every three days a week our attorneys and everyone sit down to go over this data. The reason they scrub it so hard is they are making decisions now that will be our policy in terms of will we allow it on the database or will we not? We have 2,368 manufacturers who have registered: 2,368. Now, 2,115 have been processed so that we have notified them.

Mrs. EMERSON. Let me interrupt you just for a second. All right, let's just say I am John Q. Smith, and I have a complaint to make because my baby's zipper on their jacket caused a rash on the baby's neck; and so that might be something that I would think that the zipper could have caused. And so I can go on the database and I can fill all of that in. I went on there; I know exactly what you can put in, and all the things that you require because you only have red stars on certain things that are definitely required.

Anyway, it seemed to me, unless I just felt horribly guilty about sending a fake report in because I could not do that just because there was that little signature thing at the end, but there are people who could do that. If I made my complaint, does that immediately get popped onto the database? Because obviously, you could only search the recalls on the database, as of yesterday. I guess tomorrow is the launch date for all of the consumer types of reports. So if I put in that complaint about the zipper causing the rash on my baby's neck, would that automatically show up, or does it get sifted through by you all first?

Ms. TENENBAUM. First of all, we would look at that and make sure you filled out all the data points.

Mrs. EMERSON. But it would have kicked it back to me if I had not filled it out, right?

Ms. TENENBAUM. Right, and we would not put it on the database if you did not give complete information, and if you did not check that you verified that the information is accurate and to the best of your knowledge.

And then have five days after you put that in there to send that to the manufacturer. And the manufacturer could say, First of all, it is materially inaccurate because we are not the manufacturer, and here is who has manufactured it. It might be a private labeler, but anyway that is confusing it. You could say that you are not the manufacturer, and then we would not post the report if you were not the manufacturer. We would find out who was, and notify the manufacturer. But we would send it to the manufacturer, and the manufacturer said, You know, the zipper does not touch a child's neck if you wear it appropriately, and why do you have the zipper around the child's neck anyway?

Mrs. EMERSON. Well if it comes up and it is one of those types.

Ms. TENENBAUM. Okay, all right; you are right. Then they would say, We will take a look at it and see, or they could say, We tested it before we put it on the market. We tested it on 2,000 children, and no one had a rash. Maybe your child has a sensitivity.

Mrs. EMERSON. But my point is, or my question really is, if I make that complaint and I just made it up to cause harm to a competitor, would that get posted on the website?

Ms. TENENBAUM. Well, if it is a competitor, then it would not be a true.

Mrs. EMERSON. In other words, is it possible that false data could be put on the website?

Ms. TENENBAUM. If we find out that it is false data, we will turn it over to the Justice Department.

Mrs. EMERSON. Well I understand that. Is it possible that false data could be put on? Because I went through the whole thing; I could have made up anything on there last night and at least sent it, but that is what worries me. After I pushed the Send button, does it pop up on the database?

Ms. TENENBAUM. No, we have to send it to the manufacturer first.

Mrs. EMERSON. Right, but it is possible, though?

Mr. SERRANO. But the manufacturer would have a right, prior to posting it to say, This is not true.

Ms. TENENBAUM. Right, they would.

Mr. SERRANO. You know, we go through that. We have a meeting and people get up and say, You did this and you did that, and we say No we did not.

Ms. TENENBAUM. And anyway, if we find out that it is false, it is against a federal statute to give false information to an government agency.

Mrs. EMERSON. Well of course I know that, but there are some people who do not care.

Ms. NORTHUP. Well first of all, of course the manufacturer can say, We tested it, it did not happen. They would not say that they tested it on 2,000 people. I mean, you think they tested a sweatshirt on 2,000 people? So they would probably say it complies with all the norms, and that comment could go up if it wanted. But the point is, yes, it would go up on the database.

The problem with the database is a number of things. First of all, you do not have to have firsthand information about an incident in order to put information in. Now let me just say, as a mother of six children, I can tell you that many, many products over the course of my children's lives got altered. You know, somebody bumped into one of the kids bikes, and Oh, it bent it when we were trying to fix it, the screw broke, so we got another screw. I mean, you put things back together. So let's say the bike broke and my child broke their arm. I go to the hospital and the hospital reports it, and it goes in and it says the child broke their arm. I mean, I know that the bike was altered. I would be willing to tell the manufacturer that the bike was altered. But the incident on the database is not going to show that.

Mr. SERRANO. But are we not, in a way, Commissioner, being picky, perhaps? I mean, there is always that danger. There is a contradiction going around this country now. We have got to return government back to the people. We have got to give information to the people. The people, the people, the people. I am all on board with that. But yet in this particular case where the people have an opportunity to say something is wrong and then you have an opportunity to see if indeed that is correct, and yes you run the risk that some information is incorrect, I would think that this should fall right in line with this new belief, or this renewed belief to give more power to the people. I mean, here the people can go online and say, I was affected by this. Will you check it out?

Ms. NORTHUP. Well, Mr. Serrano, let me just say that as a matter of fact, I use that information all the time.

Mr. SERRANO. And one last point. Since it is one of those few agencies that allow the manufacturer to say, Not true, which I think is pretty fair, well, what is really the problem?

Ms. NORTHUP. Well, the problem, first of all, is that it does not require enough information that comes in. Right now, American people have all of that at their fingertips. If you go on Amazon.com and you say you want to order a Graco highchair, you will get a choice of over a hundred products. They will be from $55 to $148. And you can also check that you want to see what consumers say about it, and they will tell you whether it was hard to put together, whether they sent the wrong item, whether they thought it was overpriced, and yes, much of it is safety information. So there is already in the market, without us spending this enormous amount

of money, and we can talk about the amount of money later, there is all that information available to the American people. What is important about what comes into the Consumer Product Safety Commission is that we are expected to take action about products, and so it is important that we have accurate information.

Now, if you go on, let's say I buy that highchair, and then Amazon.com sends me an e-mail and says, Why do you not comment about this highchair? And if I click on that link, it takes me right back to the highchair I bought, so we know exactly what the product is. What comes into us, you say who the manufacturer is, Graco. You say it is a highchair. You do not have to say which one of the 120 items it is. Maybe you have not even thought about that, and you say the leg broke. Well, how does Graco know which one? Is it the $55 highchair, or is it the $148 highchair? How do we know which one it is?

The person putting in the incident has to give their name and address. That is fine. But we already have third-party groups putting in data. What if it is Consumer Reports? What if it is a trial lawyer trying to make a class-action suit? This is what is terrifying the manufacturing community, the fact that without enough information, how do they comment on it if they do not even know which highchair? And if it comes in through a third-party organization that does not know who the consumer is, they got the report, then we cannot even verify it ourselves if we want to do safety information. So the first problem with this is is that it does not require enough information.

Let's say a highchair broke at my Thanksgiving dinner. Is it the highchair I lugged up from the basement that is 30 years old? Or is it the one I bought last year when my first grandchild was born? Or is it the antique I have sitting next to the fireplace? None of that has to he given.

Mr. SERRANO. I understand. At the beginning, if I recall correctly, you said, Do not fund the database. Right? Now you are saying, Make the database better. I mean, I am not putting words in your mouth.

Ms. NORTHUP. Well, let me just say, I would say do not fund it until you can make it better. But having been on appropriations and knowing that you cannot legislate on appropriations, that is one of the problems. There are other problems with it too, but I think you can improve it. I actually wrote a rule that I thought would have made the database something really good for consumers, and really good for us.

Ms. TENENBAUM. And we used a lot of the points made in it.

Ms. NORTHUP. Not the big ones.

Ms. TENENBAUM. Well, here is another thing too. We do not require the model as a required field, as you saw yesterday. But we do have it as a field that we want people to provide.

Mr. SERRANO. Why did you not require the model?

Ms. TENENBAUM. The product might have burned up, it might have been destroyed. But 90 percent of the people are putting the model in, so we do have a lot of information on the model. It could have been a cause of a fire in a home. I turned on my microwave the otber day and flames shot out. Had I turned it on and walked outside, it could have caught the kitchen on fire.

Mr. SERRANO. This happened to you, you are saying?

Ms. TENENBAUM. Yes, it did.

Mr. SERRANO. Sue. No, I am only kidding.

Ms. TENENBAUM. No, I threw it away because I said, This thing is old, and I did not report it. So I just took it to the recycle place and did not let anybody use it.

Mr. SERRANO. Right, I understand. I was only kidding.

Mrs. EMERSON. My husband did it by putting silver foil or aluminum foil in the thing, and blew up a brand new, never used microwave. And it was time to get a new one.

Ms. NORTHUP. He did not want to cook, did he? Clever.

Mr. SERRANO. On behalf of men all over America.

So what are you hearing from manufacturers that are close with that? Because I know that there is a concern, but let me preface my comments by saying that I think this is one of the better items that we have in the federal government, the ability of the public, the consumers, to come and state their case, and the idea of having the manufacturer's side-by-side comment. Can it be fixed, can it be made better, can it be more efficient? Absolutely. But I am worried about your initial statement, Do not fund it. I like your later statement, Do not fund it until you make it better. I do not like the Do not fund it at any level, but this is a good thing and if it can be made better, of course. But this is one power we have given to the people that we should not take away.

Ms. TENENBAUM. Well, what I am hearing from manufacturers is that manufacturers are signing up for the business portal, 2,368, and they are taking this very seriously. Another thing is we had a workshop for manufacturers and all of our stakeholders before we even wrote the rule on the database, and that was extremely helpful. After the databases rule, we had a separate workshop for the manufacturers. We want manufacturers to feel confident that we are going to do everything to find the actual manufacturer, and that we are going to work with them to ensure that only truthful information is on the database. And as Commissioner Northup said, we are meeting every Monday morning for a few hours because the decisions we make now set precedent.

But if I could say about the entire IT modernization, that has been so important, because we had five different silos of data at the Consumer Product Safety Commission. The CPSIA required us to modernize our whole IT system so that all of the data can be tracked through the agency so that we can have case management, so everyone, whether you are in the legal department or in the laboratory or are in compliance, can look at the same cases at the same time. This will revolutionize and allow us to intervene early on emerging hazards. And so I wanted to please give that information, because our people have worked so hard to modernize our IT system.

Mr. SERRANO. Thank you.

Ms. NORTHUP. If I may, please do not interpret our meetings with manufacturers as saying that there is not universal angst over this. And I agree with you, information is powerful, but I would also tell you that if identifying, for example, let's say the Graco highchair. If that is given information to consumers to go buy a different kind of highchair that may be less safe, because

maybe Graco swamps the market, there are five billion of those out there. If accurate information is helpful, inaccurate information is not only unhelpful, it could be dangerous, and the idea that requiring the model number, and also the approximate date it was purchased so that is it something still on the market or is it something that was made 30 years ago? These were amendments that were offered by those of us, is ways to make this a more useful database, and they were turned down by the majority. So there is great disagreement about this.

And finally, if today, we get a comment from a manufacturer saying, We do not see how this could happen, this does not seem like a leg could have broken off the highchair, whatever they say, in other words, a question about materially inaccurate. How much chance of one of the incidents going up tomorrow? They have no transparency and no confidence that we will be able to resolve that material inaccuracy before tomorrow. And what this rule said is if we have not resolved the material inaccuracy, it goes up. So if I am GE, and somebody puts in something and we cannot resolve the material inaccuracy, it goes up. That is wrong. That is wrong.

Mr. SERRANO. All right, well my time has come up. Let me just make one comment. And we are not here knocking the business community, but I am still waiting for that day when the business community says, Why do you not regulate us on this? Why do you not supervise? Why do you not check into us? I suspect if tomorrow we said, Government will not issue one rule for the next year. You guys regulate yourselves on every subject, a year will pass, and probably not one rule will come out of the business community saying, We should not do this. And so we did not get to be the great country we are by just allowing everybody to do as they please. We set in place some things to protect people, and to protect workers, and to protect the consumer, and to protect the business community, and so on and so forth. Thank you.

Mr. DIAZ-BALART. Thank you, Mr. Serrano. Mr. Womack.

Mr. WOMACK. Are fewer recalls good or bad?

Ms. TENENBAUM. Well, for industry, fewer recalls are good, because it means that their brand is not called into question. And that is what we want to get ahead of. We want to make sure that we can work with industry to be proactive so that they understand what the requirements are, and they can build safety into the product so that they will have fewer recalls. For all products in fiscal year 2008, we had 564 recalls. In 2010 fiscal year, we had 428. For toys, 2008 was 172, and fiscal year 2010 was 44. So recalls are, we say, are declining. And most of our recalls are voluntary, the company calls us and says, We have a problem and we want to work with you to recall the product. Which we do. There is a fast-track. So, we work with industry when they have a problem to go ahead and get the product off the market. But we would like to see fewer recalls because it costs companies a lot of money.

Mr. WOMACK. Well, in previous administrations, like during a Republican administration, fewer recalls might be looked at, and probably were looked at, as a sign that we were not doing our jobs. And yet, we are going to ask for more people so we can push for fewer recalls. So which is it?

Ms. TENENBAUM. Well, what it is, is that we have put the new people, a large number of the staff, in import surveillance. And we are working with CBP so that we look at that pre-arrival manifest data, and we can target products before they are unloaded. But now we have an office in Beijing, and with our Office of Education, Global Outreach, and Small Business Ombudsman, we will be able to form partnerships and train more people in China, in Vietnam, and in other areas. When I went to Vietnam, the government of Vietnam was so appreciative of us visiting. I think if we could have stayed longer, they would have extended our visa, because they wanted to ask all kinds of questions, because they had government-operated labs. And if I could have had our staff stay there to make sure that their laboratories were running the tests that we were requiring that they ran, they would have appreciated it. So we are looking for ways to educate governments as well as educate businesses. Every time we go to China and meet with the Chinese, we put on a seminar. We did one on training on ATVs, and what the requirements are for ATVs. We had 150 people attend that seminar. American manufacturers who manufacture their products in China welcome the idea that we will work with them to educate manufacturers and their workers. So, where I am headed, is in prevention. I want to help manufacturers. I want to help them have fewer recalls.

Mr. WOMACK. Ms. Northup.

Ms. NORTHUP. Well, measuring whether or not we are effective by the number of recalls is just spin. I mean, when we had a lot of recalls—like I said, it happened in 2007; it happened under the lowest budget, but it happened because when they thought there was a pattern, the agency sprung into action, and so did all the businesses spring into action. This is similar to what our Chair has done with regard to cribs, with regard to strollers. When we see that a stroller cuts off a finger, what she has done, and she has really initiated this as part of the proactive work she has done, she immediately requires that we look at strollers that have exactly the same hardware to make sure we are not going to have more fingers being amputated tomorrow. And they end up being recalled. And so yes, we would like to decrease the recalls, and companies want to decrease the recalls, too. They are putting in place their own safety, and prevention, and tracking, and so forth. But the agency, here, is good and, I believe, has gotten better at being proactive about looking at something that is a real critical issue and immediately stretching out beyond that.

Mr. WOMACK. One of the concerns I have, as a new member of Congress and when I talked to people in advance of being elected, it was the concept of government underwriting risk. At some point in time, you just cannot eliminate all risk. It is just fundamental. It is part of life. You cannot write a code for every circumstance, and you cannot craft a law to prevent something bad from happening. And when you interject the human factor into our everyday lives, things happen. We had a case in northwest Arkansas this year involving a kid. It was a very unfortunate tragedy. A young man was crushed to death by a soccer goal that came over and hit him. It was very unfortunate; one of my constituents. But the answer on the state level was to change the law and require that all

soccer goals are made by a certain licensed company doing certain things, when we all know that the issue was not the construct, it was the anchoring. And so, fortunately, Arkansas got it right and changed the law to require anchoring.

But the point I am making is we just cannot eliminate all risk. The balance I am looking for, as a legislator, is: At what point do we get into diminishing returns in our desire to want to protect the public? Diminishing returns meaning that we are going so far into the regulatory process that we are killing jobs, ruining our economy, but boy, look at the things that we are doing to protect humankind from some things that are nothing more than just bad judgment and misapplication, a poor build out of the product, because they did not go by the complicated diagram that came with it—and I am the master at that—so I am philosophically saying that I want us to be very careful that we do not get into a situation where we are throwing the baby out with the bathwater. Now, for the record, I would like for your agency to provide the breakdown of additional personnel in your ramping up, and where those personnel are going to be assigned; to which office they are going to be assigned.

How many of them will go to the Chairman's office? How many will go to the Office of the Executive Director? How many will be in Public Affairs? The point here is that I want to see if the ramping up of personnel is going direct to the operational functions of the organization, deployed out to the areas where they actually can make a difference, and not just serve to add a few more layers of administrative, bureaucratic red tape within the agency. That is one of my concerns.

[The information follows;]

Response of Chairman Inez Tenenbaum to Question from the Honorable Steve Womack

CPSC Proposed 2012 FTE Requests

General Function	FTEs	Office and Position Description
Data Intake/Rapid Incident Review	+18	This includes 16 Program and Triage Analysts in the *Office of Hazard Identification and Reduction* to quickly input and triage the increasing number of incident reports received by the Commission, and two Attorneys in the *Office of the General Counsel* to support data intake, incident review, and investigations.
Incident Report Investigations	+6	The six Field Investigators in the *Office of Compliance and Field Operations* will provide additional support for field investigation of consumer incident reports.
IT Modernization	+4	The four Information Technology Specialists in the *Office of Information and Technology Services* will maintain CPSC's new safety information technology systems.
Global and Small Business Outreach/Education	+2	This includes a Senior Small Business Ombudsman and a Director for the *Office of Education, Global Outreach, and Small Business Ombudsman* to increase the agency's focus on providing additional support to businesses, especially small businesses
Finance	+3	This includes an Internal Controls Officer, a Budget Analyst and an Accountant, all in the *Office of Financial Management, Planning, and Evaluation*, to strengthen internal controls.
Inspector General	+1	One Attorney is sought for the *Office of the Inspector General* to provide independent legal counsel as required by the Inspector General Reform Act of 2008 (P.L.110-409).
Total 2012 Increase Requested	+34	

And then, finally, I want to ask this question: Madam Chairman, do you actually go to the toy manufacturers? Mattel has been mentioned already, and it has been a while since I have bought a lot of toys, but go to the shelf at Toys R Us. Do you go to those manufacturers as part of your outreach and sit down with the CEOs and the General Counsel of these organizations, and actually ask, What can we do better with our agency as it concerns your capacity to deliver goods to your consumers? What can we do better? And I am not talking about the Ombudsman's program. I am just talking about: What have you done, as the Chairman, what has your Commission done to go out here and see how we can create jobs in this country, making these products for the benefit of the people that are consuming?

Ms. TENENBAUM. Thank you for that question, Mr. Womack. And yes, I do sit down with CEOs. I recently went to China and met with the five CEOs of the largest Chinese toy manufacturers. And they are Chinese. I have met with them twice now since I have been Chair. And they were telling us, and told me personally, what their concerns were with certain rules. They were also very proud that they had created a chemical database so that they are going to track every chemical that goes into a child's toy, and they would have software that recorded that. I have been, personally, up to New York to visit with the CEO and the leaders of Hasbro. I have worked with Mattel. And in fact, Kitty Pilarz, who is in senior leadership at Hasbro, Chairs the Toy Standards Making Committee for ASTM. So we meet with them and have interaction with them regularly. When we put rules out, we provide for a period of comment, and we write down every question, and we provide an answer to every question we receive, and we have comments on rules. So we work closely with the industry to develop voluntary standards, as well as mandatory. And I do make it a part of my job as Chairman to meet with people.

Mr. WOMACK. Same for apparel and strollers?

Ms. TENENBAUM. Yes. Last year, when the American Apparel and Footwear Association had their meeting, they asked me to come over and speak. And they said, You are coming into the lion's den. And I said, That is fine. And I not only gave a speech, I answered questions. I have been to children's apparel companies in China as well as the United States, to their distribution centers. I have gone to China and watched the testing that companies do on strollers and that is what I said earlier. We ought to be telling the great stories of what our American companies do to ensure the quality and the safety of their products. It is extraordinary. When you see that a stroller gets on a treadmill and for days is run over and over again through that treadmill so that it is durable and before its release, it is remarkable what our companies are doing to ensure the safety of people and that is the good story we ought to tell.

And they are working hard to get the lead out. We had a hearing the other day on what would be the impact on industry when we, in August, go to 100 parts per million. We have asked that Congress change the law so it is only prospectively applied. We had one of the largest third-party testing laboratories testify that they had already tested 90,000 units of products and have found that over

90 percent, in fact, I think it was 94 to 95 percent already are of less than 100 parts per million.

And so the industries have complied, they are moving forward. I am person whose glass is always half full. My husband and his family were in the steel business for a number of years, and I know that steel had to meet many requirements, and I never heard them complain about the requirements that steel had to have, the standards. But I am also positive when I see what American companies are doing to ensure the safety and remove the risk for customers.

Mr. WOMACK. I just want to make sure when those conversations are taking place, it is not, I am from the government and I am the bad guy; or, I am perceived to be the bad guy, and there is a reason for that because we can be your worst enemy if you are not doing certain things. I want that to be a good open line of communication because I think that is the way back to get regulation out of the business of stopping this dilemma we have called lack of job creation. Mr. Chairman, I will give it back.

Mr. DIAZ-BALART. Thank you, Mr. Womack, and again, I apologize, but we are all kind of going back and forth to other hearings. I hope that some of these issues that I am going to bring up, maybe if they have already been addressed, just let me know. The IT modernization issue, when the private sector does IT modernization, they usually then are able to shrink the size of the personnel. How many less people are you going to need if you do go forward with the IT modernization?

Ms. TENENBAUM. Well, the IT modernization goes back to the fact that we had all of this data coming in. I do not know if you were here when I talked about the amount of data; it is almost half a million from various sources. And we had them in separate systems so that when we wanted to look across all these systems, our people had to manually go through system after system. And when Congress asked us to modernize our IT system, it wanted the CPSC to have one system that you would put all those systems in a data warehouse, and so that you could see emerging hazards. Everyone in the agency could pull up the same system and would have the data in there. IT modernization will go on into governance, case management, finances; our whole system will be modernized.

Mr. DIAZ-BALART. So it will be more efficient?

Ms. TENENBAUM. It will be more efficient.

Mr. DIAZ-BALART. Right, but if you are going to be more efficient, and you just mentioned about how right now people have to do it manually, that hopefully will not be the case.

Ms. TENENBAUM. Well, we do not want to just investigate 10 percent of all the claims we have. This is our investigation rate. These were projected even before the database, that these are the incidences that keep going up, the number of reports, and we are only able to investigate 10 percent. So we are asking for 24 new people this year to look at all this data that is coming in, to look at the incidents reports, and to do investigations. We are trying to keep people safer. This is a good return on our investment.

If you look at our little agency, $118 million, 500 people, and we have 300 ports of entry, we have 19 people at those ports. We are trying to create as many partnerships as possible through our Edu-

cation, Global Outreach, and Small Business Ombudsman. We are working with other agencies, but it is a huge investment, $118 million, this little tiny agency, and we have over 15,000 products. We have 80 percent of the toys coming from China, and you know that this is a global complex supply chain. It is a good investment; it is a good return.

Mr. DIAZ-BALART. I am not denying that, Madam Chairwoman, but again, just specifically about that issue. Usually when you get more efficient, you can then, since you are more efficient and you are investing in technology which costs money, you are able then be more efficient.

Ms. TENENBAUM. Well, we were tiny to begin with. Just in 2008, we had 393 people when we used to have almost 1,000.

Mr. DIAZ-BALART. So you are not going to then reduce that with IT technology?

Ms. TENENBAUM. We are trying to be more effective in spotting dangers early. We are trying to be more effective in keeping consumers safe.

Mr. DIAZ-BALART. Okay, let me ask you this, though, now. Mr. Serrano mentioned something which I think is accurate. He mentioned that obviously if whoever, right? You could tell people you regulate yourself. Unless you have a reason to regulate yourself, whether it is for business reasons, whatever, you are not going to do it. The flip side of that is that usually if government were allowed to say, Hey, what regulations would you get rid of? unless they are forced to, they do not voluntarily usually. I think on both counts, we could probably agree that that is the case.

Mr. SERRANO. If I may, I do not know if you were here, but I think I may have coined a new phrase which is, Do not over-regulate, but do not under-protect.

Mr. DIAZ-BALART. Sure. And I think that is the balance that we all try to reach, and there is disagreement on what that balance always is. But when, for example, CPSIA, the legislation that we have been talking about, when those regulations are taking place, is there an estimate as to, when you speak to the businesses that you are going to deal with either on the legislation or anything else, as to what those regulations are going to do as far as actual cost to the manufacturers, how much it is actually going to cost them dollars-wise, which then translates to jobs or not?

Ms. TENENBAUM. Yes, well, prior to the CPSIA and before we implemented our proposed rule, we had to do a cost estimate. Now, under the CPSIA, Congress decided that we needed to promulgate rules on durable nursery equipment: toddler beds, bassinets, slings, baby bouncers, baby bath seats, baby walkers. And Congress said, Under these rules, you do not have to do a cost estimate. We are going to put CPSIA rule making under the Administrative Procedures Act because Congress had testimony that children were killed in defective cribs, play yards, and Congress wanted us to work with industry and first of all, look at the voluntary standard. And most of the rules for consumer products are voluntary. Very few are mandatory rules.

So we work with industry on the voluntary standard and look to see if it is strong enough. And if it was not strong enough, we are to come back with our own rule. We have passed baby bath seats,

baby walkers, full size and non-full size cribs. And Congress required us to have two new rules every six months proposed. Two rules every six months of proposed rules. We will vote on next week, bed rails, portable bed rails on youth beds. We just had a briefing yesterday on toddler beds. We will also do bassinets this year. So we are keeping up with the schedule, but we do not have to do cost estimates on those. But, for example, if we do upholstered furniture, which we have been working on 16 years, we will have to do a cost estimate.

Mr. DIAZ-BALART. Yes, Commissioner, do you want to comment?

Ms. NORTHUP. Yes, we do these rules, but I should say the Regulatory Flexibility Act, just the one on youth beds and rails, showed that there would be substantial harm to businesses and that it would cause some of the small businesses, primarily small businesses, to get out of business. But that does not stop us from issuing the regulation; we go ahead and do it anyway.

Mr. DIAZ-BALART. Right. So, okay, let me just see if I understood that.

Ms. NORTHUP. We are required, as the chair said, we are required to take two durable goods every six months and issue a rule. And so if we look at youth beds and rails, there really is not a lot of injury on these. The injury data is very, very low. But we are required to consider how maybe these could be made so that even and so we issued new rules. And there is substantial product difference that we are making, that we are going to require. And so, businesses that have been in this business for years, that are small, that are not going to be able to cover these sort of changes, they, and our regulatory flex analysis said there will be substantial problems for some of them, some will go out of business. But it does not stop us from issuing the regulation.

Mr. DIAZ-BALART. Let me put it this way. If it does not stop you, then.

Ms. NORTHUP. Just to require that we do it. I mean, I know, it is, I mean——

Mr. DIAZ-BALART. However, that is not part of the decision making.

Ms. NORTHUP. It is not part of the decision making.

Mr. DIAZ-BALART. In other words, it is the consequences of the decisions?

Ms. NORTHUP. We are required to do a regulatory analysis. Not only that, the law does not say. We still have to issue, what would we do? It is the law there that requires us to address every single child's durable product on a certain pace, and to consider how we can make it safer. And every one of them comes with a regulatory analysis. Some of them, the changes are because they are a product that is more likely to cause injury, or there is more. The companies themselves have evolved over the years. But in some cases, the product, there is a low incident rate, but we still are required to consider how the product might be revamped, so that it would be safer, and to issue those as mandatory standards. We are required to do that.

Mr. DIAZ-BALART. That is because of the new law?

Ms. NORTHUP. Yes.

Mr. DIAZ-BALART. And you do not have flexibility there?

Ms. NORTHUP. No.

Mr. DIAZ-BALART. That is amazing, by the way. That is truly amazing. Particularly in this day and age.

Ms. NORTHUP. Yesterday's regulatory flexibility analysis was one that certainly caught my eye because of the number of companies that they thought it would impact negatively. If you are in multiple products, you will be able to spread your cost over more products, and so there will not be a problem. But, it said that, for businesses that only make youth beds, or that are smaller businesses, that it would have a negative effect, and may put them out of business.

Mr. DIAZ-BALART. And the flipside, what would be the positive effect? Do we know what the positive effect would be, how many less deaths? How many less, do we know that?

Ms. NORTHUP. You could say how many deaths there were over the last 20 years. Over the last 20 years, do you know that?

Ms. TENENBAUM. On the toddler beds, there were two.

Ms. NORTHUP. Over the last 20 years?

Ms. TENENBAUM. I do not know if it was 20 years, but there were two because they got between the railing and the mattress and were suffocated. But the rule, the reg flex language in the toddler beds said that if you are a responsible manufacturer, and you are already following the voluntary standards, you would be impacted far less than the people who are manufacturing toddler beds, are not following the voluntary standard. It did not say that they would go out of business; it said it would have a substantial impact because then you will have to follow what was already the standard. But if you are a responsible manufacturer already following, you will have less impact. It did not say anyone would go out of business. It just said it would have a substantial impact.

Mr. DIAZ-BALART. But, if you are doing it, two is a tragedy, I mean, one is a tragedy.

Ms. NORTHUP. The problem with youth beds is that the majority of injuries occur because people, you are not supposed to use a youth bed for a child under the age of two, and it is primarily when people put a six-month-old or an eight-month-old in a youth bed, that they have an injury. But we are required to consider use and abuse. And so, if it is foreseeable that people are going to put eight-months-old in there, we have no flexibility on this with the law, in terms of whether we decide to issue a mandatory standard. That is what the law requires us to do. And it has to include use and abuse.

Mr. DIAZ-BALART. I think that is one of those things that does not quite pass the logic test. I mean, I do not know what the stats are. And again, one tragedy is a tragedy for that family, as a parent we all know that that is an incredible tragedy. But I do not know if we have stats about how many kids may die because they fall downstairs. I do not know if there is, I do not know what those are, but I guess you could put Nerf stairs so that they bounce. You could, I mean, obviously.

Ms. TENENBAUM. Use a gate, you could use a gate.

Mr. DIAZ-BALART. Right. But I mean even then. And then are we going to require a gate that closes by itself with a motion detector. The bottom line is that we could always go to the extreme. And we would like that nobody ever dies and nobody ever gets injured, ob-

viously. As a parent, that is what we would all like. But it seems to me that if you are dealing with two tragedies, and they are tragedies, some of those may be because there is misuse. And then, we can lose jobs for that, which is a huge tragedy. Because those are probably jobs that, those people might have children as well. It seems to me that that does not pass.

Ms. TENENBAUM. Well, I do not know that anyone will lose their job.

Mr. DIAZ-BALART. Well we do not know if——

Ms. TENENBAUM. Well, the top, on the durable nursery equipment, what we were seeing was a trend, in that the materials used were flimsy and the hardware was not as strong as it needed to be. Particularly cribs. We had over 30 deaths in drop-side cribs. And that is because the drop-side, if you looked at the wood, it was not the strong wood that was required for a crib. We did not require a racking test, which we are now, that we borrowed from Canada. And the hardware was plastic.

Now, we had a baby bed in our family that everyone in the family passed around. But it was a stronger wood, and the hardware was made out of metal, so it slid up and down and did not come detached from the sides. So you are seeing a lot of products that are being made that are not as durable. And that is why, when Congress heard testimony about infants and children being killed, and hurt severely, they wanted the best product.

Look at car seats. Look how strong car seats are now. Look at the strollers. When I visited the stroller factory, it was amazing to see all the tests that they put that stroller through so that a child is not harmed. And so it really is the safety of the child. It is based on the best science. It is based on the best engineering that we know. And we have worked with the Standards Committee. And I want to point out that there are probably 1,000 standards-making committees around the world. Think about that. And most of the standards for products that you use are voluntary.

Mr. DIAZ-BALART. I understand.

Ms. TENENBAUM. It pales in comparison to mandatory rules. But Congress heard testimony and they said, We want you to work with the Standards Committee, look at what the standards are for toddler beds, and if you think they can be made stronger, make them stronger. And that is what we are doing for all durable nursery products.

Mr. DIAZ-BALART. But you could always make everything stronger.

Ms. TENENBAUM. Well, this is based on the best science.

Mr. DIAZ-BALART. How many people die in automobile accidents?

Ms. TENENBAUM. Well, look at the automobiles.

Mr. DIAZ-BALART. I know, but we can make them better.

Ms. TENENBAUM. How much they have changed?

Mr. DIAZ-BALART. But we can make them better. And we can make them stronger. We can make it so that nobody dies by literally wrapping people in bubble wrap, and putting in a nerf car. I mean, we could.

Ms. TENENBAUM. But we do not feel like we are doing that. We feel like we are really using the best science.

Mr. DIAZ-BALART. I understand that. I understand that. But there gets to a point where, then, the cost benefit analysis shows you that you are going overboard. And I, again, I am not talking about this specific case, I am just saying that there is a time when you go overboard, and where are we not reaching that case, particularly in the case where, again, two tragedies, horrible tragedies, when you are dealing with two tragedies, some of those may be misuse. And then you have the potential of hurting people's businesses who have kids, and that is a tragedy as well. Are we not potentially going overboard?

Ms. TENENBAUM. We are very sensitive to that. But we also are sensitive that our mission is to keep children and families safe, and we believe that we need to be.

Mr. DIAZ-BALART. I understand that, but every day we are losing more and more jobs overseas.

Ms. TENENBAUM. Well, I think that there are a number of factors.

Mr. DIAZ-BALART. There are.

Ms. NORTHUP. If I could just say, if I had been asked what sort of changes you might make in the rule, I might make mandatory standards for durable infant goods where there is a trend towards injury related to the product and how it is made. We were not given that, nor have we sent up that, as a recommendation, but the fact is that when we change something, when we tell somebody they have to re-engineer their product, and there has been a low incident rate on dangers to them, but never mind, we do not care, do it. And they either go out of business, or lose product, or cannot, or it is prohibitively expensive to re-engineer this. That is a question that Congress will have to consider. But it would be a recommendation that I would make.

Mr. DIAZ-BALART. And finally, and again, I will submit some questions on Chinese drywall.

Ms. TENENBAUM. We have a lot to tell you on that. If you want us to meet with you personally, we certainly will. We will even come to your district and have a public hearing.

Mr. DIAZ-BALART. Thank you. Just lastly, do consumers have any responsibility to check products for quality and safety, or really is it kind of government control to do that? In other words, should government be in a position to make sure that everything is safe, and so that consumers never have to worry about checking to see if one product is stronger? Because they are all going to be as strong, or checking that one product. Is there any responsibility that we as consumers should have, or really is it that frankly should government be taking care of those issues so that consumers should never have to worry about those things?

Ms. TENENBAUM. Well, philosophically I believe that everyone has the responsibility to use products responsibly. But I also feel like the government plays a key role in working with manufacturers in coming up with the best standard possible for products. I remember when I read *The Jungle,* which was about the meatpacking industry, years ago when I was in high school and how the meat was contaminated because we had not regulated the meatpacking industry appropriately. And I remember that book from years and years ago, and what an impression that made on

me. My first job in state government in South Carolina was licensing childcare facilities and going in to old buildings that could barely pass fire safety standards, and worrying about children dying in those facilities. I have been a child advocate all my life, and my job is to protect children who cannot protect themselves.

Every week, we see some product that is pretty incredible and we all say, Good gracious, why would anybody think that the use of that would be safe? We looked at one yesterday, and it is almost unanimously, Oh, that is so unsafe. So we have to balance that. You cannot over-regulate, but you also have to look at who your most vulnerable citizens are, and that is children and elderly people, and people who cannot take care of themselves.

So I think it is good that we have a rule that says you have to have a voluntary standard first, and the industry has to govern itself. And if you find that that standard's not effective in keeping people safe, then you can write a mandatory rule. I think that is the way it should be. And the great majority of rules are voluntary rules that industry makes themselves. And like I said, there are probably 1,000 standards-making bodies around the world, and they work very hard to make sure that the standards are the best that they know. It is our job if we have new scientific information to work with them to improve these standards. And that is basically my philosophy.

Ms. NORTHUP. First of all, we do not oversee products because they are flimsy. I mean, because a product is flimsy, because it breaks, we do not have any oversight of that. It is only if it has the potential to injure somebody that we have a responsibility for it. So, yes, somebody going in. But remember, there are plenty of families that are of modest income, and they go in and they look at a crib, and they are judging, What can I afford? And they have to presume that every crib there on the floor is going to be safe.

I remember as a mom myself thinking that was not what I was thinking. I was thinking would it last, sort of thing. And so if it is unsafe, that is where we have a responsibility. It is this law that required us to make mandatory standards that what the chair just said is exactly right. We should have voluntary standards, and when we see that there is a danger, and the voluntary standards are not sufficient to protect children, then we should make a mandatory standard. The law did not allow us to do that.

Mr. DIAZ-BALART. Thank you. Mr. Serrano. I believe you Ms. Northop.

Mr. SERRANO. Just a closing statement because I need to leave, myself. The database does exactly what you mentioned. It puts responsibility on the consumer to put forth information, and then it allows the manufacturer to say yes or no and defend themselves. Secondly, what role does the consumer play and should government play a role? Well, our colleague, Henry Waxman, I remember, I am old enough to remember this, asked the tobacco company over and over and over at public hearings for a series, for a number of years, How harmful are you? And each one said, Oh, we are not harmful at all. It is fine. And we now know differently.

And lastly, one of the attacks these days is on labor unions. Labor unions have too much power. Well, how did they gain some power? Because there is an HBO special running around now, sad

special, about 146 women who died at the shirt factory in New York because there were no rules and no regulations whatsoever. And so yes, we do not want to over-regulate, but as I said, we need to protect. And there is the balance.

But this knee-jerk reaction that we hear from some folks in this country, not necessarily Members of Congress, that everything is over-regulation, no. The commissioner is right. You go into the store to buy a crib, and the issue should not be because I cannot afford the more expensive crib, am I getting a bad crib unsafe for my child? That person should know that whether it is a $50 crib or a $500 crib it is safe for their child. And if their work is to make sure that happens, I do not think that is over-regulating. That is actually protecting the consumer. And I thank you for your testimony. It has been a wonderful hearing. But do not get up until the chairman.

Mr. DIAZ-BALART. Thank you, Mr. Serrano. You and I here do not have a philosophical disagreement. We may have a disagreement as to how much over-regulation there may be or not, but I think we have heard it from both of you today that there are some issues where we may have gone overboard, where they do not have flexibility.

Mr. SERRANO. Well, you are coming from a point that makes sense to me which is that you know that the big Yankees payroll was beaten by the Marlins team with a payroll of about $1.50, and so you say less is better. Well, maybe not.

Mr. DIAZ-BALART. Mr. Serrano, I still detect a little bitterness there on that one. I do. I just do. And I know you cannot help it, and it is okay. Let me just thank both of you. This has been, I think, one of the most really illuminating hearings that I have had the privilege of being with in a long time. You both have put issues on the table, you have done so straightforwardly and have taken our questions and answered our questions. I just cannot thank you enough. And we hopefully will continue this conversation, because both of you have just been wonderful today. Thank you so much.

Ms. TENENBAUM. Thank you so much.

House Committee on Appropriations
Subcommittee on Financial Services and General Government
Hearing on the Consumer Product Safety Commission FY 2012 Budget
March 31, 2011

Responses of Inez M. Tenenbaum, Chairman,
U.S. Consumer Product Safety Commission

Questions Submitted by Chairwoman Jo Ann Emerson

RECREATIONAL OFF-HIGHWAY VEHICLES

Mrs. Emerson: I understand that the Commission is moving forward with a mandatory safety standard for Recreational Off-Highway Vehicles. At the same time the industry continues to work to evolve the existing voluntary standard in consultation with the Commission.

Does the Commission believe they have an active partner in addressing safety concerns with the Recreational Off-Highway Vehicles manufacturers?

> **Mrs. Tenenbaum:** In my view, we have an active partner in addressing safety concerns with the Recreational Off-Highway Vehicles manufactures.

Mrs. Emerson: And does the Commission intend to pursue further mandatory safety standards beyond the voluntary standards being jointly developed?

> **Mrs. Tenenbaum:** If staff finds that the voluntary standard does not adequately protect consumers from undue risk of death or injury, or if there is not sufficient compliance with the voluntary standard, I believe the Commission will pursue mandatory safety standards.

BUDGET

Mrs. Emerson: The budget request proposes $400,000 for a new office of Education, Global Outreach, and Small Business Ombudsman.

Why does the agency need this office?

> **Mrs. Tenenbaum:** The need for this office has existed for some time but became even more apparent during the agency's recent strategic planning process. As the Commission explored implementing each objective within the new strategic plan, it had to assess whether any gaps currently existed that would restrain or prohibit it from achieving each of its objectives.
>
> The most pressing gap identified was the lack of any institutionalized, coordinated approach to education and outreach activities. The CPSC's current office structure does not allow for an easily coordinated approach to these activities, and its current service

and product offerings either did not accomplish the objectives or were insufficient to allow implementation of certain action items. The strategic planning process also highlighted the need for CPSC to be responsive to the changing realities of the global consumer product environment and this required an increased emphasis on education, coordination, outreach, collaboration, and other similar partnering initiatives.

To address these issues, the Commission created the Office of Education, Global Outreach, and Small Business Ombudsman. This new Office will absorb the existing personnel and infrastructure of the Office of International Programs and Intergovernmental Affairs and the Small Business Ombudsman. Accordingly, I anticipate that a maximum of four new full-time equivalent (FTE) positions will be added to the new Office, assuming funding is available.

Mrs. Emerson: How does the agency currently work with small business? Given their importance to our economy I hope this is something you are already doing.

Mrs. Tenenbaum: The Commission acknowledges the unique contributions that small businesses make towards growing and sustaining our economy. For over two decades, the Commission had a staffer that worked on small business outreach issues. However, this position was reduced from a full-time position to a part-time position due to budget cuts in recent years.

In September 2010, the Commission addressed this situation by creating the position of Small Business Ombudsman within the newly formed Office of Education, Global Outreach, and Small Business Ombudsman to further assist small businesses. With this position, the Commission realized that the agency needed to seek new, cutting-edge ways of reaching out and working cooperatively with small businesses to assist them in developing innovative products that are both safe and compliant with the agency's regulations.

The Small Business Ombudsman serves as a resource for the small business community in several ways. First, the Ombudsman has reached out to small business trade organizations to listen to their members' concerns and, in turn, to bring those concerns back to agency staff for serious consideration and action. The Ombudsman also has spoken at trade events, participated in interviews, and written articles for trade publications. Through these conversations and events, the Ombudsman serves as an important and informal way for agency staff to learn about what is happening in the marketplace in order to make better informed decisions.

Second, the Ombudsman maintains a website and a dedicated toll-free telephone number from which he fields a variety of daily inquiries from small manufacturers, importers, suppliers, and retailers, providing them with timely, easy to understand answers to their questions. The agency has received excellent feedback from these businesses about the clarity of answers and level of customer service provided.

Third, the Ombudsman is developing new educational materials to help small businesses of all levels of sophistication to gain more understanding of their responsibilities to comply with consumer product safety laws. For example, the Ombudsman has produced a new series of summaries titled, "How Does This Affect My Small Business?" and is rewriting the "Frequently Asked Questions" area of the Consumer Product Safety Improvement Act of 2008 (CPSIA) page on our website in accordance with the Plain Writing Act of 2010 (P.L.111-274), a project which the agency expects to rollout this summer with the full modernization of our website, CPSC.gov.

In addition to the Ombudsman, the Chairman, the Commissioners, and the agency's staff are often engaged with small business in providing compliance and technical answers to their concerns. Agency staff, many of whose phone numbers are available on our website, are widely recognized as being accessible to stakeholders, including small businesses, to address their concerns and questions.

I believe strongly in the importance of small businesses and fully support the Small Business Ombudsman position as an important and dedicated way to ensure that small businesses receive the guidance and information they require for their businesses to continue to grow and prosper.

Mrs. Emerson: Are the functions performed by this new office already being performed elsewhere within the CPSC?

Mrs. Tenenbaum: The primary function of the new office is to coordinate and provide education and outreach activities to various domestic and international stakeholders, including manufacturers, retailers, resellers, small businesses, foreign governments, and consumers. While some of the functions of the new office are currently being performed elsewhere within the CPSC, the current state does not allow for an easily coordinated approach to these identified activities. There are also a number of functions this office will perform that are not being performed currently by the Commission. These primary functions and stakeholders include:

- Manufacturers: In the current Commission office structure, there is no single source for manufacturer-related safety information. Consequently, many manufacturers either do not know where to turn for this information or experience difficulty in accessing the information they need to fully address safety in the manufacturing process. The new office is dedicated in part to addressing this issue, and will facilitate the transfer of knowledge to industry and ultimately create safer products through better educated manufacturers. The office also will consult with industry to address issues such as quality assurance in the manufacturing process to assist manufacturers in producing products fully compliant with all relevant safety standards and requirements.

- Retailers and Resellers: The office will benefit retailers and resellers through coordinated education and outreach activities. One of the largest issues this new office will address is developing a system by which retailers and resellers are

informed of product recalls and other important safety information, including instructions on how to respond to this information in a timely fashion.

- Small Businesses: With the passage of the Consumer Product Safety Improvement Act of 2008 (CPSIA), a part-time Small Business Ombudsman is no longer sufficient to meet the Commission's needs. The CPSC requires a full time individual dedicated to serving the nation's many small businesses in the area of consumer product safety. Additionally, the Small Business Ombudsman will be charged with developing and providing information and guidance specifically tailored to small batch manufacturers so that they can understand and comply with applicable safety standards and the CPSC's regulatory requirements.

- Foreign Governments/Regulatory Bodies: Foreign governments and regulatory bodies rely on the United States for assistance in developing their own regulatory standards, and the new office will serve as a coordinated business unit to assist with this activity. This will allow the CPSC to enhance its outreach to the international community. Working with these foreign bodies, the office will enable these organizations to increase their capacity to develop product surveillance strategies, product testing methods, and voluntary and mandatory product safety standards. Finally, given its interaction with the various domestic and international stakeholders, the office will be responsible for all CPSC harmonization efforts.

- Consumers: The CPSC already engages in numerous communication and outreach activities for consumers, which are the responsibility of the Office of Information and Public Affairs (EXPA). Although the new office will not assume this role, it is intended to be the primary supplier of education and outreach-related subject matter and expertise to other stakeholders. Consequently, the new office will work closely with EXPA to better educate all stakeholders on consumer product safety and to ensure message consistency and discipline across all stakeholder groups.

DATABASE

Mrs. Emerson: Can you tell me how much this database has cost up to this point, and how much it will cost to maintain it per year?

Mrs. Tenenbaum: In presenting its annual budget, the Commission has not separated the cost of the public database from the overall Consumer Product Safety Risk Management System (CPSRMS) information technology modernization costs. Below, however, is an estimate of the work done within the CPSRMS project to develop the public database and the projected cost to maintain the public database. These estimates have been established after reviewing workload associated with the public database.

Portion of the Consumer Product Safety Risk Management System Costs
Dedicated to the Public Database

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	Total
Development	$1.450	$1.000				$2.450
Operations and Maintenance		$0.400	$0.050	$0.050	$0.050	$0.550
Total	$1.450	$1.400	$0.050	$0.050	$0.050	$3.000

Please note that the costs (in millions) above include contracted goods and services by fiscal year. Costs in fiscal years 2009 and 2010 are based on actual obligations. Costs in fiscal years 2012 and 2013 are for planning purposes. Costs in fiscal year 2011 are a combination of actual obligations and are for planning purposes.

Mrs. Emerson: Why has there been so much confusion over the cost of this database?

Mrs. Tenenbaum: Some have confused the fractional cost of the public database with the overall cost of the Commission's upgrade of its information technology (IT) systems to the Consumer Product Safety Risk Management System (CPSRMS). While the public database is a part of the CPSRMS, it is only small portion. The CPSRMS IT modernization includes:

- improving our internal operational processes to more efficiently identify emerging hazards regardless of the source of the information;
- putting all the information we receive (only about 20 percent of which are candidates for the public database) into a common database for better hazard identification. This includes information such as mandatory manufacturer reporting required by section 15, manufacturer responses to staff inquiries required by section 6(c), medical examiner reports, to name a few;
- bringing the way we interact with consumers and businesses into the modern age using an online portal rather than U.S. postal mail;
- improving data quality, reducing or eliminating manual and redundant processing, and making better use of the collective knowledge of the staff;
- modernizing the Commission's home page, www.cpsc.gov to improve public outreach and education. A critical component of this project is cleaning up thousands of published documents to help the consumers and businesses find what they are looking for faster; and
- making IT governance improvements, including improvements in IT contract management, IT budget management, Capital Planning and Investment Control, Enterprise Architecture, Information Assurance, Project Management, and Independent Verification and Validation.

CPSC has obligated approximately $23.2 million from the end of Fiscal Year 2009 to the end of April 2011 for the entire CPSRMS program. Of this, only $2.85 million has been

obligated to cover the public database portions of the CPSRMS program. As noted in the chart above, the Commission anticipates obligating approximately $50,000 annually in FY 2011, and in subsequent fiscal years, to operate and maintain the public database portion of CPSRMS.

Mrs. Emerson: How many new people are needed to administer the database?

Mrs. Tenenbaum: The CPSC has requested four additional personnel (FTEs) and four new contractors to administer the public database (data intake). This increase in personnel is necessary to meet the quick turnaround required of staff to process these reports. The CPSC also needs less than one FTE on the IT side to operate and maintain the public database.

Mrs. Emerson: Do you believe the number of FTEs requested is an accurate number?

Mrs. Tenenbaum: Yes, we believe the above number is accurate.

Mrs. Emerson: Do you have concerns regarding the accuracy of the information published on the database?

Mrs. Tenenbaum: No; the statute, and the Commission's final rule at 16 C.F.R. §1102, achieve the correct balance in providing accurate information to the public in a timely manner while also ensuring that manufacturers of consumer products have a reasonable chance to respond to reports about their products.

The law sets forth at least six provisions which help to ensure the accuracy and integrity of reports of harm published in the database:

First, reports must contain eight minimum requirements in order to be included in the database. This ensures that the quality of the report is sufficient to be helpful to others.

Second, the law requires that the submitter verify the truth and accuracy of the report. This verification applies to all information contained on a report, including the submitter's affiliation, name, and address.

Third, submitters must include their name and contact information for a report to be eligible for publication. If a question arises about the validity of a report, CPSC has the means to investigate these incidents.

Fourth, both the CPSC and manufacturers have the ability to post comments about a report, and to make a claim that a report contains materially inaccurate information (MII). The CPSC endeavors to make a decision on all timely submitted MII claims before a report is published in the database. Thus far, we have been successful at resolving these claims in a reasonably short time frame.

Fifth, both the CPSC and a manufacturer that receives the submitter's contact information can conduct further investigation into the incident described in the report, including the identity of the submitter. Many submitters are providing their contact information to manufacturers, but it is unclear whether manufacturers are taking advantage of the opportunity for follow up with the submitter.

Sixth, as the CPSIA requires, the Commission provides a clear and conspicuous notice that the CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database.

Mrs. Emerson: Is it true that other persons, aside from those directly harmed, can submit complaints to the database?

Mrs. Tenenbaum: Yes. In the interest of public safety and our statutory mission to protect consumers from unreasonable risk of injury related to the use of consumer products, we have always accepted reports from any source. This is consistent with our experience in maintaining a database of consumer product incident reports that assists in our efforts to remove products from the marketplace that pose a substantial product hazard.

Our mission to protect the public would not be served by excluding reports based solely on the person that submitted it to us. Section 6A(b)(2)(B) of the CPSA reasonably relies on the nature and quality of the information provided to determine whether a report is eligible for publication in the database. Currently, in addition to those "directly harmed," parents, guardians, and family members are an important source of information collected for the most vulnerable segments of the population. In the most basic example, if the user of a consumer product is killed or seriously injured in the incident, or is an infant, he or she will be unable to enter the report. Parents, for example, may enter information related to consumer products used by their children, regardless of whether they personally witnessed the incident or purchased the product. Restricting reports to only those people directly harmed would ensure that all deaths and the vast majority of serious injuries would be excluded from the database.

Manufacturers have a means to publicly respond to reports in the database by submitting a general comment that will display with the report. For those few reports where a manufacturer believes that knowledge of the incident is lacking and detrimental to a basic understanding of the incident, it can state this in a comment on that report for the public to view and consider.

Mrs. Emerson: Why did the CPSC not require the submissions come from firsthand knowledge of incidents of harm?

Mrs. Tenenbaum: Congress did not write Section 212 of the CPSIA to require firsthand knowledge of incidents of harm. For instance, the statute permits medical and safety personnel — most of whom Congress recognized are unlikely to have firsthand knowledge of incidents — to submit reports of harm. To have attempted to require

firsthand knowledge not only would have undermined the safety purpose of the public database, but also would have been contrary to the plain language of the statute.

Mrs. Emerson: How will the CPSC handle information regarding complaints about one type of model of an item? For example, how will consumers know that the information posted is not regarding every model of an item that a company makes?

Mrs. Tenenbaum: Most of the reports submitted thus far contain helpful, product-specific detail, including model numbers where they exist. The report form instructs submitters to provide as much detail about the product as possible, including specific requests for the model number, serial number, and UPC code. As of April 11, 2011, 85 percent of database eligible reports submitted since the March 11, 2011, launch had a nonblank value for model or serial number.

Furthermore, a report without a model number does not necessarily mean that the product has been insufficiently described. Some products, such as certain types of imported drywall, do not have model numbers. In addition, model and serial numbers are often destroyed in serious product incidents, such as fires.

Mrs. Emerson: Does the database require specific model numbers be submitted?

Mrs. Tenenbaum: As mentioned immediately above, it would be counterproductive to require a model number before a report of harm may be published in the public database. Although the database does have a field for entry for model number, serial number, and any other product specific information, it is important to note that some products, such as certain brands of imported drywall, do not have model or serial numbers. Moreover, in serious product incidents the model number may have been destroyed, along with the product.

While we agree that it is better to have detailed product information in a report, we do not agree that there is one field that will always ensure that sufficient information for every consumer product is provided. Making the model field mandatory rather than simply optional as is the case today is not a practicable solution where such information does not exist. Most report submitters, however, are providing detailed product information, including the model number, when they have this information.

IMPACT OF REGULATION

Mrs. Emerson: Many of the CPSC's rules have an impact on manufacturers both large and small. It seems to me that these rules also have a large impact on consumers, giving them less choices and higher prices.

When promulgating rules, how does CPSC consider their impact on businesses and consumers?

Mrs. Tenenbaum: Consideration of a rule's potential impact on businesses and consumers often depends, in large part, on the nature of the rule itself. For example, we sometimes engage in technical amendments to our regulations to update them or to reflect

new technologies; the affected industry may bring to our attention the need to amend or modify a rule, and we then consider the issues raised before engaging in rulemaking.

Furthermore, the processes that apply to some regulations, such as our regulations on durable infant or toddler products pursuant to section 104 of the Consumer Product Safety Improvement Act of 2008, require us to consult various groups, including representatives of consumer groups, manufacturers, and others, as part of the rulemaking process.

Finally, for our proposed rules, as well as our interim final rules, we provide an opportunity for public comment, and this provides yet another avenue for our consideration of a rule's potential impact on businesses and consumers. It also bears mentioning that, in almost all cases, we provide an opportunity for public comment on our interpretative rules even though the Administrative Procedure Act does not require us to do so.

Mrs. Emerson: Does the Commission do cost benefit analyses before promulgating rules? If not, why not? If so, how comprehensive is the cost benefit analysis?

Mrs. Tenenbaum: The underlying statute determines whether the CPSC engages in a cost-benefit analysis for a particular rule. For example, section 9(c) of the Consumer Product Safety Act (CPSA) requires a description of the potential benefits and costs of a proposed rule, "including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs." Section 9 of the CPSA establishes the procedure for consumer product safety rules. Section 3 of the Federal Hazardous Substances Act (FHSA) establishes the rulemaking procedures under the FHSA and contains language that is almost identical to section 9(c) of the CPSA.

In contrast, the Consumer Product Safety Improvement Act of 2008 (CPSIA) does not contain a cost-benefit analysis requirement for rules issued pursuant to the CPSIA.

However, for all rules that are published pursuant to the notice and comment rulemaking requirements of the Administrative Procedure Act or other laws, we engage in a Regulatory Flexibility Act analysis. This analysis requires us to evaluate whether the rule will have a significant economic impact on a substantial number of small entities.

Mrs. Emerson: Can you think of any rules currently in place that are redundant?

Mrs. Tenenbaum: If the rulemaking process suggests that a new rule would be redundant to an existing rule, we take steps to eliminate the redundancy. For example, section 104 of the CPSIA expressly mentioned full-size and non-full-size cribs as products to be addressed by rulemaking, yet the Commission already had regulations pertaining to such cribs. Consequently, when we engaged in rulemaking to adopt a new safety standard for full-size and non-full-size cribs, we simultaneously began the process to revoke the older crib regulations.

STOPPING HARMFUL PRODUCTS AT PORTS OF ENTRY

Mrs. Emerson: I am encouraged by the CPSC's Memorandum of Understanding with Customs and Border Protection. By stopping harmful products at our ports of entry, the CPSC is using resources to proactively stop harmful products from reaching the U.S. market. As I understand, once products are in the market, it is very difficult to recall a significant amount.

Is this program a priority for CPSC?

Mrs. Tenenbaum: The Import Surveillance program is one of my top priorities. I believe an effective approach to ensuring that harmful products never make their way into the hands of consumers is to stop them from entering our country.

To that end, I have taken a number of steps to add additional technological resources and personnel to the Commission's Import Surveillance Division. This Division works directly with the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) to keep dangerous products out of the United States.

As you noted in your question, the CPSC recently executed two interagency Memorandums of Understanding (MOUs) with CBP that allow us to access more "real time" importer information and target the most dangerous incoming shipments. The first of these MOUs, signed in April 2010, allows CPSC personnel to work at CBP's Commercial Targeting and Analysis Center (CTAC) in Washington, DC, and access real time manifest entry data collected by CBP. This, in turn, allows Import Surveillance Division personnel at the ports to target high-risk shipments prior to their entry into the domestic stream of commerce.

The second MOU, signed with CBP in August 2010, gives the CPSC access to information in the Treasury Enforcement Communications System (TECS). This will assist CPSC Import Surveillance staff at the ports by providing them with additional information to improve local targeting and interdiction of dangerous products.

The CPSC is also actively involved in supporting the Importer Self Assessment – Product Safety (ISA-PS) initiative that is currently being piloted by CBP. The ISA-PS is intended as a partnership among CBP, CPSC, and importers to ensure product safety compliance. It is based on a voluntary approach that provides meaningful benefits to importers who demonstrate readiness to assume additional responsibility for managing and monitoring their own product safety compliance.

We have also taken steps to increase CPSC's physical presence at ports of entry. In FY 2008, the Import Surveillance Division had only five full-time employees (FTEs), and of those only three FTEs were actually stationed at ports of entry. Today, the Division has 25 FTEs, with 19 FTEs collocated at 15 different ports of entry.

AVOIDING DANGEROUS PRODUCTS

Mrs. Emerson: What advice can you give the parents of young children to avoid lead and other dangerous elements in children's products?

Mrs. Tenenbaum: First and foremost, parents can check for product recalls at CPSC's website (www.cpsc.gov) and subscribe to CPSC's email subscription list to receive recall notices and other consumer product safety information. Parents also can review recall information as well as the experiences of other parents with products (and share their own experiences if they wish) at www.saferproducts.gov.

In addition, parents should not allow young children to play with cheap metal jewelry that may possibly contain lead and other potentially toxic heavy metals.

Finally, we encourage parents to make sure their children wash their hands often, especially before they eat and before nap time and bed time.

Questions Submitted by Ranking Member Serrano

IMPORT SURVEILLANCE DIVISION

Mr. Serrano: The CPSC instituted the Import Surveillance Division in 2008, an effort to place CPSC investigators at major U.S. ports to reduce the number of unsafe products that make it to store shelves in the first place. I think we can all agree that this is a prudent use of taxpayer dollars - stopping the harmful products before they get to the store is the best way to prevent future harm and recall efforts.

Can you describe for us how this effort is progressing and what the CPSC has learned in the years since implementation?

Mrs. Tenenbaum: Since creating the Import Surveillance Division in 2008, we have learned that CPSC's resources to support import work are grossly underrepresented as compared with other agencies with similar missions, such as Food Safety and Inspection Service (FSIS) and Food and Drug Administration (FDA). Even with limited resources, CPSC continues to pursue valuable partnerships with Customs and Border Protection (CBP) to advance the import safety mission: including updating of information sharing agreements, performing joint inspections on importers with dual agency histories, and piloting the use of CBP labs to perform product testing for lab violations.

The current 19 port inspectors stationed at ports of entry, with support from CPSC compliance field investigators and scientists, are able to inspect approximately 7000 products per year and, of those inspections, about 1750 products are sampled from shipments that are held. These collocated staff, however, cover only 15 of the 327 ports where goods enter commerce.

In an effort to maximize interagency resources, we also have stationed two staff at the Commercial Targeting and Analysis Center (CTAC) located at CBP in Washington, D.C. This office is a fusion center of many health and safety agencies that work on stopping products with overlapping jurisdictional issues to avoid duplication of resources.

CPSC Import Staff, along with CBP, have prevented more than 13 million units of non-complying products from entering the U.S. market. As our targeting methodologies evolve, and we are able to further increase staffing in the Division, we hope to further reduce the number of violative and harmful products entering the marketplace.

Mr. Serrano: What percentage of imported products are currently tested and can we expect that someday soon every product sold on store shelves in America has been tested for safety?

Mrs. Tenenbaum: The percentage of imported tested products is impossible to state with complete accuracy. The vast majority of reputable businesses appear to be complying with the law and, in particular, the implemented testing requirements of section 102 of the CPSIA. CPSC strives toward the goal of having as many consumer

products as possible, particularly children's products, tested or examined for safety prior to importation into the U.S. stream of commerce.

Through developing the risk assessment methodology for identifying non-compliant imports, as directed by the CPSIA, CPSC will make strides toward that safety testing goal by becoming better at identifying the noncompliant importers who might attempt to bring in untested products.

COMMISSION STAFFING LEVELS

Mr. Serrano: The CPSC has seen a steady decline in staffing levels over the years. Staffing levels peaked at about 1,000 in 1980 and now stand at around 550. This year's request would allow the agency to hire an additional 34 people to fill areas of critical need.

Is there a target staffing level that you think the Commission needs to be at in order to successfully implement and enforce our consumer protection laws?

Mrs. Tenenbaum: Any target staffing level CPSC would provide today must be a short term target. This is because there are rapid changes occurring globally that affect the safety of consumer products and require action by CPSC. The volume of consumer product imports has skyrocketed, with the value of imports from China and Hong Kong quadrupling from 1997-2008, resulting in a record number of recalls in 2007 and 2008 (e.g., recalls for lead paint in children's toys, powerful magnets falling out of toys that could be ingested by children and dangerous cribs).

There also has been a shift in recent years to explosive growth in import volumes from the rapidly industrializing nations of India, Thailand, Mexico, Brazil and Malaysia. Manufacturers in these countries often lack the quality control systems that aid in the development of safe consumer products. Additionally, the complexity of global supply chains has increased so that today, a single product can contain safety-critical components provided by between 10 and 100 different suppliers.

At the same time, incidents reported to CPSC have increased by 66 percent from 2005 to 2010 and are forecasted to increase another 36 percent from 2010 to 2015. However, the percent of incidents we can investigate has decreased as our resources have not kept pace.

To address these developing trends, Congress mandated that the CPSC promulgate numerous new safety rules through 2015 under the Consumer Product Safety Improvement Act (CPSIA), adding significantly to the agency's workload. With the passage of CPSIA, rulemaking activities increased more than threefold, from seven rules per year from 2000 through 2008 to 26 per year for 2009, 2010 and proposed in 2011. Each new rule increases the need for long term enforcement throughout the nation and at the more than 300 U.S. ports of entry. Experience shows that enforcing a new rule takes considerably more resources than enforcing an existing rule that has been in place for a number of years.

While we cannot estimate a long-term target staffing level, we believe that future growth will be needed to staff our safety programs commensurate with the size and scope of the issues facing us. Our 2012 request includes 610 FTEs and we believe this staffing level to be justified to minimally meet challenges facing the agency. However, CPSC is charged with providing the only national consumer product safety program for over 15,000 types of consumer products, so it is likely that additional future growth will be needed.

Mr. Serrano: In what areas is the Commission in the greatest need of adding staff?

Mrs. Tenenbaum: With over $1.5 billion in container import shipments entering the U.S. each day, monitoring the safety and quality of all imported consumer products is an extremely challenging task. Investigators at the ports work hard on a daily basis to stop unsafe products from entering the country, as well as collect samples suspected of safety violations and verify third-party certifications. The port investigators send import samples to our laboratory staff and other scientists for in-depth testing and analysis, and to compliance officers for corrective action against bad actors.

As we look into the future, CPSC's greatest staffing need will most likely come in the area of import surveillance: requiring additional investigators at the ports, as well as additional staff to support their efforts, such as compliance officers and scientists. Ultimately, with a more visible investigative presence at the ports, we will be more proactive, and consequently more successful, in stopping harmful and violative consumer goods from ever entering the country.

Questions Submitted by Congressman Tom Graves

DATABASE

Mr. Graves: With the recent launch of the Consumer Product Safety Information Database in the past few weeks there is concern that reports of harm can be submitted by individuals that wish to do damage to their competitors by submitting erroneous information. If the database is to be effective the CPSC needs to ensure the utmost accuracy of those individuals that submit information to the database.

What specific steps are in place to validate the identity of individuals that are submitting the information for the database to make sure they "are who they say they are"?

> **Mrs. Tenenbaum:** Congress required protections against false information being submitted to the public database and the Commission has implemented those protections. One of the eligibility requirements for the public database is that the submitter of a report of harm verify that they have reviewed the report of harm and that the information in the report is true and accurate to the best of their knowledge.
>
> For reports submitted via the public portal, the user cannot submit the report until they attest to the following: "I certify that I have reviewed the report and the information provided in it is true and accurate to the best of my knowledge, information, and belief." A submitter's verification of the truth and accuracy of a report includes the submitter's affiliation, name, and address. Also, we explicitly state in our rules that we will take appropriate legal action against individuals who submit false information to the government through the database.

Mr. Graves: To date, have you found any instances of falsified individuals or actual individuals whose identities were stolen to submit information?

> **Mrs. Tenenbaum:** No. To date, the CPSC has not found any instances of falsified individuals or actual individuals whose identities were stolen to submit information.

Financial Services and General Government Subcommittee
Hearing on the Consumer Product Safety Commission FY 2012 Budget

Questions for the Record for Commissioner Northup
Submitted by Chairwoman Jo Ann Emerson

BUDGET

Commissioner Northup, I noticed that you did not sign off on the CPSC's fiscal year 2012 request. Can you tell the Committee why you did not approve the budget request and what your specific concerns are with the request?

I did not support the Commission's overall 2012 budget request of $122 million, because it calls for an increase of $3.8 million over current funding levels. I believe we could be doing much more with less. Given the imperatives of reducing the national deficit and controlling federal spending, as well as requests from the Commission's House and Senate oversight committees to reduce our spending, we as Commissioners have a responsibility where possible to cut, modernize or otherwise change our programs to ensure that we are using our resources efficiently and not straying from our core mission of safety. Where we are bound by statute to take actions we believe are not in the public interest, it is our responsibility to bring that fact to the attention of Congress so that it can devise a legislative solution. Notwithstanding the obvious importance of these responsibilities, I am unaware of any rule making decision of the Commission as currently constituted that has taken into account the impact on the agency's budget, and rarely has the outcome of any rule making been influenced by consideration of its impact on American consumers or businesses.

Since starting my job as Commissioner in August of 2009, I have seen ways in which the Commission uses its resources both effectively and ineffectively. As mentioned in my written testimony, I believe the Commission has used its resources effectively in expanding its coordination with the U.S. Customs and Border Patrol, increasing our enforcement capabilities at the border, and through creative uses of social media to educate the public about product hazards. Each of these activities demonstrates that if we target our resources appropriately, where we know consumers are at risk, and using the most effective means of responding to such risks, we can do a lot of good.

Unfortunately, a majority of the Commission's time and resources since I have been a Commissioner have been spent on implementing the CPSIA, a law that largely is not based on risk. Implementation of the law and its non-risk-based, costly, lead and phthalates standards, and testing and certification requirements have taken up most of the time of the agency's top staff and has required the Commission to delay or forego its traditional risk-based rulemaking priorities. For example, since 2008 there has been a significant delay in progress on actions to address safety hazards, such as promulgating standards to reduce the risk of death and injuries caused by cigarette lighters, table saw blades and portable generators. Instead, the agency spends time and resources debating such topics as the amount and degree of testing to impose as

part of the CPSIA's Testing and Certification rule – and enforcing the law's lead standard, which bans lead in books, bicycles and other products that do not present a harm to children.

My primary request to Congress would be to amend the CPSIA to allow the Commission to refocus its resources and expertise on what it does best—assessing risk. This change, in addition to the agency's new and improved enforcement efforts at the border, would free up agency resources and allow us to better target the funding Congress provides. Certainly, it would allow us to reduce our 2012 budget request. However, because this is primarily an authorizing issue, I would also suggest two immediate ways that the Appropriations Committees can effectively reduce the agency's budget in the coming fiscal year, while maintaining our commitment to safety:

1) First, prohibit continued funding for the new public database until the Commission's regulations ensure that the information contained in a report of harm is verifiable, and the Commission has established an effective procedure for resolving a claim of material inaccuracy before a report of harm is put on the Database. Otherwise, the Commission and manufacturers will continue to be unable to determine the accuracy of some incidents, and the database will continue to contain incident data that is inaccurate and unhelpful to consumers. A database full of inaccurate information is not only wasteful; it misleads consumers who will use the imprecise or erroneous information on the database to select less safe products for purchase. In one recent example, the Commission discovered on its own after posting an incident report to the public database that it inaccurately identified the product's manufacturer. The incorrectly identified manufacturer had not been given sufficient information even to make a claim of material inaccuracy. Now, the agency has submitted a budget requesting new FTEs whose primary function will be related to the database, including IT staff, investigators, compliance and legal staff to review incident reports. All of this could have been done much more efficiently had the rulemaking included protocols to reduce the submission of inaccurate information in the first place.

2) Second, prohibit funding for the Commission to implement any *new third-party testing and certification requirements* of the CPSIA. As discussed at the hearing, such requirements are clearly the most burdensome and costly of any of the CPSIA's non-risk-based requirements. Requiring that all components of all children's products (age 12 and under) be tested at third-party, CPSC-accredited labs is unnecessary to ensure safety and simply adds layers of costs for manufacturers—primarily small manufacturers, who cannot achieve economies of scale. Of course, the Commission would maintain its authority to impose such requirements on specific products if it were necessary to address a risk. This will ensure that our focus is on ensuring safety rather than on enforcing standards and paperwork requirements entirely unrelated to risk.

The budget request proposes $400,000 for a new office of Education, Global Outreach, and Small Business Ombudsman. Why does the agency need this office?

I have many concerns about this new office, and declined to support its creation. I believe the office's stated objective of having a "coordinated approach to industry education and outreach activities" can be achieved by existing Commission offices. I am also concerned that the office will follow the usual expansionist path of government. Whenever a new office or program is created by the federal government, it seldom shrinks or even maintains the same budget, regardless of whether the need for it exists or continues over time. For example, what began as a proposal to expand a part-time Small Business Ombudsman position at the Commission to a full-time position (in our fiscal year 2011 budget), later swelled to include the current proposal for "global" outreach, a new Director, and an unspecified budget and number of staff. However, now that both the President and Congress are calling for shrinking or freezing federal spending over the next several years, it seems particularly ill-advised to promote new spending on an office that we do not need.

When the Commission, by a 4-1 vote, created the new office, the office had no specified total number of staff or budget. Under the current plan, the new office will include the current Office of International Programs and Intergovernmental Affairs (EXIP), the addition of a full-time, Small Business Ombudsman, and a new Director. For now, the agency has reassigned existing employees to fill some vacancies. However, the 2012 budget requests two new FTEs to allow the Commission to hire a Director to develop the office and to fund a permanent Small Business Ombudsman. The new Director will then be authorized to develop the office as he or she sees fit.

Although the stated objective for the office is to have a "coordinated approach to education and outreach activities," I am concerned that creating a new office to govern these responsibilities to industry may complicate or even supplant the more effective outreach we already perform under other offices. Today, a small company wishing to determine if its product is subject to a particular regulation may call the Office of Compliance for advice. It is a key function of that office to assess products every day in the course of its enforcement responsibilities. By creating a new office in charge of "outreach" duties, we create unnecessary complications and risks in our communications with the public. For instance, the two offices could answer the same question differently. Or, as is more likely, the new office will seek advice from the more experienced Office of Compliance. In that case, the new office becomes merely an intermediary, with the added risk that the second hand advice will be misunderstood or miscommunicated by the new office. In addition, a new office tasked with responding to regulatory scope issues risks moving the agency away from its enforcement responsibilities and toward something akin to providing product pre-approval services. Adoption of the latter role could turn a relatively small CPSC into a behemoth similar to the Food and Drug Administration.

The "education and outreach" activities of the agency also fall to our Office of Public Affairs, which is responsible for our website, editing and posting fact sheets on new rulemakings, and providing other resources to stakeholders. Overall, the Office of Public Affairs is in charge of the Commission's messaging to the public, including ensuring that the agency's message is on point and consistent. In that regard, it is risky to put a similar "education and outreach" objective under the purview of a brand new office, which may provide a duplicative or contradictory message to the general public and our stakeholders.

Finally, I am concerned that the stated purpose of the office implies that it will solve the problems the CPSIA has caused stakeholders like small businesses. Small businesses are not clamoring for more information ("education and outreach") about how to comply with this law; they are asking for relief from this law because it is killing them. The solution for small businesses negatively impacted by the CPSIA is to repeal the portions of the law that impose tremendous costs without increasing safety. Furthermore, no matter how successful this new office may be, most small businesses will still need to hire lawyers to understand their obligations under the Commission's far-reaching and complex regulations.

To date, the Small Business Ombudsman has focused on responding to CPSIA-related questions posed by small handcrafters. This limited service to a small minority of manufacturers does not begin to assist the vast majority of small businesses – with greater numbers of employees and a much larger impact on the economy -- suffering under the CPSIA. If the Commission really wanted to help all small businesses, it would have used its rulemakings to mitigate the unintended consequences of the CPSIA, and propose meaningful legislative reforms to Congress. It is wasteful and counterproductive to instead create a new office to perform limited outreach to micro-businesses when at least two existing agency offices already perform similar services and could more easily assume any added responsibility that will be assigned to the new office.

Are the functions performed by this new office already being performed elsewhere within the CPSC?

Yes. The following offices perform education and outreach duties to Commission stakeholders:

- Office of Compliance: This office monitors and responds to incoming incident reports from a variety of sources and pursues enforcement action (recalls and corrective actions) against manufacturers or other parties. This office is key in responding to questions from manufacturers who may seek advice on whether they are in compliance with a regulation in advance of putting a product into commerce.

- Office of Public Affairs: Many of the duties of the Office of Public Affairs are listed starting on pg. 61 of our 2012 Budget Request. These duties include: monitoring the Commission's website, blog and Twitter account, responding to press calls, running safety awareness campaigns, issuing press releases on recalls and new regulations, posting key fact sheets for consumers and industry stakeholders regarding new regulations, and communicating with stakeholders, such as thrift stores, regarding recalled products and other safety awareness issues.

- Office of International Programs and Intergovernmental Affairs (EXIP): This office was designed to coordinate our interactions with the international community and other federal agencies. EXIP coordinates the Commission's international and intergovernmental efforts with respect to consumer product safety standards development, harmonization efforts, inspection and enforcement coordination, consumer education, and information dissemination. Some of the activities of EXIP can be viewed on the CPSC's homepage (www.cpsc.gov) by clicking "International" in the left-hand menu.

The newly proposed "Office of Education, Global Outreach, and Small Business Ombudsman" will now include all of EXIP and place them under a new Director.

How does the agency currently work with small business? Given their importance to our economy I hope this is something you are already doing.

Traditionally, the agency has worked with industry through the following activities: 1) staff meetings with industry (many of which are posted on the Commission's public calendar); 2) Commissioner meetings with industry (many of which are posted on the Commission's public calendar); 3) comments received during the rulemaking process; 4) Commission workshops for targeted stakeholders; 5) communications from the Office of Compliance or the Office of General Counsel with advice on compliance with Commission regulations; and 6) materials posted on the Commission's website, including fact sheets on regulations, regulation packets, technical guidance, enforcement guidance, and Commissioners' statements.

While the agency has an open line of communication with industry, including small businesses, these communications have not translated into more effective regulations for small businesses, particularly when it comes to the CPSIA. I believe that under the statute the Commission could have taken a number of steps to alleviate such burdens without impacting safety. In fact, the primary request I received from both Democrat and Republican Senators prior to my Senate confirmation hearing was that I "find flexibility" in the law wherever possible in order to mitigate its many unintended or unforeseen consequences. Despite my best efforts as a Commissioner, this has not happened. The flexibility that I found in the following rules was rejected by a majority of Commissioners:

a) ***Absorption exclusion***: I argued that the absorption ***exclusion*** under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term "any lead" in that section may be interpreted to mean a ***de minimis***, harmless amount of lead in a children's product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axels on toys would be legal—since lead in the substrate of these products is not harmful. This change would also have eliminated the requirement to third-party test and certify such products. Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car's brass fitting contained less absorbable lead than the Food and Drug Administration deems to be acceptable in a piece of candy.[1]

b) ***Civil Penalties Factors*** – In the Commission's interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, "technical" violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.[2] Unfortunately, a majority of the commissioners did not want to provide that leeway.

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[1] http://www.cpsc.gov/pr/northup110409.pdf
[2] http://www.cpsc.gov/pr/northup03102010.pdf

c) ***Definition of Children's Product*** – The CPSIA applies to all "children's products", statutorily defined as products "primarily intended for a child 12 years of age or younger." The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended for children aged 10-12, or for an age range falling both inside and outside the upper age limit of 12. The purpose of defining the term was to guide the manufacturers of such products in determining which of them fall under the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower "fence" around the scope of covered products—or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helped neither the CPSC staff,[3] nor the regulated community.[4]

d) ***"Children's product safety rules"*** – I offered a valid, alternative interpretation of the statute's requirement of third-party testing to all "children's product safety rules." A clear distinction can be made between "children's product safety rules" and more general "consumer product safety rules" promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential "children's product safety rules," it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step, and there is no risk associated with these products that necessitates new third-party testing requirements.[5]

e) ***Database***: I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. Unfortunately, the Commission's Majority passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys and random bystanders that may not have firsthand knowledge of the incident. The Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers--particularly small businesses. Due to the inaccuracy of reports on the database, it will be a waste of taxpayer resources and will not be useful to the consumers it was intended to help.

Thus, small businesses do not need better education and outreach from the CPSC, or a new Office dedicated to these activities. They need a Commission that will meaningfully respond to their request for relief from the burdens of the CPSIA. And where statutory language limits our discretion to do so, we have a responsibility to apprise Congress of the need for a legislative solution.

Are you in favor of this office being created?

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[3] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses," *Associated Press*. December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware

[4] http://www.cpsc.gov/pr/northup09292010.pdf

[5] http://www.cpsc.gov/pr/northup07122010.pdf

As mentioned above, I voted "no" on approving the creation of this new office.

DATABASE

There has been much concern over the CPSC's consumer complaint database. There have also been various reports on how much the database actually costs.

Why has there been so much confusion over the cost of this database?

I believe the confusion surrounding the cost of the database stems from the fact that it cannot be separated from the associated cost of the Commission's broader IT modernization program. As a result, efforts to do so have produced radically varying numbers, some of which seem designed more to serve the purpose of minimizing the cost rather than reflecting it accurately.

For instance, the Commission's FY 2012 Budget Request, dated February 2012, estimates the contracting costs of both the public database and IT modernization to be $29 million, and does not distinguish the funding for the two initiatives.[6] Moreover, the agency has long promoted its IT modernization and database plans as inseparable on the grounds that the former is essential to having a more efficient database. This argument was intended to reduce the risk that the Office of Management and Budget (OMB) or Congress would seek to cut the budget by eliminating funding for either IT modernization or the database. Since 2009, OMB has requested not only our Exhibits 300 and 53 on the database costs, but also a Spend Plan for the Consumer Product Safety Risk Management System ("Database Spend Plan") laying out in more detail the annual costs of the database. In none of these documents does the agency attempt to separate the funds allocated to IT modernization from those dedicated to the public database. On the contrary, a single combined figure has always been presented. The contracts the Commission has let to execute its IT modernization plan and to create the public database also do not distinguish between the two.

In late March 2011, I requested from the CPSC Budgeting Office figures reflecting the exact cost of the database. In response, our budget office was unable to separate funds allocated to "IT modernization" from those associated with the creation of the database. Notwithstanding this admission, a variety of other cost estimates for the database (or database plus IT modernization) have been provided by various sources, including:

- A statistic cited in Commissioner Bob Adler's January 14, 2011, Supplemental Statement on the Public Database: "In fact, according to CPSC staff, the cost of the database is only a small part of the $9 million spent on the first phase of the IT modernization."[7]

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[6] Commissioners began their review of the 2012 Budget Request in fall 2010. The document states at Page 5: "By the end of 2011, the Commission will have spent $29 million in contracted work for the public database and IT modernization." http://www.cpsc.gov/cpscpub/pubs/reports/2012plan.pdf

[7] http://www.cpsc.gov/pr/adler01142011.pdf

- An estimate communicated orally by CPSC staff that the database might cost between eight and ten million dollars.

- An estimate reported by the Associated Press on February 25, 2011: "The database was ordered by Congress as part of a 2008 product safety law aimed at removing lead and other dangers from toys, and last April the commission estimated it would cost about $20 million. That estimate included a major technology upgrade of antiquated computer systems that the agency said at the time was essential to providing a foundation for the searchable database."[8]

- Chairwoman Tenenbaum stated during a February 17, 2011, hearing before the House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade, that the database was estimated to cost $3 million.

- A March 8, 2011, memorandum, prepared over two weeks *after* Chairman Tenenbaum announced the $3 million figure at the February 17, 2011, hearing, for the first time provides written documentation that the database has been estimated to cost $3 million. A copy is attached for your reference.[9]

The March 8 memorandum speaks for itself, but I find it to be an extremely confusing and loosely drafted post hoc justification for the $3 million figure. Its effort to separate the costs associated with creating the public database from expenses associated with other technology improvements is difficult to follow and unpersuasive. Indeed, before launching into its rationale for the precise delineation, the memorandum's author concedes that "[b]ecause modernizing the Commission's business processes and supporting IT systems is required in conjunction with deploying the public database, it is challenging to draw a bright line between these efforts." But the thrust of the argument appears to be that all of the funds used to create the database should not be included in its cost, because the accompanying IT modernization improvements and certain features of the database have uses beyond facilitating the public's submission and search of consumer product safety reports.

For example, the memorandum states at page 2 that "regardless of whether a report is a candidate for publication" the agency wants to: (1) drive the public from reporting incidents via the hot line or U.S. mail to an online form on the database; (2) change its standard communication method with businesses from paper forms to online forms via the business portal of the database; and (3) otherwise share with the public through the database valuable information in addition to the reports posted to the database by the public. Through this logic, the creation or upgrade of a public portal to facilitate consumer incident reporting and searching online is *not entirely* a cost of the public database, because the CPSC would have wanted *some* of this upgrade, regardless of the statute's requirements.

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[8] Jennifer Kerr. "New Unsafe Products database Under Fire on Hill," *Associated Press* (February 25, 2011). http://hosted2.ap.org/APDEFAULT/89ae8247abe8493fae24405546e9a1aa/Article_2011-02-25-Dangerous%20Products/id-e20609a71a1d4f74af36b0430f1d233e

[9] CPSC Staff Memorandum, March 8, 2011, Subject line: "Estimated Costs of Public database Development."

While nicely supporting those who seek to minimize the apparent cost of the database, I believe this carve out is unwarranted. It amounts to writing off a portion of the database's cost simply because certain of its features can also be used to accomplish other agency goals. To illustrate this point, imagine a vacuum purchased for $500 with the intent to clean a floor. The vacuum is then used for cleaning blinds, removing cob webs, and even blowing leaves from the driveway. Does this mean that the vacuum actually cost $300 because $200 was saved that could have been spent to perform the additional work? The same faulty logic – formulated in hindsight to reduce the apparent cost of the database - underlies the reduction of the database's cost from $29 million to $3 million. The features of the database that serve functions beyond facilitating public reporting and searching, including much of the IT modernization work that was an essential prerequisite to the creation and functioning of the database, have been deducted from its cost. But the fact remains that none of the database's features and their uses, nor much of the underlying IT modernization, could have been achieved had the Commission not received and spent funding to design and program the database.

The fact that the agency's broader IT modernization efforts have only just begun also indicates that much of the money spent to date directly supported the database. The database became public on March 11, but the work necessary to achieve the IT modernization goals the Chairman discussed at the hearing will not be completed for several years, and for the most part has just begun. This includes integrating our different information silos, so that our staff can search across incident reports, field investigations and standards work, and perform more complex statistical searches. So far, we have standardized the way we intake data—a laudable accomplishment considering the agency's multiple internal databases. We have also begun a website redesign, and a plan to begin standardizing incoming data. However, the "IT modernization" piece, even if it could be broken out completely from the public database, is in the early stages -- even after incurring over $29 million in contract and other costs.

It should also be noted that even the $29 million figure assigned to both the database and IT modernization understates the real cost of the database. The $29 million figure represents only the estimated contracting costs through FY 2011. It does not include the hours CPSC staff dedicated to developing the database and preparing for its launch, including managing contracts. Agency projections for the future cost of the database are also misleadingly low. The FTE cost estimates in the CPSC's Database Spend Plan only account for IT employees, ignoring the additional staff needed for data intake, investigations, and legal work associated with the new public database. The Chair is in the process of setting up multidisciplinary teams to review each incident as it is submitted to the database. This will, of course, require new FTEs or pull incumbent employees off of their current assignments, requiring new FTEs to support the increased work load. The FTE cost estimates in the CPSC's Database Spend Plan also appear to discount the expected increase in incident reports, material inaccuracy and confidentiality claims, and other work likely to be generated by the existence of a searchable public portal for the reporting of product safety incidents and issues.

The Commission's 2012 Performance Budget Request also discounts these expenses. According to that document, the "New and Reallocated Resources" dedicated to "Data Intake, Incident Review, and Investigation" is derived from an extrapolation of the growth trend line for reported incidents and investigations dating back to 2003, long before the public database was even

conceived. If, as is likely, this projection is proved to be too low, the assigned staff will be unable to timely manage all of the information reported through the database. As a result, Commission staff will be even less likely to resolve claims of material inaccuracy within the ten-day period prior to the posting of unverified information. The Commission will then either request and be provided additional funding in subsequent years, or preside over an increasingly misleading database.

How many new people are needed to administer the database?

The official Commission position communicated to me by the agency's Executive Director (ED) is that the CPSC has requested four additional personnel (FTEs) and four new contractors to administer the intake of data into the database, and less than a single information technology FTE to operate and maintain the public database. The ED also explained that the increase in personnel is necessary to meet the quick turnaround required of staff to process the reports.

Do you believe the number of FTEs requested is an accurate number?

I believe that this official position underestimates the human resources that will be required to administer the database. First, the agency's 2012 Budget Request includes a considerably larger number of new FTEs that appear to be needed to administer the new database. Starting on pg. vii of the 2012 Budget Request, $3.075 million is requested for "modernizing the CPSC's information technology (IT) systems and implementing the public database through a mixture of new and existing FTEs and contractors." On pg. viii, this funding is explained as including "four FTEs and three contractors to maintain the new IT systems [and] . . . an increase of 24 new FTEs and contractors to conduct data intake, incident review, and investigations for a total of $3.075 million." On the following page, a chart (Table C) is included which breaks down most of the needed FTEs for data intake, rapid incident review, and customer service—all for the database. And pg. ix includes one sentence in the first paragraph explaining that an additional six new FTEs are requested "to continue to investigate the increasing number of incident reports"—again, all related to the Commission's database.

I agree that the agency needs the flexibility to determine where to assign the new employees as we learn more about how to manage this new public database. However, it seems disingenuous to characterize only the "Data Intake" employees as "needed to administer the database", while ignoring the other 27 new FTEs and contractors in our budget request under the headings "IT modernization" and "Data Intake, Incident Review, and Investigation." As I have previously discussed, I believe this is part of an effort to diminish the apparent cost of the public database by artificially separating the costs of database, IT modernization, and other related expenditures, when they are inseparable. As explained above, up until shortly before our Appropriations hearing, these distinctions had not been made in any funding justifications to Congress or the Office of Management and Budget. Rather, all funding for the database and all other facets of the Consumer Product Safety Risk Management System was sought as a single lump sum.

Notably, even the Budget Request underestimates the cost of the database and the employees needed to administer it. First, the staff's justification for some of the new FTEs (*e.g.*, the six new FTEs requested to continue to investigate the increasing number of incident reports) is based

solely on the expected organic growth in incident reports that the Commission would receive even without a new database. However, since the Commission's database will be made public for the first time, and because the Commission itself is promoting its use, it is almost certain we will receive a greater quantity of incidents than ever before – in addition to any organic growth. Also, the budget request does not take into account the time and resources that Commission senior staff, including legal and compliance staff, will continue to dedicate to the new database, which may take them away from other duties. If, as is likely, the projected number of staff is proved to be too low, the assigned staff will be unable to timely manage all of the information reported through the database. As a result, Commission staff will be even less likely to resolve claims of material inaccuracy within the ten-day period prior to the posting of unverified information. The Commission will then either request and be provided additional funding in subsequent years, or preside over an increasingly misleading database.

What concerns do you have regarding the accuracy of the information published on the database?

Several features of the database and the Commission's policies governing the posting of reports make it likely that inaccurate information will be published on the database.

To begin with, the database requires that submitters of reports include their own contact information, but does not require that a report submitter have any firsthand knowledge of the product, harm or risk of harm. Nor does it require submitters to provide the contact information of an individual with firsthand knowledge, such as the product owner or the person who used the product. As a result, requiring the contact information of only the submitter is not much different from permitting the submission of an anonymous report. In both cases, the Commission has no means to verify the alleged circumstances of the incident or to obtain supplemental information relevant to determining the existence and scope of an alleged product hazard. Without access to a direct witness to an alleged incident, the Commission may also be unable to determine whether a report contains a material inaccuracy. Where a lack of information and inability to contact the product owner or a witness prevents the Commission from determining the existence of a material inaccuracy, a dubious report will remain on the database.

Moreover, these concerns are not diminished by the requirement that submitters of reports verify "to the best of their knowledge" the accuracy of the report submitted. The honest, best knowledge of someone with no personal connection to an incident or product is of little value.

The rules governing the posting of reports that are subject to a manufacturer's claim of material inaccuracy also make it likely that inaccurate reports will be posted. Manufacturers are entitled to ten business days after a report of harm is sent to them before the report is posted on the database. During that time, they may present to the Commission a claim that a report contains materially inaccurate information. But in many cases, ten days is unlikely to be sufficient time for a manufacturer to determine whether a report identifying its product contains a material inaccuracy.

This is partly because the rule passed by the majority did not require reports to contain sufficient detail about the product and incident to guide a manufacturer's investigation. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; and/or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would not permit the manufacturer even to identify the specific product, let alone to gauge the accuracy of a report about the product.

Even a manufacturer provided with sufficient information to identify a specific product may not receive enough detail about an incident to understand the role its product played in causing an alleged injury. Moreover, there may be no way to ascertain the truth in those cases where the manufacturer is certain that its product could not have caused an injury in the manner alleged. This is because a third-person reporter is not required to identify the victim or product owner, and access to a firsthand observer of the incident is necessary to resolve issues of fact.

A manufacturer forwarded a vague report has few options. Even where a firsthand observer is identified in the report, the manufacturer is not entitled to such individual's contact information. Without the ability to follow-up with a witness, the manufacturer must base its assertion of material inaccuracy upon the content of the report. In many cases, the report may not contain sufficient information for the manufacturer to ascertain whether it contains a material inaccuracy.

Even with adequate information, 10-days will often be too little time. Obvious cases of manufacturer misidentification may be discernable within the available window of time. But many products of a more generic nature will be very difficult to distinguish without a much more extensive investigation. I have spoken with manufacturers who have needed over 30-days after receiving a consumer complaint to conclude that the subject product was not their own. And those were cases where the company had access to the product. Ten days will clearly be insufficient in many cases, and as a result, materially inaccurate information will remain on the public database well beyond that point.

Even where a manufacturer meets the 10-day deadline to submit an adequately supported claim that a report is materially inaccurate, if the Commission does not also complete its investigation of the claim within the 10-day period, the report is published on the 11th day. This policy guarantees that inaccurate reports will sometimes be posted. Moreover, the materially inaccurate information will remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will

have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Further, the manufacturer has no right to inspect the product. In those cases where contact information for the product owner is neither provided nor obtainable from the third-party submitter, it would be impossible even for the Commission to inspect the product. Similarly, there would be no opportunity for the Commission to follow up with the consumer under those circumstances. The manufacturer is not entitled to the contact information of a product owner who chooses to remain anonymous.

All of these factors make it inevitable that inaccurate reports will be posted on the database, and that many will remain searchable by the public forever.

A recent example demonstrates that these are not idle concerns. A report was published on the public database in which a parent identified a particular company as the manufacturer of a toy kaleidoscope that injured her child. The report had been forwarded to the named manufacturer as required by the rule, but the report contained insufficient information for the named manufacturer to determine whether it had actually manufactured the product. The company therefore made no claim of material inaccuracy, but posted a comment explaining that it was uncertain whether it had manufactured the product. Subsequently, a CPSC compliance officer obtained the kaleidoscope from the parent as part of its investigation of the product's safety, and discovered that the parent had misidentified the manufacturer. The incident report was then removed from the database, the correct manufacturer was notified, and the report was reposted with the correct information. However, this outcome resulted from happenstance and not any protections built into the database. If the incident had not been one of the approximately 10% that lead to a follow-up investigation, the error would never have been discovered. In addition, the investigation would not have uncovered the mistake if, as the database rule permits, contact information for an individual with firsthand knowledge of the product and who retained it, was not provided. The fact that an error of this kind has already been discovered, given the short period that the database has been "live" and the small percentage of incidents that are investigated, suggests that this situation is probably not unique. Rather, it indicates that there are likely already a significant number of published incident reports that misidentify a manufacturer and that will never be corrected or removed.

Is it true that other persons, aside from those directly harmed, can submit complaints to the database?

Yes, even as properly construed, the CPSIA permits categories of persons who were not directly harmed to submit reports to the database. This includes emergency first responders and physicians, who are in a position to provide at least a degree of useful first-hand information

about an incident or injury. But I believe the Majority expanded the categories of persons entitled to submit information to the database well beyond those intended by Congress.

Section 212 of the CPSIA requires the Commission, subject to the availability of appropriations, to establish and maintain a public, web portal accessible Database on the safety of consumer products. The statute identifies five sources from which the Commission shall receive reports of harm. These are (1) consumers; (2) local, state, or Federal government agencies; (3) child care professionals; (4) child service providers; and (5) public safety entities. CPSIA § 212(b)(1)(A).

Each of these categories of submitters is likely to have first-hand knowledge of the harm reported. They can therefore be expected to provide accurate and reliable information that may be useful to consumers seeking product safety information.

Notwithstanding the statute's clear language, the Commission's Majority adopted a rule that greatly expanded the list of allowable submitters to the Database beyond those intended by Congress. For example, the Commission's regulation defines "consumers" to include "attorneys", and "public safety entities" to include "consumer advocates or individuals who work for nongovernmental organizations, consumer advocacy organizations, and trade associations." 16 C.F.R. § 1102.10(a). This expansion goes against the statutory purpose that the Database be "useful" for consumers and not disseminate erroneous information.[10] Indeed, the Majority has expanded the list of submitters to such an extent that ***anyone*** can submit reports of harm—thereby rendering meaningless the statutory language listing permitted submitters.

It is important that individuals with first-hand knowledge of incidents of harm involving consumer products be permitted to submit reports to the Public Database. However, groups or individuals with no direct knowledge of the incident, who did not see it happen or do not even know the person that was harmed, should not be permitted or encouraged to submit incident reports to the Database. There are several reasons why first-hand knowledge is essential, but the primary reason is ***accuracy***. A Database full of inaccurate reports from individuals who have second or third-hand information is not remotely helpful to consumers using the Database to determine which consumer product they should purchase.

Soliciting information from sources seeking to promote an agenda unrelated to simply sharing first hand information invites dishonest, agenda-driven use of the Database—diluting its usefulness for consumers. Trial lawyers, unscrupulous competitors, advocacy groups and other nongovernmental organizations and trade associations serve their own agendas and lack an incentive to prioritize accuracy in their reports of harm. Trial lawyers or other groups with self-serving motives will use the Commission's Database to look for potential trends and patterns of hazards. Under the Majority's Database rule, these same groups could also submit to the Database false and unverifiable reports to fuel a lawsuit. It is no coincidence that these groups are strongly in favor of this public Database and of the Majority's interpretation of the statute, which expressly allows them to submit reports of harm.

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[10] On the Senate floor, during consideration of the CPSIA on March 5, 2008, Senator Pryor stated: "We have tried to find something that is balanced, that provides information, but also has some filtering so we make sure erroneous information is not disseminated. But the goal of this provision is that the public has the right to know when products are dangerous."

There are many advocacy groups and associations that serve a role in public policy, but may not have the incentive or ability to provide specific and accurate product identification information to the Commission's Database. For example, the National Fire Protection Association (NFPA) supports government-mandated sprinklers in new homes. One cause of house fires is the use of cigarette lighters, which are consumer products. Thus, the NFPA has a strong incentive to add all reports of house fires caused by lighters to the Commission's public Database. The more incidents in our Database, the better case they can make that new fire prevention technology – which some of their members sell—should be mandated in homes.

But it is not important to the NFPA whether it correctly identifies a brand of lighter in an incident report. A lighter may appear to be the branded product of a particular manufacturer, but instead be a cheap counterfeit. The NFPA is interested solely in reporting house fire incidents; the particular brand of lighter is not relevant to its goal of promoting sprinklers. Meanwhile, the company identified in the report as the manufacturer of the cigarette lighter must defend countless unverifiable and potentially inaccurate claims about its product. Such inaccurate and unverifiable information is of no value to a consumer seeking information on the safest type of lighter.

By inviting trial lawyers, consumer advocacy organizations and trade groups to input reports of harm, the Commission has all but guaranteed that the Database will be a tool for lawsuits, policy agendas and anti-competitive activity. Under those circumstances, it cannot also serve its intended function of providing a reliable resource for parents seeking useful information about product safety. A Database populated with such information will be no more useful than "Amazon.com", "Yelp.com", or any of the other hundreds of websites where anyone can submit comments on a product, and does not warrant tax payer funding.

Why did the CPSC not require the submissions come from firsthand knowledge of incidents of harm?

The issue was a topic of debate among the Commissioners. Without revealing confidential internal deliberations, the Majority's public position is explained in the published preamble to the rule:

> The plain statutory language does not require a submitter of a report of harm to have "firsthand knowledge." We have chosen an interpretation of "consumer" that comports with our experience in maintaining a database of consumer product incident reports. Historically, we have received reports of harm from any and all consumers in order to protect individuals who use consumer goods.[11]

75 FR 76835 (December 9, 2010).

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[11] A separate statement by Commissioner Adler clarifies the Majority's view that "the term 'consumer' generally carries a broad meaning . . . we are, in fact, all consumers." Supplemental Statement of Commissioner Robert Adler Regarding the Publically Available Consumer Product Safety Information Database Rule (January 11, 2011), at 4-5. Thus, the Commission has a history of accepting reports from everyone and anyone.

In other words, the majority believes that because the Commission has long been willing to initiate product investigations based on secondhand reports, it should also publish such reports to the public. But there is no logical connection between the two circumstances. In the former case, there is no risk that the public will be mislead by inaccurate reports, and the Commission's investigation and internal deliberations remain confidential until it determines there is a real product hazard. Indeed, it is preferable that the Commission continue to absorb as much information on consumer products as it can—and this includes potentially inaccurate reports from advocacy groups, trial lawyers and trade associations. But the *publication* of inaccurate safety information will mislead the public – including in some cases toward the purchase of products that are less safe than ones falsely described as unsafe in posted reports. Notably, it is also not statutorily required that information which is neither accurate nor verifiable be posted on the public database.

But at bottom, I believe the Majority's willingness to populate the database with potentially inaccurate information stems from a fundamental difference in philosophy. The Majority apparently believes it is better to include potentially inaccurate information than to exclude any accurate information that might be reported only secondhand. They seem not to understand that the inclusion of inaccurate information diminishes the value of all of the information on the database, because there will be no way for a manufacturer or consumer to distinguish between accurate and inaccurate reports. As a result, manufacturers will not have the opportunity to improve the safety of their products, and consumers will have difficulty knowing which products to avoid and which to purchase. In other words, unlike the majority, I do not believe that casting a wider net to avoid missing any accurate information justifies the dissemination of inaccurate information. For when the two are indistinguishably combined, even the accurate information is of little value. The database is therefore no different than the many available internet blogs on which consumers contribute unverifiable comments about products, and it should not be supported with tax payer dollars.

How will the CPSC handle information regarding complaints about one type of model of an item? For example, how will consumers know that the information posted is not regarding every model of an item that a company makes?

If a report identifies as potentially hazardous a product that has numerous distinct models, but does not specify the model, the report will be posted and consumers will have no way of knowing which model is the subject of the report. That potential scenario serves to highlight once again the risk that, as currently conceived, the database is likely to lead to the posting of inaccurate or misleading information that will at best be unhelpful to consumers.

I have been informed that an analysis of reports submitted to the public database shows that approximately 85% of reports contain information in the non-mandatory field designated for the model number. Although no comprehensive review of these reports has been conducted, it has been discovered that in many cases, the information contained in the "model number" field is, in fact, not the model number of the product. The Commission is therefore still working to determine how useful "model number" information provided by consumers will be in

distinguishing among products and assisting in the determination of whether the correct manufacturer has been identified.

IMPACT OF REGULATION

Many of the CPSC's rules have an impact on manufacturers both large and small. It seems to me that these rules also have a large impact on consumers, giving them less choices and higher prices.

When promulgating rules, how does CPSC consider their impact on businesses and consumers?

The Commission conducts assessments required under the Regulatory Flexibility Act (RFA) and the Congressional Review Act (CRA). These include assessing whether or not a rule disparately impacts small businesses, particular geographic regions, prices, or the ability of domestic firms to compete. Such assessments are usually not comprehensive, because it is not required. For example, an RFA analysis may be a couple of paragraphs, depending on the rule.[12]

Under the CRA, when a rule is deemed "economically significant", the Commission sends a notice to the Office of Management and Budget (OMB) explaining how the determination was made. (Again, no cost-benefit analysis is required.) OMB has an opportunity to agree or disagree with the Commission's determination. Following that step, the Commission sends a one-page form to Congress and the Government Accountability Office letting them know the agency is issuing an "economically significant" rule---and that's the extent of the requirements imposed on the Commission by the CRA. Historically, the Commission has issued few "economically significant" rules. However, an increased number can be expected under the CPSIA.

Additionally, rules promulgated by the Commission generally are subject to the Paperwork Reduction Act (PRA), which requires notice and comment to the public and reporting to OMB. PRA analyses are usually perfunctory and do not influence the outcomes of Commission rule makings.

When required by statute, the Commission also considers the impact on businesses and consumers in the context of performing a cost benefit analysis, as discussed in the next response.

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[12] The Regulatory Flexibility Analysis that accompanied the Commission's proposed rule governing testing and certification (75 FR 28366), issued under the CPSIA, was more lengthy than usual. The assessment provides hypothetical examples of testing costs and other anecdotal data. However, it does not provide the quantitative data on the impact to industry or consumers that would normally be included with a formal cost-benefit analysis. http://www.cpsc.gov/library/foia/foia10/brief/prodcert1.pdf

Does the Commission do cost benefit analyses before promulgating rules?

The CPSC's responsibility to perform a cost-benefit analysis depends upon the nature of the rule promulgated. Before issuing consumer product safety standards or bans under the agency's core statutes (Consumer Product Safety Act/CPSA, Federal Hazardous Substances Act/FHSA and the Flammable Fabrics Act/FFA),[13] the Commission is typically required to do a cost-benefit analysis examining the impact on both businesses and consumers. For example, the CPSA requires a finding "that the benefits expected from the rule bear a reasonable relationship to its costs", before the Commission may promulgate a "safety rule." 15 U.S.C. § 2058(f)(3)(E).

If not, why not?

A cost-benefit analysis is not required for CPSC regulations that are not typical standards or bans. This would include "interpretive rules," which are meant to provide guidance to the regulatory community regarding Commission's interpretation of a statute. Nonetheless, the Commission's interpretation of a statute through such rules could have a substantial impact on both industry and consumers.[14] A "Notice of Requirements" to accredit laboratories, which is a specific type of rulemaking established by the CPSIA, also does not require a cost-benefit analysis. The purpose of this type of rule is to establish the requirements under which labs may be recognized as accredited by the CPSC. The promulgation of a Notice of Requirements also triggers the underlying statutory requirement to *third-party test and certify* to the corresponding safety standard, and has a substantial impact on industry. Also, enforcement guidance issued by the Commission is not required to have any kind of impact assessment. Notably, the Commission is not *prohibited* from doing more than the statutes require and could do full cost-benefit analyses in these cases, but typically the agency only does the bare minimum. The Commission also has the authority to determine which type of rule (or guidance) would be most appropriate, depending on the circumstance.

No cost benefit analysis is performed on rules promulgated under the CPSIA, because the statute excepted from the normal cost-benefit analysis requirement standards and bans promulgated under it. The decision was ostensibly made in order to expedite the rulemaking process. Unfortunately, removing this requirement has minimized public and Congressional scrutiny of the costs associated with the CPSIA mandates. In fact, it has allowed the Commission to ignore the costs associate with our CPSIA rulemaking, potentially preventing the Commission from more timely bringing cost concerns to the attention of Congress.

Notwithstanding the absence of a statutory requirement, I believe the Commission should itself perform or contract for the performance of full cost-benefit analyses of all its rules, including interpretive rules and Notices of Requirements. Nothing in the law prevents the Commission from doing a cost benefit analysis. In particular, the Commission should contract with an outside

[13] The Poison Prevention Packaging Act (PPPA) is another core statute of the agency, but it does not require a cost-benefit analysis.

[14] Two examples of recent "interpretive rules" issued under the CPSIA which will have a substantial impact on industry and consumers, include: Definition of Children's Product; Civil Penalties Rule.

party or request that the Government Accountability Office perform a full cost-benefit analysis of the testing and certification rule it is currently finalizing under § 102(b)(2) of the CPSIA. The rule requires an in-depth analysis across multiple products, industries and regulations, and is beyond the capability of the CPSC.

If so, how comprehensive is the cost benefit analysis?

A cost benefit analysis performed on consumer product safety standards or bans under the agency's core statutes includes a description of the potential benefits and costs of the proposed rule, including any benefits or costs that cannot be quantified in monetary terms, such as the impact on consumer choice. However, impact on consumer choice is not a chief consideration when the Commission assesses the impact of our regulations on consumers. More commonly, Commission staff considers the impact on consumers in terms of safety, including the estimated reduction in injuries and illnesses. A cost-benefit analysis would also consider the impact of price increases for manufacturers and consumers.

Can you think of any rules currently in place that are redundant?

Yes. As you know, the CPSIA requires third-party testing and certification to all "children's product safety rules." The Commission's Democratic majority has interpreted as children's product safety rules many of the more general "consumer product safety rules" that the Commission has had in place since before the CPSIA. The decision has resulted in complicated, unnecessary, and redundant testing requirements for a number of products regulated by the Commission.

For example, the Majority voted to treat the flammability regulations for carpets, rugs, clothing textiles and mattresses as "children's product safety rules" under the CPSIA. As a result, manufacturers of these products that have long been required to adhere to a strict testing protocol to ensure compliance with flammability standards now must also do additional third-party tests to certify to the agency's flammability standards, whenever they create a ***children's version*** of a product.

These rules have been in place for decades and have done an effective job without third-party testing. For example, there have been no recalls of youth carpets and rugs in the entire 37 years of the agency's existence. There is absolutely no reason to change a system that has worked. Carpets already must meet the flammability standard, they already get tested in house, and they can obtain general conformity certificates on that basis. Third-party testing will not improve children's safety. Nor does it make sense to treat so-called youth carpets differently. No child stays entirely in his own room and crawls or plays exclusively on his own rug. Children's rugs do not need different flammability protection than adult rugs. Indeed, every other rug in the house is more likely to have a cigarette dropped or candle tipped onto it than the carpet in a child's room. If this testing made sense, why would we not also require third-party testing for all carpets being laid in elementary schools, day care centers or in babies' rooms? If a wall-to-wall carpet installer arrives at a job to find a crib set up in the room and a mother far along in

pregnancy, why should third-party testing turn on whether the carpet has a juvenile design or not?

There is no doubt that CPSIA regulations treating clothing textiles and mattresses as children's products disrupt a preexisting effective testing regime. The clothing textile rule involves a long-standing and successful guarantee program that is unlike any of the rules promulgated under the CPSA. That regime effectively splits responsibility for determining the compliance of certain fabrics in a way that is not readily amenable to third-party testing.

In particular, the agency recently revised the mattress rule in a painstaking process that carefully weighed the benefits and costs entailed in that regulation. As part of that process, the agency determined that the rule would have an impact of greater than $100 million on the economy, making it the rule with the single greatest economic impact in the history of the agency up to that time. Requiring third-party testing based on an overly literal interpretation of a part of the CPSIA—for which there is absolutely no evidence to suggest it applies to the mattress rule—upsets the careful balance struck by the mattress rule's design. The oddity of overlaying third-party testing and certification on this rule can be seen from the fact that the rule will now require the burning of a queen-sized prototype mattress in an accredited third-party lab to prove the inflammability of a crib mattress several times smaller.

Of all of the votes we have taken at the Commission, I had hoped that this would be an easy one. After all, it is unlikely that Members of Congress anticipated adding third-party testing requirements to the 2007 mattress standard, the 1970 standard for carpets and rugs, and others, when the CPSIA was passed. Unfortunately, because of the make-up of the Commission, I believe it will now take an act of Congress to reverse these requirements and to prevent future "consumer product safety rules" from being caught up in the CPSIA's third-party testing regime.

STOPPING HARMFUL PRODUCTS AT PORTS OF ENTRY

I am encouraged by the CPSC's Memorandum of Understanding with Customs and Border Protection. By stopping harmful products at our ports of entry, the CPSC is using resources to proactively stop harmful products from reaching the U.S. market. As I understand, once products are in the market, it is very difficult to recall a significant amount.

What are your thoughts on this program? Do you believe this program is an efficient use of CPSC's resources?

There is no doubt that the growing cooperation between the Consumer Product Safety Commission (CPSC) and the U.S. Customs and Border Protection (CBP) has expanded the Commission's ability to more efficiently and effectively prevent unsafe products from entering the United States.

The CPSC gained access to the International Trade Data System Automated Commercial Environment (ACE) in 2007, and since that time has expanded the number of ports at which

CPSC employees work side by side with CBP officers. ACE gives CPSC staff access to "entry summary" data for any shipment of products as soon as the data becomes available.

In 2008, CPSC created a new Import Surveillance Division. The team, in cooperation with CBP, is tasked with inspecting, detecting and stopping hazardous products from entering the United States.

While the ACE data is useful, it is generally not available before a shipment has arrived. That is why the CPSC's October 2010 MOU with CBP is so important. It gives CPSC access to CBP's Import Safety Commercial Targeting and Analysis Center (CTAC). CTAC provides CPSC staff with ship manifest data even before a product arrives at port, thereby allowing the CPSC to conduct risk assessments and target those shipments most likely to contain dangerous products.

The access to CBP's databases obtained through MOUs, combined with day-to-day cooperation between CBP and CPSC Import Surveillance Division personnel working side-by-side at United States ports, permits the CPSC to target, sample and detain, export or destroy a far greater number of unsafe products. Moreover, it is able to do so with only a couple dozen employees. I strongly support these efforts and will continue to work with the Chair to identify additional ways in which CPSC can cooperate with CBP to maximize the safety return on the CPSC's expenditure of resources.

AVOIDING DANGEROUS PRODUCTS

What advice can you give the parents of young children to avoid lead and other dangerous elements in children's products?

Based on my experience as a CPSC Commissioner and as a mother of six, I am keenly aware of the dangers children can face from consumer products. As with all of the hazards against which the CPSC protects consumers, parents can avoid products known to contain lead in paint or other dangerous elements by checking the Commission's www.recalls.gov website or signing up for recall updates through email. It is also important to provide age-appropriate gifts to toddlers and young children, to supervise their play, and to remember that most incidents can happen in a split second.

Parents should also learn about the common, everyday hazards children confront at home, and be vigilant to avoid them. For example, drowning is among the most common occurrences reported to the CPSC. Drowning can occur not only in pools, but in bathtubs, hot tubs, toilets and even buckets of water. Drowning prevention is an important focus of the Commission, and I am proud to have participated in one of the Chairman's Pool Safely Campaign events in Washington, DC. I also hope that the Commission's education campaign on drowning prevention may extend to settings beyond swimming pools. Choking hazards also present an all too common risk for children, including from coins and small batteries.

A child's sleep environment is also a potential source of risk about which parents should be aware. I therefore strongly support the Chairman's "Safe Sleep Campaign", designed to educate parents on crib safety and the potential safety hazards present in an infant's sleep environment.

For example, soft bedding placed inside of a crib is a significant hazard, because infants' neck muscles are not strong enough to help them to avoid suffocation. Soft bedding is not a consumer product hazard, per se, but it is a common danger that we hear of all too often at the Commission. That is why I continue to support efforts at the Commission to focus not only on the safety of the cribs themselves but also on all of the general hazards related to infant sleep.

Lead

I believe it is important to clarify the risks associated with lead, especially since the CPSIA has removed the ability of our agency to assess risk in this area, as we would for other hazards. Some advocates say that "there is no safe level of lead", implying that none of us can ever spend enough time and money to reduce or eliminate lead everywhere. But there is, in fact, an *unsafe* level of lead that has been established by our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.[15] The Safe Drinking Water Act declares "zero lead" to be the objective for the amount of lead in water, but pipes carrying the water are permitted to be 80,000 parts per million (8 percent) lead – allowing for negligible, trace amounts to exist in the water we drink.[16] California Proposition 65[17] as well as the European Union[18] allow for a negligible amount of absorbable (or soluble) lead in children's products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)[19] is then taken into the body every day through the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at greater than minimal levels. The experts at the CDC and NIH have found that lead paint in old houses and lead in dirt[20] near old gas stations are the main source of environmental lead presenting a

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[15] "Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children," Food and Drug Administration, November 2006: http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Metals/Lead/ucm172050.htm

[16] Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: http://www.epa.gov/safewater/sdwa/basicinformation.html

[17] California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65 - http://www.oehha.org/prop65.html, Children's Health at OEHHA - http://oehha.ca.gov/public_info/public/kids/schools041707.html

[18] European Committee for Standardization (CEN), EN 71-3 Safety of Toys-Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994; http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/toys/

[19] Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22

[20] Although lead in dirt is a proven hazard for small children residing near old gas stations, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. http://www.epa.gov/lead/ This standard for

danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high.

In the same vein, a heavily lead-laden metal charm or piece of jewelry that can be swallowed presents a danger, because such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument or a vinyl lunchbox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Consider the CPSIA's lead requirements in comparison to these known lead hazards in the environment today. The CPSIA's arbitrary lead content limits (currently 300ppm, and moving this August to 100ppm or the lowest achievable level between 100ppm and 300ppm) remove the ability of the Commission to assess risk, or the *absorbability* that exists for a particular product. Thus, the law's lead content levels dictate that the metal handle bars of a bike that pose ***no health risk*** to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children's jewelry that actually is dangerous.

The CPSIA has resulted in a ban on children's books published before 1985, because the ink in them is likely to contain lead above the allowable level. Some at the Commission and many Members of Congress have expressed dismay that books have been affected, because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

Finally, children do not live cooped up inside of their rooms surrounded only by "children's products"—the primary focus of the CPSIA. Children live throughout the house, run around outside, and play with adult products such as pots, pans, furniture knobs, door handles, appliances and TV remotes. For example, the new costs associated with this law will affect a young child's lamp (usually turned on and off by the parent) but not the lamp in the den or the living room that a child is as likely to turn on and off. These products do not threaten a child's health due to their lead content, because the lead in them is not absorbable. This further illustrates the absurdity of the CPSIA's requiring the unnecessary reengineering of children's products with lead, while children are just as likely (if not, more likely) to play with everything else in the house.

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safety is less strict than the current lead content standard provided in the CPSIA for children's products, which is 300ppm and scheduled to fall to 100ppm in August of 2011.

Questions for the Record for Commissioner Northup
Submitted by Congressman Tom Graves

DATABASE

With the recent launch of the Consumer Product Safety Information Database in the past few weeks there is concern that reports of harm can be submitted by individuals that wish to do damage to their competitors by submitting erroneous information. If the database is to be effective the CPSC needs to ensure the utmost accuracy of those individuals that submit information to the database.

What specific steps are in place to validate the identity of individuals that are submitting the information for the database to make sure they "are who they say they are"?

The official Commission position is that the identity of individuals is validated by (1) the requirement that submitters verify that the information contained in a report – including the submitter's affiliation, name and address -- is true and accurate to the best of their knowledge; and (2) the threat that appropriate legal action will be taken against individuals who submit false information to the government through the database.

I believe neither of these putative safeguards is likely to discourage individuals from misrepresenting their identity when submitting a report, or lead to the discovery of those individuals who choose to do so. A person willing to misrepresent his or her identity in connection with the submission of a report is unlikely to be discouraged from doing so by a self-verification check box. Moreover, as the official Commission position reflects, no steps are taken beyond confirming that the self verification box is checked to confirm a submitter's identity.

I also do not believe the threat of legal action is much of a disincentive to those wishing to provide a false identity. As noted, the Commission apparently lacks a system of "specific steps" to verify a submitter's identity in the first place. The threat of prosecution carries little weight in the absence of a system for detection. And even if the Commission became suspicious of a submitter's stated identity, it can take no prosecutorial action independent of the Justice Department. Notably, between fiscal years 2004 and 2010, the Commission referred for criminal prosecution to the Department of Justice only one case that did not involve illegal fireworks. This reflects the fact that the Justice Department has many priorities that supersede litigating cases on behalf of the CPSC, and has historically agreed to do so only in cases involving severe and pervasive injury combined with repeated, intentional wrongdoing.

There is even less likelihood that a case would be brought based on a claim that inaccurate incident or product information was submitted through the public portal. To begin with, the difficulty of proving that a report is not "true to the best of [the submitter's] knowledge" makes it unlikely any action would be taken. Even a consumer advocacy group in the habit of submitting reports based on third and fourth hand information heard "though the grapevine" is still submitting a report to the best of its knowledge. Finally, assuming the Commission concluded that a report failed to meet this lax standard, the choice to prosecute would be made by the

Department of Justice. I would be shocked if the Department of Justice, overwhelmed by significant cases effecting the national interest, would exercise its discretion to dedicate resources to litigation over whether someone really didn't believe something they heard about a consumer product.

To date, have you found any instances of falsified individuals or actual individuals whose identities were stolen to submit information?

In response to your inquiry, Commission staff has informed me that the Commission is unaware of any instances where an individual submitted a report under either a fictitious name or the name of another individual without authorization. Notably, based on the response to the above question, it is unclear, in any event, how the Commission would become aware of such a falsification. Commission staff apparently make no effort to verify the identity of report submitters beyond ensuring that the "self-verification" box is checked.

FRIDAY, APRIL 1, 2011.

OFFICE OF PERSONNEL MANAGEMENT

WITNESS

HON. JOHN BERRY, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT

Mrs. EMERSON. The subcommittee will come to order.

Happy April Fool's Day.

I want to welcome Director Berry from the Office of Personnel Management. I do appreciate your service. You have a tough job. And I know that while today usually is reserved for practical jokes and pranks, I think it is only opportune for us today to consider the serious challenges of OPM's mission to recruit, retain, and honor our world-class Federal workforce to serve the American people.

OPM leads Federal agencies on personnel management issues for the country's 1.9 million Federal civilian employees. It designs, develops, and oversees compliance with workforce policies in areas of recruiting, selection, development and compensation. Also, OPM has the responsibility for managing tens of billions of dollars in retirement, health and life insurance trust funds for Federal employees.

For fiscal year 2012, the President's budget requests annual operating expenses of $258 million for the Office of Personnel Management, including the Inspector General, to carry out OPM's mandated responsibilities. This is an $18 million, or 7 percent, increase over fiscal year 2010.

As you know, our current spending levels are unsustainable and our committee is committed to fiscal responsibility. And Director Berry, I want to try to work as closely as we can to fund your highest priorities without adding anything additional to the Federal debt.

As the Federal Government transforms itself to address the country's most pressing needs, agencies must have the ability to recruit and retain talented and highly skilled employees. Over the next decade, the Federal Government is facing a huge retirement wave which will result in the loss of leadership and institutional knowledge across the government. So the Federal agencies really need your help to meet this challenge.

You have significant responsibilities, Director Berry, and I look forward to working with you to accomplish your goals and make sure we have the best workforce to serve the American public.

With that, I would like to recognize my friend, our subcommittee ranking member, Mr. Serrano, for any opening remarks he would like to make.

Mr. SERRANO. Thank you, Madam Chairman. And I did notice that Albert Pujols set a record——

Mrs. EMERSON. Zero for five.

Mr. SERRANO. Zero for five and three double plays in one opening day. That has never happened in the history of sports.

Mrs. EMERSON. So do you suppose that having a 10-year contract would have solved that?

Mr. SERRANO. Yes, he would have relaxed more and paid more taxes and maybe kept the shutdown from taking place.

Mrs. EMERSON. Well, there is that.

Mr. SERRANO. I would also like to welcome Mr. John Berry, who we have a lot of respect for.

OPM has a very challenging and important mission overseeing the employment and benefits for millions of Federal workers and millions of Federal retirees. We may disagree up here about the appropriate size of government, but we all agree that it is critical to have a personnel system that has the flexibility and resources to hire and retain a high-quality workforce to staff an efficient Federal Government.

In addition to the current workforce, you are responsible for retirees, a number that is expected to increase substantially in the coming years. Recently, there have been many failed efforts to modernize the retirement system. Despite repeated investment, we still have a system that is outdated and inaccurate, and therefore unable to accomplish its mission. I understand that you are planning a more incremental modernization of the retirement process, and I look forward to hearing about these efforts.

Finally, although we appear to be making progress, there is still an unfortunate possibility of a government shutdown. OPM will have an important role in making sure that the necessary parts of the Federal Government continue to function. I look forward to hearing how you are preparing agencies for this eventuality and making sure that Federal workers know their role in the event of a shutdown. I look forward to addressing these issues during the time for questions, and I would like to welcome you again, Director Berry.

Thank you.

Mrs. EMERSON. Thank you.

Now I would like to recognize Director Berry. Please, if you would keep your remarks to 5 minutes, that way we can get some extra questions in. And let me also say that I believe we are going to have votes called somewhere between 10:45 and 11:00. I am hopeful that we are going to just have a couple, and so we will perhaps have to recess just for a couple minutes. So thank you, and welcome.

OPENING STATEMENT

Mr. BERRY. Thank you, Madam Chair. It is an honor to be with you and Ranking Member Serrano. Thank you so much for having us today. It is great to be here and to discuss some of our priorities. I will try to keep it real short so we get to your questions right away.

Government is increasingly a knowledge-based enterprise where our people are our most important asset. To have a government

that delivers the best services to the taxpayers in the most efficient, cost-effective way possible, we can't avoid investing in our workforce.

Over the past 2 years, as directed by President Obama, we have led a government-wide initiative to reform hiring by making the process quicker and easier so that good, qualified candidates can apply. Our goal: Bring the best and the brightest into the Federal civilian service by making government the model employer for the 21st century. And we are trying to lead by example within the Office of Personnel Management.

In 2010, under President Obama's Veterans Employment Initiative, we hired 2,000 more veterans than in 2009, despite hiring fewer overall people across the government. I am very proud that at the Office of Personnel Management we hired the highest percentage of disabled vets in the government, more than DOD and VA.

We met Congress' 2004 goal to speed up security clearance investigations, eliminating a backlog that we inherited that was over a year in length. Now over 90 percent of investigations are done within 40 days. When we inherited it, it was 179 days. So you can see the improvement on that. And the GAO removed us from the high-risk list this year. A lot of things go on, very little comes off; this one came off. And our movement of this towards the 40 days was one of the primary reasons it was able to.

We are supporting agencies as they work to improve employee engagement and facilitate greater partnership between agencies and employee groups. We are increasing the strategic use of telework. Thank you all for passing and adopting the Telework Enforcement Act of 2010. We are on point in getting that implemented.

Our budget request for 2012 will build on these accomplishments. As part of the President's budget, it is a responsible plan to ensure that we live within our means while still investing in key areas for our future.

Our general funds request for basic operating expenses represents an overall decrease of almost $3 million from 2011 from the CR level. For the administration of civil service retirement and insurance programs, we are requesting a slight increase of $19 million from the annualized 2011 limitation on transfers, and it is to deal with some of the numbers that you all have reflected and talked about.

We are facing an increase in retirement claims. Even in the first third of this year, there is a 15 percent increase in retirements. The Postal Service has announced an additional group of retirements that they are going to pursue, and we also have retirements coming from the Base Closure Realignment Act, in addition to our normal rate of about 100,000 retirements a year. So you can see the demand that is going to put on our services.

To save money and to counteract some of the increases we are asking for, OPM has made the difficult decision to terminate the Retirement Systems Modernization Program. However, we can better achieve automation by now getting back to basics. We are conducting a full review, bottom up, of our systemic process and looking at what pieces make sense to automate that are the most com-

monly used and the most easy to automate. It is going to be almost impossible to automate the entire process. It is just too complicated and too individual in basis. And so what we are looking at is automating the key pieces of it instead. By eliminating that as a formal program, we don't have to provide the oversight, et cetera, that we would have to, which will produce a $2 million administrative cost savings for us by eliminating that program officially.

Also, we are eliminating the second phase of our financial systems, looking at the earned benefit trust fund, our CBIS Phase 2 approach. We have run into problems with CBIS Phase 1. We are working through those problems. We are working with the Comptroller General of the United States. We think we can work this out. Our problems aren't unique. Every agency that is using this system is having similar problems. We are probably having the fewest problems of anybody across government, so I think we have the best chance of making this work. But we certainly don't want to go any farther until we have worked the kinks out of Phase 1. So that will save $41 million from that project that would otherwise be spent.

The Affordable Care Act directs OPM to approve and oversee the multi-state health plans that will be offered to Americans on state insurance exchanges, a major new responsibility. We stood up the preexisting condition plan in less than 45 days. Our overhead is .08 percent, and we now provide primary coverage for that in over 23 States of the Union.

In addition, ACA opened the Federal Employees Health Benefits and Life Insurance Program to employees of tribes and tribal organizations. That is going to add another 1 million people to our workload. We have consolidated and reorganized our staff to better efficiently manage these responsibilities so that our request for increases is less than it would otherwise be.

Our budget proposal also includes several other long-term saving initiatives: A wellness program that I believe is going to have a long-term impact, that we can demonstrate through our agency that if we take this government-wide, will produce millions and millions of dollars in savings; a health claims data warehouse that will allow us to achieve greater savings in FEHBP and for our retirements. And we can assure you that we will maintain tight oversight on patient privacy.

Finally, we are seeking authority to streamline pharmacy benefit contracting within the FEHBP and to leverage enrollees' purchasing power to reduce cost. We estimate that we can save $69 million in the first year, and almost $2 billion in the ongoing years. Our 2012 budget helps ensure our ability to provide the best value to the American people by continuing to recruit, retain and honor our world-class workforce.

Thank you, Madam Chair, and I am happy to answer any questions.

[The statement of Mr. Berry follows:]

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

STATEMENT OF
THE HONORABLE JOHN BERRY
DIRECTOR
U.S. OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
UNITED STATES HOUSE OF REPRESENTATIVES

on

OFFICE OF PERSONNEL MANAGEMENT FY2012 BUDGET REQUEST

APRIL 1, 2011

Chairwoman Emerson, Ranking Member Serrano, and Members of the Subcommittee:

I appreciate the opportunity to testify before you today on the President's Fiscal Year 2012 Budget request for the Office of Personnel Management (OPM). This budget will help us achieve our vision to recruit, retain, and honor a world-class workforce to serve America. Our people are our greatest advantage. To have a government that delivers the best services to the taxpayers in the most efficient way possible, we need to invest in them.

Over the past two years, we have made significant progress toward making the Federal Government the model employer for the 21st Century. As directed by the President, we are spearheading a government-wide initiative to reform recruiting and hiring to bring the best and brightest into the Federal civilian workforce.[1] To that end, I am also committed to leading by example and making OPM a model employer.

We have moved from a complicated essay-based application process to accepting resumes and cover letters. We have reduced job announcements to a reasonable length and put them in plain language. We are contacting employees at four points in the process and reducing the time to hire so we do not lose good people. And in 2010, when government agencies hired fewer people overall, with help from President Obama's Veterans Employment Initiative, we hired 2,000 more veterans than in 2009.[2]

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[1] Presidential Memorandum, *Improving the Federal Recruitment and Hiring Process*, (May 11, 2010).
[2] From OPM Enterprise Human Resources Integration – Statistical Data Mart (EHRI-SDM).

Statement of Hon. John Berry
Director of the U.S. Office of Personnel Management

April 1, 2011

I also want to note our success in meeting Congress's goal to speed up clearance investigations for individuals the Federal Government wants to hire. When OPM took over the Background Investigation Program pursuant to the *Intelligence Reform and Terrorism Prevention Act of 2004* (IRPTA), we inherited over a half million pending cases and a backlog of 133,095 cases that were over a year old. Now, we have cleared the backlogand the security clearance program has been removed from the Government Accountability Office's (GAO) 2011 High-Risk Series.[3]

We are supporting agencies as they work to improve employee wellness and engagement, and we are facilitating greater partnership between agencies and employee groups. We are also working to implement the provisions of the *Telework Enhancement Act of 2010*,[4] to help agencies update and implement their telework policies in order to establish a flexible and more efficient workforce, reduce agency overhead costs, and help ensure continuity of operations in the event of bad weather, disaster, or terrorist attack.

Our budget request for FY 2012 will help us build on these accomplishments and achieve our strategic goals to Hire the Best, Respect the Workforce, Expect the Best, and Honor Service.

FY 2012 Budget Request

The President's budget is a responsible plan for ensuring that we can live within our means while at the same time making critical investments to win the future. The budget makes tough choices to cut spending and cut the deficit by calling for a five-year non-security discretionary freeze, saving more than $400 billion over the next ten years and bringing domestic discretionary spending to the lowest it has been as a share of the economy since President Dwight D. Eisenhower.

OPM's budget makes tough choices as well, and recognizes challenges the agency faces in FY 2012. OPM's General Funds request for basic operating expenses totals $100,027,000, which represents a decrease of $2,944,000 below the annualized amount provided by the continuing resolution for FY 2011. For the administration of civil service retirement and insurance programs, OPM also requests a total of $132,523,000 in transfers from the three earned benefit Trust Funds, an increase of $19,786,000 above the annualized FY 2011 limitation.

In response to the financial challenges our Government is currently facing, OPM has made the difficult decision to suspend our retirement systems modernization (RSM) program. The full automation of the Federal retirement process is needed to bring better and more efficient services to current and future retirees and we have endeavored for many years to fully implement these changes. However, we can better achieve these goals by getting back to the basics of retirement services rather than managing improvements through a large scale project. Eliminating the RSM program as a formal budget item will save at least $2 million in administrative costs while we

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[3] Dodaro, Gene L., *GAO's 2011 High-Risk Series: An Update*, (GAO-11-394T). (February 17, 2011).
[4] Public Law 111-292 was signed into law on December 9, 2010.

conduct a bottom up review of the Retirement Service process and maintain a focus on achievable goals to automate the retirement processing system.

Also, the planned second phase of OPM's financial system, Consolidated Business Information System (CBIS), to encompass the earned benefit trust funds has been placed on indefinite hold to address and remediate critical issues exposed during deployment of the system in FY2010. This will result in a savings of approximately $41 million over the lifetime of the project.

The enactment of the Affordable Care Act (ACA) designated OPM as the agency responsible for approving and overseeing multi-state health plans to be offered to the American public on the state exchanges.[5] In addition, the Act extended eligibility for participation in the Federal Employees Health Benefits Program and the Federal Employees Group Life Insurance Program to employees of Tribes and Tribal organizations.[6] OPM has consolidated its existing and new healthcare and insurance responsibilities into a new Healthcare and Insurance (HI) organization to help us carry out these responsibilities more efficiently while protecting the integrity of our existing operations.

Our budget proposal also includes several other initiatives to help us realize savings in the long-term. We have launched a wellness program with the General Services Administration and the Department of Interior that offers biometric screening, wellness classes, smoking cessation programs, and a health clinic. In addition, the Health Claims Data Warehouse (HCDW) project is an initiative to collect, maintain and analyze data from health claims under the Federal Employees' Health Benefits Program (FEHBP), including drug utilization from Pharmacy Benefit Managers (PBMs), the Pre-existing Conditions Insurance Program (PCIP), and Multi-State Plan options on an ongoing basis. And let me be clear that patient privacy is foremost in our minds and it will be vigorously protected.

The budget also proposes that OPM be given authority to streamline pharmacy benefit contracting within the FEHB program and leverage enrollees' purchasing power to reduce costs and obtain greater value for enrollees and the American people. We estimate this will save approximately $69,000,000 in the first year and $1,800,000,000 over ten years.

As this Administration's chief people person, I again want to express my appreciation for the opportunity to testify in support of this budget request which will help ensure that we are able to provide the best value to the American people as we continue to recruit, retain, and honor a world-class workforce to serve America.

Thank you, and I'll be glad to answer any questions that you may have.

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[5] 42 U.S.C. 18054
[6] Section 409 of the Indian Health Care Improvement Act (Public Law 94-437), as amended by section 157 of S. 1790, the Indian Health Care Improvement Reauthorization and Extension Act of 2009 (IHCIREA). Section 10221 of ACA (Public Law 111-148) incorporated IHCIREA.

United States Office Of Personnel Management
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BIOGRAPHY

John Berry

John Berry is the Federal Government's Chief People Person. As the Director of the United States Office of Personnel Management, he is responsible for recruiting, hiring, and setting benefits policies for 1.9 million Federal civilian employees. Calling this a new day for the civil service, he is reinvigorating the Federal workforce to meet the challenges of the 21st century.

John is working closely with partners both inside and outside of government to fulfill President Obama's charge to "make government cool again" by developing flexible, results-oriented HR policies and working to change how Americans view their public servants. His goal: build a workforce of dynamic innovators who put serving the American people at the heart of everything they do.

With over twenty years of experience in the Federal government, Berry is a passionate and aggressive advocate for public service and Federal workers. He first developed expertise in Federal employee and retirement issues during ten years as Legislative Director for Congressman Steny Hoyer of Maryland, now the Majority Leader.

During the Clinton Administration, Berry served as Deputy Assistant Secretary and Acting Assistant Secretary for Law Enforcement at the Department of the Treasury, where he had direct-line authority over 40% of the Federal law enforcement community, including the Secret Service and the ATF. He then served as Assistant Secretary for Policy, Management and Budget at the Department of the Interior.

From 2001 to 2008, Berry pursued his interest in conservation as Director of the National Fish and Wildlife Foundation and then as Director of the National Zoo, where John the Lion is named after him.

Mrs. EMERSON. Thank you very much, Director Berry. I appreciate very much your testimony.

BUDGET REQUEST

Under the budget request, you list a few things that you needed extra people for—interspersing it with savings, I might add, so it was harder to add it all up at the same time. Anyway, tell me now, your budget request is for 7 percent more, or $18 million, than the 2010 request. So the initiatives that OPM plans to spend they have proposed increase on are?

Mr. BERRY. The increase is getting ready to handle the multi-state exchanges under the ACA. That is the bulk; $12 million of the increase is for that to really staff up.

Mrs. EMERSON. And how many people is that, do you think?

Mr. BERRY. It is approximately 20. Am I correct on that? Twenty-six people.

Also, the Employee Viewpoint Survey, which we have done every other year, is proposed in this budget to go to an annual survey, and then every other year to survey every employee in the Federal Government. We used to just survey a random sample. So that has an additional cost of $1 million.

We have stood up a new Office of Diversity and Inclusion. That is a $1 million increase to allow us to continue forward progress there. And there is a request that is being made government-wide by the Office of Management and Budget that we would play a role in for improving our acquisition of $640,000. So those are the major increases in that.

Mrs. EMERSON. Okay. So if you went back to 2008 fiscal year levels, or let's say a 17 percent decrease, more or less, tell me how that would impact you all.

Mr. BERRY. I think we could make that work, Madam Chair, if you would work with us on flexibility on the trust fund side of the house. What we could work with you and your staff on developing is if we had to go back to the 2008 level, we can't avoid the additional burden, and I can't pretend that we can just eat the entire cost of getting ready for these multi-state exchanges. It is going to be a significant new responsibility for us. But I believe we could work with you on—as I said, we managed this with less than 1 percent of overhead cost. And I think that if you were to give us—we are not talking about a wild increase here. You are allowed under the law to go up to 2 percent to authorize this. So with a slight increase of taking us to 1 percent, for example, would allow us potentially to go back to a 2008 level and still maintain getting ready for these important new responsibilities.

MULTI-STATE EXCHANGE

Mrs. EMERSON. Let me ask you something; when you have to stand up the multi-state exchange, does that require more people at the outset, but then once you have it going then those people could be either shifted elsewhere or they could be temporary employees? I mean, is that how it works once you have things on a roll?

Mr. BERRY. I think the 26 that we are asking for, Madam Chair, is I believe going to be sort of a stable baseline. It is one that we

will build into over the course of—if you give us the authority. I don't see going much beyond that. In other words, I think that is a good, stable thing to be able to handle the millions of people that will have to come on in addition.

Mrs. EMERSON. So the FEHBP people wouldn't be able to perform a dual function?

Mr. BERRY. Right. First, let me say what the law requires. The law requires us to keep these absolutely separate. How I have done this though, so that we have the efficiency of being able to share, obviously, good information and training—because you want both to inform the other—is we have one Office of Health and Insurance that has two deputies, one for FEHBP, one for the ACA. That way, their staffs, the statistical analysis, the data warehouse, the information that we can share back and forth, that will inform both, but the actual management and policy direction that is required under the law we can keep separate. So we will be able to do that.

So clearly the FEHBP is going to continue to be the larger element of the staff. The numbers are larger and they will probably remain so. But there will be, we estimate, in the millions that will be an additional workload that we will have to manage through those exchanges that would be under the ACA section.

Mrs. EMERSON. I really do have to commend you for being able to keep your administrative costs to manage the FEHBP at .08. I mean, it is remarkable. And it certainly sets the bar for any—in the private sector, we know that they could then perhaps reduce their administrative costs as well.

FEDERAL HIRING

Let me ask you one other question during this round because this is a pet peeve of mine. If, for example, I found a job at the Department of the Interior in which I was interested, I was qualified, tell me what the process is for me to apply for the job, who reviews my application, and how that all works, if you would.

Mr. BERRY. Each agency controls their own hiring. So, for example, we don't hire for the Federal Government, we create the policies within which they work.

Mrs. EMERSON. Right. So I want to talk about the policy piece just for a second.

Mr. BERRY. So in that case, for example, Interior, we try to share to gain efficiencies in certain portions of the process, for example, advertising the positions. So all the agencies have come together with us and we have created USAJobs. So there is sort of a central, automated entry place for you to enter your resumes. But those resumes, in that case, would go to the Interior Department. They would screen and assess those resumes to create a pool of well-qualified candidates and then would select—and apply veterans preference. That is what we have set the policies to do all of that. The agency in Interior would then interview people from that well-qualified pool and make their selection to try to match the best skills with the position that they are hiring.

Mrs. EMERSON. So are HR managers within each of those departments making those decisions, or are the people for whom the applicants would be working doing the screening?

Mr. BERRY. The ultimate decision is made—and what the President wants to see done in the Executive order on hiring reform, we want to make sure that responsibility is put with the hiring manager, the person who is actually going to have to be managing the job because they know what they need and can match the chemistry of that job with the right skills set. The HR people are supposed to make sure that the policies are being followed so that veterans' rights are being protected, disabled vets are being protected, et cetera, and creating a legitimate, well-qualified pool that has open access for competition. They are making sure that box is checked, but the actual hiring decision is being made by the hiring manager who is going to be supervising the work.

Mrs. EMERSON. But the hiring manager is only given a select number of people from the pool, even if all of them are equally qualified?

Mr. BERRY. Now here is where we would love to work with you on improving this. One of the things the President's Executive order—that we could do within the law and we are allowing—is, let's say you were applying for an accountant position and you didn't get the job for the accountant but you have gone through a very arduous process, you have competed, you are in the well-qualified pool. Right now you would have to start all over again. To alleviate that, what we have done to try to make it easier is within that department, if they are hiring other accountants, you don't have to start over. They can interview and hire from the well-qualified pool of accountants anywhere in Interior.

Now I asked the obvious question: If Transportation is hiring accountants, why can't they hire from that pool? The law prevents us from sharing between departments now. We would obviously support changing that to allow us to share those positions governmentwide. Any company does this, we should do it too. Right now we have made it easier within departments; I would love to make it easier across the government.

Mrs. EMERSON. So what in the statute actually prevents it? What line? What does it say?

Mr. BERRY. We will get you the specifics, but it limits our authority to share those positions within the department, it says. And so we just essentially need to—we would have to change a word.

[The information follows:]

HIRING REFORM

We do not think there is a sufficient way to broadly interpret current statute to provide an authority for agencies to share competitive certificates across agencies with other appointing authorities. The authority to appoint employees lies with an agency head or with his or her designee.

During the earlier years of Civil Service, OPM (formerly the Civil Service Commission) was responsible for competitive examining within the Executive branch. Based on 5 U.S.C. 3317 and 3318, OPM certified individuals out to agencies for appointments within those agencies. That OPM authority has since been delegated to agencies through 5 U.S.C. 1104. Agencies are responsible and accountable for the appointments they make within their agencies. These appointments must be made in accordance with the merit system principles, veterans' preference and the statutory provisious regarding the proper order of making appointments. Executive Branch agencies have signed agreements with OPM that authorize them to appoint individuals to positions within their agencies using the rnles, regnlations, and processes that OPM would have used absent a delegation.

In September 2010, OPM transmitted to Congress a legislative proposal entitled the Federal Hiring Modernization Act of 2010, which, among other things, would have amended 5 U.S.C. 3317 to expressly permit agencies to share with each other the names and scores of candidates who have been assessed and found to be qualified. The other agencies could make selections from the same certificate for similar jobs for a period of 240 days, without having to post a new job announcement. This would reduce some of the time it takes agencies to fill jobs and would eliminate the need for applicants to snbmit multiple applications for the same types of jobs.

Mrs. EMERSON. Well, certainly for a position that is an accountant, an accountant is for the Interior Department or DOT, or whatever.

Mr. BERRY. I couldn't agree more. It would be a great commonsense advance. It would certainly reduce the frustration level of applicants because now they would have an opportunity to be considered across the government for those pools of jobs. So I think it would be a great step forward in terms of efficiency.

Mrs. EMERSON. Okay. I appreciate that. We may come back to that. Thanks.

Mr. Serrano.

Mr. SERRANO. Thank you so much.

INFORMATION TECHNOLOGY

Director Berry, you inherited several troubled IT systems when you came to OPM, including the Retirement Systems Modernization Program and the Consolidated Business Information System. In the fiscal year 2012 budget you propose to put both systems on hold to address and remediate issues with each system. We had a hearing 2 weeks ago about government IT, and OPM is now playing a bigger role in helping to get some of these systems back on track.

Are you working with OMB to address the problems in these systems.

Mr. BERRY. Absolutely, Mr. Serrano. It is one of our highest priorities. We also work very closely with OMB and Vivek Kundra there, who is the chief CIO, if you will, for the government. And I believe we are one of his cutting-edge practitioners in how to do IT acquisition. We have learned from the private sector here. We have met with CEOs who have advised us, avoid any RFP that is longer than 9 months; get away from the multi-year buys; go short; go for instant deliverables that you can turn on and bring it on in phases, as opposed to trying to do everything at once. And I think that is very wise counsel. And so we have been working in that direction, sir.

We are going to be overhauling USAJobs this fall. And we have been designing it in pieces, we have been testing it in pieces, and we will be turning it on in pieces. And the ultimate goal is to deliver success. I don't want to claim success before it happens, but we are on track, we are on schedule and on budget with that project. And so it is a good example of applying the new techniques to an IT acquisition. We are now taking that into retirement, into our accounting system, and the other IT acquisitions we will do, but that is sort of the approach we are taking, sir.

Mr. SERRANO. And what are your goals? Do you have a time by which you want things to run a certain way? And which way would you want them to go?

Mr. BERRY. Well, the first and the most important I think we can do is, one of the things we are again trying to lead by example on is setting a very tough performance standard for our employees and then asking them to step forward to meet it, and working closely with them in partnership to develop those goals so that there is good buy-in on the front, everybody understands what is being expected, but then people know they have to deliver.

RETIREMENT PROCESSING

So, for example, on the retirement processing, it is a very complicated, arduous process that is largely pen and paper right now and is going to be for many years to come. We can automate pieces of it, and that is what we are looking to do. So for example, where a calculation needs to be made, we can automate that calculation. And we are trying to electronically get all the data now. The good news is we have made some progress. Every applicant is now fully electronic. So all new hires, we won't run into this problem. For existing hires, we have reached about 3 to 4 years back of getting people who are eligible to retire. Our goal is everyone eligible to retire within 5 years will have their file fully automated, because if it is fully automated, it again increases the speed with which people can review documents, adjudicate them, and make sure people are getting the right calculation.

Mrs. EMERSON. Is it a matter of speed or is a matter of losing information? Was it that people who were around 20 years, 30 years, all of a sudden we didn't know they were around?

Mr. BERRY. RSM was killed just before I came into the job, the official acquisition, the contract that we had with a carrier. The best thing I would describe as why it died was they tried to take an off-the-shelf system and apply it to the Federal system, which doesn't have—each case is so unique. Let me just give you a hypothetical example. If you were a Federal employee and you worked at Commerce but you had military service and you were in the reserve and you served in Afghanistan, for the period of time that Congress will award a higher rate of pay for retirement, you get credit for those years that you were in a war zone in Afghanistan, in your case, but it doesn't necessarily apply to every action.

Mr. SERRANO. What do you mean to every action?

Mr. BERRY. For example, the treatment and formula that Congress has passed for Afghanistan is different from Iraq. And so our people adjudicating this have to go back and say, okay—and the days are assigned. It gets really sort of into details that you would be amazed. So they have to go back and verify, were they in the war zone during those days, and if they are, then they get a higher credit and a higher calculation. Well, there was no way the off-the-shelf system could go back in and say, okay, how do I handle this situation and that situation? And so how those cases are done now is we pull all that evidence together and we have a legal specialist who adjudicates those files and certifies that, yes, this employee worked at this period of time, they are eligible for this level of benefit, and then they apply the formula that applies to that unique person. But it is literally different for every employee, which is the problem. This is one, where together, if we could come up with—I know it would be too much to ask to expect Congress not to

award these unique benefits because I know that that political pressure is going to be there regardless of party, regardless of year. What I would love to do would be, wouldn't it be great if we could agree together on, let's agree on a basket of benefits and give you sort of a low, medium, high choice. You all could decide, okay, we want to award the high benefit to this one, or the low, but then we could get some sense of standardization. What happens is sort of with each event we end up with new rules, and that makes it really hard to administer. And so if maybe we could work together to sort of standardize this, we could have an easier life going forward.

MILITARY SERVICE CREDIT

Mr. SERRANO. Now there is a limit, right, X amount of years, of how much military time you can purchase, if you will?

Mr. BERRY. Yes. And I can get you that, sir, officially for the record.

[The information follows:]

MILITARY SERVICE CREDIT

In general, an individual cannot receive credit for any military service in his or her Civil Service Retirement System/Federal Employees Retirement System (CSRS/FERS) computation if they are receiving military retired pay (except if the retired pay is awarded on account of a service-connected disability or if the retirement is from a reserve component of the Armed Forces). However, the individual can elect to waive the military retired pay and make a deposit into the civil retirement system in order to have the military service added to his or her civilian service in computing the CSRS/FERS annuity. An individual may only make payments to capture service credit for military service after 1957, and deposit must be made prior to retirement.

Mr. SERRANO. Otherwise, Mr. Womack will purchase like 30 years or something, right?

Mr. WOMACK. Thirty years, 5 months and 19 days.

Mr. SERRANO. Which means that immediately he would be in the Federal Government much longer than I. I understand that.

RETIREMENT PROCESSING

So just finishing up on this issue, I mean, I even know of some folks who have considered retirement but won't retire because their paperwork is not in order for them to retire, they would be missing out on many years. When can this be in order? Or are there some people that have been lost through the system and can never be recovered, or their information cannot be recovered?

Mr. BERRY. Well, we definitely don't want to lose anybody; I mean, that would be a failure of our fiduciary responsibility. We do encourage employees who are thinking about retirement, we try to work with employees and agencies long in advance of their actual retirement date—sometimes even a year ahead—to say let's make sure we have copies of all of your file. Work with your HR professional in your agency—see, the files aren't with us, they are with the agencies. And let's take your Interior example. If you are at Interior, you would work with the Interior people to make sure you have gotten all your paperwork right. If you had military service, you would go back to DOD and you would get that paperwork in order.

When we have a full file, then we can adjudicate that file very quickly, where one of our problems, our biggest problems of delay is, we will receive a file from an agency and it will be missing the military piece or it will be missing—you had worked at FAA before you came to Interior and they won't have the FAA piece of paper. Well then we have to work to get that, and that obviously takes time as we try to get that.

So we encourage retirees—it is much easier for them, they know their record, they know where they were—to go back and get that all pulled together for us. And then the speed with which their file can be adjudicated is much, much faster. So we try to educate both employees who are coming into retirement as well as the agency HR officials to get those records complete because then we can adjudicate quickly.

Mr. SERRANO. Okay. Well, thank you, Madam Chair. I certainly encourage you to continue to move on this, and certainly in the area of veterans benefits. We hear a lot about "support of our troops." Well, I am a big believer that the support is not only when they are in uniform, it is later on as a national thank you for their service.

Mr. BERRY. I couldn't agree more, sir. Our strategic plan, one of its four goals, is honoring service. And I believe every day, when we are processing retirements, we are reflecting how the American taxpayers are thanking people for their service, both in uniform and in the civil service, for honoring their country. And so it is up to us to make sure we give them respectful treatment and fast, efficient treatment as well.

Mr. SERRANO. Thank you.

Mrs. EMERSON. Thank you.

Mr. Diaz-Balart.

Mr. DIAZ-BALART. Thank you, Madam Chair.

Good to see you, sir. You have kind of touched on this, but I just want to make sure that I got it right. And you talked about some of the issues. So is it 46,000 Federal retirees who basically will receive only about 60 percent of their annuity payments through errors; is that correct?

Mr. BERRY. No. I didn't mean to imply that, sir.

What we do, because we know it takes a while to get these files put together to make the correct adjudication, is if someone comes in, we pay what is called a partial payment. And now, because we know, because of the backlog, that we have a longer period of time to get these things adjudicated, we are paying 95 percent of what we estimate their payment would be. So I don't want to give the impression to any of the members of the committee that you are sitting there not getting paid in your retirement while we are waiting to adjudicate the file or waiting to get the paperwork from the FAA. You are getting your monthly check right from the beginning, and that is what we try to do, and up to what we estimate to be 95 percent of what you would get through the paperwork we have.

The only people that are complicated in that are folks who have court orders. Let's say, for example, a divorce, where a judge has said 50 percent of your retirement needs to go to your former spouse. In that case, you might be expecting X payment. We have to honor the court order and reduce—we can't pay you 90 percent

of your whole payment, we have to factor the court order in. And oftentimes that leads to tension, as you can imagine, resolving those cases. Many of them end up on your desks and we work those out with you. But I do want to explain that because it is an important distinction.

Mr. DIAZ-BALART. All right. Let me ask you then—so I got that; now how long does it usually take then to finalize the process so people can actually get their real number as opposed to the estimated 95 percent? In both cases, in the cases of the regular folks, and then how long does it usually take to adjudicate the cases where there are more complicated circumstances? And I am sure there can't be a one set answer for that, but roughly.

Mr. BERRY. We have 100,000 cases a year. Three to six months. Here it is. 100,000 cases a year. Right now we have a 45,000 case backlog, which is what we are wrestling with. And it takes, the average case—here, let me see. It might be better, if it would be okay for the record, to get you the details on the specifics of the average case. And we can break down sort of the entire case so you will be able to see the numbers of each one.

[The information follows:]

RETIREMENT PROCESSING

Currently, the average case will be processed fully in 117 days. If the case involves a disability, court order, service credit or survivor benefit, the longest it will take to fully process the case is 141 days.

But we usually have sort of about a 10,000 to 20,000 case carryover; that is sort of an average backlog. The 45,000 one now is sort of a function of increased postal retirements, getting ready for the Defense Department retirements under base closure that are coming. And some of what we are seeing is an increased retirement rate. Just in the first third of the year we are seeing about a 15 percent increase in retirements. And so that is what is driving this.

Mr. DIAZ-BALART. Thank you, Madam Chair.

Mrs. EMERSON. Ms. Lee.

DIVERSITY

Ms. LEE. Thank you very much. Good afternoon. Thank you for being here.

Let me reference your testimony where you indicated that, as directed by the President, you are spearheading the government-wide initiative to reform and recruit and hire the best and the brightest workforce. Of course we all want to see, as you said, OPM to become a model employer.

In the President's directive, in the memo, "Improving the Federal Recruitment and Hiring Process," was diversity an issue? And in terms of diversity, if it was included as one of the best and the brightest and diverse workforce, how you are recruiting people of color into the workforce? Do you have a plan to do that? And if you have the information in terms of what the demographics look like or the characteristics of your workforce look like now, I would like to know what it looks like.

Mr. BERRY. We definitely have a plan; it is one of my highest priorities. My Deputy Director, Christine Griffin, we recruited away from the EEOC. She is a lawyer, an attorney, one of the highest

ranking people with a disability in the Federal Government, along with Secretary Shinseki and others. She is a veteran of the United States and a phenomenal leader on this issue. She has been leading a working group across the government and agencies on this specifically. We have a working group on Hispanic employment, we have a working group on diversity throughout the government, and also people with disabilities.

Ms. LEE. How about African American, Latino and Native American?

Mr. BERRY. African American is included, and all of the groups are a part of this focus.

The good news is—and it is not great news, but it is good news, at least we are pointing in the right direction, let me give you some of the numbers. The numbers of minorities in the Federal workforce increased by 5 percent in 2010, or essentially 31,000 more employees. The Federal workforce is 17.7 percent black, 8 percent Hispanic, 5.6 percent Asian Pacific Island, 1.8 percent American Indian, and 66 percent white. Minorities constituted 33.8 percent, if you will, of the workforce.

Now we also are following and tracking senior pay in SES because I think it is important not just to look at overall hires. The number of minorities at senior pay levels increased 9.4 percent between 2009 and 2010; it went from 3,700 to over 4,000. Women represent 31.2 percent of senior-level positions. We can do better there. But again, we had an improvement. The proportion of women and minorities in GS Grades 13 through 15, the more senior-rank grades just before the SES, increased by 7.9 percent, and the SES by the 9.4. So you can see some good early starts, but nnw how do we keep that going? And we are looking at this from sort of a three-pronged approach. One is, we have stood up—and we are asking your support to keep funding to allow us to continue going—an Office of Diversity and Inclusion at OPM. We believe it ought to be not just assigned to EEO or HR, we have to merge and marry and break down those silos so that people see diversity as an asset.

I will give you a good example. I was talking with a FEMA Administrator in their planning for Katrina, and he said had we had a more diverse workforce, our plans, quite frankly, for Katrina would have been better. We had not thought through the impact of, in an emergency situation, sending all white officers into African American communities, knocking on the door saying you must leave your homes. We did not have the right mix of employees to think that through nor to implement it effectively in the event of an emergency. And so diversity is powerful not just in—it needs to pervade everything we do because it will produce better results at the end of the day.

So we are looking at this from student hiring, and our Office of Diversity is working with our Office of Student Outreach and Recruitment through minority institutions. And we are also looking at this from the SES. We have stood up an SES office at OPM that had been disbanded. And the three of them are carefully coordinating and tracking similar data. So this is one we are going to look at from every angle, recruitment, retention, training, and advancement.

So my commitment to you is we are not taking our eye off this ball just because we have had some good early progress in the first year. We are going to stay at this and hope it continues to get better.

Ms. LEE. Thank you very much. I appreciate that response and what you are doing because I ask this question of all of the agency heads; and some of the answers are very vague, but it sounds like you know what you are doing.

Mr. BERRY. Trying very hard.

Ms. LEE. And on track. Maybe you need to train some of these other agencies. Thank you very much.

Mr. BERRY. I did just speak this week to HR professionals and CHCOs and EEO. There was a convention up at the Wardman Park, and I was a keynote up there about doing that training, just what you talked about.

Ms. LEE. Good, thank you.

Mr. SERRANO. I want you to be aware that you got praise about what you are doing from Ms. Lee and you got praise from the chairwoman about the budget. That is pretty rare around here.

Mrs. EMERSON. How did I praise on the budget?

Mr. SERRANO. He said he had 1.8 percent in one of the areas—

Mrs. EMERSON. No, how they administered the FEHBP. They did a fabulous job on administering that.

Mr. SERRANO. Take it as praise.

Mrs. EMERSON. Praise is praise.

Mr. Womack.

Mr. WOMACK. Thank you, Madam Chairwoman. I will try to do my part to contribute to the love affair going on here today.

Mr. Berry, you have an impressive resume. I give you credit for your longtime service to our country.

As I looked at your resume, or your bio, I noted that perhaps the most qualifying aspect of your background must have been when you were Director of the National Zoo because my experience as a Mayor for 12 years in dealing in the HR arena, that is precisely what that arena is, it looks a lot like a zoo. I want to congratulate you for the work that you have done to streamline your processes to make what appears to be your organization much more user friendly and for your work and having come from a military background and knowing the real difficulty in background investigations and its relevance to what we do here in Washington. You are to be commended for that.

WELLNESS

The other thing that I noticed in your testimony was in regard to wellness programs, and I want to kind of drill down on that for just a moment because I am a huge believer that in this debate that we have—and have had now for quite a while—about health care and health care reform, that we have said some things and we have done some things, but we haven't done enough to put some of that emphasis back on the people that work for us. And look, the private sector is doing this stuff and they are doing it with great results. And so I want to congratulate you for your wellness program, and I want to know a little bit more about it.

Mr. BERRY. Well, Mr. Womack, thank you, I couldn't agree more.

Every CEO I mentioned, when you ask them, what do you think is the low-hanging fruit where we can save taxpayers money on this, and every one of them, first on the agenda is what you just described, wellness. They say it has produced bigger savings over the long run than they even anticipated. Now the hard part for an annual budgeting process is people want to see results in 1 year. And all of them will say you are not going to see it in year one, you won't see it in year two, but by four and five it starts to show up in a major way.

We brought on, in our little campus—we sit next to Interior Department and the General Services Administration, so we thought, let's work together and we hired a wellness company that has come in. We offer everything from—we have a Weight Watchers class that is fully subscribed; we have weight training, we have exercise classes. All of the screenings are free.

I do a monthly town hall meeting. And everything is religiously private and only the employee knows, so I don't get to see the data. But as a way to encourage the employees I have shared my data as saying you got to do this because it is free. And what I was so impressed with was the counselors. I wish my primary care doctor had spent as much time with me as this counselor did. They went through my results for 45 minutes. And I had been ignoring my triglycerides, I was 5 points above the goal. But the lady who was talking with me found out that my dad had had heart issues. And she said, because of your genetic predisposition, do you realize that those 5 points don't sound like much—my doctor had always just said, oh, it is five points—it is a 20 percent higher risk rate for a heart attack in your category; you have to lose 10 more pounds. So I had taken off 10 pounds already. I said, another 10? And I am going to do it, I am on my way.

And the interesting thing is this dialogue, what is so exciting to me, Mr. Womack, is people in the elevator—it is so invigorating to have people who are saying to me, Mr. Berry, I lost 14 pounds. Now people are talking about their weight efforts and commenting what they are carrying on the elevator, oh, shouldn't be doing those wings, got to get to the salad bar more. That is the stuff that is going to produce the millions—and if you can imagine, transferred out, billions of dollars in savings. This will have a huge impact in early cancer diagnosis, earlier treatments, healthier employees, and it is going to translate into direct savings for FEHBP, which is big dollars, over $11 billion a year. So you can imagine, if we can produce just 5 to 10 percent, we are talking hundreds of millions of dollars.

So it is one I am passionate about. I appreciate your interest and focus and experience on this and look forward to your counsel as to how we can do better.

Mr. WOMACK. Well, I won't use too much of my time to brag on the city where I came from, but we established a wellness center for our seniors because we recognized we had a growing senior population and we built a 55,000 square-foot facility with warm water therapy and light pools and those kinds of things.

Mr. BERRY. Great.

Mr. WOMACK. We charged a very nominal fee just so we could know who is there and have a little information on them. The first

year, Madam Chairwoman, we thought we would have 1,000 members in this organization, and we had 1,500 members in the first week, and now over 14,000 members, and average daily use of between 1,000 and 1,500 people in this facility in a small town in northwest Arkansas.

What you said a moment ago is correct about the savings on the health care side of the house, but here is the lost information, and this is what I want everybody to be mindful of, particularly as it concerns our Federal workforce. It is also a productivity issue.

Mr. BERRY. Absolutely.

Mr. WOMACK. And so when we have a healthier person, they are not going to be on sick leave as much, they are not going to be hospitalized, and they are not going to have to be resorting to all these tests and everything, medical procedures, and what have you, that come with a bad lifestyle. So from a control of health care costs standpoint and also from a productivity standpoint, it has worked where I was and it will work here.

Are you getting any pushback? In other words, are any of these programs mandatory, so to speak, or being forced on people? Are there any requirements? How are you going through that legal——

Mr. BERRY. Totally voluntary now, sir. And what we are finding very much tracks what we have heard from the private sector. It is interesting, when I met with the CEOs they said, well, there are two ways to do this, you can just make it totally voluntary or you can incentivize. They all encouraged us, there is enough data to show you you need to incentivize it because totally voluntary you are going to end up with about 20 to 30 percent participation rate. Well, now we are a year into this, guess what our participation rate is, without any incentive, just totally voluntary? It is like 24 percent. So we are right between where they told us we would be.

Where the private sector is making the big savings is their percentage rates run 80 to 90 percent participation in these programs. Well, how do they do it? They do it by incentivizing. So they will either lower a copayment, or you get a rebate or things like that. Each company will take an entirely different approach. I think the future of this—and it will be interesting to work, especially with your experience on this, and we would really welcome your ideas—how can we move from the 30 percent to the 80 percent? And I don't have a specific proposal for you other than to know we would have a lot more savings if we had 80 percent participation.

None of them recommended to make it mandatory. They all said you can reach the 80, 90 percent level if you do the right incentive structure. So maybe if we could work together, we could figure out how to do that.

Mr. WOMACK. I think it is a way forward, and I would certainly recommend that to the agencies. I do appreciate your testimony this morning and your leadership in the OPM.

I yield back, Madam Chairwoman.

Mrs. EMERSON. Perhaps we should have a Biggest Loser contest or something.

I am going to shift away from this discussion, given the fact that my doctor just told me to lose 10 pounds and I just can't seem to stay away from good food. But it is impressive what you are doing. And peer pressure is terrific, but certainly making it easy for some-

one to participate is even, I think, more important, and it is wonderful.

As far as what Mr. Womack was doing with the senior center, I find that sometimes it takes a little bit to get some of our seniors doing it, but once they do, then everybody wants to do it.

Mr. BERRY. Well, and it is also making it easier. So like in our cafeteria, for example, I went down yesterday, it is so easy, they have a Weight Watchers option. And it is already calorie counted for you—salmon, vegetables—everything is proportioned and so you don't have to do any of the thinking. And so you say, okay, give me the Weight Watcher option. What we have done, our salad bar used to be a pretty lame salad bar, now we have one of the best salad bars in the city, and it is a really good one. People are going to it because it is more interesting. So sometimes just making it more easily available is part of the solution.

Mrs. EMERSON. And Weight Watchers is a good thing; we will talk to the Mayor of Capitol Hill about that. But in the meantime, if you can invite our subcommittee down for lunch, that might be a nice thing to do.

PAY FOR PERFORMANCE

All right. I want to talk a little bit about Pay for Performance and step increases if we could. In 2009, only 737 out of more than 1.2 million employees were denied a regularly scheduled step increase and accompanying raise because of poor performance. That equates to about a, what, .06 denial rate, or less than half of 1 percent, which, despite being low, is still the highest rate in recent years. So just a couple of questions with regard to that.

In your opinion, under the current Federal pay system, are Federal pay and promotions correlated with performance? What does OPM do to monitor or give guidance to agencies on awarding performance pay increases? And do you think managers actually have the flexibility or the range of carrots and sticks to improve employee performance? And are there consequences at all for poor performance, not only for the employee, but for the manager?

Mr. BERRY. Let me begin by saying, we can do a lot better. I would not sit here and tell any of you that we have nailed performance management in the Federal Government. We have not. Our managers are too timid. We do not have regular—a good performance system would be managers regularly sitting down at least quarterly and having a very straightforward conversation with employees about what is being expected and is it happening? Right now it is done more on an annual basis, and it is given short shift, it is not given the attention it deserves. We are going to be working very hard this year to change that.

We have created a working group of the Chief Human Capital Officers Council on how we can do a better job on having managers and employees pay more attention, and use the authority—you give us broad authority in performance management, both to incentivize and to discipline. And quite frankly, the Federal Government has not done a good job in exercising the authority you have given us. I am going to try this year—that is one of my highest priorities this year—to move the needle on that. I am doing it with my own employees by example, but we are also going to do it across the gov-

ernment. So this CHCO Council is working on that. We are having it chaired by two career senior executives so that it is not seen as a political gotcha game, so that it will be something that can be professionally applied. We are working with the Partnership Council, with the unions to get buy-in to this.

Now more specifically to your question on the within grades. First, I agree we can do a much better job on performance, and we are going to try it, and I hope to have some really good results to bring back to you. This time next year I hope to be able to describe just what we are doing that is going to hold people more accountable. And quite frankly, if someone is not doing the job, we ought to fire them. I mean, we ought to give them a chance to correct—and obviously, if we are not giving them the right tools or training, then we ought to do that, but if after all of that they are still not doing the job, get rid of them. And we can get rid of them in the Federal Government; it is just that managers have not been doing that. And we are going to try to work to create a more rigorous system to apply that principle.

WITHIN GRADE INCREASES

Within grades, now it is kind of interesting. Let's discuss within grades for a second. Every company, private or public, has an approach of sort of a career advancement trajectory. What within grades do is there are 10 steps that take you 18 years to go through. And the principle that sort of both the private sector and the public sector use in terms of HR management is, you want to advance people to the midpoint of their range relatively quickly as a way to keep them because you are making a huge investment up front in training. And a lot of times what happens is if you train somebody, now another of your competitors will come in and steal them away, they save the money of not having to train them. So if you are not advancing people up front to sort of a midpoint of their career, then it is more slowly.

And so how it works in the Federal Government, building on that model, is for the first third of your career you get a step increase, which is 3 percent of your pay annually. For the second third of your career you get it every other year. For the third, the last percentage of your career you get it every 3 years. And what that does is it creates a natural trajectory if—and you only can be awarded this if you have acceptable performance. So you can see where we can—that is broadly defined. So through the performance management—and I think our unions are going to work with us on this—there has to be a natural trajectory.

So if you come in as a GS–12, step 1, it takes 18 years to get to step 10 just through a normal trajectory of that 1-year, 2-year, 3-year approach, and it is in 3 percent, a step equals 3 percent. We can, I think, through performance management, better define what acceptable performance is to ensure that if you are not performing well, a big stick can be we can withhold your within grade.

So we are going to be looking at that as part of this equation, but that gives you a little bit of an example.

Within grades aren't designed to really be performance pay, per se. They are designed to create a career trajectory that retains the training that you are making in that person over an 18-year period.

So there are performance elements—bonuses, awards and things like that—that are purely performance-based, but the within grades weren't ever designed in the law to be a pure performance base. There is a performance element, but it is really to create a career trajectory.

If that is a long answer, I apologize.

PERFORMANCE MANAGEMENT

Mrs. EMERSON. No, I understand. I mean, we all get caught up. Having worked many years in the private sector myself, in many cases I saw people who should have been fired be given promotions just to shovel them out of specific departments and the like. And I dare say I have seen that, having worked in my very first job for the Federal Government, but that was more years ago than I want to say.

Another thing that is frustrating to me is the process by which one would sever the relationship because I know that there are people, for example, who are involved with the Bernie Madoff scandal of the Securities and Exchange Commission who have not yet been terminated because of adjudication and all sorts of things.

I mean, we are not talking about some minor screw-up, they are talking about major lives that were ruined by people not being able to perform their jobs. And I don't understand why it takes so long for them to be terminated.

Mr. BERRY. As I say, we have the ability in the Federal Government right now to do something called a performance improvement plan. So if a manager has an employee like that, you can as the manager put 30, 60, 90 days and say this is what you are doing, this is what I want, you have X days to get there, you don't, you are fired. It can be that straightforward. And our managers don't exercise that.

Mrs. EMERSON. And they are not held accountable either; correct?

Mr. BERRY. It is a historic problem that we are going to wrestle with. But I believe that if we go after that it will have a huge productivity increase for the government, as Mr. Womack was mentioning. And it will serve the taxpayer better. And quite frankly, our labor unions and our employees will be grateful, because as a Federal manager I have removed people, and the people who have come back to thank me when I removed somebody have been their co-workers because they said thank God somebody actually had the backbone to deal with the situation. We have been carrying this deadwood. We have been doing their job for them. You weren't happy to come to work. Getting them out, I am happy to come to my job now.

And it is for the credibility of our managers we have got to he serious about this, and our employees want it. It shows up in our employee surveys. One of the highest things that people feel is we do not discipline poor performers. And it is our workers are telling us that. They feel it is unfair, and they are right. And we need to fix it. So we are going to go after it full force.

Mrs. EMERSON. And that hurts morale.

Mr. Serrano.

WELLNESS

Mr. SERRANO. Before I get to a couple of questions let me just say I was really very pleased to hear Mr. Womack speak of wellness. For a while in government it has been seen as a perk. If you have any exercise facility within a Federal place, that is a perk, even if people pay to join it.

But if you have a person come in and tell you about weight or about heart disease or whatever, it is a perk. And yet we have learned from many countries throughout the world, even some we don't like very much, that if you put up front wellness as an issue, if you put up front preventive medicine as an issue, at the end of the day you don't have the situation we have in this country. I was so pleased to hear that.

Mr. WOMACK. If the gentleman would yield on the subject, it says a lot about the employers. The employer demonstrates a concern for his or her employees' health. Because there is only one of those people, and if their health is in jeopardy, I think it is the employer's responsibility, the leader's responsibility to help that person look for success. So it is productivity. It is a sense of compassion for the well-being of the individual, and of course it is the cost of government. So it is all relative. And if you have been on our side of the table from the executive branch, you get that pretty quickly. The private sector get its completely.

Mr. SERRANO. But my praise with your comments was the fact that you don't hear that often enough, that you usually hear, that is a perk. Let these people go after work to their own place. Don't do it at the work site. Don't have any assistance. That is such a mistake.

So I hope we hear more of this. And I think that there is something happening in Congress that could help with that area, is that more and more of the people coming to Congress for some reason in the last 10 years, I have noticed, are people who are physically active and exercise. And you will see it in a couple of weeks when we have our annual race for charity when more and more and more House teams get together and run and participate. So that is a good thing.

VETERANS EMPLOYMENT INITIATIVE

Tell me about the Veterans Employment Initiative. You know, I have always felt there was a contradiction in this country in some areas, and that is you have people who are very gung-ho about our involvement in military actions, but are not supportive when the troops come home. And I have seen these bumper stickers that say "support the troops" and I wish you could add to that, yes, for the next 20 years, for the next 30 years, for all the time it needs to help them. I am the kind of guy you see voting against the military action and then voting for whatever they need when they come home. Whatever they need when they come home. Of course, it is not the troops that I have a problem with, it is the people who decided to send them there or the action itself.

So tell me about the initiative and tell me how closely you are working with the Veterans Administration.

Mr. BERRY. Well, Mr. Serrano, thank you for your leadership on so many veterans issues. You have been a stalwart over so many years. The President's Executive order I have to say is the thing if you were to ask me for my 2-year term what am I most proud of, it would be having recommended that Executive order to the President.

My father served in the 1st Division in Guadalcanal, and my name I earned from my uncle who was killed in the Pacific, my dad's brother. And so this is a close personal issue for me and I look at it as a way to honor the memory of my father.

The first thing I tackled was looking at veterans—the unemployment rate for returning vets right now from Iraq and Afghanistan is amongst the highest in the country. And knowing the difficult economic times they were coming back to and the competition they faced and we looked at it, and DOD and VA do a great job and so does OPM. Almost 30 percent of our new hires are vets. So we are in the highest category. But many civilian agencies I looked at weren't really carrying their weight. They were not doing a good job. Two to 5 percent of their hires were vets.

So we went to the President and made him aware of this and he said we have got to get everybody to row in the same direction. And he created an Executive order and a council that is chaired by Secretary Shinseki and Secretary Solis, so we have both Labor and VA as the heads and then I am the COO of the council. And we have met four times. What they do is we get every agency together, it is very high level, and people are tracked on their performance. For the first year we were just getting it set up and we just told everybody to do better. The good news is that every agency but two did better.

This year, not wanting to just count on that, we set up an accountability model to hold everybody in place. So if you were in the level of DOD, VA and OPM, above 25 percent in your hires, stay there. You are doing great, keep it up. If you are in the middle category, sort of 10 to 20 percent, do an additional 2 to 3 percent. If you are below 10 percent, that is kind of like the Weight Watchers thing, you have to lose some more weight, you have got to run faster, you have got to do 3 to 5 percent. And so for the lower performers we are expecting them to hire more and to move up faster.

And so every agency now has and knows exactly where they fall. I sit on the President's management council with Jeff Zients at OMB; all of the deputy secretaries come in addition to this council. Monthly. I share the data with every agency, here is where you are. You are either on track or off. It is regular, religious attention. And we are not going to take our eye off of this.

The first year results, like I said, 2,000 more vets hired across the government. Even though we hired less Federal employees it was an impressive step to get this out of the box.

The other thing, lastly, is that we are working with the VSOs, the veteran service organizations, the Legion, the VFW, the Student Vets are in sync with us and we are developing some innovative approaches. What we are looking at is jobs in the military that ought to be easily transferable to the civilian side.

Med techs. We have a desperate need for nurses. We can't hire enough. What if we train med techs to become nurses and guar-

antee them a job in the Federal Government when they come back. Now we are moving beyond from just tracking the data to looking how can we take jobs that are easily transferable and give them the training to do it.

Mr. SERRANO. Well, again, I think that that is a great initiative and a great approach and you should be proud of that Executive order because it is a good one.

Let me take you to a couple of places now where we would probably all like to go right now, to the American Territories.

Mr. BERRY. I volunteer, sir.

Mrs. EMERSON. Let's all go to Puerto Rico. Sounds awesome today.

RECRUITMENT IN THE TERRITORIES

Mr. SERRANO. So both in the area of hiring diversity, of hiring minorities, the Northern Mariana Islands, Guam, Samoa the Virgin Islands, Puerto Rico fit that category well. But also just in the area that I have always discussed with you and other agencies that they are members of our country. They live in Territories. They don't live in States, but they should be included.

And I call your attention to the fact that sometimes it works. For example, NASA has quite successfully recruited from the University of Puerto Rico at Mayaguez, my hometown, for many years now. In fact proudly we say that whenever a rocket goes up there are a lot of folks from Mayaguez on the ground that made it possible. It works for them. It should continue to work for the rest of the agencies. What are we doing to recruit?

Mr. BERRY. Well, we are doing a lot but we have to stay with it. It is one of these things it is not going to be a one-shot effort. I was very pleased and thank you for your support and helping us get the word out in Puerto Rico. The hiring event we did in last October there it was very well subscribed. And we did get a number of jobs, at least 36 that I know of, but it may end up being more now.

But the more important thing was in doing that event we also trained people on how to apply for other Federal jobs so they had a good learning that will I believe will increase their probability of success in future job searches. We need to do that regularly. We did that jointly with NASA, DOD and VA. And we are going to continue to look at how we can continue to outreach effectively through those. I think there are very powerful ways to do.

The other thing we have done specifically I think will help the Territories. We have included them on this specific focus area. The diversity data I was talking with Ms. Lee about. The Hispanic community is underrepresented relative to its numbers in the civilian labor force. It is probably the largest gap, if you will, of our diversity categories right now, 8 percent versus about 14 to 15 in the civilian side. And so we are at 8 in the Feds. There might be a lot of reasons for that. So we have got to make sure that our access points are open and we are reaching out in the right places and including the Territories in this.

We have created a Council on Federal Employment there that is chaired by my Chief of Staff, Liz Montoya and John Sepulveda, who is the H.R. Director at the VA, who understands this well, and

they have an agency group of 65 people across the government that are developing student outreach, training, mentorship, on boarding, the whole 9 yards on this on how to do better by outreaching to Latinos and Latinas and people from the Territories. And I think this is going to bear fruit. There is a lot of great brain power going on this and some very creative, initiative approaches to this that are going to build much more than the annual hiring fair. It is going to be an ongoing more consistent, religious approach that will get this into practice.

Mr. SERRANO. Let me say this, even in that issue there is a disconnect. We send dollars to the colleges throughout this country and then we recruit. Well, we send dollars, not equal shares, to the Territories and then traditionally we don't recruit in those universities. So even if you just are talking about, you know—I cannot believe I'm saying this—what the taxpayer deserves, if you invest, then go recruit some place. But I thank you for your efforts.

Mr. BERRY. Mr. Serrano, if I could, one closing point, and it circles back to your first question. Our effort to hire vets is also going to help on each one of these categories. Every one of those categories in the diversity is well represented in the military. They know that through the voluntary workforce.

We have already invested billions in training in these people. They are great leaders. They are great assets. I use the vet to be "valued, experienced and trained." We would be darn fools not to take advantage of this and by doing it not only we will get great skilled people but we will also increase our diversity numbers.

Mrs. EMERSON. Thank you, Mr. Serrano.

Mr. Diaz-Balart.

Mr. DIAZ-BALART. I don't know if I could read anything into when Mr. Serrano was talking about people being out of shape. He was looking in this direction.

Mrs. EMERSON. I am the only one out of shape up here.

Mr. DIAZ-BALART. Well, Madam Chairman, this is not all muscle, trust me. Years of working on that.

Actually still talking a little about aerospace——

Mr. SERRANO. He is still a great baseball player.

NASA WORKFORCE

Mr. DIAZ-BALART [continuing]. There are obviously going to be a lot of retirements because of NASA and the space shuttle. I know that you have been looking at that and you have been very proactive. Can you talk about how it is going and what you are looking at, please?

Mr. BERRY. I am also very excited. I am finally going to get to see a shuttle launch. I am going to go down with Secretary LaHood and NASA Administrator Bolden next week to see the shuttle launch. Hopefully I should say, if the weather and everything cooperates.

We are committed. Obviously there is going to be a major transition in this program and just like we did with Base Closure and Realignment and everything else, these are great employees. They have served their Nation, they are highly skilled, many of them engineers.

Mr. DIAZ-BALART. Literally rocket scientists.

Mr. BERRY. Literally. And we need to take full advantage of them. I am working with Administrator Bolden and Lori Garver, the Deputy. We have issued guidance and encouraged agencies and we are going to be working to hire these folks and to provide them opportunity and to give them every tool in our book that we can do to help them. And so my commitment to you is that we look forward to continuing to work on this and provide priority focus until we have them in good jobs. And to do everything we can to help. And so I am very open to suggestions or other ideas of how we can help in that kind of transition. Because like you say they are the best and the brightest and we need to keep them.

Mr. DIAZ-BALART. Thank you.

Mrs. EMERSON. Ms. Lee.

NURSING WORKFORCE

Ms. LEE. Thank you very much. You mentioned, Mr. Berry, the need for nurses, the nurse shortage, yet nurses are telling me they can't find jobs. We had a hearing last year——

Mr. BERRY. Send them to me. I will hire them. Let me tell you, we are having such a hard time, Mrs. Lee, that I have issued—we only do this in categories that every one of our attempts to try to solicit hires have failed so badly and our need is so great that we do something called direct hire authority, that I have given that authority to any agency in the Federal Government, that if they can hire a nurse directly they don't have to compete the position. So as long as they are certified, they can do the job, they can be hired immediately.

Ms. LEE. There are several organizations who represent nurses who have testified and indicated that they cannot find jobs for nurses in those who have just graduated from nursing school.

Mr. BERRY. It might require people to move obviously. In other words, in some areas they might not find it in the location they want, but we have got jobs for them. And they are well-paying jobs, they are in great places, they can work with our VA hospitals, our HHS hires. The nursing need is severe across the government.

The other category in desperate trouble is veterinarians. We are not competitive in that field. So this is a tough area, and so like I say, that is another direct hire thing that I have given out: Find one, hire them.

Ms. LEE. Okay, I am going to go back and have some more discussions on this. Appreciate that.

HIRING AND THE DIGITAL DIVIDE

Let me just ask you in terms of in the process of streamlining and modernizing the processes at OPM, have you taken into account the whole issue of the digital divide and how when people—I know many of our communities still, people of color, seniors, don't have access to computers. How do you apply for a job if you don't have access to a computer or do you have a variety of ways that you can do it?

Mr. BERRY. There definitely are a variety of ways and we do try to work, you know, not only with sort of traditional methods, we work with a lot of the retirement groups who help us get word out and work with that. But also sort of our libraries and other folks

who are great at making computers available so that people can come in and apply and get on to USAJobs and other things.

But we also are trying to help in sort of a—good case in point is I opened at OPM this year an office aimed at veterans, veterans hiring, that had all the specialized disability equipment so that sometimes it is not only a question of the digital divide. Even if they have access to equipment, it does not accommodate a disability. And so working with DOD, we got all the specialized equipment. So now vets with disabilities can come in and use that equipment. We are making that available to any agency on a space available basis. So we try to help in every way we can to make it fully accessible, you know, to as many people as possible.

Ms. LEE. It is not apply only through the web? I mean through the Internet?

Mr. BERRY. That is clearly the primary mechanism now, but it is not the only way. You can come in other ways.

Ms. LEE. If I wanted to apply for a job and did not have a computer, no library nearby, which is the case in many communities——

Mr. BERRY. You can use paper.

Ms. LEE. Do it the old-fashioned way still. As long as that option is there. So many private employers now won't even accept an application the old-fashioned way, and it is a barrier right there that excludes so many people. You still don't have for whatever reason access.

Mr. BERRY. My staff informs me that you can still do the old paper-pencil.

Ms. LEE. Thank you.

Mrs. EMERSON. We have such a slog of votes that there is no way—slog? We will be over on the floor for 2 hours almost. We will certainly not make you wait for us. And the only other question I just wanted to ask you briefly was with regard to the your request to hire an environmental manager. Don't you have somebody who already does that now?

Mr. BERRY. I'm sorry?

Mrs. EMERSON. I think there is a request here, let me find it. $100,000 for an environmental manager who is going to be responsible for ensuring that OPM is in compliance with all major environmental laws and regulations. I am assuming you already have somebody who does that.

Mr. BERRY. This is part of the Greening the Government Initiative that we are looking to make sure we can step up in a full way so that on everything we do, whether it be paper purchasing, our fleet management, our energy use, I believe it is an investment that will produce, just like the Wellness Initiative, significant savings. Because, for example, just on electricity alone, that person should hopefully pay for their job three times over if they help us to design and take advantage of all of the new technologies and energy monitoring and management systems that are out there. They have gotten very sophisticated.

And the reason that this is a specific request is this has become a specialty profession. It used to be okay, we are going to buy recycled paper. Now they need to have an engineering understanding to look at energy flow and water flow and other things, and that

is where this is generated from. I believe it is a request that will produce the savings that will more than pay for itself in the years ahead.

Mrs. EMERSON. It is with skepticism that I will close the hearing on that note. It was a wonderful hearing and you did a great job and your team does as well. And I think it is not always easy to be a Federal employee because they get bludgeoned by so many and it is hard work, and I thank you very much for your contribution.

Mr. BERRY. Thank you, Madam Chair, I appreciate you and it is an honor to be with you today.

[The information follows:]

Financial Services and General Government Subcommittee
Hearing on the Office of Personnel Management FY 2012 Budget

Questions for the Record Submitted by Chairwoman Jo Ann Emerson

RETIREMENT SYSTEMS MODERNIZATION (RSM)

Ms. EMERSON: In August of last year, OMB identified your Retirement Modernization Project as "high-risk" and in need of more scrutiny. GAO has done several reviews of this troubled project over the years and made many recommendations to improve its execution. OPM requested $1.5 million in fiscal year 2011 to develop a retirement calculator, but no funds are requested for the project in fiscal year 2012. What is the status of the project today?

Mr. BERRY: The Retirement Systems Modernization (RSM) program has been cancelled as a formal development project. Efforts to automate the retirement system are continuing with a "back to the basics" approach starting with incremental changes that can be piloted before obligating large amounts of resources. Funding will be used to continue imaging and scanning of incoming retirement records, upgrades to existing retirement systems, and other small-scale enhancements to retirement systems (i.e. on-line retirement application).

Ms. EMERSON: How close is the retirement calculator to completion?

Mr. BERRY: The retirement calculator was completed as of December 2010.

Ms. EMERSON: How was the decision made to halt this program and request no funding for RSM in fiscal year 2012?

Mr. BERRY: Based on an evaluation of the RSM investment and other alternatives, OPM decided to terminate the project and transfer future retirement investments toward other IT services in the retirement program. We believe the full automation of the Federal retirement process can be better achieved by getting back to the basics of retirement services rather than managing improvements through a large scale project.

Eliminating the RSM program as a formal development project in the budget will save at least $2 million in administrative costs in FY2012, while the agency conducts a bottom up review of the retirement service process and maintains a focus on achievable goals to automate the retirement processing system.

Ms. EMERSON: Accuracy remains a major problem in processing retiree claims with 23 percent of all claims missing one or more records. Additionally, 11 percent of claims are not received during the first 30 days of retirement causing further delay. What is OPM doing to address issues pertaining to the speed and accuracy in which agencies submit retiree claims?

Mr. BERRY: OPM is currently conducting a complete review of the Retirement Service process from the bottom up, to determine changes needed to improve business processes and increase speed and accuracy. There will be incremental technology changes where

appropriate, but the agency will not be able to identify broader technology changes until the review is completed.

FEHB COSTS

Ms. EMERSON: OPM manages the Federal Employees Health Benefits Program and you've made it your goal to be the innovation leader in employer-based health insurance. In 2007 and 2008, OPM was able to hold Federal employee health insurance costs to about a 2 percent increase despite rising health care costs. Now, it's been over a year since Congress passed the Affordable Care Act and we continue to see dramatic increases in health care costs across the country. In this past year Federal employee health insurance costs have increased by about 7 percent. Can you explain why costs are going up?

Mr. BERRY: There are a number of reasons for the premium changes. In general, FEHB rates reflect changes in the health care marketplace. The FEHB Program uses market competition and consumer choice to provide comprehensive benefits at an affordable cost to enrollees and the Government. In addition, we use firm negotiation with health insurance carriers to keep cost increases as reasonable as possible.

Following is a breakdown of the contributors to the 2011 FEHB premium increase:

Average 2010 Biweekly Premium	**$257.04**	**$113.89**	**$370.93**	
Utilization, Technology & Medical Inflation	$18.56	$8.11	$26.67	7.2%
Demographics (Age, Sex, etc.)	$0.52	$0.23	$0.74	0.2%
Benefit Changes	$1.90	$0.83	$2.73	0.7%
Enrollee Choice (Plan Movement)	($4.34)	($1.89)	($6.23)	-1.7%
Reserves, Financing, etc.	($1.33)	($0.58)	($1.92)	-0.5%
Other Factors	$3.56	$1.55	$5.11	1.4%
Average Biweekly Change	**$18.86**	**$8.24**	**$27.10**	**7.3%**
Average 2011 Biweekly Premium	**$275.90**	**$122.13**	**$398.03**	

*Totals may not add due to rounding.

The question notes that Federal employee health premium increases were held to about 2 percent in 2007 and 2008. For those years, OPM used its authority to use contingency reserve funds in order to defray increases in premiums, thus making the increases for those years smaller than what they otherwise would have been.

Ms. EMERSON: To what degree have you been able to control Federal employee health insurance costs and in future years will you negotiate better deals for Federal employees?

Mr. BERRY: For 2011, health care premiums were projected by some employers, consultants and others to rise at faster rates than FEHB premiums did. OPM attributes "choice" as part of the reason FEHB compares favorably to premium increases nationally and firmly believes choice helps promote healthy competition among carriers. FEHB has

important features, including a wide choice of health plans and competitive benefit packages as well as no pre-existing condition limitations or waiting periods. OPM's goal is to continue to find innovative ways to keep the FEHB Program affordable and to make sure premium dollars are spent on the benefits that customers want and need.

HEALTHCARE

Ms. EMERSON: For fiscal year 2012, OPM requests $12.3 million to fund management, development, design, and analysis activities for the Multi-State Option Plan. This is the first request that OPM has made to Congress for the new healthcare law. However, I understand you received funding in fiscal year 2011from the Department of Health and Human Services to help administer the Federally-run Pre-Existing Condition Insurance Plan. How much funding did OPM receive in fiscal year 2011 from the Department of Health and Human Services?

Mr. BERRY: As of May 4, 2011, OPM has received $10,236,821 in FY2011 through an Economy Act agreement with HHS as well as reapportionment of HHS funds. The total is broken down as follows:

$2,481,000 for Pre-Existing Condition Insurance Plan (PCIP)
$ 288,821 for State Appeals
$2,467,000 for External Review
$5,000,000 for Affordable Care Act implementation
$10,236,821 TOTAL

Ms. EMERSON: How much has OPM already obligated and how many employees worked on healthcare in fiscal year 2011?

Mr. BERRY: OPM expects to utilize all the funds provided by HHS for FY2011 healthcare reform implementation. About 20 current employees (to varying degrees) are working on healthcare reform activities. OPM is in the process of increasing staff levels to perform all of its responsibilities under the Affordable Care Act and to obtain expert consulting contracts to assist with key aspects of implementation.

Ms. EMERSON: Does the fiscal year 2012 budget include any funds from HHS?

Mr. BERRY: OPM's budget request does not include funds from HHS. However, we expect to receive approximately $2 million from HHS to operate PCIP in 23 states and the District of Columbia on HHS' behalf.

Ms. EMERSON: Can you provide more specifics on how your $12.3 million request for 2012 will be spent?

Mr. BERRY: The request will fund FY 2012 management, development and design, and analysis activities for the Multi-State activities. This will fund:

- **$6.2 million for OPM salaries and benefits to fund 26 FTEs.**

- **$2 million for partial support of the design and development of the Health Claims Data Warehouse Project, including funding for cost associated with the system integrator.**
- **$4.1 million for contracts providing specialized technical support (e.g., actuarial, demographic, economic, or statistical analysis) and institutional support (facilities, travel, training, equipment, etc.).**

HIRING REFORM

Ms. EMERSON: Director Berry, you have been put in charge of overhauling the way the Federal government recruits and hires our civilian workforce. In doing so, you have sought to streamline the USAJOBs process by eliminating the lengthy knowledge, skills and abilities questionnaires--and replacing them with more specialized assessment tools. I understand that as part of this streamlining process, HR officers must take on more responsibility in overhauling the hiring process. However, a study issued in August of last year by the Partnership for Public Service found that chief human capital officers are worried their HR staffs aren't up to the task. In fact, the study found that three out of five respondents feel their HR staffs don't have the skills to help their agencies transition to a new state of improved human resource operations and workforce management. What is OPM doing to help agencies' chief human capital officers come up with solutions to these problems?

Mr. BERRY: Pursuant to President Obama's May 11, 2010 memorandum, *Improving the Federal Recruitment and Hiring Process*, OPM has taken action to track agencies' performance in implementation of hiring reform and work with senior agency leaders, hiring managers, and human resources professionals to correct agency hiring problems. OPM is also identifying best practices across the Federal Government for improving the hiring process and provides policy guidance to agencies on implementation of reform efforts.

OPM has launched, in partnership with the Chief Human Capital Officers Council (CHCOC), the HR University (HRU), the Federal Government's one-stop training resource center for the Federal HR professional. Through the use of a web-based platform, the HRU provides a wide variety of training and development resources geared toward Federal HR professionals.

OPM has also developed and launched video training on veterans appointing authorities, military spouse employment, and hiring individuals with disabilities. These trainings provide HR professionals and hiring managers with the salient points on these authorities in a quick and entertaining way.

We are also developing a web-based training application that will train HR professionals and hiring managers on the special appointing authorities for Veterans and Veterans' Preference. The web-based training program will be launched in the summer of FY 2011. This training will be made available on the HRU as well as provided to agencies to allow for customization.

Also, on Veterans Hiring, we will be conducting a 2nd Veterans Employment Symposium in July 2011. The Symposium will focus on hiring managers to ensure they understand the special appointing authorities for Veterans and value of the America's Veterans.

Ms. EMERSON: How are you helping agencies to retool the people they already have in place?

Mr. BERRY: OPM has conducted Nationwide Hiring Reform Training Sessions, which have touched on all aspects of Hiring Reform. The statistics on our Training Session outreach breaks down as follows:

- **17,300 trained (HR professional and hiring managers)**
- **351 workshops**
- **31 states**
- **66 cities**
- **55+ agencies/organizations**
- **21 Federal Executive Board locations**

OPM has also provided "train-the-trainer" sessions for agency human resources practitioners on developing a strategic "on-boarding" program to maximize employee productivity, engagement, and retention. On-boarding is not limited to orientation or mentoring; it is an ongoing process that includes welcoming, training, and acculturating a new hire.

Ms. EMERSON: What action still needs to be taken to improve the timeliness and quality of the federal hiring process?

Mr. BERRY: More than two years ago, the Administration embarked on a broad initiative to reform the entire Federal hiring process. We have attempted to address broad systemic problems such as reducing long job announcements, allowing resumes and cover letters as applications, and contacting potential hires throughout the process.

In September 2010, OPM transmitted to Congress a legislative proposal entitled the Federal Hiring Modernization Act of 2010. Among other things, the proposal includes provisions to allow agencies to quickly increase their hiring to meet urgent and unexpected needs; give hiring managers a larger pool of qualified applicants to choose from; permit agencies to share with each other the names and scores of candidates who have been assessed and found to be qualified; and allow agencies to post targeted job announcements for certain jobs. These improvements would help agencies address ongoing challenges in meeting applicant's expectations for user-friendly procedures, clear communication regarding processes, and seamless transition into the Federal Government.

Questions for the Record Submitted by Congressman Yoder

USA JOBS WEBSITE

Mr. YODER: Last August, OPM announced that it would build the next USAJobs website in-house and no longer use a commercial vendor to supply these services. At the time, OPM insisted that it would not cost more than the use of a commercial vendor and that the site would be ready for launch in July of 2011. What is the anticipated savings by using internal resources to build and maintain this website?

Mr. BERRY: The anticipated savings are predominantly in the ongoing operations and maintenance (O&M) of the system. We have already added new features beyond the original which make it hard for a direct comparison; however, we predict the O&M in the out years will be fairly level yet provide more functionality and ease of use over the prior system. Estimated expenses, projected over a 5-year period, suggest that the system can be delivered for costs that are competitive with what is available commercially. The value added benefits of a non-proprietary solution that leverages economies of scale should result in long-term cost-savings across Government.

Mr. YODER: What did it cost OPM to outsource this project?

Mr. BERRY: The operating cost for FY2011 paid to the contractor is $6.1 million. Going forward, we are using a hybrid approach that capitalizes on internal OPM resources to build the core technology while leveraging both public and private sector methods and tools to produce a seamless, secure, cost effective, and flexible recruitment and staffing environment. The development and implemeotation of each phase of the project is using a collaborative approach with agency partners. The project is not completed yet, but the work is tracking to the predicted cost of $5.7 million.

Mr. YODER: Will this new website be ready for launch this July? If not, when do you anticipate it will be ready?

Mr. BERRY: We are on schedule to complete the development of the new USAJOBS in July 2011. In accordance with OMB and NIST requirements, an independent IT security review will be conducted to ensure appropriate security measures have been built into the new website before it is actually implemented in a production environment. After successfully completing all testing, the system will launch into production October 2011 with new features such as: improved search capabilities; enhanced security; improved account management; and common data standards to name a few. This system also includes an entirely new platform with many new features that streamline and enhance the applicant's experience while providing a more open architecture making it easier to leverage best practices and tools from the vendor community.

WITNESSES

H.R. ———, LEGISLATION TO REVISE THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

APRIL 7, 2011

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SUBMITTED MATERIAL

H.R. ———, LEGISLATION TO REVISE THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT

THURSDAY, APRIL 7, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Mary Bono Mack (chairman of the subcommittee) presiding.

Members present: Representatives Bono Mack, Blackburn, Stearns, Bass, Harper, Lance, Cassidy, Guthrie, Olson, McKinley, Pompeo, Kinzinger, Barton, Butterfield, Dingell, Towns, Rush, Schakowsky, and Waxman (ex officio).

Staff present: Gib Mullan, Chief Counsel; Shannon Weinberg, Counsel; Paul Cancienne, Policy Coordinator; Brian McCullough, Senior Professional Staff Member; and Alex Yergin, Legislative Clerk.

Mrs. BONO MACK. Good morning. It is with a sense of purpose as well as a sense of urgency that we gather here today to consider some sensible ways to make the Consumer Product Safety Improvement Act, also known as CPSIA, work better for all Americans. There is bipartisan agreement that CPSIA, while well-intentioned, has created a number of serious problems for manufacturers and retails. Today, we will examine some ways to make a good law even better.

The chair will now recognize herself for an opening statement. You can start me back at 5. Thank you.

OPENING STATEMENT OF HON. MARY BONO MACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

In our first hearing of the year, we heard about many of the problems associated with passage of CPSIA. Today, we will focus on a preliminary discussion draft, which offers a range of possible solutions.

One major area for reform relates to the regulation of children's products. In this area, we have the benefit of five unanimous recommendations from the CPSC. We also have draft legislation from last year and other CPSC suggestions in response.

The discussion draft aims to reduce the regulatory burdens of the law without undercutting consumer protection. A fundamental premise is that the Commission can actually protect consumers far better when it is allowed to set priorities and regulate based on risk. Where possible, we should spare the Commission from having to make time-consuming, case-by-case determinations, and let it spend more time on its bigger problems. This is especially true in our current budget climate where we have to make the best use of agency resources.

We need to strike the right balance and that is seldom easy. The discussion draft points to areas where we must decide important policy questions. I hope our witnesses today will help us to make wise choices by shedding light on these issues.

In Section 1, for example, the draft leaves open the age for defining the term "children's product." At our last hearing, my friend and colleague Mr. Dingell, the chairman emeritus of the full committee, reminded us that a lot of the problems with CPSIA originated in the Senate, but this is one that did not. The Senate-passed bill applied the lead content limits to products for children ages 7 and under. That age would have kept the focus on children who are at greater risk when it comes to lead, because very young children, according to the CPSC, are much more likely to put things in their mouth. The House set the top age at 12 years old because of the so-called "common toy box" concern. But by pushing the age to 12, we ended up regulating a huge number of products that are never going to be mouthed or even handled by young children. These include not only the well-known examples of ATVs, bicycles, and books, but also band instruments, scientific instruments, and clothes for older children, among other things.

Another key area is third-party testing. Again, the discussion draft tries to strike an appropriate balance. It preserves third-party testing for lead paint, cribs, pacifiers, small parts, and children's metal jewelry, all priorities that Congress explicitly set in CPSIA. For other standards, however, it gives the Commission discretion to decide what standards should require third-party testing. And it gives the Commission new authority and flexibility to require testing for only some portions of a standard or only for certain classes of products. It also asks the Commission to make sure that the benefits of third-party testing justify the costs before making it mandatory.

Another major area of reform is the CPSC's public database, which just recently began to post complaints. The discussion draft addresses some of the more significant problems that were brought to light in our earlier hearing.

First, the draft spells out in greater detail who can submit reports of harm for the public portion of the database. Among consumers, only those who have suffered harm or a risk of harm—as well as members of their family, legal representatives, or any person authorized by the family—could make public reports.

Second, the draft sets forth a process for improving product identification. The database cannot help consumers if they don't know which products have problems. The draft enlists manufacturers to help consumers provide better descriptions.

Third, the draft gives CPSC more options for solving claims of material inaccuracy. The fundamental premise here is that the database may do more harm than good if it misleads consumers based on inaccurate information.

Finally, the draft would strengthen the Commission's authority to investigate complaints. While some consumers may benefit from the ability to see safety-related complaints, a lot more consumers will benefit if the Commission can investigate complaints more quickly.

Congress must move quickly, too, because the clock is ticking. Unless we act soon, the 100 parts-per-million lead limit will take effect retroactively in August, and once again, millions of dollars worth of products will become illegal to sell, donate, or export.

We have an opportunity and an obligation to make CPSIA a law that benefits all Americans.

[The prepared statement of Mrs. Bono Mack follows:]

PREPARED STATEMENT OF HON. MARY BONO MACK

The committee will come to order.

Good Morning. Today, we turn back to the subject of the Consumer Product Safety Improvement Act of 2008, also known as CPSIA. In our first hearing of the year, we heard about the many problems associated with this law. Today, we will focus on a preliminary discussion draft, which offers a range of possible solntions.

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We need to strike the right balance, and that is seldom easy. The discussion draft points to areas where we must decide important policy questions. I hope our witnesses today will help us to make wise choices by shedding light on these issues.

In section 1, for example, the draft leaves open the age for defining the term "children's product." At our last hearing, my friend and colleague Mr. Dingell, the Chairman emeritus of the full committee, reminded us that a lot of the problems with CPSIA originated in the Senate, but this is one that did not. The Senate-passed bill applied the lead content limits to products for children age 7 and under. That age would have kept the focus on children who are greater risk when it comes to lead, because very young children, according to the CPSC, are much more likely to put things in their mouth. The House set the top age at 12 years old, because of the so-called "common toy box" concern. But by pushing the age to 12, we ended up regnlating a huge number of products that are never going to be mouthed or even handled by young children. These include not only the well-known examples of ATVs, bicycles, and books but also band instruments, scientific instruments and clothes for older children, among other things.

Another key area is tbird-party testing. Again, the discussion draft tries to strike an appropriate balance. It preserves third-party testing for lead paint, cribs, pacifiers, small parts, and children's metal jewelry—all priorities that Congress explicitly set in CPSIA. For other standards, however, it gives the Commission discretion to decide what standards sbould require third-party testing. And it gives the Commission new authority and flexibility to require testing for only some portions of a standard or only for certain classes of products. It also asks the Commission to make sure that the benefits of third-party testing justify the costs before making it mandatory.

Another major area of reform is the CPSC's public database, which just recently began to post complaints. The discussion draft addresses some of the more significant problems that were brought to light in our earlier hearing.

First, the draft spells out in greater detail who can submit reports of harm for the public portion of the database. Among consumers, only those who have suffered harm or a risk of harm—as well as members of their family, legal representatives or any person authorized by the family—could make public reports.

Second, the draft sets forth a process for improving product identification. The database cannot help consumers if they don't know which products have problems. The staff draft enlists manufacturers to help consumers provide better descriptions.

Third, the draft gives CPSC more options for solving claims of material inaccuracy. The fundamental premise here is that the database may do more harm than good if it misleads consumers based on inaccurate information.

Last, the draft would strengthen the Commission's authority to investigate complaints. While some consumers may benefit from the ability to see safety-related complaints, a lot more consumers will benefit if the Commission can investigate complaints more quickly.

Congress must move quickly, too, because the clock is ticking—unless we act soon, the 100 ppm lead limit will take effect retroactively in August and once again millions of dollars worth of products will become illegal to sell, donate or export.

Mrs. BONO MACK. And now I would like to recognize the ranking member of the full committee, Mr. Waxman, for his 5-minute opening statement.

Mr. WAXMAN. Chairman Bono, thank you very much for recognizing me to give this opening statement and Mr. Butterfield to allow me to go ahead of him.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I share your belief that some changes are needed to the toy bill that we passed in 2008. That legislation was an historic step forward for children's safety, but like most legislation, it was not perfect. It has had some unintended consequences and needs refinement. But the discussion draft before us, which is the subject of today's hearing, takes a wrecking ball to the law and would endanger young children. As the chair of the Consumer Products Safety Commission wrote us today, this draft would turn back the clock to an era when harmful products made their way into the stream of commerce and into the hands of innocent children.

In 2008 our committee led the way in passing a strong toy safety law. We held hearings at which we learned about children who died or were severely injured by lead in toys and small charms. We learned that other children suffered catastrophic internal injuries from magnetic toys that ripped through their intestines. And we witnessed record recalls and loss of confidence in the safety of children's products. Despite strong bipartisan support for the new law, implementation has not always been smooth. The ATV industry, the bicycle industry, the publishing industry, and makers of handcrafted toys have all raised valid compliance issues.

I know it is possible to address these concerns without gutting the law. When I was chairman of the committee in the last Congress, we initiated a stakeholders' process to produce the draft bill that gave targeted relief to industry while maintaining the most important health and safety protections in the new law. That draft legislation was supported by both industry and consumer groups. Although the Republican staff were consulted at every step in the process, Ranking Member Barton decided he would not support the bill and we never acted on it.

The discussion draft before us is a very different document. Democrats, consumer groups, and health experts were not consulted. The result is a one-sided proposal that provides relief to industry but sacrifices children's health and safety. According to the Consumer Federation of America and Consumers Union, this proposal undermines safety testing for children's products, undermines lead protections, undermines the effectiveness of the new crib safety standard, and undermines the new public safety product hazard database.

According to Chairman Tenenbaum and Commissioners Adler and Moore, this proposal would be a reversal of several of the core safety provisions in the law. Not only are they critical of the bill, but let me just state quite clearly, there is no chance that a bill this extreme could ever become law. It would not survive in the Senate, and if it did, it would be vetoed by the President. The result would be a lost opportunity. Many of the witnesses who will testify today have identified legitimate concerns but they will receive no relief if all we produce is a more partisan gridlock kind of legislation.

If we work together, I am confident that we can find a way to address most of industry's concerns without jeopardizing the important safety advances we made in the toy safety law. And I had a discussion with the chairman yesterday. I think there is an opportunity for us to work together and produce a product that will be a consensus product. I hope that after this hearing is over we can start fresh and we can produce a genuine bipartisan reform we all can support.

Madam Chair, I would like to yield the rest of my time and an additional 1 minute without any objection to Mr. Rush, who chaired this subcommittee in the last Congress and I think has an important statement to make.

Mrs. BONO MACK. Without objection, the gentleman is recognized.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. Thank you, Madam Chair, and I want to thank the ranking member for the full committee for yielding this time to me.

Madam Chair, consumer protection is one of the core functions of this subcommittee, and I want to commend you for convening this important hearing. However, I am surprised to see that instead of talking about improving safety for our children, making our new law's implementation possible, we are focusing on undoing one of the legislative achievements of this subcommittee historically. Demolition and destruction, not creative solution seems to be the policy agenda for our new Republican majority. I am still waiting to see when we will talk about real policy solutions, including the policy implementation issues as it relates to this bill for the American people.

Regulations are not a problem. It is the constant changes or the risk of changes that are difficult to manage for our manufacturers, our consumers, and for the American public. We need to agree once and for all and implement the laws that we have developed. We need regulatory predictability. There is a similar Product Safety

Improvement Act that the Republicans are attempting to revise today represents demolishing the most comprehensive overhaul of U.S. consumer protection oversight in a generation, one that established policies which repaired our Nation's broken product safety system.

And I must say, Madam Chairman, that I am very proud of what we did with bipartisan input, with input from all the stakeholders despite the political differences that we all shared. We were able to reinvigorate the CPSC with resources. We added additional commissioners. We authorized a shiny new testing lab. And Madam Chair, may I ask for an additional 30 seconds?

Mrs. BONO MACK. The clock——

Mr. RUSH. All right. Well, Madam Chair, I just want to conclude by saying that this hearing could be better spent if we were really trying to—maybe we could solve some of the problems——

Mrs. BONO MACK. All right——

Mr. RUSH [continuing]. That we have implementing the bill. Thank you.

Mrs. BONO MACK. All right. So the gentleman yields back. And now——

Mr. RUSH. I yield back the time I have.

Mrs. BONO MACK. Chairman Upton, in accordance with the committee rules, yielded me his 5 minutes, and as his designee, I would like to recognize the chairman emeritus of the full committee, Mr. Barton, for 2½ minutes.

Mr. BARTON. Well, Madam Chairman, I really can't do it in 2½ minutes. So you are going to have to give me at least 3 minutes or just go to somebody else.

Mrs. BONO MACK. Well, we were rather lenient with the other side, so that is not a problem. Go ahead.

Mrs. BLACKBURN. Madam Chairman, I will yield the chairman emeritus my time.

Mrs. BONO MACK. So the chairman emeritus is recognized for 3½ minutes.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. There is an old joke about somebody trying to get somebody to vote for him and the guy says I would never vote for you if you were running unopposed. And the man goes back and says well, how do we put that voter down? He says put him down undecided. That is kind of what we need to put Mr. Waxman down after what he said.

I participated as the ranking member when this bill was passed. I participated in the last Congress when there was an attempt to amend it. When Chairman Waxman said that the Republicans and the staff were consulted, that is a true statement, but we weren't listened to. In the last Congress, Chairman Waxman and his allies were almost totally inflexible in trying to come to some common ground on changes to the law that was passed under Chairman Dingell's chairmanship back in 2008.

This discussion draft does not take a wrecking ball to the law. It is a good-faith attempt to reconcile the law that, in its current state, is literally unenforceable. We have that in testimony from

the Consumer Product Safety Commission. They have basically—I wouldn't even use the term basically—they have no flexibility at all. The discussion draft that Chairwoman Bono Mack has crafted does give flexibility. I think that is a good thing. It does change some of the principles or modify some of the principles from the law that was passed 2 years ago, but it keeps the core of the law together and it does give the Commission the flexibility and the industry that has to live by it the ability to actually use a little common sense in implementation. I think that is a good thing. I think this discussion draft is a vehicle that can be a bipartisan compromise. But a compromise means both sides have to come together. And Chairman Waxman's statement indicates to me that it is the bill or nothing. And I don't think that is a position to take when we are trying to do something that should be everybody's best intentions to actually protect the children of America, but also gives those that provide the products for our children the ability to provide them in a safe and effective fashion.

I am the father of a 5-year-old and the grandfather of five grandchildren that are under the ages of 13. There is no way in this world that I want to do anything that would put my 5-year-old child or my grandchildren in harm's way. So Madam Chairwoman, I think the discussion draft is a good starting point. It is a starting point. It is not an end point. And if Mr. Waxman and Mr. Rush and our friends on the minority side wish to work with us, we can come up with something that improves the bill that is now the law and gives the flexibility that is necessary.

So with that, I want to thank the Chairwoman for giving me some extra time and thank the vice-chairwoman, Ms. Blackburn, for giving me some of her time. And I yield back.

Mrs. BONO MACK. I thank the gentleman for his statement and yield 1 minute to Ms. Blackburn.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Madam Chairman. I am only going to take about 30 seconds because there are several individuals that would like to speak on this issue. I want to thank the chairman for bringing forward a discussion draft that will encourage us all to listen to the science and to use some common sense. I am a mother. I am a grandmother. I am an aunt. I am a sister. There is no way I would want to have products in the marketplace that are going to be harmful to children and grandchildren, no way at all. And I think it is important that we listen to the science. I think that it is important that we apply some common sense. I have also listened to a lot of the crafters and the small producers in my area and have had good discussions with them. Also, Mr. Howell, when we get to you, I am going to want to talk about this database that I think is seriously flawed. And I thank the chairman and yield back.

Mrs. BONO MACK. I thank the gentlelady and recognize the gentleman from Florida, Mr. Stearns, for 1 minute.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Thank you, Madam Chairman. Let me echo what the emeritus chairman, Joe Barton, said. I was a conferee on this. We had lots of recommendations. We in fact specifically recommended what the CPSC did in January 2010 when they reported back to Congress and they identified some of the problems. There was no flexibility. And they recommended solutions. And we had these recommendations under Joe Barton's leadership to provide the CPSC with this kind of flexibility they need to grant exclusions to the lead limits but they didn't listen. So I think, Madam Chair, what you are doing here is the Lord's work. We need to have the flexibility. And we heard from Commissioner Northrup, who was a former Member of Congress. She also bought this out. And so I am pleased to be here and to support you and I appreciate what you are doing. Thank you.

Mrs. BONO MACK. I thank the gentleman. Last but not least, the gentleman from North Carolina, the ranking member of our subcommittee, Mr. Butterfield, is now recognized for his 5 minutes.

OPENING STATEMENT OF HON. G.K. BUTTERFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. BUTTERFIELD. Let me thank you very much, Chairman Bono Mack, and especially thank you to all of the witnesses who have come forward today to give us your testimony.

You know, Madam Chairman, my recollection—and I was simply a rank and file member of the subcommittee in the last Congress—but my recollection of this is somewhat different from my good friend from Texas, Mr. Barton. My recollection is that CPSIA followed a long and well-considered road to passage that included many, many hearings and extensive conference with the Senate from introduction to enactment. I recall that this legislation at all times remained a bipartisan effort, and I am surprised to hear today that it was not. The vote tally speaks volumes about the bipartisanship nature of this law. Much of the law was taken word-for-word from some of Mr. Barton's language that he had authored. The House passed the conference report with a vote of 424 to 1. And while I don't know it for a fact, I suppose Mr. Barton may be the 1, but the vote was 424 to 1. And the Senate passed it——

Mr. BARTON. Could the gentleman yield?

Mr. BUTTERFIELD. Yes.

Mr. BARTON. I voted for the bill.

Mr. BUTTERFIELD. You did vote, right.

Mr. RUSH. He voted for it, yes.

Mr. BUTTERFIELD. All right. And the Senate vote was 89 to 3. Today, however, it is apparent some portions of the law need to be refined. The ranking member of the full committee has acknowledged that and I do as well. Unfortunately, the discussion draft does not seek to refine the law. Rather, it seeks to undo nearly 2 years of close consultation and careful compromise with Members of Congress, industry—many of whom are here today—and consumer groups, and potentially puts consumers and children at risk. The minority was not consulted to my knowledge in the prepara-

tion of the draft legislation. And I am confident the language would look very different had we been invited to the table and had an opportunity to participate. The draft language would redefine what is considered a children's product to a yet-to-be-determined age, possibly exposing both those who would be classified as children and those who would not to potentially dangerous products.

I ask my colleagues about households with multiple children, if a 9-year-old has a toy intended only for ages 9 and older, is it not reasonable to expect that 9-year-olds with a preschool-age sibling would also want to and will find a way to play with that toy? But perhaps most alarming is rolling back the current lead content limits in favor of risk assessment. This is similar to the model that proved to be inadequate prior to CPSIA but with the twist of creating additional burdens for the Commission.

Since the model and the draft will require premarket risk assessment, CPSC will have to determine for each and every children's product how manufacturers should measure the risk. I am troubled that the draft eliminates independent third-party testing for all children's products with a very narrow exception for five categories. I remind my friends of the millions of toys that were recalled in '07 due not only to high lead levels but design-related safety defects as well. It was clear that manufacturers of children's products and their suppliers had fallen asleep at the wheel and their in-house safeguards were inadequate.

Finally, and I am going to yield to the gentlelady from Illinois in just a minute—CPSIA required the CPSC to create a Public Product Safety Information Database so that consumers would have a convenient way to report and learn about dangerous products. The draft language marginalizes the efficacy of the database by limiting who can submit information, as well as establishing a drawn-out process by which the submitter, the Commission, and the manufacturer are required to have ongoing contact. The more burdensome it becomes to make a safety complaint, the less likely consumers are to use the database. At this time I will yield my remaining time, Madam Chairman, to the gentlelady from Illinois.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. I thank the gentleman for yielding.

To say that I am concerned about the draft bill would be a vast understatement. Here we are in the Subcommittee on Commerce, Manufacturing, and Trade, and instead of looking at ways that we can create jobs, good jobs for the American people, we are examining a bill to undermine consumer protection, words that used to be part of the subcommittee's title. The draft bill is not a collection of small fixes. It would fundamentally gut key pieces of the CPSIA, including the provisions I authored to ensure that durable infant and toddler products are subject to rigorous testing requirements.

I want to read a letter I received from Danny Keysar's parents, which I hope to submit for the record, along with two other letters from parents who lost their children. Danny's mom wrote, "As parents who have paid the ultimate price for unsafe products, we know you don't want to see more children suffer as our son did."

Giving flexibility to the CPSC to enforce safety provisions is one thing, but this wholesale reversal of crucial safety provisions sends us back to a scenario we know leaves children at risk.

I yield back the balance of my time.

Mrs. BONO MACK. All right. And the chair inadvertently overlooked the last 30 seconds on our side, and I would like to recognize the gentleman from Texas, Mr. Olson, for 30 seconds.

OPENING STATEMENT OF HON. PETE OLSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. OLSON. I will be brief. I am pleased to be here, and I thank the Chair for her leadership in bringing forward this important draft legislation to fix the unintended consequences of CPSIA.

As a parent, nothing is more important to me than the safety and health of my children. I think this draft provides us with a balanced way forward that protects my children from harmful products without devastating our country's small businesses. If my children are protected, your children are protected.

I thank the Chair and looking forward to helping her advance a commonsense fix to this law. I yield back.

Mrs. BONO MACK. I thank the gentleman. And now all opening statements are concluded. And we have three panels before us today. Each of the witnesses has prepared an opening statement that will be placed in the record. Each of you will have 5 minutes to summarize that statement in your remarks. On our first panel we have, in reverse order, but we have Robert Howell, Assistant Executive Director of Hazard Identification and Reduction at the U.S. Consumer Product Safety Commission. That is a mouthful. And then Dr. Barbara Beck, a widely respected expert in toxicology and a former EPA region chief and fellow at the Harvard School of Public Health; and Dr. Dana Best, who is presenting on behalf of the American Academy of Pediatrics.

Good morning. I would like to thank you all for coming. You will each be recognized for 5 minutes. To help you keep track of time, the little clock in front of you, when it turns yellow, please recognize that is the 1-minute mark if you could start wrapping up and when the light turns red, your time is up. I would also ask you to remember to turn the microphone on before you begin. And now I would like to start with Dr. Best for your 5 minutes. Good morning and welcome.

STATEMENTS OF DANA BEST, MD, MPH, FAAP, AMERICAN ACADEMY OF PEDIATRICS; BARBARA D. BECK, PH.D., DABT, FATS, PRINCIPAL, GRADIENT; AND ROBERT JAY HOWELL, ASSISTANT EXECUTIVE DIRECTOR, HAZARD IDENTIFICATION AND REDUCTION, U.S. CONSUMER PRODUCT SAFETY COMMISSION

STATEMENT OF DANA BEST

Ms. BEST. Good morning. Thank you for this opportunity to testify today. I am a pediatrician and pleased to represent the American Academy of Pediatrics. The AAP is deeply concerned that the subcommittee is considering legislation that would profoundly alter the CPSIA and could reverse the progress towards safer toys and

children's products. Today I will focus on four areas: the scope of children's products, lead limits in children's products, risk assessment, and the need for third-party testing.

First, the scope of children's products should protect children up to age 12. The AAP recommended that the CPSIA cover products for children up to age 12 years based on developmental and pragmatic concerns. With regard to developmental issues, the mouthing behaviors that cause the most concern for exposure to hazards like lead peak in the toddler years and taper off throughout school age, although it is not unusual for school-age children to place toys and other objects in their mouths or to mouth or suck on items like jewelry and pens. For some groups, such as children with developmental delays, mouthing behaviors may persist until adolescence or later.

Another concern is that toys are often shared. While most parents work hard to keep toys for older children away from younger children, they may not always be successful. It is therefore important to ensure that toys are as safe as possible for all children in the household.

Second, the CPSIA's limits on lead in children's products should not be relaxed. In the judgment of the AAP, there is no scientific basis for establishing a de minimis level for lead in children's products. To date, science has not identified a threshold below which lead ceases to damage a child's brain or body. There is no known safe level of lead. During the development of the CPSIA, the AAP was asked to recommend a limit for lead in children's products. Following a rigorous scientific review, the Academy recommended that lead in children's products be limited to 40 parts per million. The rationale behind this level is explained in my written testimony.

The AAP is also concerned that the discussion draft proposes to distinguish between lead exposure due to sucking on an item from lead exposure due to licking an item. From a scientific perspective, there is no basis for making this differentiation. Both actions defined as "mouthing" in the pediatric literature are associated with lead ingestion.

The AAP urges Congress to resist calls to set differing standards for lead in children's products based solely on the likelihood of sucking, licking, or swallowing. Given the extreme toxicity of lead, its bioaccumulation, and the irreversible nature of the damage it causes, the concept of setting different levels of lead for various types of toys or children's products is troubling.

Third, risk assessment is not an appropriate method for limiting lead exposure in children's products. The draft before the subcommittee appears to shift from measurement of total lead in children's products to risk assessment frameworks. The AAP urges you to leave intact the straightforward, predictable total lead standard in the CPSIA. The fundamental premise of risk assessment is that some degree of risk is acceptable such as when the benefit of receiving a drug is compared to its side effects. In the case of lead, there is no benefit to exposure. While the harms are numerous and significant such as decreased IQ, if the CPSIA standard is altered, Congress would need to determine what level of IQ loss is considered acceptable.

In addition, standards should protect not only the average child, but also children at higher risk of lead exposure and its consequences. This is best accomplished using the lead limits currently in the CPSIA.

The AAP is deeply concerned that a risk assessment framework would require the CPSC to perform or confirm risk assessment on many different products. It is unclear who would bear the ultimate responsibility for determining risk or what the process would be for reconciling differences when risk assessments differ between the agency and the manufacturer.

Finally, third-party testing is necessary to ensure the safety of children's products. The discussion draft proposes significant changes to CPSIA's third-party testing requirements, dramatically reducing the number and types of products subject to independent testing. This would essentially return us to the pre-CPSIA state of affairs in which consumers were expected to guess which toys and children's products were really safe.

The AAP would like to make one more comment on another point made in the discussion draft and strongly recommend that noncompliant cribs not be permitted in childcare facilities.

In conclusion, the AAP urges you to not weaken the CPSIA's protections against lead and other hazards as you consider ways to improve the ability of manufacturers and businesses to comply with this important law. Thank you.

[The prepared statement of Dr. Best follows:]

American Academy of Pediatrics

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Summary of Testimony of Dana Best, MD, MPH, FAAP
on behalf of the American Academy of Pediatrics
Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade
Discussion Draft of a Bill That Would Revise the Consumer Product Safety Improvement Act of 2008
Thursday, April 7, 2011

The American Academy of Pediatrics (AAP) strongly supported the provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA) that were designed to make children's products safer, primarily by reducing exposure to lead and other hazards, and requiring manufacturers to demonstrate safety before products could be sold. The AAP is therefore deeply concerned that the Subcommittee is considering legislation that would profoundly alter the CPSIA and could reverse the progress toward safer toys and children's products. As the Subcommittee considers these issues:

- The scope of children's products should protect children up to age 12 years.
- The CPSIA's limits on lead should not be relaxed.
- Risk assessment is not an appropriate method for limiting lead exposure in children's products.
- Third-party testing is necessary to ensure the safety of children's products.
- Non-compliant cribs should not be permitted in child care facilities.

The AAP has serious concerns that many of the concepts in the Discussion Draft before the Subcommittee would roll back important child health safety protections. The CPSIA was passed in response to significant deficiencies in our nation's product safety system, which had allowed for the widespread sale and distribution of products dangerous to children's health. The AAP urges Congress not to weaken the CPSIA's protections against lead and other hazards as it considers ways to improve the ability of manufacturers and businesses to comply with this important law.

American Academy of Pediatrics

DEDICATED TO THE HEALTH OF ALL CHILDREN™

Thursday, April 7, 2011

Testimony of
Dana Best, MD, MPH, FAAP

On behalf of the
American Academy of Pediatrics

Before the Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade
Discussion Draft of a Bill That Would Revise the Consumer Product Safety Improvement Act of 2008

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Dana Best, MD, MPH, FAAP
American Academy of Pediatrics
April 7, 2011

Thank you, Mr. Chairman, for this opportunity to testify today before the Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade about children's product safety. My name is Dana Best, MD, MPH, FAAP, and I am pleased to represent the American Academy of Pediatrics (AAP), a non-profit professional organization of 60,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults. I am an Associate Professor of Pediatrics at George Washington University School of Medicine here in Washington, D.C. and served for six years on the AAP's Committee on Environmental Health, which is the primary body within the AAP that handles lead and other environmental health issues.

The American Academy of Pediatrics strongly supported the provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA) that were designed to make children's products safer, primarily by reducing exposure to lead and other hazards, and requiring manufacturers to demonstrate safety before products could be sold. The AAP is therefore deeply concerned that the Subcommittee is considering legislation that would profoundly alter the CPSIA and could reverse the progress toward safer toys and children's products.

My testimony will cover four areas under discussion by the subcommittee: the scope of children's products covered by the law; limitations on lead in children's products; concepts of risk assessment; and the need for third party testing.

The Scope of Children's Products Should Protect Children Up to Age 12

The CPSIA defines a children's product as "a consumer product designed or intended primarily for children 12 years of age or younger." The AAP recommended that this law cover products for children up to age 12 years based on both developmental and pragmatic concerns.

With regard to developmental issues, the mouthing behaviors that cause the most concern for exposure to hazards like lead are most prevalent among young children, peaking in the toddler years and tapering off throughout school age. However, it is not unusual for school-age children to still place toys and other objects in their mouths, and it may in fact be fairly common for them to mouth or suck on items like jewelry or writing instruments. For some groups of children, such as children with developmental delays, mouthing behaviors may persist even longer.

Another key concern was the fact that toys are often shared among multiple children in the same household, regardless of whether those items are age-appropriate. While most parents work hard to keep toys meant for older children away from younger siblings, it is inevitable that young children will at least occasionally gain access to toys meant for their older brothers and sisters. It is therefore important to ensure that toys are as safe as possible for all children in a household.

Dana Best, MD, MPH, FAAP
American Academy of Pediatrics
April 7, 2011

Lead is a Potent Neurotoxin

Lead has been recognized as a potent neurotoxin since the time of the Roman Empire, although the mechanisms by which it inflicts brain damage have only been explored and understood in the past century. The brain damage caused by lead exposure is permanent and irreversible. Few options exist for treating lead exposure at high levels, and these treatments have potentially dangerous side effects. No options exist for treating lead exposure at low to moderate levels.

Exposure to lead is amply documented to cause the loss of intellectual capacity. On average, children whose blood lead levels (BLLs) rise from 10 to 20 micrograms per deciliter (mcg/dL) lose two to three IQ points. More recent studies have shown an even greater impact on IQ of BLLs under 10 mcg/dL. Key studies reported a loss of 4 to 7 IQ points in children whose lead levels rose from 1 mcg/dL to 10 mcg/dL..[1,2] These studies suggest that "low" levels of exposure – meaning BLLs less than 10 mcg/dL – cause proportionately greater harm than higher levels.

In addition to these impacts on IQ, lead exposure has documented effects on behavior, with higher rates of behavioral problems reported in young children, teens and adults exposed to lead during childhood. Associations between lead exposure and increased aggression, commission of crime and antisocial or delinquent behaviors have been identified.[3,4,5,6] Children with elevated lead are more likely to have problems with attention deficit and reading disabilities, and to fail to graduate from high school. Other effects include abnormal balance, poor eye-hand coordination, longer reaction times, and sleep disturbances.[7,8,9]

With all of this information in mind, it is critically important to note that lead bioaccumulates. A percentage of lead will be excreted by the body, and the rate of clearance is dependent on a number of factors, including nutritional status. But a percentage of lead is also stored in the body, primarily in bone. These body stores persist over decades. When a woman becomes pregnant, her body draws upon its calcium stores to help create her fetus's bone structure. If lead has been stored in the bone, the developing fetus will be exposed to doses of lead throughout pregnancy.[10]

The costs associated with lead exposure are tremendous. Health economists estimate that every time average blood lead level increases by a small amount* across the children born in any given year, $7.5 billion is lost in potential earnings for those children.[11] Other studies have estimated the annual cost of lead poisoning in American children at $43.4 billion.[12] Costs are borne by our health care, education, and justice systems, among others.

Lead is naturally present in our environment at low levels. Human activities have raised those levels through contamination, whether by adding lead actively to products like paint or gasoline or producing it as a byproduct of activities like burning coal. Lead is present at low levels in our air, soil, and water, but often very difficult to remediate in those cases. It is therefore critical to restrict lead exposure in environments directly under our control, such as consumer products.

* "Small amount" is defined here as 1 mcg/dL increase in blood lead level.

Dana Best, MD, MPH, FAAP
American Academy of Pediatrics
April 7, 2011

The CPSIA's Limits on Lead Should Not Be Relaxed

During the development of the CPSIA, the AAP was asked by Congress to recommend a limit for levels of lead in children's products. The Academy engaged in a rigorous scientific process, including a review of the pertinent literature, and ultimately recommended that lead in children's products be limited to 40 parts per million (ppm). You will find attached to my testimony a letter to then-Energy and Commerce Committee Chairman Henry Waxman explaining the AAP's calculations in detail with appropriate references.

Briefly, the AAP's experts determined that the appropriate goal of a standard should be to prevent a child from losing one IQ point. For close to two decades, the U.S. Food and Drug Administration (FDA) has recommended a daily intake of no more than 6 micrograms (mcg) of lead per day for children age 6 years and younger.[13] Scientific models of lead ingestion indicate that daily consumption of 6 mcg of lead would increase a child's blood lead level by 1 mcg/dL. The medical and scientific literature are in substantial agreement that an increase of 1 mcg/dL in blood lead level is capable of causing the loss of approximately one IQ point in children whose blood lead level is under 10 mcg/dL.[14,15] It is important to note, however, that the FDA's recommendation refers only to dietary intake and does not take into account other potential exposures to lead, such as paint. FDA officials explicitly stated, "These numbers will need to be adjusted downward to allow for other anticipated exposures to lead."[16]

The Consumer Product Safety Commission's 2005 interim guidance on lead in children's jewelry states that an item with more than 600ppm of lead would be capable of raising a child's blood lead level from 2.2 to over 10 mcg/dL.[17] Given that the AAP's goal was to prevent an increase of 1 mcg/dL, the total of 600ppm was divided by 7.8 to reach 77ppm. Recognizing that most children are exposed to other sources of lead and that lead is bioaccumulative, the AAP recommended roughly a two-fold margin of safety and reduced the recommendation from 77 to 40ppm. The level of 40 ppm was also selected to fall above the naturally-occurring background levels of lead seen in most parts of the United States.[18]

It is the considered judgment of the AAP that there is no scientific basis for establishing a "de minimis" exposure level for lead in children's products. As one study summarized, "With the recent evidence demonstrating an inverse association between blood lead levels and cognitive function in children exposed to low levels of lead, there is no safety margin at existing exposures."[19] To date, science has not been able to identify a threshold below which lead ceases to damage a child's brain or body.

Risk Assessment Is Not an Appropriate Method for Limiting Lead Exposure in Children's Products

The discussion draft before the Subcommittee appears to contemplate shifting from measurement of total lead in children's products to a framework based around risk assessment. The AAP urges you to leave intact the straightforward, predictable total lead standard in the CPSIA rather

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April 7, 2011

than introducing the considerable uncertainty and unpredictability that is often associated with risk assessment.

The fundamental premise of risk assessment is that some degree of risk is acceptable. For example, in medicine, the expected benefit of a given drug or device is considered against the possibility of side effects. In the case of lead, however, the known benefit is zero, while the known risk is significant. If the CPSIA's standard is to be altered, Congress would first need to determine what level of IQ loss is considered acceptable across the exposed population.

In addition, risk assessment should – but often fails to – take into account factors related to both the object and the subject, in this case the product and the child. It has been suggested that product-related risk assessment might consider the amount of lead in the product, its physical accessibility, and the size of the item involved. Factors related to the child should also be considered, such as the age and developmental stage of the child who may be reasonably expected to encounter the product. It is also critically important to note, however, that key groups of children will have additional vulnerabilities that risk assessment fails to take into account adequately. Children with poor nutritional status or certain genetic traits will absorb higher levels of lead. Children who already have an elevated blood lead level may lose IQ points more readily than those with no detectable blood lead level. Standards should protect not only the "average" child, but also those children at higher risk for the adverse consequences of lead exposure. This is best accomplished with the lead limits currently in the CPSIA.

The AAP is deeply concerned that a risk assessment framework would require the CPSC to shoulder an untenable burden in attempting to perform or confirm risk assessment on various products. It is unclear who would bear the ultimate responsibility for determining risk, or what the process would be for reconciling differences in risk assessment between the agency and a manufacturer. For all of these reasons, the AAP urges you to reject calls for risk assessment related to individual products and the amount of lead that should be permitted in them.

The discussion draft proposes to distinguish between lead exposure from items that can be sucked on versus licked, or which can versus cannot be placed in a child's mouth. The AAP urges you to avoid setting different standards for lead in children's products based on any such distinction. From a scientific perspective, there is no basis for differentiating between a child licking versus sucking on an object. Children demonstrate a marvelous ability to bring to their mouths and keep there all manner of objects. The preferred term would be "mouthing" and would cover all related behaviors.

The AAP urges Congress to resist calls to set different standards for lead in children's products based solely on subjective assessments of the likelihood of mouthing or ingestion. Given the extreme toxicity of lead, its bioaccumulation, and the permanent, irreversible nature of the damage it causes, the concept of setting different levels of lead for various types of toys or other children's products is troubling.

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April 7, 2011

Third-Party Testing Is Necessary to Ensure the Safety of Children's Products

In 2007, the nation experienced a rash of product recalls that opened our eyes to the previously-unrecognized prevalence of lead in children's products. Numerous companies, including several that made some of the best-known and most-loved brands and children's products, were found to have sold items posing a range of hazards, from high lead levels to toxic chemicals to small, powerful magnets that could perforate the intestines if more than one was swallowed.

The voluntary system of product safety had failed in a very public and visible way. In response, the CPSIA required that all children's products undergo independent testing for safety before appearing on store shelves. Third-party testing was the solution designed to give parents the peace of mind that their children were not serving as test subjects for potentially unsafe products. It was also a necessary step to ensure that children's products imported from other countries compiled with U.S. safety standards.

The discussion draft proposes to make significant changes to the third-party testing requirements in the CPSIA, dramatically reducing the number and types of products subject to independent testing. This proposal would essentially return us to the pre-CPSIA state of affairs, where consumers were expected to make their best guess as to whether the toys and children's products they purchased were actually safe. Some have noted that recalls have dropped in recent years – a welcome trend, and one which the AAP applauds. Compliance with these still-voluntary standards is not, however, a justification for repealing those rules. The AAP urges the Subcommittee not to rescind requirements for third-party safety testing for children's products.

Non-Compliant Cribs Should Not Be Permitted in Child Care Facilities

The discussion draft proposes to permit child care facilities to continue using fixed-side cribs that do not comply with the recently-approved CPSC crib safety rule. Passed unanimously by the five bipartisan CPSC commissioners, this rule bans drop-side cribs and made several other important changes to the crib safety standard. The AAP is sensitive to the challenges this rule poses for child care providers who must replace noncompliant cribs and urged CPSC to provide a substantial phase-in period for crib replacement, which the agency did. We urge Congress not to alter this important rule and its implementation.

In conclusion, the AAP has profound concerns that many of the concepts in the discussion draft before the Subcommittee would roll back important child health safety protections. The CPSIA was passed in response to significant deficiencies in our nation's product safety system, which had allowed for the widespread sale and distribution of products dangerous to children's health. We urge you not to weaken the CPSIA's protections against lead and other hazards as you consider ways to improve the ability of manufacturers and businesses to comply with this important law.

Dana Best, MD, MPH, FAAP
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April 7, 2011

The American Academy of Pediatrics appreciates this opportunity to offer comments on the discussion draft before the Subcommittee to amend the Consumer Product Safety Improvement Act of 2008. We look forward to working with you to protect the health, safety and wellbeing of all our nation's children.

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January 21, 2009

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
2125 Rayburn Office Building
Washington, DC 20515

Dear Chairman Waxman:

The American Academy of Pediatrics, a non-profit professional organization of 60,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults, appreciates this opportunity to respond to your inquiry for more details on the development of our recommendations for limiting lead content in children's products.

Lead and Children's Health

There is no "safe" level of lead exposure. The vulnerability of children to lead poisoning during development of their brains and nervous systems has been amply demonstrated, and the literature is very consistent. On average, children whose blood lead levels (BLLs) rise from 10 to 20 micrograms per deciliter (mcg/dL) lose two to three IQ points. More recent studies have shown an even greater impact on IQ of BLLs under 10 mcg/dL. Key studies reported a loss of 4 to 7 IQ points in children whose lead levels rose from 1 mcg/dL to 10 mcg/dL.[1,2] These studies suggest that "low" levels of exposure – meaning BLLs less than 10 mcg/dL – cause proportionately greater harm than higher levels. The effects of lead on health do not stop once the child's brain and nervous system mature or the BLL falls. A recent study found that in a group of 7 year old children who had experienced a BLL of 20-44 mcg/dL around age 2 years, the concurrent BLL (i.e., BLL taken at age 7 years when the IQ test was administered), was more closely associated with IQ at age 7 years that BLL at age 2 or age 5 years.[3]

Another important lasting effect of lead exposure is on behavior, with higher rates of behavioral problems reported in teens and adults exposed to lead during childhood. Children with elevated lead are more likely to have problems with inattention and reading, and are at higher risk of failing to graduate from high school.[4] Investigators have identified associations between lead exposure and increased aggression, commission of crime and antisocial or delinquent behaviors.[5,6,7,8] Studies have suggested that several nations which began reducing lead exposure aggressively in the 1970s experienced corresponding decreases in crime rates two to three decades later.[9] Other effects include abnormal balance, poor eye-hand coordination, longer reaction times, and sleep disturbances.[10,11,12]

Lead is easily absorbed by ingestion or inhalation. The most common route of exposure of children is through ingestion, usually by putting hands and other objects in their mouths. Both hand-to-mouth exploration and playing on floors are typical behaviors for children, especially younger children. Studies using videos to record oral behaviors of young children report hand or object in mouth activities 20 or more times per hour.[13,14] If hands or objects placed in the mouth have lead, these usual childhood activities deliver doses of lead.

Once lead enters the body it remains there for years. Lead is similar to calcium from the elemental perspective. This means that our bodies "see" lead as calcium, absorb it into blood and then store it in bone. These stores of lead can be released years later, when bone changes occur or demands on calcium stores are made.[15] Another consequence of storing lead in bone is that exposures separated by months or years have an additive effect on the body's burden of lead and can exert effects over decades. Acquisition of lead in the body even in small amounts (i.e., amounts that result in BLLs less than 10 mcg/dL) contributes to this accumulation of lead. This means that even short term or small cumulative exposures can have lasting negative effects.

Over the past 30 years, average BLL has declined dramatically in the U.S., due largely to the elimination of lead from gasoline and mandated restriction of lead content in paint. At the same time, however, elevated BLL is still not uncommon. Eliminating elevated blood lead levels was established as a key goal under the federal Healthy People 2010 initiative.[16] The AAP believes firmly that our nation must continue efforts to reduce childhood lead exposure and its pernicious impacts. In the past three years alone, the AAP has pushed the Environmental Protection Agency to reduce airborne lead emissions under the National Ambient Air Quality Standards; urged the Food and Drug Administration to eliminate lead in imported candies and their wrappers; and continued our long-term engagement with the Department of Housing and Urban Development to reduce children's exposure to lead paint in older housing and through home renovation activities. We intend to sustain these efforts to ensure that children's potential for exposure to lead is reduced as much as possible and new avenues of exposure are not created.

Lead in Children's Products

As you know, prior to the passage of the Consumer Product Safety Improvement Act (CPSIA), our government had never set limits for acceptable lead content in children's products, with the exception of lead in surface paint. The restriction of lead content to 600 parts per million (ppm) dates back to 1978 and does not apply to any other material or component in toys or children's products. As a result, toys and children's products could have unlimited amounts of lead in areas other than surface paint without violating any mandatory standard. Further, the 600 ppm limit for paint does not represent a health-based standard.

Lead can find its way into toys and children's products as a naturally-occurring component of materials used or as a deliberate or incidental additive. Lead is used

directly in certain materials, such as to stabilize some vinyl compounds and in lead crystal. Lead may also be a contaminant in air, water or soil that comes into contact with materials or components during the manufacturing process. Regardless of its source, however, lead's toxic effect on the developing brain requires us to examine these processes and minimize exposure whenever possible. Because there is no "safe" blood lead level in children, the AAP focused attention on limiting lead to trace amounts that would not represent "added" lead to products.

Development of the AAP Lead Recommendation

In September 2007, the AAP was asked by the House Committee on Energy and Commerce to testify about the hazards of lead and to make specific recommendations for lead content that would be used in the development of product safety legislation. While the AAP had published guidelines on lead exposure prevention, detection and management in the past, we had never attempted nor been requested to provide specific targets for lead content in products. The recommendation delivered to Congress was an ancillary effort that builds upon but is not inconsistent with or contradictory to our previously published statements.

The AAP's recommendations were developed by our Committee on Environmental Health (COEH), which comprises 9 top pediatric environmental health experts serving in a volunteer capacity. While child health issues were their guiding principle, the COEH also went to great lengths to examine the associated practical issues involved to ensure that the final recommendations would be pragmatic and feasible. The primary considerations were: 1) no "safe" threshold for blood lead levels for children has been identified;[17] 2) lead negatively affects health and development at levels well below 10 micrograms per deciliter (mcg/dL) blood lead level;[18] and 3) lead is a naturally-occurring element and may therefore be present is a wide array of materials so "lead-free" status may not be achievable in some products. Therefore, children's exposures to lead in products should be severely limited, but some low level of exposure, a "trace" amount, could be expected.

The primary goal of the COEH in developing these recommendations was to establish a guideline based directly on child health issues, rather than the selection of an arbitrary number. After much discussion, the committee agreed that the appropriate benchmark for its recommendation should be the loss of 1 IQ point. Using California Office of Environmental Health Hazard Assessment analysis that evaluated the upper 97.5% confidence level of blood lead level associated with this effect, a 1 IQ point loss would be prevented by limiting a child's BLL increase to no more than 1 mcg/dL.[19] Supporting a rationale on 1 mcg/dL rise is the FDA upper limit for lead in food at 6 mcg/lead/day for children aged <6 years, which is expected to cause a child's BLL to rise by 1 mcg/dL.[20] There is no logical reason to accept a higher rise in blood lead level from product exposure than from food exposure.

The COEH's next task was to determine the amount of lead that would result in a child's BLL increasing by 1 mcg/dL from exposure to a child's product. This evaluation focused on information posted by CPSC evaluations.[21] The committee determined as follows:

- Based on the 1999-2000 National Health and Nutrition Examination Survey (NHANES), the average blood lead level of a child aged 1-5 years in the US in 1999-2000 was 2.2 mcg/dL.
- In developing its recommendation for lead in toy jewelry, the CPSC calculated that an extractable lead content of 175 mcg would cause an average child's BLL to rise to 10 mcg/dL over a 1 month exposure period. The agency determined that this level of exposure occurs at a level of 0.06% lead by weight (600 ppm, coincidentally, the same limit as the 1978 lead paint ban).[22]
- As noted above, however, the COEH had already determined that waiting for BLL to rise to 10 mcg/dL was not acceptable due to the neurological damage that would occur. In order to limit the BLL rise to 1 mcg/dL, the CPSC figures were divided by 7.8, which represents the rise in BLL from 2.2 mcg/dL to 10 mcg/dL, to obtain the figure that would correlate to a BLL increase of 1 mcg/dL. Accordingly, 600 ppm lead divided by 7.8 equals 77 ppm lead being capable of causing a BLL increase of 1 mcg/dL.

In its next step, the COEH took into account the fact that most children are exposed to lead from a variety of sources, which may include lead paint hazards in the home, airborne lead emissions, contaminated soil, and other consumer products. Since lead is bioaccumulative and highly persistent in the body, it is important to provide a margin of safety to ensure that exposure to a single toy or children's product cannot cause BLL to increase 1 mcg/dL.

In determining how to set this margin of safety, the COEH examined the practical issues associated with lead exposure. Lead occurs naturally in the environment, so setting lead content at zero was not deemed to be a feasible recommendation. The committee examined data from a variety of sources to learn about the natural geological occurrence of lead in the United States. The U.S. Geological Survey provides nationwide data on lead exposure, which illustrates that naturally occurring lead levels generally top out at 30 ppm.[23] The AAP confirmed this data with Geological Survey and independent geologists. Given this evidence, the COEH recommended a two-fold margin of safety for lead content in children's products, dropping the recommendation from 77 ppm to 40 ppm. You may note that this is considerably lower than the margin of safety mandated under other federal laws; for example, the tolerance for pesticide residue on food requires a ten-fold margin of safety (i.e., limit set at one tenth of the amount estimated to cause the negative effect) for vulnerable populations, including children.

Development of the CPSIA Standard and Exceptions Clause

Over the year that Congress spent working intensively on this legislation, the AAP engaged in a detailed dialogue with both House and Senate offices regarding the merit of various possible exemptions to the lead guidelines. In partnership with these offices, the

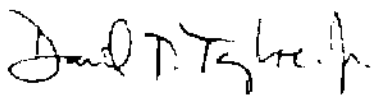
AAP collaborated on the development of legislative language that empowers the Consumer Product Safety Commission (CPSC) to accept and evaluate applications for such exemptions. This process will include possible exemption for inaccessible lead, although the definition of inaccessibility was the subject of much debate. For example, it was questioned whether lead would be considered inaccessible if it were covered by paint or electroplating, or included in a compound such as vinyl or lead crystal. In each of these cases, the COEH advised that lead was not inaccessible because barriers like paint and electroplating can be breached, vinyl deteriorates with time and use, and lead leaches from crystal in the presence of acid (including stomach fluids).

In the final legislation, the CPSC is specifically directed to examine the application of the lead standard to electronic products, including batteries, and to develop guidelines for minimizing children's exposure to lead that cannot be eliminated from these products. The AAP supported these proposals, which will allow for the transparent, science-based evaluation of proposals to permit lead in certain components of toys and children's products. The AAP anticipates offering our views and guidance to the CPSC as such applications are submitted and examined.

The AAP is acutely aware of the impact our recommendations can have, and we strive to ensure that all AAP recommendations are based on science and practical to implement. Led by the COEH, the AAP engaged in a thorough, evidence-driven review to develop our lead recommendations. Following that, AAP members and staff spent countless hours engaged with numerous Congressional offices to explore the issues associated with lead in children's products and to assist in crafting a final bill that would protect children's health through pragmatic, feasible standards. The AAP strongly supported this legislation and looks forward to working with the Consumer Product Safety Commission on its implementation in the coming years.

I hope this letter satisfies your request for information and gives you confidence that the AAP's recommendations represent an empirically-based solution grounded in science. If the Academy may be of further assistance, please contact Cindy Pellegrini in our Washington, D.C. Office at 202/347-8600.

Sincerely,



David T. Tayloe, Jr., MD FAAP
President

DTT:cp

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Mrs. BONO MACK. I thank the gentlelady and recognize Dr. Beck for 5 minutes. Can you make sure your microphone is on and close to your mouth, please?

Ms. BECK. Sorry.

Mrs. BONO MACK. Thank you.

STATEMENT OF BARBARA D. BECK

Ms. BECK. My name is Barbara Beck. I am a toxicologist risk assessor at Gradient, an environmental consulting company and I have worked on issues of lead exposure, toxicology, and risk for over 20 years, starting from my time at EPA Region 1 where I was involved in development of one of the first clean up levels for lead in soil that I am aware of. I have evaluated exposures, toxicology of lead in products, workplace, and in the environment.

In its present version, the CPSIA Act has established a concentration limit of 300 parts per million for lead, which will go in August to 100 parts per million unless it is not feasible. This is going to be problematic and is problematic at present, especially for metallic alloys that contain lead such as tire stem valves. My concern with the present approach is that it doesn't consider the actual exposure, the intake, the absorption, and the impact of lead releases from such products on blood lead levels. Blood lead levels are typically considered the appropriate metric for evaluating exposures to lead.

Risk-based approaches have been used to establish limits for lead for decades. It has been used to establish limits for lead in air, water, and soil. Such approaches have been beneficial. Blood lead levels of children in the U.S. have declined by over a factor of 10 over the past 20 years as lead has been removed or reduced from air, from food, and from paint.

The proposed changes represent a step in the right direction. Determination of a de minimis level of lead exposure is consistent with what has been conducted with other types of materials such as soil, air, and water, and it also proposes the use of a methodology to identify how much lead is released, what the actual exposure would be from a children's product. This approach is not only consistent with regulatory policy in other settings, but with fundamental principles of toxicology. The dose is what matters. The dose of a chemical—whatever the chemical is, how hazardous it is—is really critical in determining whether there would be a risk or no risk.

I am not here to propose a specific model or a specific de minimis limit, but I do note that the approaches should consider the age of the child: mouthing behavior peaks at age 2 to 3, absorption of lead from the gut peaks around that age, and choosing a value of, say, 7 years old would be protective of younger children. The method that is considered should consider how a child actually interacts with the product and risk-based methods are available to evaluate mouthing behavior, contact by hand with products, hand-to-mouth, as well as the potential swallowing of a product and the impact that contact on blood lead. That can be modeled.

My comments that are provided to the committee provide a hypothetical example of how such an analysis could be conducted. It is not meant to propose specific de minimis values or the specifics of

an approach but to demonstrate that there are methods. In my particular example, I demonstrate how a release of 1 microgram of lead from a product per day every day for a 2- to 3-year-old child would not have a discernible impact on blood lead. Some people may consider that de minimis.

In conclusion, I strongly encourage the committee to consider the use of such risk-based approaches in proposing amendments to the CPSIA. Such approaches will allow for health-protective risk-based limits that would be sound public health policy, as well as sound risk management policy. Thank you.

[The prepared statement of Ms. Beck follows:]

Testimony of Barbara D. Beck, Ph.D., DABT

Regarding "Discussion Draft of H.R.___, a Bill that would Revise the Consumer Product Safety Improvement Act"

Prepared for the
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2125 Rayburn HOB/316 Ford HOB
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Executive Summary

The lead limits stipulated by the Consumer Product Safety Improvement Act (CPSIA) of 2008 have forced many manufacturers to stop selling certain products, because the products contain components exceeding the current 300 ppm total lead standard of the Act. The difficulty with this approach to regulating lead in products is that it does not consider the *actual* exposure of children to lead. This is because the presence of lead in a product, as reflected by the concentration of lead, does not necessarily mean that there will be a significant exposure to lead. If the exposure to lead is very small, there will not be any health effects. Unfortunately, the present version of the CPSIA does not support consideration of exposure. Risk-based analyses that take into consideration age of child, exposure frequency and duration, exposure route, and dose represent a scientifically supportable approach to determine exclusions from the lead standard. In 2009, I recommended at a Congressional Briefing that that such risk-based analysis be allowed under the auspices of the Act. The "Discussion Draft H.R. ." dated March 29, 2011, proposed by the Subcommittee on Commerce, Manufacturing, and Trade to amend the Act, suggests just such an approach. Although details need to be worked out with respect to the testing method and specific criteria (*e.g.*, allowable lead exposure limits), conceptually the proposal, by focusing on *actual* exposure of young children to lead from a product, rather than concentration of lead in the product, represents an improvement over the present version of the CPSIA, while remaining health protective.

1 Introduction

Good morning and thank you for this opportunity to testify regarding the CPSIA and the need for a risk-based approach for lead in children's products. I am Barbara D. Beck, Ph.D., diplomate of the American Board of Toxicology (DABT), and fellow of the Academy of Toxicological Sciences. For 24 years I have been a toxicologist and Principal with Gradient, a firm specializing in human health exposure and risk assessment, and located in Cambridge, Massachusetts. Prior to Gradient, I held positions at the Harvard School of Public Health, US EPA Region I, and Tufts University School of Medicine. I am past president of the Academy of Toxicologists, and have been a DABT for 20 years.

Over my 30+ year career in toxicology and public health, I have worked extensively on projects involving lead. More than 20 years ago, while at US EPA Region I, I developed the first target action level for lead in soil. During my tenure at Gradient, I have worked for the private and the public sector on many projects involving lead exposure, toxicology and risk. These projects have included refinery and mining sites, children's toys, consumer products, and automotive vehicles. I was also significantly involved in providing regulatory comment for the lead National Air Quality Standard (NAAQS). On April 1, 2009, I testified at the CPSIA Rally and Congressional Briefing regarding lead and the CPSIA.

I would also like to emphasize that I am presenting my testimony this morning on my own behalf as an independent scientist. I am not being compensated for my travel expenses or any of the time I have spent preparing for today's testimony. In addition, I am not representing myself under any Federal contract or grant.

2 Consumer Product Safety Improvement Act (CPSIA) of 2008

The Consumer Product Safety Improvement Act (CPSIA) of 2008 stipulates that, as of August 14, 2009, children's products that contain more than 300 ppm (mg/kg) lead may no longer be sold in the United States (US Congress, 2008). The limit will be reduced to 100 ppm on August 14, 2011, unless the Commission determines that this lower limit is not technically feasible. Based on the current language, while manufacturers may petition for exclusion from these standards, exclusions are allowed only if the manufacturers can demonstrate that no lead can be absorbed by children.

The scientific community understands that, based on multiple lead-related recalls occurring in 2007, Congress was motivated to write the Act to be protective of our children's health, and, in the case of lead, to eliminate lead risk to children. However, there have been untoward consequences of the Act, as some manufacturers and businesses have suspended sales of their existing inventory. The act has been particularly burdensome for manufacturers of steel, copper, and aluminum alloys, as components made from these materials typically contain fairly high concentrations lead. The end result is that certain individual components in the products exceed the current lead standard – even though exposure to lead in those components is, because of the nature of the way children come into such components, unlikely, and would not result in health effects. Thus, the Subcommittee on Commerce, Manufacturing, and Trade has responded with a proposed bill that would amend the CPSIA to allow for a risk-based approach, that is protective of public health, and to relieve the burden to manufacturers.

As I explained during my testimony at the Congressional Briefing in 2009, a risk-based approach focuses on *actual* exposure and the health significance of that exposure. Such an approach can be extremely effective in protecting a child's health. Consider, for example, how average blood lead levels in children have been reduced by nearly 10-fold, from 15 µg/dL in 1976 to 1.5 µg/dL in 2007-2008 (CDC,

2011), an important public health success story. This was accomplished by focusing on *important* sources of lead exposure (*i.e.*, sources that had a significant impact on blood lead levels), specifically lead in air (from leaded gasoline), in food (primarily from lead solder in cans), and in paint, to the general population of children. Indeed, risk-based approaches are widely used and considered appropriate in other sectors, for example, in human health risk assessment for lead in soil performed for Superfund sites (US EPA, 1997).

3 Lead Standards and Permissible Intake

Regulatory agencies develop standards to prevent harmful health effects. In general, the agencies purposely over-estimate exposures to and the toxicity of chemicals in order to be certain that human health is protected. This means that standards have a margin of safety (*i.e.*, the permissible dose of a chemical is well below the dose that causes harmful health effects). This provides confidence that regulatory limits will be sufficiently protective for all individuals, even those who might especially sensitive to the chemicals of interest. In the case of lead, children are typically considered to be more susceptible than adults.

A permissible level of lead in a toy or another children's product must be based on an understanding of how lead is released from a toy, the amount of lead potentially ingested by a child, and the quantitative impact of that ingested lead on blood lead. Lead that cannot be released from a toy or other product because the lead is in an inaccessible location or bound in a matrix would not constitute a risk potential because the lead would not be ingested by the child. Thus, to be meaningful, a standard should be linked to the amount of lead released from the toy. A standard based on soluble lead [*e.g.*, the 90 ppm standard specified for soluble lead in ASTM F963-07e1 (ASTM, 2007)] would, in general, be

preferable to a standard based on total lead (unless a robust relationship between total lead and soluble lead has been determined).

Thus, a standard could be developed by setting a target blood lead increment and then calculating the amount of lead released from a toy or other product that would result in an impact at or below the target blood lead increment. Conceptually, health-based limits for lead in other media, such as air, water, or soil, have been developed in this manner, using exposure parameters specific to that medium (see, for example, CPSC, 1977; US EPA, 2001, 2002).

4 Proposed Change to the CPSIA: *De Minimis* Exemption

The new bill proposed by the Subcommittee on Manufacturing, Trade, and Commerce proposes a *de minimis* exemption for lead released from children's products, specifically stating that:

> The limits established under subsection (a) shall not apply to any component part of a children's product if, under reasonably foreseeable conditions of use and abuse, it is unlikely that a child who is exposed to the product would ingest more than a *de minimis* amount of lead. (Subcommittee on Manufacturing, Trade, and Commerce, 2011)

In terms of implementation, the proposed amendments state:

> The Commission shall, by regulation, establish a methodology for estimating the amount of lead a child would likely ingest from exposure to a component part. Such methodology shall distinguish, at a minimum, between parts that can be placed in the mouth and parts that cannot be placed in the mouth. (Subcommittee on Manufacturing, Trade, and Commerce, 2011)

Moreover, until such methodology is defined by the US Consumer Product Safety Commission (CPSC):

> [A] manufacturer may use any reasonable methodology to estimate the amount of lead a child would ingest from exposure to a component part. (Subcommittee on Manufacturing, Trade, and Commerce, 2011)

Although details on implementation (*e.g.*, testing method and definition of the *de minimis* lead exposure limit) need to be worked out, the proposal focuses on *actual* exposure of young children to lead from a product, and considers the impact of that exposure in terms of health. This is an important improvement over the present version of the CPSIA.

The following sections provide scientific support for the use of a risk-based approach, including a hypothetical example that describes an approach to assist in the definition of a *de minimis* level. The sections also contain information on application of such a risk-based approach to children's products, including a discussion of possible extraction methods for product testing and the use of blood lead modeling.

5 Consideration of Exposure: Risk-Based Approach

The mere presence of lead in a children's product or component does not mean that there is an exposure hazard to a child. Moreover, a component with a high concentration of lead does not necessarily mean that a child will subsequently be exposed to a high concentration of lead. Several exposure factors, described below, must be considered to determine whether the lead in a particular product constitutes a health risk to a child contacting that product.

5.1 Dose Response

The most fundamental concept in toxicology is the dose-response relationship, commonly summarized as "the dose makes the poison" (Eaton and Gilbert, 2008). All substances show a dose-response relationship. For example, small amounts of salt may be consumed without adverse effects, but ingestion of much larger quantities can result in adverse effects, such as elevated blood pressure (Braunwald *et al.*, 2001, p. 1415). As another example, at the recommended dose of two tablets,

aspirin yields pain relief from headaches or other minor aches, and even lower doses can be used to prevent and manage cardiovascular disease. However, taking more than the recommended dose can lead to increasing levels of toxicity, including death (Roberts and Morrow, 2001). Similarly, lead exhibits a dose-response relationship, with the likelihood and nature of effects being greater with increasing dose, typically expressed as blood lead levels.

5.2 Exposure Duration and Frequency

The dose of a chemical is affected by a number of factors. For example, how long and how often someone comes into contact with a chemical will affect the dose. In the case of a children's consumer product, it is important to know whether the child comes into contact with the product every day, or only occasionally. It is also important to know how many hours or minutes of each day a child contacts the product. For example, daily or infrequent contact with the product may be possible. With less time of contact, exposure will generally be less. One-time acute exposure (*i.e.*, accidential ingestion) is also possible; appropriate science-based assessments are available to account for such potential acute exposure, if that is a plausible exposure scenario.

5.3 Exposure Route

The manner in which a person comes into contact with the chemical (for example, through the skin *versus* taking the chemical in through the mouth) is also important. The chemical also must be accessible to the child in order for an exposure to occur. While some chemicals can be taken in through the skin, others are not taken in through the skin very well, if at all. In the case of children's products, a young child might possibly chip or bite paint off a painted product, or, if the paint is loose, take paint off by sucking on the children's product. If the paint contains lead, these activities could result in some lead taken into the body through the mouth; this is termed "ingestion." Because lead is not taken up through

the skin, just handling the children's product will not result in a dose of lead. Another possible exposure scenario is surface-to-hand transfer and subsequent transfer from hand to mouth. Considerations for this scenario include the surface area of the hand/fingers touching a component, the transfer of lead to the hand/fingers, the frequency and duration of the contact, the transfer of lead from hand/fingers to mouth, and subsequent intake of the lead into the body. Methods are available to quantify the transfer of metals, such as lead, from components to hands *via* use of wipe tests (see, for example, Dubé *et al.*, 2004).

5.4 Lead Intake *versus* Uptake

Intake is generally expressed as the amount of a chemical at the skin, lungs, gastro-intestinal tract that is available for absorption. Intake, while necessary to yield a "dose," is not equivalent to absorbed dose (uptake), the amount of a chemical absorbed into the blood stream. Lead intake (particularly from children's products) is primarily through ingestion (*e.g.*, through direct mouthing of a children's product or through hand-to-mouth contact).

How much lead a child actually absorbs, after lead is ingested, is an important consideration in a risk-based approach. Bioavailability (*i.e.*, the fraction of ingested lead that is solubilized in the gastro-intestinal tract) determines the amount of lead that can be absorbed into the body (uptake). Bioavailability should be considered when evaluating exposure using a risk-based approach. The bioavailability of lead in the digestive tract depends on the physical (*i.e.*, particle size) and chemical form of lead, and can vary by more than 10-fold. This is clearly an important determinant of the amount of lead uptake into the body.

5.5 Blood Lead Modeling

In order to evaluate the impact of lead exposure to the body, the amount of lead absorbed must be converted to a blood lead value. Models such as the *Integrated Exposure Uptake Biokinetic (IEUBK) Model for Lead in Children* (US EPA, 1994), or the O'Flaherty model (1997) are widely accepted risk-based approaches that have been used in a number of circumstances to quantify the impact of lead uptake on blood lead. These models can be and have been applied in risk-based approaches to evaluate the impact on blood lead of different types of exposures of lead, from soil, air and products.

5.6 Consideration of Age of Child

The Act considers products manufactured for children up to age 12. However, it is important to note that there is a significant difference between a 2- to 3-year-old toddler and a 12-year-old, and how they will interact with a children's product. The 2- to 3-year-old will have much more frequent hand-to-mouth contact than the 12-year-old and will contact products in a different manner than a 12-year-old (US EPA, 2006; RIVM, 2008). The 2- to 3-year-old absorbs more ingested lead and is more susceptible to the developmental effects of lead than older children (US EPA, 2006; O'Flaherty, 1998). Recognition of the important behavioral and physiological differences between the young child and older children would represent a significant improvement in the CPSIA. Although the proposed amendment does not specify the age group under consideration, it appears to be reducing the target group to younger children (*versus* as old as 12 years).

6 Appropriate Extraction Methods

The new amendment is written in such a way that approaches beyond the testing procedures defined in ASTM Method F963-7e1 (ASTM, 2007) toy safety standard might be considered appropriate

for evaluating lead exposure. The use of extraction methods is one accepted approach to evaluating exposure of lead and other constituents from products. Some of the methods evaluate chemicals leaching in acidic solutions that mimic gastric fluid [*i.e.*, the solubility extraction procedures in ASTM Method F963-7e1 (ASTM, 2007)]. As another example, CPSC recently released an updated 24-hour acid extraction test procedure to address acute exposure and mimic accidental ingestion of metal jewelry; the method was designed to evaluate cadmium leaching from swallowable small parts (CPSC, 2011). These methods, while appropriate for the scenario where a small part is likely to be swallowed whole, would potentially overestimate exposure in certain cases, such as mouthing or sucking scenarios. However, protocols have also been developed and used to assess chemical leaching in saliva. For example, CPSC developed a method to assess migration of diisononyl phthalate (DINP) from polyvinyl chloride (PVC) children's products (CPSC, 1998), a method that has also been adapted by CPSC to assess lead leaching from objects due to contact with saliva. This method involves shaking the sample for 6 hours in a simulated saliva solution at a neutral pH of approximately 7.2 and at a temperature of 37°C. A similar method was adapted and used by Duke University to evaluate lead leaching from brass ball point pen tips (Baker, 2009). CPSC has used a saline extraction method to evaluate cadmium leaching from metal jewelry during a mouthing scenario (CPSC, 2010). Depending on the nature of the product and how young children interact with that product, a saline extraction method would be more appropriate than an acid extraction method in a number of cases.

7 Use of Blood Lead Modeling in Developing Permissible Lead Limits

Blood-lead modeling is an important tool used to calculate the impact of exposure on blood lead. It has been used to set permissible limits for lead in other media, such as air, water, and soil (for example, US EPA, 2008, 1988, 1998, respectively). Various blood lead targets may be considered for determination of the *de minimis* amount of lead extracted from a product. For example, in developing the

National Ambient Air Quality Standard for Lead. US EPA used a 1-2 µg/dL increment in blood lead as the target to establish a permissible air lead limit (US EPA, 2008). In the case of lead in soil, US EPA (1998) focuses on a modeled distribution of blood lead for a hypothetical child. Another consideration is whether the modeled impact of the extractable lead could have a detectable incremental impact on blood lead.[1]

While the proposed amendment does not define a *de minimis* daily intake of lead, I provide here a hypothetical example using a value of 1 µg/day intake of lead, every day for a 2- to 3-year-old. Using blood modeling, specifically US EPA's IEUBK model, this amount of ingested lead would result in a mean blood lead change of 3.0 µg/dL to 3.1 µg/dL. As presented graphically below, such an increment would be negligible.[2]

Specifically, Figure 1 compares the blood lead impact based on a 1 µg/day intake of lead. In this example, I assumed that a 2- to 3-year-old child would take in this amount of lead in a soluble form, every day for two years.[3] Alternate assumptions may, depending upon the product and the plausible ways in which a child might interact with that product, also be appropriate. In this calculation, it can be seen that the contribution of lead from 1 µg is indiscernible as the blood level remains the same.

[1] It should be emphasized that my description of these approaches is meant to be illustrative. I am not proposing a specific increment to blood lead as a target under the CPSIA, but rather describe approaches whereby a permissible limit may be developed.

[2] An impact of approximately 2 µg/dL or less of a lead release would not be reliably and routinely detectable in an individual child. For example, in a study by Chandramouli *et al.* (2009), the majority of quality control results were within a range of +/- 2 µg/dL. These findings are generally consistent with recommendations from the US Centers for Disease Control that, for investigative actions, laboratories set their internal quality control limits to +/-2 µg/dL or ±10%, whichever is greater (Parsons and Chisolm, 1997).

[3] I do not provide these exposure assumptions as ones that ought to be used under amendments to the CPSIA, but to illustrate a process.

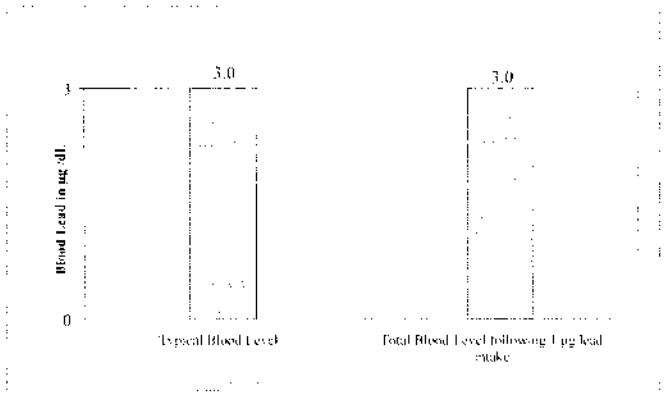

Figure 1. Comparison of Blood Lead Levels in µg/dL Before and After a 1 µg Intake by a 2- to 3-Year-Old Child

8 Recommendation

In conclusion, in order to appropriately evaluate exposure to lead in children's products, I recommend use of a risk-based approach that incorporates methods such as saliva extraction and blood lead modeling. This approach would reasonably mimic exposure scenarios relevant for a young child, while also emphasizing prevention of significant increases to blood lead. While many details remain to be worked out, I urge Congress and CPSC to seriously consider the new bill proposed by the Subcommittee on Manufacturing, Trade, and Commerce, which would amend the CPSIA to allow a health-protective risk-based approach.

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Mrs. BONO MACK. Thank you, Dr. Beck. Mr. Howell, you are recognized for 5 minutes.

STATEMENT OF ROBERT JAY HOWELL

Mr. HOWELL. Good morning, Chairman Bono Mack, Ranking Member Butterfield, and members of the subcommittee. My name is Robert Howell. I am the assistant executive director for the Office of Hazard Identification and Reduction at the Consumer Product Safety Commission. I appreciate the opportunity to testify before you this morning regarding certain technical aspects of the discussion draft of legislation that would revise the Consumer Product Safety Improvement Act. The testimony that I will give this morning represents my personal views and has not been reviewed or approved by the Commission and may not necessarily reflect the views of the Commission.

In my role at CPSC, I oversee the technical work of the Agency within the Office of Hazard Reduction's directorates for Engineering Sciences, Epidemiology, Economic Analysis, Health Sciences, and Laboratory Sciences. My office is responsible for the collection and analysis of death and injury data associated with consumer products, the evaluation of consumer products for potential safety hazards and regulatory compliance, and the development of technical solutions to product safety concerns.

Prior to joining CPSC in 2006, I served as vice-president of manufacturing and operations for a multinational corporation with responsibility for the management of global manufacturing and logistics.

On January 15, 2010, the five members of the CPSC issued a report to Congress regarding possible improvements to the CPSIA. In suggesting those improvements, the commissioners noted that the recommendations were focused on maintaining the "safety and welfare of consumers while minimizing administrative burdens on the Agency or significant market disruptions caused by the implementations of specific provisions of the CPSIA."

Specifically, the Commission listed the following recommendations for improvement of the statute: that the Commission "needs additional flexibility within Section 101 to grant exclusions from the lead content limits in order to address certain products, including those singled out by the conferees;" that "Congress may, with some limitations, choose to consider granting an exclusion for ordinary children's books and other children's paper-based printed materials; the Commission believes that a prospective application of the 100 parts per million lead limits would be helpful for our continued implementation of the law;" and that the "Commission remains committed to working with Congress to explore other ways to address the concerns of low-volume manufacturers" with regard to the testing and certification requirements in Section 102 of the CPSIA.

From my perspective, the CPSIA has improved the health and safety of consumers, particularly children. In additional, industry has made substantial progress over the past 2½ years adapting to the requirements of the law. For example, the children's product industry has made progress in reducing the levels of lead since the enactment of CPSIA. In a recent Commission hearing on the tech-

nological feasibility of reducing the lead limits to 100 parts per million, a representative of SGS—a global inspection, verification, testing, and certification company—presented a statistical analysis of lead content testing data with close to 90,000 data points collected primarily from its Shenzhen laboratory that specializes in the testing of children's toys and other children's products.

In its analysis, SGS found that 96.3 percent of metal components tested at or below 100 parts per million. The analysis also determined that just over 97 percent of glass and ceramic components tested at or below 100 parts per million. Concerning plastic components, SGS found that 99.4 percent of those components tested at or below 100 parts per million. However, there are certain provisions of the CPSIA such as the current exceptions to the Section 101 lead limits that can be improved in such a way as to reduce the burden on the regulated community while maintaining an appropriate level of safety for America's consumers. I personally believe this balance is necessary to ensure efficient and effective implementation of the CPSIA from the perspective of both the regulated community and the regulators.

There are several approaches that could allow the CPSC to address the unintended consequences of certain regulatory requirements in the CPSIA. For example, the Commission has heard from a number of Members of Congress that they did not intend to cover all-terrain vehicles under the provisions of Section 101. Accordingly, Congress could permit the Commission to exempt certain products like ATVs from the lead limits. This will allow the CPSC to weigh the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV.

Assuming that the exceptions would be made on a notice-and-comment basis, the underlying analysis and support for any exceptions would be public, allowing for transparency and accountability for all stakeholders involved in the process.

Finally, allowing the Commission to regulate on a timetable influenced by the seriousness of the actual risk would allow for better priority-setting that will permit Commission resources to be put towards the most serious health risk.

Mrs. BONO MACK. If you could please sum up now.

Mr. HOWELL. Madam Chairman, thank you.

[The prepared statement of Mr. Howell follows:]

Statement of
Robert J. Howell
Assistant Executive Director
Office of Hazard Identification and Reduction
U.S. Consumer Product Safety Commission

Before the

House Energy and Commerce Committee

Subcommittee on Commerce, Manufacturing and Trade

Legislative Hearing: "Discussion Draft of H.R. ____, a bill that would revise the Consumer Product Safety Improvement Act."

April 7, 2011

Good morning, Chairman Bono Mack, Ranking Member Butterfield, and Members of the Subcommittee on Commerce, Manufacturing, and Trade. My name is Robert J. Howell, and I am the Assistant Executive Director for the Office of Hazard Identification and Reduction at the U.S. Consumer Product Safety Commission ("CPSC").

I appreciate the opportunity to testify before you this morning regarding certain technical aspects of the discussion draft of legislation that would revise the Consumer Product Safety Improvement Act (CPSIA). The testimony that I will give this morning represents my personal views.[1]

In my role at CPSC, I oversee the technical work of the agency within the Office of Hazard Reduction's directorates for Engineering Sciences, Epidemiology, Economic Analysis, Health Sciences and Laboratory Sciences. My office is responsible for the collection and analysis of death and injury data associated with consumer products, the evaluation of consumer products for potential safety hazards and regulatory compliance, and the development of technical solutions to product safety concerns.

In addition to these responsibilities, I served as Acting Director of CPSC's Office of Compliance and Field Operations from July 2010 through February 2011. Prior to joining CPSC in 2006, I served as Vice-President of Manufacturing and Operations for a multinational corporation, with responsibility for the management of global manufacturing and logistics.

I. Past Commission Statements on Possible CPSIA Changes

On January 15, 2010, the five members of the CPSC issued a Report to Congress regarding possible improvements to the CPSIA.[2] In suggesting those improvements, the Commissioners noted that the recommendations were focused on maintaining the "safety and welfare of consumers while minimizing administrative burdens on the agency, or significant market disruptions, caused by the implementations of specific provisions of the CPSIA."

Specifically, the Commission listed the following recommendations for improvement of the statute:

1) that the Commission "needs additional flexibility within [section 101(b)] to grant exclusions from the lead content limits in order to address certain products, including those singled out by the Conferees;"

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[1] The testimony has not been reviewed or approved by the Commission and may not necessarily reflect the views of the Commission.

[2] A copy of the January 15, 2010, "U.S. Consumer Product Safety Commission Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117," is available at: http://www.cpsc.gov/ABOUT/Cpsia/cpsiareport01152010.pdf.

2) that "Congress may, with some limitations, choose to consider granting an exclusion for ordinary children's books and other children's paper-based printed materials;"

3) "the Commission believes that a prospective application of the 100 ppm lead limits would be helpful for our continued implementation of the law;" and

4) that the "Commission remains committed to working with Congress to explore other ways to address the concerns of low volume manufacturers" with regard to the testing and certification requirements in section 102 of the CPSIA.

II. Staff Comments on the Discussion Draft

In general, the CPSIA has improved the health and safety of consumers, particularly children. In addition, industry has made substantial progress over the past two and a half years adapting to the requirements of the law.

For example, the children's product industry has made significant progress in reducing the levels of lead since enactment of the CPSIA. In a recent Commission hearing on the technological feasibility of reducing the lead limits to 100 ppm, a representative of SGS, a global inspection, verification, testing, and certification company, presented a statistical analysis of lead content testing data (89,273 data points) collected primarily from its Shenzhen laboratory that specializes in the testing of children's toys and other children's products.[3]

In its analysis, SGS found that 96.29 percent of metal components tested at or below 100 ppm lead. Of those components exceeding 100 ppm, 2.22 percent tested greater than 600 ppm lead, 0.8 percent tested between 300 ppm and 600 ppm for lead, and 0.69 percent tested between 100 ppm and 300 ppm for lead. The analysis also determined that 97.46 percent of glass and ceramic components tested at or below 100 ppm lead. Of those components exceeding 100 ppm, 1.39 percent tested greater than 600 ppm lead, 0.81 percent tested between 300 ppm and 600 ppm for lead, and 0.34 percent tested between 100 ppm and 300 ppm for lead. Concerning plastic components, SGS found that 99.4 percent of plastic components tested at or below 100 ppm lead. Of those components exceeding 100 ppm, 0.37 percent tested greater than 600 ppm lead, 0.17 percent tested between 300 ppm and 600 ppm for lead, and 0.06 percent tested between 100 ppm and 300 ppm for lead.

However, there are certain provisions of the CPSIA, such as the current exceptions to the section 101 lead limits, that can be improved in such a way as to reduce the burden on the regulated community while maintaining an appropriate level of safety for America's consumers. I personally believe this balance is necessary to ensure efficient and effective

[3] A copy of the presentations and written comments from the February 16, 2011, Public Hearing, including the SGS presentation, can be found at http://www.cpsc.gov/library/foia/foia11/pubcom/lead100pres.pdf.

implementation of the CPSIA from the perspective of both the regulated community and the regulators.

There are several approaches that could allow the CPSC to address the unintended consequences of certain regulatory requirements in the CPSIA. For example, the Commission has heard from a number of Members of Congress that they did not intend to cover all-terrain vehicles (ATVs) under the provisions in section 101. Accordingly, Congress could permit the Commission to exempt certain products, like ATVs, from the lead limits. This would allow the CPSC to weigh the risk of possible lead exposure to a child riding a youth-sized ATV against the risk to the child from riding a larger and more powerful adult ATV.

Assuming that the exceptions would be made on a notice and comment basis, the underlying analysis and support for any exceptions would be public, allowing for transparency and accountability for all stakeholders involved in the process. Finally, allowing the Commission to regulate on a timetable influenced by the seriousness of the actual risks will allow for better priority setting that will permit Commission resources to be put towards the most serious health risks.

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Madame Chairman, thank you again for the opportunity to testify regarding certain technical aspects of the discussion draft.

I would be happy to answer any questions at this time.

Mrs. BONO MACK. Thank you. Oh, perfect. Thank you. That worked out just well. I want to thank our panel of experts. And now the chair will recognize herself for the first 5 minutes of questioning.

And Mr. Howell, the first question to you. How does the CPSC staff go about deciding whether a substance or a product poses a risk to children? And briefly, what factors are important?

Mr. HOWELL. As CPSC staff evaluates potential risk to children, it involves several different teams within CPSC. We have a human factors team that will actually age-grade the product and determine what particular product characteristics are important in age-grading to ensure that the product is targeted to the correct group of children. If, for example, we are evaluating that product with regards to lead, for example, a complete risk assessment would be conducted taking into account not only the intended consumer but any other children that may be attracted to that particular toy based on characteristics of the toy.

Mrs. BONO MACK. Thank you. Does the Commission have information on the cost of third-party testing? For example, do you know how much it would cost to have a bicycle tested by a third-party lahoratory to all the applicable standards?

Mr. HOWELL. We have heard from the bicycle industry that the cost to test a $50 bicycle for all the applicable standards would run somewhere in excess of $10,000.

Mrs. BONO MACK. Wow. Thank you. And the focus of a lot of our attention, especially on this side of the aisle and again, Mr. Howell, is the database. I actually think the database is helpful and useful, but I think it has problems and we should talk about it a great deal. My thinking is that it is 100 percent negative derogator and that if the manufacturer can respond that they are seen as defensive. There must be a way—if you buy anything anywhere on the internet now, Amazon, I mean even Zappos.com, you know, there are comments on both sides. People can give the good and the bad of a product. Yet this database is 100 percent negative. Can it not be refined so that there is a more accurate depiction of a product?

For example, if I complain about something potentially hurting my child but this is one example out of 10,000—but nobody else would have any way of knowing that—can't the database be refined to be a more accurate depiction about a product in society?

Mr. HOWELL. Chairman Bono Mack, I am quite certain that either Congress or the Commission could—within CPSIA as written—make modifications. But that is certainly more of a policy matter and is beyond my responsibilities at CPSC.

Mrs. BONO MACK. Well, thank you. I think I made my thoughts pretty clear there in my questions. So also, to you Dr. Best, you state from a scientific perspective that there is no basis for differentiating between a child licking versus sucking on an object. In CPSIA however, Congress drew that very distinction for purposes of phthalate limits. Do you see a reason why this is changed? And I always do that on that word. Do you see a reason why this distinction makes sense for phthalates but not for lead?

Ms. BEST. We didn't actually work on the phthalates issue, and so I can do some research and perhaps offer you a response. But again, I am an expert on lead, not on phthalates.

Mrs. BONO MACK. All right. Thank you. And you mentioned also that older children sometimes put ballpoint pens or jewelry in their mouths. You also mentioned that toys may be shared among multiple children in the same household. But aren't there many other items which older children do not mouth and to which younger children rarely, if ever, have access?

Ms. BEST. Of course. But we are talking about the harms to children from lead-containing objects. And so, you know, our focus is on those lead-containing objects that may be dangerous to younger children.

Mrs. BONO MACK. But common sense would say, as a parent—my kids are now 23 and 20 and my step-kids are 8 and 11—common sense would say to a parent their children don't only come in contact with children's products whether it is a 2-year-old toy, a 10-year-old toy or an adult, say, electronic component of some sort. Is that not a problem as well? Is it common sense that we are trying to say that a—from what I understand—a Hannah Montana DVD is under one category and a Miley Cyrus DVD is on another category and then a DVD player is entirely exempt? So parents ask themselves these questions all the time. It is one of these things, what are they thinking in Washington? Because it makes no sense at all. As a pediatrician, how do you address that?

Ms. BEST. I am having trouble understanding the question. So yes, there are products in the house that are not intended for children that do not come under the CPSC's purview in this context. And while there are other safety groups that may work with those products, we are focusing on the safety of children's toys here and products intended for children. And that is our focus.

Mrs. BONO MACK. We are out of time. Just to make a little more clear that it is common sense, sometimes, that you can't protect from everything here. And that is the question. Is the Commission focused on its highest priorities? So I am sorry, but I need to yield now to Mr. Butterfield for his 5 minutes of questioning.

Mr. BUTTERFIELD. Thank you, Chairman. Prior to the enactment of this legislation, the Consumer Product Safety Commission assessed the risk posed by children's products containing lead by estimating the amount of lead intake from the product and the subsequent effects of exposure on blood lead level. For the most part, this was what I call an after-the-fact assessment. That is the Commission mostly looked at products for exposure to and risks from lead after products had entered the marketplace and been put into the hands of children. The discussion draft seems to create a de minimis exception that makes the total lead content limits in CPSIA more meaningless. Basically, any component part that cannot be swallowed can contain any amount of lead so long as a child isn't expected to ingest more than some amount to be determined amount of lead. So rather than determining the total amount of lead contained in a product, the discussion draft would call on manufacturers to estimate the amount likely to be ingested and takes it as a given that it is oK for kids to take in some amount of lead from their toys.

Ms. Best, the de minimis exception in the discussion draft is essentially a return to the approach that the commission used prior to the legislation. As I read it, any component part of a toy or other

children's product such as a crib would be allowed to release a de minimis amount of lead, say 6 micrograms per day. Can you please explain what would happen if a child played with more than one toy in one day? Even a child who has one special toy plays with dozens of toys in a day. Could that child be exposed to 6 micrograms per day per toy? I do not read the de minimis standard as requiring the consideration of other exposures to lead in a given day. Can you help me with this?

Ms. BEST. Well, the Academy is very much against the de minimis standard for many of the points you raised. Lead exposure doesn't come just from one individual product. It comes from the environment. It can be found in our food, in our air, certainly on paints, certainly in the water in Washington, D.C., in the past. And so we are very concerned about the bioaccumulation of lead through all these different sources. Because lead doesn't immediately get passed out through your body, you can actually store it. Some of these stores persist for years, if not decades. And that is one of the things we are very much concerned about.

Mr. BUTTERFIELD. Thank you. Many of us agree that there are specific products that can't meet the lead content limits and can't be made without lead—we acknowledge that—and that some form of relief should be provided for the narrow universe of products. We agree, some of us, that this relief should be as simple to understand and apply as possible while remaining protective of children's health and safety. So far as I can tell, the proposed de minimis exception in the draft fails on all of these counts. Implementing the de minimis exception will require taking into account very product-specific considerations, and on a good number of instances, it will require applying varying lead requirements for differing parts of the same product.

For example, say I manufacture a toy truck that contains plastic and metal, some large enough not to be swallowed and others that can be swallowed. For each plastic component, I would have to ask is this small enough to be swallowed? If the answer is no, then I would have to ask how do I expect a child to interact with this component? Is lead likely to be ingested from the interaction? How much lead can I expect to be ingested from the interaction? What age is the child doing the interacting? For the metal components, the manufacturer would then have to ask, can I meet the alternative 600 parts per million total lead count standard in the draft? If the answer is no, the manufacturer would again have to run through the analysis as I described. Can it be swallowed? So forth and so on.

Mr. Howell, let me ask you this yes or no, sir, and I am going to be out of time momentarily. Would the Commission have to develop multiple methodologies given that children interact differently with different products?

Mr. HOWELL. Yes.

Mr. BUTTERFIELD. Would requiring the Commission to develop multiple methodologies to account for the different ways children can interact with different products and parts require substantial investment of the Commission's limited resources?

Mr. HOWELL. No.

Mr. BUTTERFIELD. In your experience, sir, do retailers and manufacturers prefer clear lines for compliance over estimating the likelihood that their product might behave in a certain way?

Mr. HOWELL. Many do.

Mr. BUTTERFIELD. Under current law, sir, enforcement is simply the product meets the standard or doesn't meet the standard. Under the draft that we have in front of us, the Commission's enforcement seems to be more complicated. For each product at the border where there might be a problem, the Commission will have to do complicated testing. Couldn't this slow down products and have them retain longer at some of our ports?

Mr. HOWELL. Yes.

Mr. BUTTERFIELD. All right. Thank you very much. My time is out.

Mrs. BONO MACK. All right. The chair recognizes the vice chair of the subcommittee, Ms. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Chairman, and thank you to our witnesses.

Mr. Howell, I would like to start with you if I may, please. As I mentioned in my opening statement, the database—as we hold our initial hearing on this issue, we are very much aware that the database is incomplete; it has problems. The chairman mentioned some of the problems that are there with how information is recorded. And I want to know two things from you if you would, please, sir. Number one, would we be better off to take that thing down until the problems are worked out? And number two, what needs to he done to correct the problems that are around the database? Very quickly, please. I have got other questions.

Mr. HOWELL. Ms. Blackburn, because the problems that you cite are not clearly defined, I am going to respond to your question clearly in a very broad way. Certainly the decision whether to keep the database up or down becomes a policy decision. It is not one that my technical staff necessarily are the appropriate ones to make. The challenges of implementing anything that is new certainly will require the attention of staff in order to get it right. Many of the things that we see in the database, regardless of the nature of the reports of harm, would require resources to get a handle on the appropriate way to respond.

Mrs. BLACKBURN. OK. And I will help you with that definition. The prior hearing that we had we heard from the commissioners that if there is a complaint against, say, Graco cribs, then all Graco cribs are—you know, you don't define between that. So I would ask you to submit to us in writing with a little bit more detail what you think needs to be done. Because I think we need to take the thing down and bring it offline, work out the kinks, and then bring it back so that it is understandable to consumers so they know exactly what the product is and so there is a method for them to evaluate what actually is the problem and then if they do or do not want to purchase that product. At this point right now, people can just rail against a brand and not necessarily a specific product or a part. And there is that problem of definition within that use.

I want to come to Dr. Beck. Mr. Vitrano, who is going to testify on the next panel, submitted testimony. And thank you all for submitting your testimony in advance. And in there he talks about the

lead intake from children's interaction with ATVs is less than the intake from drinking a glass of water. And I would like to know in your opinion do you agree with that? Do you find that to be an accurate statement and a little bit of definition around that and see if—what I am looking at is if the metal parts on an ATV contain higher lead than are permitted by the EPA for drinking water standards, I am sure you can understand our confusion with that issue.

Ms. BECK. Yes. His statement is correct. It is based on analysis that we did in which we had wipe samples. Because the question is how does a child interact, say, with the valve stem? We had samples of wipes that rubbed the valve stem, and that was to mimic a child touching a valve stem when they fill their——

Mrs. BLACKBURN. OK. So Dr. Beck, it would be true that a child gets more lead content in drinking a glass of water than from playing with an ATV?

Ms. BECK. They would get more lead from what is commonly found in drinking water but is permissible under EPA than they would get from contacting their hands with the valve stem on an ATV or from touching the handles.

Mrs. BLACKBURN. OK, now, let me ask you this. Do you find this with other products? Have you found this same association in other products that you have tested, maybe with the wipe test?

Ms. BECK. We have also done wipe tests on scooters and we had similar results, that what came off in a wipe was relatively small, less than what a child might typically get from drinking water.

Mrs. BLACKBURN. OK. Thank you very much. I appreciate that. And I will go ahead and yield back.

Mrs. BONO MACK. I thank the gentlelady. The chair recognizes Ms. Schakowsky for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Madam Chairman. Mr. Howell, in your testimony you note that an independent testing lab, SGS, has found that almost 90 percent of toys tested by it recently comply with the 100 parts per million lead limit. While I realize this is data from only one entity, it seems to provide at least some evidence that the children's product marketplace has largely adapted already to the 100-parts-per-million limit. Would you say that is true?

Mr. HOWELL. Yes, I would. I would also add to that, though, that it may also indicate that we are rapidly approaching a point of diminishing returns in that the effort to achieve the final reduction in lead may be much more costly than the incremental cost of getting to where we are today.

Ms. SCHAKOWSKY. Certain members of industry have been very critical of fixed parts-per-million limits for lead in children's products and have advocated a move back—as we heard from Dr. Beck today—to risk-based standard. However, the American Society of Testing and Materials, ASTM's F–963 toy standard, which has been drafted through a consensus process and is now a mandatory rule under the CPSIA, contains fixed parts-per-million limits for certain toxic metals and surface coatings of toys like cadmium—is it antimony?—and barium and in those areas—well, so I am asking why not lead? If they could go to a PPM for other things, why not

lead? And let me pose the same question to Dr. Best. But Mr. Howell?

Mr. HOWELL. Certainly you can regulate lead either on a fixed-content limit or on the extractable amount. That becomes, basically, not only a policy choice but a choice of economics and ease of test, if you will, that would facilitate compliance.

Ms. SCHAKOWSKY. So would you say that it is easier to administer for many companies and for the Commission to go on a parts-per-million basis?

Mr. HOWELL. Certainly, there are advantages to testing by content in the fact that it is that time is much faster. It certainly doesn't generate the level of hazardous waste than what chemistry does. But at the same time I believe another way to look at the problem, perhaps, would be a balance between both the parts-per-million content at some prescribed level and then a risk-assessment approach at levels above that to deal with, perhaps, products such as ATVs and bicycles where the exposure is, perhaps, much, much less of a concern than you might have in something that is mouthable or swallowable.

Ms. SCHAKOWSKY. Thank you. Dr. Best, I wonder if you would comment on these issues.

Ms. BEST. One of the big differentiations between the CPSIA and the ATSM—or MS, whatever—their levels is that the ATSM's levels are soluble lead. And we are concerned not only about the surface coating but as the product wears, the surface coating may be worn off and so then you are getting deep into the content of whatever product we are talking about, and again, the swallowing question comes into play.

Ms. SCHAKOWSKY. Right. But my question is if the toy manufacturers could go to a parts per million for these other things, why not with lead?

Ms. BEST. Well, we believe that they can go to a total lead content level and achieve that reasonably. And as some of these data have shown, many manufacturers——

Ms. SCHAKOWSKY. OK. One other question on lead content. You had mentioned that children with disabilities sometimes continue mouthing, you know, well past a little kid and yet products designated as—I am looking what it is called—special products for the disabled are not in the category that would require a mandatory third-party testing for almost all children's products. Do you think that is a mistake?

Ms. BEST. I can't say I know all of the definitions of special products for the disabled. Certainly, you know, I wonder if some of them are more adapted products such as adaptive listening devices and adaptive hearing devices, so they are not toys. And so we have been very focused on the toys and so that is where, you know, all of our evidence has been based.

Ms. SCHAKOWSKY. Thank you.

Mrs. BONO MACK. All right. The chair recognizes Mr. Barton for 5 minutes.

Mr. BARTON. Thank you. Mr. Howell, my recollection is that in the Congress and the hearing in this Congress that the commissioners who testified, testified that the current law doesn't give

them the flexibility that they need to implement the law. Is my recollection correct?

Mr. HOWELL. I recall the same thing.

Mr. BARTON. You recall the same thing? So that is a yes?

Mr. HOWELL. That is a yes.

Mr. BARTON. OK. Dr. Best, what is wrong with giving the CPSC some flexibility to implement the law?

Ms. BEST. It is my understanding that they already have some flexibility to——

Mr. BARTON. That is not their understanding.

Ms. BEST. Well——

Mr. BARTON. I mean they testified at least twice——

Ms. BEST. Right.

Mr. BARTON [continuing]. That they need more flexibility. So let us stipulate that they don't have flexibility. Why, then, would it not be prudent for Congress to give them some flexibility?

Ms. BEST. Well, the stipulation I would have to look at. But the concern we have is that children's health is not something that should be negotiated based on manufacturers' profit.

Mr. BARTON. Well, nobody is saying that the stipulation should be based on profit. That is a fairly obnoxious comment to make in reply to my question.

Ms. BEST. When we do a risk-based assessment or we allow great freedom in terms of how safe toys are, we go back to the days where children——

Mr. BARTON. OK, well, look, I don't have time for a 5-minute longwinded non-statement. Do you support any flexibility at all for the Commission? Yes or no?

Ms. BEST. I will support some——

Mr. BARTON. So that is a——

Ms. BEST [continuing]. Very defined, limited——

Mr. BARTON. Thank you.

Ms. BEST. [continuing]. Carefully protective flexibility.

Mr. BARTON. You do support some flexibility. That is a good thing. Let me go back to Mr. Howell. The House bill, when we actually passed the bill under Chairman Dingell's leadership, had a 12-year-and-under standard. The Senate bill had a 6-year-and-under standard for children. The Senate receded to the House to the 12-year. That is one of the changes in the draft before us is that we leave the age as undefined. If you split the difference between the Senate and the House, obviously it would be 9 and under. Is that a reasonable compromise or is that unfeasible in your opinion?

Mr. HOWELL. To some degree it depends on the risks that you are trying to manage. I will say in that some work done several years ago in establishing lead limits for children's jewelry, which the work was terminated because of the CPSIA, staff had determined that 9 and under would be an appropriate age based on how children interact with a product such as jewelry.

Mr. BARTON. Let me ask that same question to Dr. Best. Is there some middle ground between 6 and 12?

Ms. BEST. We carefully reviewed this in 2007 and we believe 12 is the right age.

Mr. BARTON. OK. What about Dr. Beck?

Ms. BECK. I think that it is somewhat of a science policy decision that there really is no bright line. I do think what Mr. Howell has proposed, 7, 9, that they are reasonable compromises. Obviously, a young child might play with toys of an older child, but it will be less frequent. But as I said, ultimately, I think that there is need for some judgment in determining what the actual age should be.

Mr. BARTON. OK. Mr. Howell, on third-party testing, the draft preserves third-party testing for certain priority standards and priority products and it gives the Commission the flexibility to require third-party testing for other standards. Is that something you think the Commission would support in this draft, the third-party testing amendments?

Mr. HOWELL. Sir, I am unable to speak for the Commission.

Mr. BARTON. You work for the Commission. You are the only Commission representative we have.

Mr. HOWELL. I work for the Commission but the question was do I believe the Commission would buy into this proposal,and I cannot predict what the Commission might accept or not accept.

Mr. BARTON. So you just walk around in a daze when you are at the Commission even though you are the——

Mr. HOWELL. No, sir, but I do not control the votes of the commissioners.

Mr. BARTON. Well, but you can have an opinion about what their position might be. You have got a better opinion than I do.

Mrs. BONO MACK. The chair would recognize that we are out of time and, with all due respect to my dear colleague, but recognize now for 5 minutes Mr. Towns.

Mr. TOWNS. Thank you very much, Madam Chair. Let me ask discretion, first of all, I guess to you Dr. Best. Can you explain how lead buildup in bones throughout a lifetime can impact pregnant women and developing fetuses and why children are born with lead in their blood?

Ms. BEST. Yes. Lead is similar to calcium in that our bodies see lead as if it was a calcium molecule and then absorb it into our bones throughout our lives. And so if you are exposed to more levels of lead as you are developing bones or remodeling bones, which goes on throughout life, you are likely to absorb and store lead in your bones to a greater extent.

During pregnancy, there is a very high calcium demand on the mother's body and the fetus actually steals calcium from the mother. And if the mother doesn't have enough daily dietary intake from calcium, the bones will be resorbed and calcium from the bones will then be used to help the fetus develop. And so if there is calcium being released from the bones and there is also lead in the bone, the lead is released at the same time and then transferred to the fetus.

Mr. TOWNS. Thank you very much. Let me ask you this, Mr. Howell. When can a product that has shown consistent compliance, you know, through a third-party testing be relieved from testing? How many years?

Mr. HOWELL. If the objective is to establish a prevention-based program, the answer to that would be that while the frequency of testing could certainly be extended, I would suggest that perhaps it could never be terminated if you will but just longer periods of

time between third-party testing. In the industry that would be a skip-lot quality approach.

Mr. TOWNS. Even if you test it and there is consistency and you still feel that you can't say 2 years, 10 years, 20 years? You just would have to continue?

Mr. HOWELL. Well, the assumption there is that things never change in the manufacturing process. And, for example, the lead in paint that some say was the beginning of the CPSIA discussion was a total surprise to the manufacturer. They thought they had their process totally under control and they had a supplier who brought material into their factory, they assumed it was correct—and, in fact, it was loaded with lead. So if indeed the goal is to measure compliance to assure the American public that the product is safe, I would suggest that while you could increase the time between testing that you might be accepting some risk if you chose to terminate the testing until such time as you determine there was another problem and then reinstitute the testing.

Mr. TOWNS. Right. Thank you. Is there sufficient flexibility for the Commission to allow for—I am trying to see if there is anything on this side that we need to do.

Mr. HOWELL. In my opinion and, of course, as has been stated many times by the Commission itself, there is certainly a need for additional flexibility for the Commission to act appropriately to implement the law and safeguard consumers.

Mr. TOWNS. Dr. Best, is there anything that we need to do on this side as Members of Congress? Let us switch roles for a minute.

Ms. BEST. Besides pass a budget? Sorry. I think we need to remember that toys are not a requirement for life and we want children to have the best opportunity that they can possibly have. And, you know, the option is not between a drug that has side effects for a child. The option is between a toy that is safe and a toy that may not be safe. And so we need to remember that, you know, every toy is not a required product to help a child grow. They need toys but they need to know that those toys are safe. And we need to continue to remember that lead is dangerous at small levels. Even very small levels it causes IQ loss and the more we find out about the low levels of lead, the more harms we discover.

Mr. TOWNS. Thank you. I see my time has expired, Madam Chair. Thank you very much.

Mrs. BONO MACK. I thank the gentleman and recognize the gentleman from New Hampshire, Mr. Bass, for 5 minutes.

Mr. BASS. Thank you very much, Madam Chairman, and I appreciate your holding this important hearing to discuss a piece of legislation which corrects a response to a problem which was clear and understandable and necessary which occurred during the period of time that I was not serving in the Congress. And I was thinking of saying I am not surprised that the response that was passed by Congress essentially endeavors to use a Howitzer to kill a mosquito and so here we are trying to make this necessary new law work better.

However, my questions are for Mr. Howell, and they don't deal with the central controversy of the bill but rather with some equipment that the CPSC is using and whether or not its use should be expanded. I understand that the Consumer Product Safety Com-

mission uses several dozen handheld x-ray fluorescence analyzers and they are used both in the laboratory and also in ports of entry. They quickly, effectively, non-intrusively, and accurately determine whether and how much lead is in a product. Can you give us a brief description of your experiences using this equipment and enforcing limits on lead?

Mr. HOWELL. Certainly. The XRF scanners have certainly helped the efficiency and effectiveness of implementing the law. There initially were some limitations. The XRF is a good tool for detecting lead and other potentially toxic heavy metals in homogenous materials like plastics. However, there were some limitations early on in checking for lead in surface coatings, as in paint.

Mr. BASS. Um-hum.

Mr. HOWELL. However, just recently CPSC issued a Notice of Requirements recognizing that HD XRF technology had been developed, a testing protocol had been developed under ASTM and that is now an approved method to test for lead in paint. So it certainly is an efficient technology.

Mr. BASS. As the lead individual for hazard reduction's support expanded use of these XRF devices by manufacturers, retailers, and porters as a means to ensure compliance with lead limits?

Mr. HOWELL. I believe the cost savings, in my experience, has been motivation enough. Certainly, most manufacturers who can afford a unit, to my knowledge, have acquired one.

Mr. BASS. So the expanded use of this equipment would, in your opinion, improve the safety and quality of the products on the market today?

Mr. HOWELL. It certainly is an effective way for a manufacturer to monitor his incoming materials and his outbound materials.

Mr. BASS. OK. And lastly, as you may know, the EPA and HUD have used handheld XRF for decades to test for lead in homes and they are obviously protecting children. CPSIA includes a limit for lead in small painted areas on children's products. I think it is 2 micrograms per square centimeter of paint. Do you support making this limit applicable to larger painted areas as well?

Mr. HOWELL. If you would allow me to respond to that question in writing, I would like to get with our chemist and give you an appropriate response.

Mr. BASS. OK. Fair enough. Thank you very much. And I thank the chairlady. I yield back.

Mrs. BONO MACK. I thank the gentleman. And the chair recognizes we have a series of votes on the floor so it is my intention to have Mr. Dingell as his 5 minutes of questioning and then we will break and return to resume questioning after the series of votes. So Mr. Dingell, you are recognized for 5 minutes.

Mr. DINGELL. Thank you, Madam Chairman. To the witnesses, these questions will require a yes or no answer only because of time.

The draft legislation requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given child's product. However, while the Commission establishes such procedures, the draft legislation would permit the manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component

part." Question: Is there any such reasonable methodology in use by manufacturers today for testing children's products? Starting with Dr. Best.

Ms. BEST. I am not familiar with what manufacturers can do.

Mr. DINGELL. Ms. Beck?

Ms. BEST. Oh, I am sorry.

Mr. DINGELL. Yes or——

Ms. BECK. There is methodologies. I don't know if the manufacturers know about them.

Mr. DINGELL. Thank you. And if you please, Mr. Howell, yes or no?

Mr. HOWELL. I am not aware.

Mr. DINGELL. Now, starting again, Dr. Best, is it possible the ambiguity of the term "reasonable methodology" would lead to a wide variance in test results across the manufacturers of similar products? Yes or no?

Ms. BEST. Yes.

Mr. DINGELL. OK. Dr. Beck?

Ms. BECK. I don't know.

Mr. DINGELL. Mr. Howell?

Mr. HOWELL. I do not know.

Mr. DINGELL. Could this—well, I will just defer on that particular question. Now, Mr. Howell, the draft legislation would allow CPSC, subject to conditions, to require a third-party testing of children's products. Under the draft bill, CPSC would require a third-party testing only if the Commission first verifies the testing capacity of "accredited third-party conformity assessment bodies," as well as establishes and publishes Notice of Requirements for such accreditation of such assessment bodies. Does this include both national and international or domestic and international bodies? Yes or no?

Mr. HOWELL. I believe it does, yes.

Mr. DINGELL. OK. Now, if so, how many such assessment bodies are there worldwide?

Mr. HOWELL. CPSC recognized conformity assessment bodies are currently in excess of 300 I believe.

Mr. DINGELL. OK. Now, further, does the Commission have the resources with which to verify the testing capacity of all third-party conformity assessment bodies? Yes or no?

Mr. HOWELL. I can't answer that question yes or no.

Mr. DINGELL. It means that you do not know they do have such capacity. Now, moreover, is it your understanding the draft legislation, the Commission would have to accredit all third-party conformity assessment bodies? Yes or no?

Mr. HOWELL. No.

Mr. DINGELL. If so, do you believe the Commission has the resources with which to accomplish this purpose? Yes or no?

Mr. HOWELL. Yes.

Mr. DINGELL. In summary, do you believe the practical effect of these requirements would be that the Commission would seldom, if ever, require third-party testing of children's products? Yes or no?

Mr. HOWELL. No.

Mr. DINGELL. Now, Mr. Howell, CPSIA defines a children's product as one "primarily intended for a child 12 years of age or younger." The discussion draft would change this definition to "intended for use by a child," then it leaves a gap, "age to be determined—years younger." Would these words "for use by" limit the number and type of products covered by this definition? Yes or no?

Mr. HOWELL. Yes.

Mr. DINGELL. Now, to Drs. Beck and Dr. Best. Would you care to comment briefly on Mr. Howell's response to the last questions? Starting with Dr. Best.

Ms. BEST. No.

Mr. DINGELL. You can if you wish. Ms. Beck?

Ms. BECK. If the age decreases from 12 to some number less than 12, then the number of products to be tested, of course, would diminish because the products are defined for different age groups.

Mr. DINGELL. Ladies and gentleman of the panel, thank you. Madam Chairman, I thank you for your courtesy.

Mrs. BONO MACK. I thank the distinguished gentleman. And it is my intention that we recess now for this series of votes and we return at high noon. So we will see you all at high noon if we are quick on the floor with votes. If not, a little wiggle room. See you guys at noon. Thanks.

[Recess.]

Mrs. BONO MACK. All right. The chair will recognize Mr. Pompeo for 5 minutes.

Mr. POMPEO. Great. Thank you, Madam Chairman. Thank you, panelists, for hanging with us through the vote.

You know, I heard Mr. Waxman say this was a wrecking ball and I heard somebody say we were comprehensively demolishing the CPSIA. I think there is lots more to do. I think this is a very good first step, but there is a lot more work to do.

I wanted to ask you, Mr. Howell, just a couple questions about the database. We have been live now for almost a month, right? How many reports have we received since March 11 under the database rule?

Mr. HOWELL. The number is approximately 1,500 at this point.

Mr. POMPEO. And other than those—so there is a 5-day period before it goes out to the manufacturer. How many of those have been sent on to the manufacturer of those 1,500?

Mr. HOWELL. I would like to respond in writing with precise numbers. But at this point of those that we have received, I think approximately 50 percent at this point have been sent to manufacturers.

Mr. POMPEO. And so how many of those are past the required time period to send on to the manufacturer approximately?

Mr. HOWELL. Actually, once they pass the CPSIA check, which is the eight requirements to be considered, at that point they would be passed to the manufacturer and we are not late in sending the initial notice to the manufacturer. Those are happening on time.

Mr. POMPEO. So everything is on time. Everything is good. You have got the resources to respond at the level of the reports that have come in so far and you are making all of the deadlines that were imposed by the rules that CPSC put in place?

Mr. HOWELL. I believe for the most part, yes.

Mr. POMPEO. And how is this being conducted? How do these come in? Who is reviewing them? Are you reviewing them along with staff and a committee? What kind of resources are being dedicated to that project?

Mr. HOWELL. At this point in time, there are several different staff members involved in the review, part of that because it is a brand new process and we are trying to understand what we are getting in, making the appropriate decisions regarding reports of harm to ensure that they do, indeed, meet the qualifications. It is roughly a team of 10 to 12 with representatives of technical staff, legal staff, and IT.

Mr. POMPEO. Wow. 10 to 12 people. Wow, for 1,500 across 30 days. So what do you have? 35 a business day, 50 a business day, something like that?

Mr. HOWELL. Probably somewhere in the neighborhood of 50 a business day.

Mr. POMPEO. Yes. Can you keep up with it?

Mr. HOWELL. At this point yes, but we are in a learning curve and we understand that as we get a better handle of the nature of these incoming reports, we expect efficiencies to increase.

Mr. POMPEO. Why would you go through a learning curve when you have had this database running without it being public for such a long time? Why wouldn't we have done the learning curve before we went live?

Mr. HOWELL. When we were in the soft launch, not every manufacturer necessarily felt compelled to respond knowing that those reports would not necessarily go live. Now that we are live, we are getting many more responses from manufacturers.

Mr. POMPEO. My first question focused on the process internal to CPSC before forwarding on. Tell me how the process is going in getting a response from manufacturers to date that have had the deadline arrive for their response to be due?

Mr. HOWELL. You know, the manufacturers receive notification that there has been a report of harm. Manufacturers can file a claim of material inaccuracy.

Mr. POMPEO. How many have done that so far?

Mr. HOWELL. I believe there has been less than 10 percent have filed claims for material inaccuracy. They can also file claims for confidentiality, which is extremely rare at this point in time. And they are certainly free to file a comment without necessarily filing a claim of inaccuracy or confidentiality.

Mr. POMPEO. How many have said "not me, not my stuff?"

Mr. HOWELL. The vast majority of the material inaccuracy claims tend to be just that nature. "It is not my product."

Mr. POMPEO. And are those still online readily accessible to the public? So you all send it to the manufacturer and they say it is not my stuff, are you then putting it online?

Mr. HOWELL. No, if they claim that it is not their product, that is a valid claim of material inaccuracy. And until such time as that is resolved and the problem clearly identified, it does not get posted.

Mr. POMPEO. Thank you, Mr. Howell. Ms. Best, you talked about—she is not here. Let me ask you one more question, Mr. Howell. How many items from the punch list that Commissioner

Tenenbaum gave me on the database have you all been able to work through since she was here? That is what is still left to fix?

Mr. HOWELL. I am not familiar with that punch list. I will certainly respond to that in writing.

Mr. POMPEO. Thank you. Madam Chairman, I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentleman and recognize Mr. Butterfield to explain the absence of the witness.

Mr. BUTTERFIELD. Thank you, Madam Chairman. You will notice that Dr. Best is absent this afternoon. I want the record to show that she had prior obligations this afternoon and had to leave. I am told that she is seeing patients today and has scheduled those appointments with the understanding that we would convene this morning at 9:00 a.m. instead of 10:00 a.m. But please be assured that she will be available to answer any questions that any of the members may have. Thank you.

Mrs. BONO MACK. I thank the gentleman and would remind the committee that we did delay the starting point of today's hearing to accommodate the Democrats. And it is unfortunate that the witness had to leave but remind members, too, you can submit further questions to her in writing later. And at that point, we will be happy to recognize Mr. Harper for 5 minutes.

Mr. HARPER. Thank you, Madam Chair. Mr. Howell and Dr. Beck, thank you for being here today. I am sure you can come up with a list of a dozen things you would rather be doing or mayhe 100 things, but we welcome your attendance and appreciate what you are sharing with us.

And Mr. Howell, just a couple of questions on some issues involving this. And I know that when we are talking about the common toy box theory applying, of course, to toys, it seems like there are a lot of other products that it really makes no sense at all. For example, infants and toddlers are not going to have access to motorized products like ATVs or at least we hope they are not. What is the situation with, say, ATVs and other things like that when it comes to these regs?

Mr. HOWELL. One would certainly not expect that small children would have frequent access with those type of outdoor products, certainly.

Mr. HARPER. OK. When we talk about, say, electronics, you know, the Commission set much higher lead limits for certain metal alloys. When the Commission granted a stay of the lead content limits for ATVs and bicycles, it set temporary limits at the same or very low or similar levels I mean. Why does the CPSC consider them to be safe or at least safe enough for now? What is the rationale for that?

Mr. HOWELL. When the Stay of Enforcement was issued, it was simply a stay from the testing and certification requirements. There was not a stay of the requirement to conform to the law as written. So the limits that are established are the limits that were prescribed in law.

Mr. HARPER. Got you. Now, I will ask if the Commission is aware of any deaths in fixed-side cribs in daycares?

Mr. HOWELL. Would you repeat that, please?

Mr. HARPER. Sure. Yes, sir. Is the Commission aware of any deaths involving fixed-side cribs in daycares?

Mr. HOWELL. I am not aware of any but I will certainly take that question back and have our epidemiologist do a data-pull.

Mr. HARPER. In your testimony, Mr. Howell, you have suggested the Commission be allowed to regulate on a timetable influenced by the seriousness of the actual risk to allow for better priority-setting. Do you have specific suggestions that you can share on how you can do this or how we can do this?

Mr. HOWELL. I believe any organization that has finite resources needs to ensure that they are allocating those resources to the highest priorities. You know, certainly there are various ways to rank those within the Commission. One might suggest that frequency and severity at-risk populations are all criteria that would help identify higher-priority projects versus those that might fall lower on the list. And it is really all about managing finite resources in a way that provides the greatest return on those efforts.

Mr. HARPER. OK. Dr. Beck, Mr. Vitrano, who will testify on the next panel, submitted testimony that says you estimated the lead intake from children's interaction with ATVs is less than the intake from drinking a glass of water and I ask if that is true nr any info on that statement.

Ms. BECK. Yes, we did an analysis in which we used wipe tests from ATVs so we had actual data and we compared how much children would get from that scenario versus what a child might drink in a typical glass of drinking water, which may contain small amounts of lead. So that is a correct conclusion from our analysis.

Mr. HARPER. And when was that analysis done? How recently?

Ms. BECK. It was, I believe, either 2008 or 2009.

Mr. HARPER. All right. But wouldn't it be true, though, that the metal parts of the ATVs contain much higher lead than permitted by EPA drinking water standards?

Ms. BECK. It is a little bit apples and oranges because the drinking water standards based on what is in the water——

Mr. HARPER. Right.

Ms. BECK [continuing]. That is a very low concentration in the water. And then if you were to say what does that mean in terms of—you could compare it to PPMs in a valve and, of course, that would be much, much higher. But it is a little bit of an apples-and-orange comparison.

Mr. HARPER. But based on that analysis, your concern about ATVs as it concerns infants and toddlers, you would not be overly concerned with that at all, would you?

Ms. BECK. No, because it is really not a plausible scenario.

Mr. HARPER. Sure. OK. I yield back.

Mrs. BONO MACK. I thank the gentleman and recognize Dr. Cassidy for 5 minutes.

Mr. CASSIDY. I really enjoyed this panel. All of you attempted to be very fact-based and referenced-based. So let me just first compliment you. And my compliments to Dr. Best, who is no longer here.

First you, Mr. Howell. Clearly it is common sense that a kid is not going to chew on an ATV and probably not on the stem of a bicycle. On the other hand, I can understand that if there was

some other product that the varnish wore off that the child could gnaw down to and actually have some lead exposure. So I guess my question to you is are we able to come up with a definition that which is absurd that the kid would ever chew on is moved over here and that which it is plausible is moved over there? Is that something within the Commission's ability to accomplish?

Mr. HOWELL. Certainly in the Commission's traditional risk-based evaluation of consumer products, that would be an evaluation that would be conducted. How a child interacts with the product is important in determining the level of risk that that child may be subjected to from that certain product. In the case of ATVs, we would find it less likely the child would swallow or mouth an ATV. Certainly you would expect that there could be some migration of lead from contact with the hand on an ATV.

Mr. CASSIDY. Now, I gather from Dr. Best—and I am sorry she is not here because I just wanted to explore this because all three of you know so much more about this issue than I. That is why you are the panel members and I am not—that there was some dissatisfaction from the risk-based assessment. So now I am sure there are many aspects of risk-based assessments, but was one of the areas that folks were unhappy with, did that include your ability to differentiate lead paint peeling off a wall from an ATV, one is a great risk, one is a minimal risk for lead exposure?

Mr. HOWELL. I have certainly heard the arguments against risk-based but I am not fully aware of all the underlying rationale behind that criticism.

Mr. CASSIDY. So it sounds like you feel like risk-hased is a practical thing for the Commission to implement?

Mr. HOWELL. The Commission has been using a risk-based approach for decades now.

Mr. CASSIDY. Now, you mentioned in response to Mr. Harper, the last line of your testimony to "effectively prioritizing Commission resources towards those of the most serious health risk." Now, I have learned in life that if you attempt to monitor everything, you end up monitoring nothing. But on the other hand, if you monitor a few things, you often can monitor them well. And I have also learned that there is oftentimes, you know, 99.9 percent risk with this subset of activities and .1 percent with this subset. Is that so clearly broken out in lead exposure? Can you say, listen, this is really high-risk stuff. We need to focus our resources even more so than now if we were so allowed, as opposed to this, which is incredible low-risk. We are kind of killing our time over here.

Mr. HOWELL. Certainly, the Agency is extremely concerned with those lead-bearing items that can be swallowed. Acute exposure to lead is certainly a very serious, serious thing. One would expect that the risk decreases as you move from swallowing to mouthing, from mouthing to touching. And the management of that risk at that point then becomes a decision on how the child interacts with the product and what you——

Mr. CASSIDY. So you mean by risk-based would make some differentiation between high- and low-risk and it would all be upon how the child interacts and the relative amount, et cetera, et cetera?

Mr. HOWELL. Yes, that is a basis of——

Mr. CASSIDY. Now, the other thing occurs to me is that we have heard last time from a previous panel about the craft-makers and you know, somebody in Oregon who makes these nice little airplanes that apparently needs a—I shouldn't laugh—but you know, it would make probably 100 planes a year, sells them out of their shop and now has to get a third-party assessment as to the lead content of the paint. Now, in your risk assessment, do you also say listen, if it is below a certain production value or quantity per year—I mean the ability of something that is produced on the scale of 100 a year, as one example, is really unlikely to have a significant impact, do you have any such sort of evaluation like that?

Mr. HOWELL. Our evaluation is from a risk approach is a product evaluation and the consideration of the volume of the product produced is not relevant to the assessment of the risk that that particular product may present to the consumer who is using that product.

Mr. CASSIDY. Yes, it wouldn't be for the particular consumer, but it would be for the epidemiology of it in terms of a population issue, correct?

Mr. HOWELL. Absolutely. And when it comes to prioritizing the Agency's work, that is where the frequency severity factors come into play.

Mr. CASSIDY. So you do incorporate the population aspect to it. OK. Well, thank you. Ms. Beck, I am sorry, no questions for you. It was just mine were more oriented to Mr. Howell. Thank you.

Mrs. BONO MACK. The chair recognizes Mr. Kinzinger for 5 minutes.

Mr. KINZINGER. Let me see if I can get this to work here. Well, maybe. Well, how are you doing today? Hopefully well. I don't need to take a lot of time because I think you guys have been very good at answering the questions. I appreciate your time and I appreciate the chairwoman for organizing the hearing.

You know, one of my concerns when we get to government involvement in areas is something that I affectionately refer to—as many other do—as the law of unintended consequences. You know, it is obviously when somebody does something that looks great on paper and then in actuality has a completely different effect.

So Mr. Howell, my question, speaking in terms of the law of unintended consequences to you, do you agree with the past-acting Chairman Nord's statement of April 3, 2009, that the "application of the lead content mandates of this act may have actually the perverse effect of actually endangering children by forcing youth-sized vehicles off of the market" and in a result actually children riding vehicles that are bigger or, in essence, too big for them, adult-sized ATVs if you will.

Mr. HOWELL. I agree with that statement.

Mr. KINZINGER. OK. So you do agree with that. Madam Chairwoman, I would like to ask unanimous consent to insert two documents into the record.

Mrs. BONO MACK. Without objection.

Mr. KINZINGER. The first, a statement from acting Chairman Nancy Nord of the CPSC from April 2009 requesting exclusions from the lead-content limits of the Consumer Protection Safety Improvement Act of '08. The other is a letter from Edward Moreland,

Senior Vice President of the American Motorcyclists Association to Chairwoman Bono Mack and Ranking Member Butterfield regarding the discussion draft.

[The information follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF ACTING CHAIRMAN NANCY NORD
ON THE REQUEST FOR EXCLUSIONS FROM THE LEAD CONTENT LIMITS OF THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008
April 3, 2009

In considering exclusions, consumer safety must direct the outcome of our deliberations. Therefore, it is with extreme reluctance that I am voting today to deny the petition, filed by companies and associations representing the ATV and motorized bike industries, for an exclusion from the lead content limits found in Section 101 of the Consumer Product Safety Improvements Act (CPSIA). I do this because the clear language of the law requires this result, not because it advances consumer safety. To the contrary, application of the lead content mandates of the CPSIA to the products made by the petitioners may have the perverse effect of actually endangering children by forcing youth-sized vehicles off the market and resulting in children riding the far more dangerous adult-sized ATV's.

For this reason, in my capacity as chairman, I am directing compliance staff to stay enforcement of Section 101 and related provisions of the CPSIA to this category of products for twelve months and hope my colleague, Commissioner Moore, will join me in making this a unanimous decision by the Commission. During this time-out, it is my hope that Congress will consider how the law needs to be fine-tuned to address this serious child safety dilemma. This enforcement hiatus will also give industry the opportunity to examine what reasonable changes can be made in their products to bring them closer to the requirements Congress set out in the CPSIA. Staff will meet with industry to do more testing to determine how their products can meet the 300 ppm threshold Congress set and determine what is possible. I will expect periodic status reports on progress to this plan.

It is clear that the law does not give the Commission the flexibility to grant an exclusion for petitioners' products. Congress wrote Section 101(b) in such a way as to leave little discretionary power with the agency to grant common sense exclusions. This lack of flexibility was brought to the attention of Congressional staff working on the legislation during the conference process and it was confirmed this is what was intended. As our career staff has discussed on many occasions and as we now have been formally advised by staff, we do not have the statutory authority to grant the exclusion requested in this case.

Even though the career staff of the agency has concluded that we cannot grant the exclusion, they have NOT concluded that petitioners products present a health risk to children because of exposure to lead. To the contrary, staff states "a bigger safety concern than lead exposure is that the elimination of youth ATV sales will most likely increase the number of adult ATV's purchased to be used by younger children; therefore increasing their risk of injury and death."

The issues presented to us in the petition are much more complex than just ordering petitioners to "get the lead out" of their products by a certain date. Petitioners have presented persuasive evidence that lead serves

a purpose in the structural integrity of the metals used in the products and that suitable substitutes are not available. They point out the impracticality of using virgin materials for these products, including issues dealing with the recycling of metals. They point out that the approach in the CPSIA is contrary to the approach taken in the rest of the world, e.g. the European Union which has looked at these issues rather extensively and made allowances. These are all issues that the Commission should have the authority to consider but under the rigid language of the CPSIA, we cannot.

The effect of denying the petition is to make Section 101(e) of the CPSIA, which limits the Commission's authority to stay enforcement during rulemaking, no longer applicable. Therefore, during the pendency of a stay of enforcement, ATV's and motorized bikes appropriately sized for children twelve and younger can again be available and the Commission will not seek penalties for violation of Section 101 and related provisions of the CPSIA against those who sell them. I hope that the state attorneys general will follow the lead of the agency on this matter.

All stakeholders – industry, users, Congress, and the Commission—need to come together to fix the statutory problems that have become so apparent, in a common sense approach that does not unnecessarily burden those regulated, yet provides safety for American families.

April 6, 2011

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce
Manufacturing & Trade
House Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Cliff Stearns
Ranking Member
Subcommittee on Commerce
Manufacturing & Trade
House Committee on Energy & Commerce
U.S. House of Representatives
2257A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Stearns:

On behalf of the American Motorcyclist Association (AMA) and the All-Terrain Vehicle Association (ATVA), we are writing the hearing on April 7, 2011 regarding discussion draft of H.R. ___, the Consumer Product Safety Improvement Act (CPSIA) of 2008.

Founded in 1924, the AMA is the premier individual rider-based advocate on the motorcycling issues. Along with our sister organization, the ATVA, the Associations represent the interests of the Photo of riders and other off-way motorcyclists and ATV riders nationwide.

We commend you for your efforts to provide a congressional exclusion for youth-model motorcycles and all-terrain vehicles (ATVs) from the unintended effects of the CPSIA. A permanent exemption for youth-model off-highway vehicles (OHVs) is extremely sensible that will maintain the benefits of recreational activity from the powersports industry, create jobs and, above all else, preserve the safety of young riders. For all of these reasons, the AMA and ATVA urge the Subcommittee to move, debate and pass H.R. 412, the "Kids Just Want to Ride Act."

Authored by Representative Denny Rehberg and supported by five bipartisan cosponsors, H.R. 412 is the most promising and viable legislative remedy available to permanently exclude youth-model OHVs from the perils and unintended consequences of the CPSIA. H.R. 412 would provide relief for many of the worst-hit victims of the CPSIA: young riders and their families who enjoy the sport of off-highway motorcycling and ATV riding. Specifically, H.R. 412 would exempt youth-model motorcycles and ATVs from the lead content mandates of the CPSIA. It would allow the private sector to safely and responsibly produce youth-sized OHVs that are appropriately designed for young riders. Finally, H.R. 412 would ensure that youth-sized OHVs are not subject to the CPSIA's third-party testing requirements.

In a statement on April 5, Nancy Nord, then-Acting Consumer Product Safety Commission (CPSC) Chairman Nancy Nord commented that the implementation of the lead content mandates of the CPSIA "will have the perverse effect of actually encouraging children to ride [unregulated] adult-sized ATVs." Nord again addressed the issue on May 4, 2009, in her statement on *The Negative Consequences of the Youth Protection and Off-Highway Vehicle Safety Act*, stating that, "We have heard from the Members of Congress and they don't want to be the last to make your ATVs or this way."

For these reasons, the AMA and ATVA urge the Subcommittee to consider and pass H.R. 412, "the Kids Just Want to Ride Act," which provides the necessary categorical exclusion for youth-model motorcycles and ATVs from the CPSIA.

Again, thank you for the opportunity to provide comment on this important issue.

Sincerely,

Edward Moreland
Senior Vice President, Government Relations

CC: Chairman Fred Upton
Ranking Member Henry Waxman
Members of the U.S. House of Representatives Committee on Energy & Commerce

Mr. KINZINGER. The next question I have, common sense seems to support the notion that youth model OHV should not be subjected to the lead content provisions of this act. Would one of the solutions to this conundrum be an outright categorical exemption, like the one provided in H.R. 412? It is called the Kids Just Want to Ride Act. It is one I am a co-sponsor on.

Mr. HOWELL. As a policy decision, that certainly would be an option.

Mr. KINZINGER. OK. Well, like I said, those are basically my two big questions I had. You all have done a great job here in front of us today. I appreciate your time. And I would yield back my time.

Mrs. BONO MACK. I thank the gentleman. And at that point I am happy to thank our panelists for staying and for your expert testimony. We appreciate everything you have had to offer today and hopefully we will craft some great legislation. So thank you for your time and we will spend a quick 30 seconds or a minute seating the new panel and get started right away. Thank you again.

All right. Thank you. Our second panel is comprised of four witnesses. Welcome. And thank you for staying with us this morning. Our first witness, again, but not in the order of recognition, but to introduce Erika Jones. She is a partner at Mayer Brown here representing the Bicycle Product Suppliers Association. Welcome. Our second witness is Paul Vitrano, General Counsel for the Motorcycle Industry Council. Also testifying today is Sheila Millar, a partner at Keller and Heckman, LLP. And our fourth witness on this panel is Caroline Cox, Research Director for the Center for Environmental Health. Welcome to each of you.

You all know the drill now, the 5 minutes and the clocks and how they work. So if you could just pay attention to those, we appreciate it. We will have some floor votes again eventually, so if we can move it along, that would be terrific.

So now we are going to begin with our first witness and recognize Ms. Cox for 5 minutes.

STATEMENTS OF CAROLINE COX, RESEARCH DIRECTOR, CENTER FOR ENVIRONMENTAL HEALTH; SHEILA A. MILLAR, PARTNER, KELLER AND HECKMAN, LLP; PAUL C. VITRANO, GENERAL COUNSEL, MOTORCYCLE INDUSTRY COUNCIL; AND ERIKA Z. JONES, PARTNER, MAYER BROWN, ON BEHALF OF THE BICYCLE PRODUCT SUPPLIERS ASSOCIATION

STATEMENT OF CAROLINE COX

Ms. COX. Thank you very much for the opportunity to testify today. My message is that CPSIA, as written, has been an enormous success and I am really privileged today to be able to provide research data to document that success.

You heard earlier that health professionals agree that there is no safe level of exposure to lead for children. So I am discouraged to see the proposed revisions in the CPSIA that would weaken a law that has worked so well to protect American children from unnecessary lead.

For the last 15 years, my organization, the Center for Environmental Health, has worked to protect children and families from harmful chemical exposures. Our experience before and after pas-

sage of the CPSIA demonstrates that the law has been highly successful. Prior to adoption of the law, we found high lead levels in dozens of children's products sold to millions of American families by major retailers. At that time there was no federal law to protect children from lead so we relied on California State Law. Since the lead limits under CPSIA went into effect, our experience shows a dramatic change in the marketplace for children's products.

In the last year and a half, we purchased over 1,200 children's products from major national retailers and screened them for lead. These were stuffed animals, toys, games, lunch boxes, backpacks, jewelry, toy sporting equipment, lots of other things. As far as we know, it is the largest independent monitoring of compliance with CPSIA to date.

Out of these 1,200 products, we found only 46 that did not comply with CPSIA lead standards based on tests by a CPSIA-certified lab. In other words, more than 96 percent were in compliance. And because we intentionally purchased products that were likely to have lead problems, we believe overall compliance is even higher.

This data contrasts with what we found in 2007 and 2008. Our results show that over the 4-year interval, the prevalence of lead hazards in children's products was reduced by a factor of about 3. Given the immense size of the U.S. market for children's products, this is a major accomplishment.

We do understand that CPSIA requirements can be a hardship for small business and we would support amendments to help with that. We believe that the CPSIA has been effective because one, the lead standards are comprehensive. They cover virtually all children's products and all accessible parts of those products. And that has created a huge market for complaint materials and components.

The standards are straightforward, and because they are based on a total content standard, testing is accessible, consistent, and affordable. Lead content standards are the only kind of standards that allow materials and components to be tested upstream in a supply chain. When you have exposure-based standards or risk-based standards, the testing can only be done on finished products after it is already made.

And the third point I would like to make is that the lead standards apply to a really meaningful definition of "children," up to age 12. Because lead is a cumulative and persistent toxicant, it is particularly important to maintain this requirement. Protect children as they move into their teenage years and girls move into childbearing years.

I wanted to just give a quick visual demonstration of the success of the CPSIA. Here is Curious George from 2007. His face contains lead at a level 20 times the current CPSIA standard. Don't kiss this George. And I think most kids probably wanted to. Here is the current post-CPSIA George. George is lead-free and sold at the same price. I think this really shows how successful the law has been.

We respectfully recommend that this committee support the public health success that the CPSIA has been. Crucial support includes the lead content standards, as well as the definition of a child as 12 years old and younger. Thank you so much.

[The prepared statement of Ms. Cox follows:]

CEH

Committee on Energy and Commerce
Subcommittee on [illegible]
Thursday, April 7, 2011
"Demonstration of CPSIA Success"
Summary of Testimony from Caroline Cox
Research Director, Center for Environmental Health

My fundamental message today is that the CPSIA as written, has been an enormous success. I am privileged today to be able to provide research data to document that success. As you heard earlier today, health professionals agree that there's no safe level of exposure to lead for children. So it is discouraging to see proposed revisions in the CPSIA that would significantly weaken a law that has worked so well to protect American children from unnecessary lead exposures.

CEH's experience before and since passage of the CPSIA demonstrates that the law has been highly successful in promoting safer products for American children. Prior to adoption of the law, CEH found high lead levels in dozens of children's products sold to millions of American families by Wal-Mart, Target, Kmart, and other major retailers. But at that time, we were unable to point to any federal law to protect children from the lead hazards posed by these products.

Since the lead limits under CPSIA went into effect, our experience shows a dramatic change in the marketplace for children's products. Between September 2009 and December 2010, we purchased over 1200 children's products from major national retailers and screened them for lead. We purchased stuffed animals, toys, games, lunch boxes, backpacks, jewelry, toy sporting equipment, and other products. We believe that this is the largest independent monitoring of compliance with the CPSIA to date.

Out of these 1200 plus products, we found only 16 that did not comply with CPSIA lead standards, based on independent tests by a CPSIA-certified laboratory. In other words, more than 98% of the products tested were in compliance with the law. Because we intentionally purchased products made with materials that were previously known to have had lead problems, this suggests that overall compliance with CPSIA is truly even higher.

This data also contrasts with testing we conducted in 2007, before the law was developed, and in 2008, before its lead limits were in effect. Our results show that over the four-year interval, the prevalence of lead hazards in the children's products was reduced by a factor of approximately forty, suggesting a similar decrease in children's products in general. Given the immense size of the U.S. market for children's products, this is a major accomplishment.

We understand that CPSIA requirements can be a hardship for small business and would support amendments to help small business meet the testing and certification requirements of the law. But based on our compliance monitoring, we believe the CPSIA has been effective because:

- The lead standards are comprehensive and cover virtually all children's products.
- The standards are straightforward, and the total content basis means that testing is accessible, consistent, and affordable.
- The lead standards apply to a meaningful definition of "children" up to age 12. Since lead is a cumulative and persistent toxicant, it's especially important to maintain the 12 and under age requirement of the law, as this is the best way to prevent exposures as children move into their teenage years, and as girls move into their childbearing years.

When a law is working well, the best successful characteristics of the law should continue. We respectfully recommend that this committee support the public health success that the CPSIA has been since 2008. Crucial support includes continued support for the lead content standards passed in 2008, as well as support for the definition of a child as a person 12 years old and younger.

Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
Thursday, April 7, 201
"Demonstration of CPSIA Success"
Testimony of Caroline Cox
Research Director, Center for Environmental Health

The U.S. Public Health Service states, "No safe blood lead level in children has been determined." According to the U.S. Environmental Protection Agency, lead can affect children "at blood lead levels so low as to be essentially without a threshold." The Centers for Disease Control and Prevention has concluded that "no level of lead in a child's blood can be specified as safe."

So it is discouraging to see proposed revisions that would significantly weaken a law that has worked so well to protect American children from unnecessary lead exposures.

For more than fifteen years, the Center for Environmental Health has worked to protect children and families from harmful chemical exposures. We work collaboratively with major corporations, helping them identify ways they can reduce their use of toxic chemicals, often resulting in economic savings while protecting public health. In some cases, we use litigation to reduce the use of and exposure to toxic chemicals. For example, in a landmark 1997 study, CEH investigated the use of lead-containing brass pipes in home water filtration systems. By 2000, we reached legal agreements with major producers of home water filters, ending the industry's use of materials that were leaching lead into "filtered" water.

Use of a total content standard is more appropriate for lead limits than a limit based on presumed exposures. Total content standards are inexpensive, easy replicable, and not subject to interpretation. By contrast, exposure assessment testing is a subjective process open to interpretation and manipulation. Witness the case of lead-containing vinyl in children's lunchboxes. When CEH found high lead levels in many vinyl children's lunchboxes, the FDA initiated an investigation. FDA used the lead test data from CPSC's testing of lunchboxes, and based on this testing FDA warned lunchbox makers about their use of lead-containing vinyl, concluding that "some migration of lead to food as a result of such use may reasonably be expected." But CPSC interpreted their test data differently: explaining the agency's inaction on lunchboxes, an agency spokesperson stated, "The food that you put in the lunch box may have an outer wrapping, a baggie, so there isn't direct exposure."

Because its lead standards are content based, under the CPSIA, producers, consumers, and regulators all know and understand the standards. Reverting to subjective standards now would be a setback for American families, who expect Congress to take the most protective approach when it comes to our children's health.

Changing the law from a total lead content standard to a standard based on exposure would be detrimental to public health, regulatory and industry needs. Total content testing of materials used in children's products is consistent and objective; screening devices for total content are available and inexpensive; total content

standards allow companies to specify materials to meet the standard. The latter is one of the most important characteristics of a total content standard: with today's complex supply chains, retailers, distributors, and manufacturers need an objective way to specify the quality of products or materials when they commit to a contract. Measuring lead content is the only efficient way for the complete supply chain to document compliance.

By contrast, exposure assessment is inconsistent and subjective; there is no way for companies to screen products for any of the typical exposure assessment tests, so testing costs will increase; and it is not possible to specify standards for components or materials.

CEH's experience before and since passage of the CPSIA demonstrates that the law has been highly successful in promoting safer products for American children. Prior to adoption of the law, CEH found high lead levels in dozens of children's products sold to millions of American families by Wal-Mart, Target, Kmart, and other major retailers. Examples of some of the lead-tainted children's products we found before advent of the law include:

- Imported candies;
- Diaper rash creams;
- Children's anti-diarrheal medicines;
- Baby bibs and lunchboxes;
- Toys; and
- Dozens of items of children's jewelry, including many with components containing 90% or more lead.

In each case, we were unable to point to any federal law to protect children from the lead hazards posed by these products, and thus we relied on California law to address the problems.

Since the lead limits under CPSIA went into effect, our experience shows a dramatic change in the marketplace for children's products. Between September 2009 and December 2010, we conducted what we believe is the largest independent monitoring of children's products for compliance with the CPSIA lead standards. We purchased and screened over 1200 children's products for lead. We bought the products in California primarily from major national retail chains. Because our charge (under a grant from the California attorney general) was to identify non-compliant products, we did not purchase products at random, but rather selected products that were similar to, or made from similar materials as ones identified in the past with lead problems. We purchased stuffed animals, toys, games, lunch boxes, backpacks, jewelry, toy sporting equipment, and other products.

Out of more than 1200 products tested, we found only 46 products that did not comply with CPSIA lead standards, based on independent tests by a CPSIA-certified laboratory. This suggests that at least 96% of children's products are compliant with the CPSIA lead standards. Because we intentionally purchased products that were made from materials known to have had lead problems in the past, our results suggest that overall compliance with CPSIA lead standards is likely even higher.

We also have data from 2007 and 2008, and have used it to demonstrate the downward trend in lead-tainted children's products since the law took effect. Our results show that lead hazards are less prevalent post-CPSIA than either before the law was passed or just prior to implementation of the law. Of the 100 products we tested in 2007, 9 (9%) had components whose lead content exceeded 600 parts per million (ppm), the level that became the first CPSIA standard. Of the 400 products we tested in 2008, 20 (5%) had components whose lead content exceeded 600 ppm. These results show that over the four-year interval, the prevalence of lead hazards in the children's products we tested was reduced by a factor of approximately three, suggesting a similar decrease in children's products in general. Given the immense size of the U.S. market for children's products, this is a major accomplishment.

Based on our experience with monitoring CPSIA compliance, we suggest that the following characteristics of the CPSIA lead standards helped make them successful:

- The lead standards are comprehensive. They cover virtually all children's products, virtually all retailers, suppliers, and manufacturers, and virtually all accessible parts of those products. We believe that this provided assurances to manufacturers that compliant products would find a market.

- The way that the numerical standards are expressed is straightforward. With the exception of paint (90 ppm standards), all materials must currently meet the same standard (300 ppm). In addition, the standards are expressed in terms of lead content, a characteristic that can be measured at any point in the chain of commerce. This made it possible for retailers, vendors, and manufacturers to specify lead content in contracts with their suppliers and to be able to determine if those specifications were being met.

- CPSIA lead standards apply to a meaningful definition of "children," up to age 12. Based on the most recent research, doctors and scientists now say that pregnant women and therefore young women who intend to become pregnant may be the most important subpopulation to protect from lead exposure. Since lead is a cumulative toxicant that is stored in the body for years, lead exposure of 12 year olds is a serious concern.

  At this point I'd also like to speak briefly as a parent rather than as a researcher. Most parents have seen the strong attraction that their children have for toys and other items designed and used by older children. In order to protect young children we need to make sure that products designed for somewhat older children are made of safe materials.

- The lead standards, as written in CPSIA, apply to businesses of all sizes. We believe that the wide scope of the standards has been one of the important factors in making the law a success. However, we would support amendments that recognize the special needs of small businesses.

In conclusion, we respectfully recommend that this committee support the public health success that the CPSIA has been since 2008. Crucial support includes continued support for the lead content standards passed in 2008, as well as support for the definition of a child as a person 12 years old and younger.

Mrs. BONO MACK. Thank you, Ms. Cox. Ms. Millar?

STATEMENT OF SHEILA A. MILLAR

Ms. MILLAR. Thank you, Chairman Bono Mack and Ranking Member Butterfield, members of the subcommittee. I appreciate the invitation to appear here today.

As a longtime consumer protection attorney—and I think all of the members of the panel here and everybody in this room share the same view. We need and want a strong and effective CPSC that has both the authority and the resources necessary to adopt and enforce national consumer product safety standards. Where we differ is that some of us favor revisions to CPSC's arbitrary one-size-fits-all limits that apply irrespective of the type of product, material, age of the user, or actual risk of exposure, its illusory or nonexistent exemption scheme, its retroactive effect and burdensome testing requirements, which have cost money and jobs.

Based on my experience with many different federal agencies, if I have learned one thing over the years, it is that sound public policy should be based on facts and science and risk. So I want to focus on a few key points from my written testimony.

First, the lead and substrate limits were derived from the unfounded assumption that presence equals risk. It doesn't. And I think Dr. Beck illustrated that point carefully this morning. The CPSC's own research has demonstrated that materials that are high in lead may sometimes yield less migratable lead or about the same amount of migratable lead as products that comply with 600 or 300 parts per mission. Exposure is the key to risk. And so we do believe that revisions that are more targeted to exposure keying off of proven things that the CPSC has done for years makes a lot of sense.

In terms of the lead exemption process, the proposal here offers a good step forward but remains unnecessarily complex. In addition, the limited exemption scheme is coupled with a general provision that gives the CPSC new authority to adopt 600 ppm limits on older children's or even adult products. Because I support a risk-based approach, I favor neither the current exemption process as drafted, nor giving CPSC general authority to simply adopt the 600 ppm limit on any product, irrespective of risk.

In contrast, the phthalates provision offers an elegantly simple view that could be applied more generally. It tracks the CPSIA exemption for inaccessible component parts but gives the Commission authority to adopt health-based exemptions, exemptions from the prohibition that are not necessary to protect children's health. Why not adopt a consistent science-based exemption process for both lead and phthalates predicated on the simple basic rule: that the government should not be in the business of banning safe products.

I do want to spend a couple minutes talking about testing. Let me be clear. Testing has an important role in compliance. And as Mr. Howell referenced this morning, there may be ways to look at how to dovetail testing regimes with supplier assurances, self-certifications, and other proven techniques that help confirm safety.

Let us also be clear that the prospect of $15 million penalties offer very powerful incentives to comply to say nothing of the prospect that your products will simply be rejected by your customers.

From the standpoint of total content testing, I differ with Ms. Cox in that we have seen over and over again the total content lead tests are not so uniform as you might expect. There is considerable variability and the absence of any definitive inter-laboratory variability factor is a key problem, particularly as levels drop lower and lower. So when we look at these differences in terms of inter-laboratory variability, a material—which may have residual lead content, let us say, a plated piece of metal where you are building on a piece of tin coupled with a nickel-plating, a copper-plating, a silver-plating—at the end of the day, the addition of those added metals, each of which could have residually low total content, could put you above 100 ppm. And I think we have seen the need for exemptions to perhaps look at a broader array of material to address that naturally occurring problem.

I would also caution against assuming that component testing is the solution to all ills with certification testing here. I represent many raw materials suppliers of plastics, chemicals, and other materials, and they are simply not willing to subject themselves to the jurisdiction of the CPSC to provide component-test certifications in the rigid scheme required by CPSIA.

I strongly support a national safety net for consumers. I also strongly support reducing unnecessary burdens on the regulated community by restoring the CPSC its authority to make sound risk-based decisions. Thank you again for the invitation and I look forward to responding to any questions.

[The prepared statement of Ms. Millar follows:]

STATEMENT OF

SHEILA A. MILLAR

PARTNER

KELLER AND HECKMAN LLP

BEFORE THE SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND TRADE

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

DISCUSSION DRAFT OF H.R. ____, A BILL THAT WOULD REVISE THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

April 7, 2011

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SUMMARY

The Consumer Product Safety Improvement Act of 2008 (CPSIA) includes some important updates to the Consumer Product Safety Commission's (CPSC) authority that generated considerable support from businesses and consumer groups alike. However, other provisions were and remain controversial because they depart from sensible risk-based decision-making designed to be protective of public health. CPSIA adopted an unduly proscriptive scheme of absolute limits on total lead and phthalates, setting standards inconsistent with risk-based measures commonly adopted by other regulatory agencies and indeed by CPSC itself. Those limits were coupled with 1) an exemption process that has proven to be meaningless, in the case of the lead limits, or non-existent, in the case of phthalates limits, 2) arbitrary reduction schedules for lead content, 3) retroactive effect, and 4) a confusing, burdensome testing scheme. The result is legislation that bars the CPSC from making common sense decisions about protecting the public, and thus results in bans on safe products, costing both money and jobs since the law went into effect. We need and want a strong and effective CPSC with both the authority and the resources necessary to adopt and enforce national consumer product safety standards based on science and risk. The draft legislation offers some positive steps towards this goal, but further revisions should be considered to advance a consistent public policy framework that assures that children are protected and that responsible businesses can continue to produce safe, affordable compliant products for children.

Chairman Bono-Mack and members of the Subcommittee, my name is Sheila Millar. I am a partner with the law firm of Keller and Heckman LLP. Thank you for the opportunity to appear before you today to discuss reform of the Consumer Product Safety Improvement Act of 2008 (CPSIA). I have represented manufacturers, importers, retailers, and trade associations who make consumer products, packaging, medical devices, and other products, as well as suppliers of raw materials used in these products, for over 30 years. My practice involves issues before many different regulatory agencies, often involving the intersection of law and science, so I will focus principally on the provisions relevant to children's products. My comments reflect my personal views, drawn from my years of regulatory experience, on how to advance a strong, national, uniform consumer product safety law that achieves the goal of protecting children without eliminating products that, by any reasonable and accepted objective health measure, are safe. The draft CPSIA reform bill offers some modest steps towards this goal.

1. **Defining a "child."** CPSIA defines "children" to be those 12 and younger. Children are not "little adults." Nor, however, should all children in this age group be treated identically. "Children under 12" have physical and developmental differences and interact with consumer products differently. This is reflected in current law, which establishes different requirements for particular hazards based on the age of a child. Adopting a risk-based policy framework will allow for the development of health-protective standards for children's products keyed to the actual intended user.
2. **Lead substrate limits.** The cornerstone of a sound health and safety public policy is risk-based regulation. This is reflected in laws administered by health and safety agencies such as the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Consumer Product Safety

Commission (CPSC) pursuant to the Federal Hazardous Substances Act (FHSA). It is a well-acknowledged law of science that hazard is a function of toxicity plus exposure. Risk is the potential hazard posed by the exposure, which in turn requires an assessment of the type of material, the type of product, foreseeable handling and use, and age of the intended user. In enacting CPSIA's arbitrary total content limits on lead in substrate, Congress departed from well-established health risk management concepts. It first adopted a 600 ppm limit, then dropped to 300 ppm, with an impending 100 ppm limit coming up this summer unless modified. These limits are not related to actual risk, since the presence, existence or content of a substance in a product or component does not automatically result in potential harm to health. As a result, CPSIA imposes burdens beyond those needed to address the potential risk of harm through reasonably foreseeable handling and use, obsoleting products that are "safe" one day and banned the next. Although the revisions in the draft legislation are a positive step, they do not restore a risk-based framework. Consequently, the likelihood remains that safe products will be banned by the legislation even as revised. Other agencies, like FDA and EPA, have developed health-protective risk-based approaches to managing potential lead exposure which may offer useful alternatives to the current framework.

3. **The lead exemption process should be modified.** If CPSIA is not modified to establish a more sensible basic policy framework in regulating lead in children's products, the exemption process in Section 101(b) should be modified to allow for exemptions for materials or products that will not pose a potential health risk based on reasonably foreseeable use and abuse. The proposed legislation is an improvement to the current exemption process, which has resulted in no exemptions despite demonstrated *de minimis* risk of exposure. However, the new exemption process remains unnecessarily complex and restrictive. It establishes two

approaches for exemptions, one for certain specific metals (steel, copper and aluminum alloys), and one for materials that pose a *de minimis* risk, provided, in each case, that they are not small parts. The scientific rationale for this limited two-step exemption process is not apparent. Any product or material that does not result in anticipated adverse health effects based on appropriate science relevant to the reasonable worst-case anticipated exposure route should be exempt. In some cases that may be hand to mouth contact. In others it may be mouthing, and in still others it may be accidental ingestion. If a product or material is demonstrated to be reasonably safe, utilizing appropriate scientific methodology to assess exposure via the anticipated potential route of exposure, there is simply no health or policy reason to ban it. In contrast, the suggested phthalates exemption process in Section 6 of the draft bill authorizes the Commission to exempt from the phthalates limits products or materials where the Commission determines that compliance with the prohibition is not necessary to protect children's health. This is a more sensible way to address the issue, and we believe that you should create a consistent and scientifically appropriate path for all health-based exemptions.

4. **Phthalates provisions.** The proposed bill includes a much-needed exception for inaccessible component parts that contain phthalates, similar to the inaccessible component parts exemption from the lead limits, and allows the Commission to grant an exclusion when it determines that compliance with the limits is not necessary to protect children's health. This is a sound risk-based approach that could easily substitute for the more complex and restrictive lead exemption options offered in the draft bill. Inclusion of an accessibility requirement will also assure that the phthalates limits apply only to products that will result in direct exposure through interaction of a child. Again, the risk of actual exposure to children

in the age range of concern is key. Products like breast pumps and bottle warmers, among others, should obviously be exempt from the phthalates limits, as should toys or child care articles that realistically would not likely involve health risks to children.

5. **Lead and phthalates standards should be prospective.** We support clarifications to CPSIA to assure that limits apply prospectively to products manufactured after the effective date. The lost businesses and lost jobs that were the result of the earlier implementation schedule of CPSIA cannot be restored, but further adverse impact to businesses whose products comply one day but not the next, or are otherwise safe, can be avoided.
6. **Modify unduly burdensome testing requirements.** Manufacturers have an obligation to meet applicable standards and to take appropriate measures to assure that they do. Otherwise, they face recalls and possible penalties for non-compliance. Testing has an important and ongoing role in compliance. However, micromanaging the test process by statute is not the best way to achieve the most cost-effective compliance, nor does it allow companies to rely on other compliance strategies or to leverage existing federal and other regulatory requirements to assure compliance. The draft bill offers important modifications to the current burdensome CPSIA testing scheme, recognizing that a system of compliance must be predicated on the specifics of the product category and supply chain. A few additional suggestions include:
    a. **Allow for supplier self-certifications, including as a mechanism to establish a reasonable basis of compliance with chemical content limits for components and raw materials.** Manufacturer certifications are a proven legal method to establish compliance under many laws, including the Flammable Fabrics Act, for example. CPSC's proposed final testing rule suggests that component testing will

be a solution to the costs and burden of mandatory third party testing of children's products. However, to take advantage of component testing, the raw material supplier must agree to subject itself to the jurisdiction of the CPSC and meet the requirements of a "reasonable test program." Raw material producers often do not themselves produce a consumer product, and may not be willing to subject themselves to the jurisdiction of CPSC for this purpose, particularly the burdensome production testing approach. However, they can often offer assurances of compliance. For example, many consumer product companies specify FDA-compliant raw materials for use in children's products, sourcing materials from reputable third parties who can provide written supplier assurances of compliance with FDA requirements adequate to assure that the material meets lead limits. A company that is willing and able to offer low lead materials safe for use in contact with food surely offers adequate assurances of safety for use in a consumer product.

b. **If production testing is retained, refer to "representative samples" rather than "random samples" in Section 102(b).** The draft bill now allows the CPSC to prescribe reasonable testing programs to be used as the basis for certification for test requirements not yet in effect. However, further guidance on the parameters of a reasonable testing program in general may be needed. For example, with regard to production testing, the CPSC's proposed definition of the term "random samples" requires manufacturers to adopt a complicated statistical approach to the selection of samples. A better term to substitute for "random samples" is "representative samples," meaning samples that are selected in a

manner intended to assure that they are representative of actual production, avoiding preselected or "golden" samples, not implementation of a complicated and expensive statistical selection process.

c. **Direct the CPSC to issue public guidance on inter-laboratory variability in total lead and phthalate test results.** Many reports have been submitted to CPSC documenting inconsistent results from laboratory to laboratory on total lead and phthalate content when the same product or component is tested. Products that meet lead or phthalates limits based on tests by one laboratory may fail when the same product is tested by another laboratory. Many companies require that tests be conducted by "their" laboratory so that they have consistent results for just that reason. This adds cost to the process, defeating one of the purposes behind third party testing. Products tested by any party that do not meet the applicable lead or phthalates limits by even a small margin cannot be sold and will not be accepted by customers. By virtue of failing a test these products are treated as banned hazardous products, subject to reporting and recall, irrespective of any actual potential risk of harm to a child. The problem is exacerbated as small differences in inter-laboratory results can have an enormous impact as regulatory limits drop, even as manufacturers operate on tighter and tighter tolerances in an effort to assure compliance. Adoption of an inter-laboratory uncertainty factor is a much-needed step in addition to adopting a risk-based framework of regulation.

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The revisions in the draft bill are a good start towards ameliorating some of the adverse impacts of CPSIA, but further changes along the lines I have outlined here will help maintain a strong national safety net for consumers and reduce unnecessary burdens on the regulated community by restoring to the CPSC its authority to make sound risk-based determinations. The result will be an improved CPSIA, grounded in a public policy framework that draws on proven health-protective approaches to risk. I appreciate the opportunity to appear here today and would be happy to respond to questions.

Mrs. BONO MACK. Thank you very much. Mr. Vitrano, 5 minutes.

STATEMENT OF PAUL C. VITRANO

Mr. VITRANO. Chair Bono Mack, Ranking Member Butterfield, and distinguished members of the subcommittee, thank you for the opportunity to testify. I am Paul Vitrano of the Motorcycle Industry Council, which represents nearly 300 manufacturers of motorcycles and ATVs, aftermarket companies, and allied trades. We appreciate the subcommittee's efforts to address the unintended consequence of the CPSIA, which has effectively banned the sale of youth ATVs, motorcycles, and snowmobiles. The act has actually created unsafe situations for young riders by reducing the unavailability of appropriately-sized speed-restricted youth models.

As you noted during the last hearing, Chair Bono Mack, the CPSC has made the judgment that the risk of lead exposure to children is outweighed by the risk that children face if youth ATVs are not available. The act also has cost manufacturing and dealership jobs.

We urge Congress to fix this unintended ban and appreciate the subcommittee has offered an initial draft reform bill. Within the framework of the draft bill, the only way to fix the ban on youth vehicles with certainty and without imposing further needless costs and burdens on our industry and its customers is to amend the range of children's products at least for these vehicles to age 6 and under.

Alternatively, we ask you to consider adding a categorical exemptinn to the bill. There already is widespread support for this approach. Representative Rehberg has authored the Kids Just Want to Ride Act, H.R. 412, which currently has 61 bipartisan cosponsors. And just last week, Senators Klobuchar and Tester offered a categorical exemption as an amendment to the small business bill currently before the Senate.

ATVs and motorcycles do not present any lead-related health risk to young riders and Congress has made it clear that it never intended the lead content restrictions for toys to apply to these vehicles. We ask that you keep in mind thc following points as you work to provide young riders in our industry with much-needed relief.

First, the lead content in metal parts of ATVs and motorcycles poses no risk to kids, as Dr. Barbara Beck testified earlier this morning. The estimated lead intake from kids touching metal parts is less than the lead intake from drinking a glass of water.

Second, everyone agrees that the key to youth safety on ATVs and motorcycles is ensuring they ride the right size vehicles. By reducing the availability of these vehicles, the CPSIA has created—in the CPSC's own words—a "more serious and immediate risk of injury or death" than any risk from lead exposure.

Third, in 2009 MIC estimated that a complete ban on youth-model vehicles would result in about 1 billion in lost economic value in the retail marketplace every year.

Fourth, motorcycles and ATVs are motor-powered machines, not toys or other articles kids wear or play with. So the extent and nature of the children's interaction with our vehicles is materially different. As you know, kids do not mouth tailpipes or swallow bat-

tery terminals. Young riders typically only touch a few parts of the vehicles like handlebars and clutch levers and often with gloved hands.

Finally, ATVs and dirt bikes are stored outside the house, usually in garages, sheds, or barns and thus are much less likely than household items to be touched by young children. In addition to being remotely located, the vehicles have keys and use is controlled and supervised by parents.

There are two commonsense ways to fix this problem once and for all and without imposing further unnecessary testing and certification costs and burdens on our industry and customers. We urge you to exclude these youth vehicles from the lead content provisions by lowering the age range to primarily intended age 6 and under or adding a categorical exemption.

We also support the recommended changes to the CPSIA database provisions. One of our members recently received a report of harm where a rider who had been drinking prior to riding rode off a cliff at night in the dark. Nothing in the report indicated any problem with the ATV, but because the CPSIA database on its face only accepts reports of "unsafe" products, the inclusion of this report will result in the ATV implicitly being classified as an unsafe product. Unless Congress acts, the database will become a repository of inaccurate information that defames manufacturers and misleads customers. We believe the modest changes proposed in the draft legislation will result in a more useful database with accurate and relevant information for consumers. Thank you. I am happy to answer any questions.

[The prepared statement of Mr. Vitrano follows:]

SUMMARY OF TESTIMONY OF PAUL C. VITRANO
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
United States House of Representatives
April 7, 2011

The CPSIA was intended to protect children from ingesting lead from toys. However, the lead provision has had unintended consequences and I am here to testify about what many believe is one of the most absurd of those consequences. The CPSIA has effectively banned the sale of age-appropriate youth ATVs, motorcycles and snowmobiles because of the tiny amount of lead content in certain components. As a result, the Act has actually created unsafe situations for youth off-highway vehicle riders by reducing the availability of appropriately-sized, speed-restricted youth models. As you noted during the last hearing Chair Bono Mack, "the CPSC has made the judgment that the risk of lead exposure to children is outweighed by the risks that children face if youth ATVs are not available and they ride adult-sized ATVs instead." The Act also has crippled key parts of our industry, costing manufacturing and dealership jobs across the country.

On behalf of our members, their thousands of dealers, youth off-highway enthusiasts and their families, the Motorcycle Industry Council urges Congress to fix this unintended ban. We appreciate that the Subcommittee has offered an initial draft reform bill and is holding this hearing to discuss it. Within the framework of the draft bill, the only way to fix the ban on youth ATVs, motorcycles and snowmobiles with certainty – and without imposing further needless costs and burdens on our industry and its customers – is to amend the range of "children's products" at least for these vehicles – to age 6 and under.

In the alternative, we ask you to consider adding a categorical exemption to the bill. There already is widespread bi-partisan support for a categorical exemption for youth motorcycles and ATVs. Rep. Rehberg has authored The Kids Just Want to Ride Act, H.R. 412, which currently has 60 bi-partisan co-sponsors. And just last week, Sens. Klobuchar and Tester offered a categorical exemption as an amendment to the small business bill which was on the Senate floor.

ATVs and motorcycles do not present any lead-related health risk to young riders, and Congress has made it clear that it never intended the lead content restrictions for toys to apply to these vehicles. It is time to correct this untenable situation by either lowering the age to 6 and under or adding a categorical exemption in the bill. The industry also strongly supports the Committee's recommended changes to the CPSIA database provisions.

TESTIMONY OF PAUL C. VITRANO
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
United States House of Representatives
April 7, 2011

Chair Bono Mack, Ranking Member Butterfield and distinguished Members of the Subcommittee on Commerce, Manufacturing and Trade, thank you for the opportunity to testify on the urgent need for amendments to the Consumer Product Safety Improvement Act. I am Paul Vitrano, General Counsel of the Motorcycle Industry Council. MIC is a not-for-profit, national industry association representing nearly 300 manufacturers and distributors of motorcycles and all-terrain vehicles; motorcycle, ATV and recreational off-highway vehicle parts and accessories; and members of allied trades such as insurance, finance and investment companies, media companies and consultants.

The CPSIA was intended to protect children from ingesting lead from toys. However, the lead provision has had unintended consequences and I am here to testify about what many believe is one of the most absurd of those consequences. The CPSIA has effectively banned the sale of age-appropriate youth ATVs, motorcycles and snowmobiles because of the tiny amount of lead content in certain components. As a result, the Act has actually created unsafe situations for youth off-highway vehicle riders by reducing the availability of appropriately-sized, speed-restricted youth models. As you noted during the last hearing Chair Bono Mack, "the CPSC has made the judgment that the risk of lead exposure to children is outweighed by the risks that children face if youth ATVs are not available and they ride adult-sized ATVs instead." The Act also has crippled key parts of our industry, costing manufacturing and dealership jobs across the country.

On behalf of our members, their thousands of dealers, youth off-highway enthusiasts and their families, the MIC urges Congress to fix this unintended ban. We appreciate that the Subcommittee has offered an initial draft reform bill and is holding this hearing to discuss it. Within the framework of the draft bill, the only way to fix the ban on youth ATVs, motorcycles and snowmobiles with certainty – and without imposing further needless costs and burdens on our industry and its customers – is to amend the range of "children's products" – at least for these vehicles – to age 6 and under.

In the alternative, we ask you to consider adding a categorical exemption to the bill. There already is widespread bi-partisan support for a categorical exemption for youth motorcycles and ATVs. Representative Rehberg has authored The Kids Just Want to Ride Act, H.R. 412, which currently has 60 bi-partisan co-sponsors. And just last week, Senators Klobuchar and Tester offered a categorical exemption as an amendment to the small business bill which was on the Senate floor.

ATVs and motorcycles do not present any lead-related health risk to young riders, and Congress has made it clear that it never intended the lead content restrictions for toys to apply to these vehicles. It is time to correct this untenable situation by either lowering the age to 6 and under or adding a categorical exemption in the bill.

It is estimated that over 13 million Americans enjoy riding off-highway motorcycles and over 30 million enjoy riding ATVs. Safety of our riders – particularly our youngest riders – is a top

priority of the powersports industry. Vehicles, helmets and other gear and accessories are specially designed for youth riders to allow them to safely enjoy this family-friendly form of outdoor recreation.

In February 2009, however, ATVs and motorcycles designed and primarily intended for youth riders aged 6 to 12 became banned hazardous substances under the CPSIA because small amounts of lead – that pose no risk to youth – are imbedded in metal parts of those vehicles to enhance the functionality of those components.

As you know, the CPSC concluded that the language of the CPSIA prevented it from making common-sense decisions and resulted in the CPSC denying the powersports industry's petitions for exclusion from the lead content provision. The exclusion was denied despite the fact that the CPSC's own staff acknowledged that there was no measurable risk to children resulting from lead exposure from these products.

As a temporary stop-gap measure, the CPSC issued a stay of enforcement of the CPSIA's lead content limits in May 2009. Unfortunately, this stay of enforcement has proven unworkable. Due to the risks, uncertainties and burdens of the law, many manufacturers and dealers are no longer selling youth model off-highway vehicles. Over half of the major ATV manufacturers are no longer selling the smallest youth models despite the stay, significantly reducing the availability of these vehicles for children.

The CPSC has acknowledged that the ban on youth off-highway vehicles creates a significant safety issue because it likely will result in children 12 years of age and younger riding larger and faster adult-size vehicles. CPSC studies show that almost 90% of youth injuries and fatalities occur on adult-size ATVs. In contrast, the CPSC's staff scientists acknowledge that the presence of lead in metal alloys in these youth models does not present a health hazard to children. The Commission also acknowledges that children riding these vehicles only interact with a limited number of metal component parts that might contain small amounts of lead, like brake and clutch levers, throttle controls, and tire valve stems.

We appreciate the Subcommittee's efforts to address the unintended consequences of the CPSIA. We ask that you keep in mind the following points as you work to provide young riders, their families and our industry with much-needed, long overdue relief.

First, the lead content in metal parts of ATVs and motorcycles poses no risk to kids. In 2009, Dr. Barbara Beck estimated that the lead intake from kids' interaction with metal parts is less than the lead intake from drinking a glass of water.

Second, everyone agrees that the key to keeping children safe on ATVs and motorcycles is by ensuring they ride the right-sized vehicles. The CPSIA has put kids at significant risk by reducing the availability of youth model vehicles. The CPSC has described this unintended consequence of the Act as a "more serious and immediate risk of injury or death" than any risk from lead exposure from these products.

Third, the CPSIA is needlessly harming the economy and costing jobs when everyone is trying to grow the economy and create jobs. In 2009, MIC estimated that a complete ban on youth model vehicles would result in about $1 billion in lost economic value in the retail marketplace every year.

Fourth, motorcycles and ATVs are motor-powered machines, not toys or other articles kids wear or play with or, so the extent and nature of children's interaction with our vehicles is materially different. Young riders typically only touch a few parts of the vehicles, like handlebars and brake and clutch levers, and often with gloved hands.

Finally, ATVs and dirt bikes are stored outside the house, usually in garages, sheds or barns, and thus are much less likely than household items to be touched by young children. In addition to being remotely located, the vehicles have keys and use is controlled and supervised by parents.

As Representative Rehberg stated when introducing his bill to exclude youth ATVs and motorcycles from the Act's lead content restrictions, "the original legislation Congress passed was meant to keep kids safe from lead content in toys. Ironically, the overreaching enforcement wound up putting kids at risk by forcing them to use larger more dangerous machines that are intended only for adults."

Everyone agrees that the lead content restrictions for toys were never meant to apply to youth model motorized recreational vehicles. There are two obvious, common sense ways to fix this problem once and for all, without imposing further unnecessary regulatory costs and burdens on

our industry and customers. We urge you to exclude youth ATVs and motorcycles from the lead content provisions of the CPSIA by lowering the age range to age 6 and under or adding a categorical exemption in the bill.

I also would like to express the powersports industry's support for the Committee's recommended changes to the CPSIA database provisions. Industry has already experienced requests for misleading reports of harm to be posted on the government-run database. Indeed, one manufacturer recently received a database entry where a rider, who had been drinking prior to riding his ATV, rode off a cliff at night in the dark. Nothing in the report indicated any problem with the ATV. But nevertheless, because the death was "related to use of [a] consumer product," the CPSC has indicated that the ATV should be classified as being "unsafe" in the database. With the Commission having implemented the database the way it did, the database likely will become a repository of inaccurate information that defames manufacturers and misleads consumers. A guiding principle before anything is posted should be accuracy, and we believe the modest changes proposed in the draft legislation would result in a more useful database with accurate and relevant information for consumers.

Thank you. I would be happy to answer any questions.

Mrs. BONO MACK. Thank you, Mr. Vitrano. Ms. Jones, you are recognized for your 5 minutes.

STATEMENT OF ERIKA Z. JONES

Ms. JONES. Good afternoon, and thank you for inviting me to be with you this afternoon. I am Erika Jones, and I am counsel to the Bicycle Products Suppliers Association, which represents most of the manufacturers and importers of children's bicycles and adult bicycles offered for sale in the United States.

The bicycle industry has taken very seriously the expectations of Congress when the CPSIA was enacted. The bicycle industry has made substantial progress toward reducing lead in children's bicycle products or making the lead inaccessible to children and appreciated the Stay of Enforcement that was enacted by the Commission and used that time productively to make these design changes and material substitutions in their products.

Nevertheless, the industry is facing another brink of uncertainty as later this year a new standard of 100 parts per million looms on the horizon and presents a number of feasibility and practicability challenges for the industry. The industry presented data to the Commission in February of this year and again last month in written comments providing data from testing of a bicycle that was specced by its manufacturer to be below 100 parts per million because retailers are beginning to demand that level of achievement. And despite this effort to reach that goal, over 38 of the over 100 parts that were tested by the laboratory exceeded 100 parts per million, and that is attributable to the variability that is present, inherent, and we think at this point, can no longer be worked out of the system. These were metal parts. The bicycle industry has solved the issue with respect to plastic and other non-metallic parts but continues to have a problem with those components on bicycles that are made from metal alloys.

A witness at the CPSC regulatory hearing last month, who was retained by the bicycle industry and who runs a CPSC-certified lab, testified that he has in his experience seen a shrinkage in the number of children's bicycle models that are offered for sale and the number of manufacturers willing to engage in this sector, which means a loss of choice for consumers. And this, we believe, is attributed to the cost of testing for the over 100 parts of a bicycle that are accessible and therefore have to be tested.

Bicycles provide safe, affordable, and environmentally friendly transportation. They provide children with an enjoyable means of outdoor exercise, which we think is far more important for the health of children than protecting them from the theoretical risks from touching metal bicycle components with their hands. If lead testing costs make children's bicycles too expensive for average families to afford or if affordable used bicycles are difficult to obtain, the health of America's children could be affected far more than from the presence of lead in a tire valve stem that they may touch only on occasion.

I would like to address a comment made by the previous panel, by Dr. Best, who made a comment that there is no benefit to lead and therefore it should be inherently unnecessary. We disagree with that. Lead in the quantities that we see it in metal alloys that

are used in bicycles provide a tremendous benefit. They provide corrosion resistance. Lead alloys provide strength and durability that is needed for appropriate performance of a bicycle. And it would not be socially useful or desirable to produce a bicycle that may meet a lead-free standard but which falls apart or which cannot be operated in an outdoor environment where it is intended to be used.

The industry applauds your subcommittee for convening this hearing today. We believe there is a need to reform the CPSIA to reverse these unintended consequences and eliminate the unnecessary regulatory requirements that are driving up the cost of children's bicycles making them less available and we urge prompt action on sensible reforms of the CPSIA. Thank you.

[The prepared statement of Ms. Jones follows:]

BEFORE THE
SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND TRADE
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 7, 2011

TESTIMONY OF
ERIKA Z. JONES
ON BEHALF OF
BICYCLE PRODUCT SUPPLIERS ASSOCIATION

SUMMARY OF TESTIMONY

- The Bicycle Product Suppliers Association supports reforming the CPSIA and believes that sensible reforms are needed to address practical problems in the market.
- BPSA supports revising the age threshold for the definition of "children's product" to a lower age, and recommends establishing the threshold at age six.
- BPSA agrees that any new lead substrate standard should be prospective only.
- BPSA supports the establishment of an alternative lead substrate standard for components manufactured of certain specified metal alloys.
- BPSA welcomes provisions that recognize that component parts not likely to result in the ingestion of more than a de minimis amount of lead should not be subject to the standard and the testing requirements.
- BPSA supports an exclusion for the resale of used and refurbished children's products by charitable organizations.
- BPSA supports the proposed changes to the public database to make the data submissions more useful and accurate.
- BPSA does not support conferring authority on CPSC to extend the 100 ppm lead substrate limit to adult products.
- BPSA urges prompt action on sensible reforms of the CPSIA.

BEFORE THE
SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND TRADE
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 7, 2011

TESTIMONY OF
ERIKA Z. JONES
ON BEHALF OF
BICYCLE PRODUCT SUPPLIERS ASSOCIATION

Chair Bono Mack, Ranking Member Butterfield, and members of the Subcommittee, I appreciate the opportunity to testify before you this morning on the important matter of the need for amendments to reform the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

I am Erika Jones, counsel to the Bicycle Product Suppliers Association, an association of suppliers of bicycles, parts, accessories and services who serve the specialty bicycle retailer. BPSA has engaged actively and constructively with the U.S. Consumer Product Safety Commission since the enactment of the CPSIA. BPSA's efforts to work with the CPSC staff to find solutions to CPSIA implementation issues have included the following:

- BPSA met in the fall of 2008 with the staff to discuss issues related to the bicycle standard (Part 1512) and challenges that were presented by the requirement for certification to all provisions of that standard, in light of the fact that the standard had not been revised in many years and contained some provisions which were not applicable to some modern bicycle designs. Since that time, BPSA has worked with the staff to identify the bicycle standard provisions requiring clarification or modification.
- In early 2009, BPSA petitioned the CPSC for limited relief from the lead standard for children's bicycles on the grounds that the lead in the metal materials used for children's bicycles would not result in the absorption of any measurable lead in a child's body. The

BPSA petition was supported by the best available scientific evidence, including specifically the expert report of Dr. Barbara Beck of Gradient, who analyzed worst-case scenarios of exposure to BPSA's members' products and concluded that no measurable increase in the blood levels of children could be expected to result from their exposure to, and contact with, the metal materials for which the BPSA sought relief. As the Committee knows, the CPSC concluded that it was unable to provide the relief sought under the terms of the statute, but provided a limited stay of enforcement for the lead requirements.

- BPSA presented data at a public Commission meeting earlier this year regarding the imminent change in the lead substrate standard, which is scheduled to change from 300 ppm to 100 ppm in August of this year. BPSA advised the Commission that its test data documented the significant variability that exists in components manufactured of certain metal alloys, making it infeasible to certify compliance with a 100 ppm standard with any reasonable degree of confidence.
- BPSA also advised the Commission at that hearing that its members had been successful in identifying substitute materials for high lead-content metals and/or alternative designs that resulted in making the high lead-content materials inaccessible to children, but that these efforts came at high costs, and despite substantial investment, the industry has still not been able to identify suitable metal materials that can consistently meet a 100 ppm standard. Yet, the prospects for obtaining administrative relief from the Commission are unclear, particularly with respect to products that will be on retail shelves as of August 2011.

In short, BPSA members have taken seriously the expectations of the Congress in enacting the CPSIA, and have made substantial progress toward achieving the goal of reducing unnecessary lead in children's bicycle products. Nevertheless, despite these substantial efforts, BPSA members are facing yet another brink of uncertainty as the date for implementation of the 100 ppm standard looms on the horizon.

With respect to the requirements for third-party laboratory testing of children's products, BPSA has worked constructively with the CPSC staff to address issues related to laboratory capacity; however, some issues remain, particularly with respect to the costs of testing. BPSA presented information to the Commission at the recent public meeting on the feasibility of the 100 ppm standard about the shrinkage of the market in terms of the number of companies willing to market children's bicycles. While the total volume of children's bicycles sold annually has not diminished, the number of children's bicycle models in the market is reduced from the number that were offered for sale before CPSIA's enactment, and the number of manufacturers willing to participate in the children's bicycle market sector has diminished, according to BPSA's expert who participated in the recent public meeting at the CPSC regarding the technological feasibility of a 100 ppm lead substrate standard. We believe that these market impacts are directly traceable to the onerous requirements of the CPSIA, including specifically the testing costs that are required to certify compliance with the CPSC's regulations.

For all of these reasons, BPSA strongly supports the efforts of this Subcommittee to bring some sorely needed reform to the CPSIA.

BPSA is particularly supportive of the following proposals in the discussion draft:

- Reducing the age threshold for definition of a "children's product." BPSA supports lowering the age threshold for the definition of a "children's product," and recommends

that the appropriate age threshold for determining whether a bicycle is a "children's product" should be whether the bicycle is intended primarily for use by a child six years of age or younger. This change alone would relieve BPSA members of the need to expend scarce resources on lead substrate testing on those bicycles intended for use by pre-teens, for whom there is no reasonable prospect of being injured from exposure to lead, as documented in Dr. Beck's analysis supporting the 2009 BPSA petition.

- Specifying that any new lead substrate standard would be prospective only, and not apply to products on retail shelves. BPSA has provided the Commission with information as to why a 100 ppm standard is not technologically feasible for metal components on children's bicycle products, and urges this Committee to report legislation that will provide complete relief from this requirement for bicycles. Although BPSA members are not seeking relief from a 100 ppm lead substrate standard for non-metal components, such as vinyl handgrips, it is unfair and extremely disruptive to apply that standard, or any new performance standard for that matter, to products that were manufactured before the effective date of the new standard. Except in the rarest of circumstances, new government standards should apply prospectively to products that are manufactured after the effective date of the new standard.
- Establishing an alternative lead substrate standard for metal components made of steel, copper or aluminum alloys. BPSA supports this provision, and believes its enactment would be directly responsive to some of the practical concerns that BPSA members have identified, and documented in prior presentations to the CPSC; however, it is unclear whether this provision would provide any relief from the testing burdens associated with the requirement to certify compliance. BPSA suggests that one additional step that might

be helpful to small businesses that are struggling with the testing costs would be to direct the CPSC to establish a roster of those metal alloys (perhaps identified by grade or other recognized identifier) that would be identified as presumptively compliant with the alternative standard, thereby relieving the manufacturer of the obligation to test separately for lead substrate compliance if the manufacturer chooses to use one of the alloy grades specified on the roster. (Of course, a manufacturer would remain free to specify a different material and test components made of that different material for compliance with the lead substrate standard.)

- Establishing a de minimis exception for component parts that are not likely to result in ingestion of more than a de minimis amount of lead. BPSA welcomes any provision that acknowledges the fact that the mere presence of lead in certain components does not necessarily present a health or safety risk to children. BPSA believes that product regulations that effectively ban the use of certain materials should be based on scientific risk assessments and a thorough understanding of the societal trade-offs that arise from such effective bans.
- Creating an exclusion for the resale of used or refurbished children's products by charitable resellers. BPSA strongly supports the intention of this provision, which is to permit the distribution of used or refurbished children's products by charitable organizations. Particularly given the scientific evidence strongly supporting the conclusion that children's bicycles do not present a health or safety risk to children based on the presence of lead in certain components, there is no good public policy reason to deprive families of the option of obtaining affordable, second-hand bicycles.

- Revising the public database provisions to make the submissions more useful by ensuring that submitters have actually experienced harm or risk of harm and by requiring more verification of disputed reports.

* * *

BPSA does not support conferring authority on the CPSC to extend the 100 ppm lead substrate limit to adult products. No justification has been offered for the need for any such requirement for adult products. In the short time since this draft legislation has been made available for review, BPSA members have been unable to evaluate whether the materials substitutions and redesigns for inaccessibility that were done for children's bicycles are feasible or practicable for adult bicycles. Before conferring any such authority on CPSC, BPSA urges this Committee to allow more time to evaluate the need for, and consequences of, any such new authority to impose a new mandate.

Our collective experience with the CPSIA has reminded us all of the need for regulators to consider unintended consequences before moving to ban a product or a material. The CPSIA was enacted with the best of intentions, but has proven in practice to present some practical challenges for manufacturers. BPSA believes that the CPSC should maintain its traditional method of regulating potentially harmful products and substances on the basis of a scientific risk-based assessment of potential harm balanced against the costs and other consequences associated with the ban or other regulation.

BPSA members are very proud to serve the needs of American bicycle consumers of all ages. Bicycles provide safe, affordable and environmentally friendly transportation. Bicycles provide children with an enjoyable means of outdoor exercise, which is far more important for the health of America's children than protecting them from the theoretical risks from touching

metal bicycle components with low lead levels. If lead testing costs make children's bicycles too expensive for average families to afford, and if affordable, used bicycles are difficult to obtain, the health of America's children could be affected far more than from the presence of lead in tire valve stems.

BPSA applauds this Subcommittee for convening this hearing today to consider the need to reform the CPSIA to reverse the unintended consequences of that law and to eliminate unnecessary regulatory requirements that are driving up the costs of children's bicycles. BPSA urges prompt action on sensible reforms of the CPSIA.

Mrs. BONO MACK. Thank you, Ms. Jones. You get the record for coming in 45 seconds short, so I am going to recognize myself for the first 5 minutes of questioning and direct my question to you.

You made reference several times in your written testimony to the August time frame. What happens in August that this time frame is of such concern that we need to do something about it in this amendment that we are looking at?

Ms. JONES. On August 11 of this year the lead standard for substrate will drop to 100 parts per million, and under the current interpretation of the statute that will have immediate effect at the retail level, meaning it will really be retroactively applied to products that are on the retail shelves that are being built right now as we speak. And that has a devastating effect on product planning and as I testified a few minutes ago and as we have submitted data to the CPSC, the 100-parts-per-million standard is technically not feasible right now for the bicycle industry to meet.

Mrs. BONO MACK. Thank you. And you also state that "except in the rarest of circumstances, new government standards should apply prospectively to products that are manufactured after the effective date of the standard." Can you give us examples of circumstances in which new standards have been applied immediately and retroactively? And how do those examples differ from the instance we have before us?

Ms. JONES. Well, the best example is the one we were just discussion of the 100 parts per million, which will apply immediately on August 11, not to products built after that date but to products on retail shelves as of that date, the same process applied when the 300 parts per million standard took effect in 2009. And it had the same effect and disruptive effect at the retail level.

This is not the norm for product regulation in other government agencies where normally—even at the CPSC as well—normally, manufacturers are given lead time to plan for the new regulation, to redesign their products, to absorb the costs in a more orderly fashion, and to work out their inventory so that products sold after the effective date reach retail shelves in a compliant fashion. That is the proper, orderly way to regulate products for safety improvement, not to disrupt the market with these very abrupt changes that do not permit that kind of orderly transition.

Mrs. BONO MACK. Thank you. Ms. Cox——

Ms. COX. Could I make a brief comment there?

Mrs. BONO MACK. No, I would like to move on. I have limited time and I do have a question for you, though. And you do mention that the FDA's warning about lunchboxes containing lead claiming that FDA interpreted CPSC's data differently than CPSC itself. How many lunchbox recalls did FDA order after it reviewed CPSC's data?

Ms. COX. This happened a long time ago but my recollection is there were not recalls but just a warning letter sent to lunchbox manufacturers telling them to fix the problem.

Mrs. BONO MACK. I guess you mentioned this in your testimony that your discussion of lunchboxes suggests that FDA would disapprove of a risk-based lead standard and insist on a total lead content standard, but in fact they don't have any total content standard for lead, do they?

Ms. COX. I actually think the example of the lunchboxes shows that, you know, one of the big advantages of the total content standard, it provides a clear, consistent number which manufacturers, retailers, regulators, everybody knows what the threshold is. I mean one of the issues with the lunchboxes was that it occurred pre-CPSIA, and so different agencies interpreted the results of the risk-based testing in different ways. And what we have now with CPSIA is a clear standard and lunchboxes all across the country—I have tested a lot of them over the last couple of years, and they are great.

Mrs. BONO MACK. All right——

Ms. COX. They comply with the standards.

Mrs. BONO MACK. Thank you. Ms. Millar, why isn't a total lead standard as health-protective as an exposure-based standard?

Ms. MILLAR. The risk to a child or to any consumer is based on actual handling and use. One of the assumptions that is incorrect that is underlying CPSIA is the notion that 100 percent of lead and substrate will migrate out of the product. That is actually not true and the CPSC's own data demonstrates that actual migration rates are generally very low, even in worst-case, 24-hour acid ingestion test conditions. That is why we think that total content—and I think Mr. Howell expressed it this morning—can be useful as a benchmark screen, but absolute limits that ban products that actually don't result in exposure of the sort that Mr. Vitrano and Ms. Jones talked about this morning do serve to essentially ban products that are objectively safe because they don't result in significant harmful exposure to the consumer who is handling the product.

Mrs. BONO MACK. Thank you. Mr. Butterfield, you are recognized for 5 minutes.

Mr. BUTTERFIELD. Thank you very much. Let me go to you if I can, Ms. Cox. In your testimony you state that exposure assessment testing is a subjective process, open to interpretation and manipulation. Is that a fair characterization of your statement, that it is subjective as opposed to objective?

Ms. COX. It is definitely subjective, yes.

Mr. BUTTERFIELD. All right. And the gentlelady on the first panel, Dr. Beck, testified and supports the risk assessment, seems to provide support for your view as well. Her written testimony that she submitted indicates that assessing risk is highly contextual and hinges on a number of factors.

Dr. Beck testified that you would want to know a lot of different things. You would want to know what the product is, how frequently a child interacts with the product, the duration of the interaction, will the child likely bite or suck on the product, will the child touch the component, how large an area the child will touch, and so forth and so on. That is about seven separate pieces of information that Dr. Beck identified. And I can add a couple more. How old is the child and in what stage of development is that particular child? What is the nutritional status of the child? Does the child have certain genetic traits that will lead to greater absorption? And so forth. It seems to me that perhaps the only person who could know all of these things and come up with that type of risk assessment would be someone who is superhuman.

Let me start with one simple question. Is it correct that with a lead content limit, a manufacturer or a retailer only has to know the answer to one simple question, how much total lead is in the component?

Ms. COX. Yes, that is correct. And just to reinforce what I said earlier. That allows the manufacturer or anyone in the supply chain to specify to their suppliers the type of material that they need.

Mr. BUTTERFIELD. Dr. Beck also in her testimony asserted that a standard based on soluble lead is generally preferable to a standard based on total lead. And as I understand it, total lead is a measure of how much lead is in a component, period. This is the measure required by the legislation. Solubility, on the other hand, refers to the amount of lead released from a component under certain specified conditions. Is it correct, Ms. Cox, that the conditions for measuring solubility are not consistent? That is they could choose to vary the time, temperature, and the solution that is used, whether to agitate the solution and so on. Would you elaborate on that, please?

Ms. COX. I think I could just say that I have actually heard people in the laboratory and testing industry say that if something complicated like a solubility test or other exposure-based testing was required that there actually wouldn't be lab capacity enough to be able to do these tests because they are so much more complicated and time consuming than a simple test for lead content.

Mr. BUTTERFIELD. Will changing even one of these conditions affect the amount of lead that will be released during the test?

Ms. COX. I think—yes, I am not a lah specialist but that is my understanding, yes.

Mr. BUTTERFIELD. All right. My next question is—I guess I have time to do it. Let me try this. In your testimony, Ms. Cox, you point out that a total lead content limit allows companies to specify materials that meet the standards when contracting with suppliers. If I understand you correctly, a manufacturer can tell his or her metal supplier, I want to buy metal from you but only metal that contains no more than 300 parts per million and a supplier would be able to easily fill that order as specified. Could you respond?

Ms. COX. Correct. In the exposure-based testing you can't do until the product is completed, so that would happen at the very end of the manufacturing process, whereas with the total content, you can specify the content of all the materials and components that are used in a product. So it allows you to do it sort of premanufacture rather than having to potentially reject a product after it is already made.

Mr. BUTTERFIELD. All right. All right, Madam Chairman, I yield back.

Mrs. BONO MACK. Thank you, Mr. Butterfield. And now I would like to recognize Ms. Blackhurn for her 5 minutes.

Mrs. BLACKBURN. Thank you so much. And thank you all for your patience today.

Ms. Cox, I enjoyed listening to your testimony and especially that you used Curious George. I have got a 3-year-old and a 2-year-old grandchild and that is one of their favorites. Let me ask you some-

thing. Do you find more lead in products that we import or products that are domestically manufactured?

Ms. COX. I think probably everybody here is aware that virtually all the products on the shelves of major national retailers are products that are not made in this country. So, you know, when we find products that exceed CPSIA limits, it is not surprising that that is also true.

Mrs. BLACKBURN. OK. In listening to your testimony and the testimony of others, it has been kind of curious—and Mr. Vitrano and Ms. Jones, I will ask you. With motorcycles and bicycles, do you all find more lead in those that we import or those that are domestically produced?

Mr. VITRANO. All the major manufacturers of ATVs actually produce many of the models in the U.S. itself.

Mrs. BLACKBURN. OK.

Mr. VITRANO. Some models are made by those companies from outside the U.S. and——

Mrs. BLACKBURN. Well, maybe that they are domestically produced is one of the reasons we have less lead in a wipe test than in a glass of water. Ms. Jones, bicycles?

Ms. JONES. Most children's bicycles are not made in this country any longer.

Mrs. BLACKBURN. OK. And so you don't see that as being pertinent to what you all do?

Ms. JONES. We do not see that as being pertinent.

Mrs. BLACKBURN. OK. That is fine. You know, I have wondered if maybe since we have driven manufacturing out of this country is one of the reasons we are here having this hearing today and talking about the amount of metals that are there and some of the environmental litigation that has been brought forward and has driven manufacturing away from our shores. Maybe that is one of the reasons that we are here.

And I know, Ms. Cox, that the Center for Environmental Health uses litigation quite frequently under California's Prop 65 warning requirements. And I know that you all do some work and wanted to ask you, do you all get a bounty for identifying violations under Prop 65 labeling laws?

Ms. COX. Proposition 65, for those of you who don't know, was a ballot initiative in California in 1986——

Mrs. BLACKBURN. Yes, but you identify violations under that, so do you all get a bounty?

Ms. COX. The statute, as passed by the voters, provides for if the statute is violated, there are civil penalties that are paid to the State——

Mrs. BLACKBURN. Yes, I have got some of them in front of me——

Ms. COX [continuing]. And the plaintiffs who identify the violation is entitled to 25 percent of those civil penalties.

Mrs. BLACKBURN. OK. So I have got an exhibit in front of me that identifies some of these. So if one type of fashion accessory listed above is checked, it would be $45,000 in that identification. So you all would get 25 percent of that if you identified those.

Ms. COX. 25 percent of the civil penalties.

Mrs. BLACKBURN. OK. All right. So 25 of the 45,000. So, OK, is this a funding revenue stream for your organization?

Ms. COX. My organization has a diverse source of revenue. Like most nonprofit organizations, we receive grants from foundations. We also have a strong committed group of individual supporters who support us financially. And then we do get some money from our litigation as well.

Mrs. BLACKBURN. Is that with the Lexington Law Group? Is that under a consent decree?

Ms. COX. Could you repeat the question? Sorry.

Mrs. BLACKBURN. I said is that with the Lexington Law Group, your litigation? OK. Let us move on. So then you get some money that comes to you through identifying these violations and most of the product, I guess, that you are looking at is things that are imported and they are on the shelves of major retailers, is that correct?

Ms. COX. Yes.

Mrs. BLACKBURN. And how many lawsuits have you partnered with the Lexington Law Group?

Ms. COX. Let us see. There were a lot of questions there.

Mrs. BLACKBURN. Yes, let me help you out with this. My time is nearly out. What I would like to know—and you can submit in writing—I would like to know what percentage of your funding relates to litigation. I would like to know how many lawsuits you have partnered with the Lexington Law Group. And I would like to know how much money you have made, what your revenue stream is from Prop 65 lawsuits in violations since the passage of CPSIA. And with that, Madam Chairman, I yield back the balance of my time.

Ms. COX. Yes, I think it probably would be best for me to provide that information in writing since it is a lot of numbers.

Mrs. BLACKBURN. Yes, ma'am, I was asking for it in writing.

Ms. COX. I would be happy to do that.

Mrs. BLACKBURN. For the record.

Mrs. BONO MACK. Thank you. The chair is happy to recognize Mr. Pompeo for 5 minutes.

Mr. POMPEO. Thank you, Madam Chairman. Following up on Ms. Blackburn, would you submit all of the sources of funding for your organization when you put that in writing to us, not only that that you get for Prop 65 but other sources for funding for the center, the CEH?

Ms. COX. Yes, I would be happy to.

Mr. POMPEO. Thank you.

Ms. COX. And just to clarify, the work that I talked about in my testimony, monitoring for CPSIA compliance, that money came from the California Department of Justice, California Attorney General.

Mr. POMPEO. So governmentally funded, is that right?

Ms. COX. Sorry?

Mr. POMPEO. Government funding from the State of California?

Ms. COX. It went through a private foundation but the source of the money was the attorney general's office.

Mr. POMPEO. Thank you. Ms. Millar, this is fascinating to me. I am new here. This is all very fascinating. You, on the other hand,

you get paid by your clients and you are here today trying to avoid them paying you by reducing the regulatory burden. I find that fascinating to see the charitable effort you are making here today. Yes, no, I truly meant it that way. I meant it as a compliment.

Ms. Jones, you said that you have a problem with metal alloys in the bicycle industry?

Ms. JONES. Yes, sir.

Mr. POMPEO. Why do you use metal? Just why don't you stop using it?

Ms. JONES. Metal alloys add a great deal of important value to bicycles. They help the bicycle be corrosion-resistant, they help them be strong and durable, and we really couldn't make bicycles without them.

Mr. POMPEO. So there is no substitute?

Ms. JONES. Well, no, that is not true. There are substitutes, for example, carbon fiber. Some very high-end racing bikes for adults are made of carbon fiber but they would be way too expensive——

Mr. POMPEO. But I am not going to buy that for my son?

Ms. JONES. You are not going to buy that. It would be too expensive.

Mr. POMPEO. Yes. Yes, my son might like it but I am not going to buy it.

Ms. JONES. There is no affordable, practical substitute.

Mr. POMPEO. Thank you. That is what I figured. We were talking before about these different tests. Mr. Butterfield, Ms. Cox, asked you about some different tests and you said boy, the testing would just be really hard. He was describing these testing would be very difficult, soluble, non-soluble, it would be really hard and inconsistent. Is that right? And so you then said yes, that would be hard, so let us just take a simpler test that probably doesn't really accomplish what we are trying to do. So it is a proxy at best. The perfect testing would be hard and difficult so what everybody defaults to is this simple test that really doesn't get to the true risk of exposure to a consumer of a product. Did I understand your response correctly?

Ms. COX. I would prefer to phrase it as——

Mr. POMPEO. I am sure you would.

Ms. COX [continuing]. The goal——

Mr. POMPEO. I would prefer if you would not rephrase it but simply answer my question.

Ms. COX. The goal of CPSIA was to remove a toxic metal from children's products. And there had been a long history prior to CPSIA of risk-based approaches not being successful, and the lead content standard has been very successful at changing the marketplace and getting lead out of these products.

Mr. POMPEO. I have no doubt. And banning lots of things would make them successful, too. We can always create a test that is over-inclusive and solve a problem. But as you can see from Ms. Jones' comment earlier, we create another one. My son doesn't get to exercise on his bicycle. Ms. Millar, do you have a view on the testing that Mr. Butterfield asked Ms. Cox about?

Ms. MILLAR. Yes. As I said earlier—and I think Mr. Howell alluded to this as well this morning in his testimony—the ability to use total content as screening is an important tool. There is no

question about it. And I think it is true that people do try to target where they can meet a certain limit. It does help in the supply chain. It is not true that total lead tests are always uniform and never varied. We see a lot of different variability in total content test. And I think the problem becomes that when you establish an absolute ban, what we have seen for bikes, for ATVs, for certain, you know, pearlized buttons, for example, have agents in them that are metallic, you can have violations of total content limits where objectively applying standard accepted procedures that the CPSC uses, whether it is a wipe test, a saline test to mimic mouthing, which is a 6-hour-test procedure—they have an established procedure—or their updated 24-hour acid exposure test, you can establish whether or not that product is going to pose a risk. And so the manufacturers are going to always target to some objective limit where they can. The problem is that you are going to ban them where they exceed it where there is not a risk.

Mr. POMPEO. It makes sense. I have got one more question, just 20 seconds. Mr. Vitrano, Ms. Jones, have any of you had any experience responding to a CPS database complaint at this point? There has only been a month. Have any of you had experience responding to——

Ms. JONES. Yes.

Mr. POMPEO. How did it go?

Ms. JONES. We still have a couple in process but, you know, it is certainly something that people pay attention to. They take it seriously. In no case, however, has a client to date had a materially inaccurate incident report submitted to them.

Mr. POMPEO. But they have had to spend a bunch of money talking to you? Thank you. I yield back my time.

Mrs. BONO MACK. I thank the gentleman and recognize the distinguished chairman emeritus, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Madam Chairman, thank you. The questions are to all witnesses and I would very much appreciate it if they would be answered yes or no.

First of all, beginning with Ms. Cox, are you aware of a uniform reasonable methodology in use by manufacturers of children's products to find what is the amount of lead in a product? Yes or no?

Ms. COX. Yes.

Mr. DINGELL. Ma'am, Ms. Millar?

Ms. MILLAR. Yes.

Mr. DINGELL. And you, sir?

Mr. VITRANO. Yes.

Mr. DINGELL. Ma'am?

Ms. JONES. Yes.

Mr. DINGELL. OK. Now, is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products? Yes or no? Ms. Cox?

Ms. COX. Yes.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. No.

Mr. DINGELL. Sir?

Mr. VITRANO. I don't know.

Mr. DINGELL. Ma'am?

Ms. JONES. No, we are not seeing that.

Mr. DINGELL. The next question, if it wouldn't lead to a variance, do you believe that this could pose a risk to the health of the children who use such products? Yes or no? In other words——

Ms. COX. I don't think I am able to answer that question.

Mr. DINGELL [continuing]. Is that variance going to put the children at risk? Well——

Ms. COX. Well, certainly, we need consistent testing.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. I don't see the variability, so my answer is no.

Mr. DINGELL. And you, sir?

Mr. VITRANO. It would depend on the variability.

Mr. DINGELL. Ma'am?

Ms. JONES. And we are not seeing the variability.

Mr. DINGELL. Ms. Cox, do you want to take another shot at it? All right. We will go to the next set of questions because time is very limited here.

We have the term "accredited third-party conformity assessment bodies." I assume that this includes both domestic and international bodies that would do this kind of testing? Am I correct? Yes or no, Ms. Cox?

Ms. COX. Yes.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. Yes.

Mr. DINGELL. Sir, if you please?

Mr. VITRANO. Yes.

Mr. DINGELL. Ma'am?

Ms. JONES. Yes.

Mr. DINGELL. All right. Now, if so, how many such assessment bodies are there worldwide? I don't expect you to know but give me a shot in the dark, the best count you can give. How many do you think there are? Ms. Cox?

Ms. COX. I don't know.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. A couple of hundred, I believe.

Mr. DINGELL. Sir?

Mr. VITRANO. For youth model ATVs there currently is 1.

Mr. DINGELL. Ma'am?

Ms. JONES. For bicycles there are only two in the U.S. and about a half-dozen outside of the U.S.

Mr. DINGELL. Thank you, my friends. Does the Commission have the resources with which to verify the testing capacity of all of these third-party conformity assessment bodies? Yes or no? Ms. Cox?

Ms. COX. I don't know.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. I don't know.

Mr. DINGELL. Sir?

Mr. VITRANO. I don't know.

Mr. DINGELL. Ma'am?

Ms. JONES. I don't know.

Mr. DINGELL. Now, is it your understanding of the draft legislation that the Commission would have to accredit all third-party conformity assessment bodies? Yes or no?

Ms. COX. I don't know.

Mr. DINGELL. In other words, would they have discretion under the legislation to decide who they would accredit and how and why they would accredit? Yes or no?

Ms. COX. I don't know.

Mr. DINGELL. Ma'am?

Ms. MILLAR. I don't know.

Mr. DINGELL. Sir?

Mr. VITRANO. I don't know.

Mr. DINGELL. Ma'am?

Ms. JONES. I don't know.

Mr. DINGELL. All right. Now, in summary, do you believe that the effect of these requirements would be that the Commission would seldom, if ever, require third-party testing of children's products? Yes or no?

Ms. COX. I don't know.

Mr. DINGELL. Ma'am?

Ms. MILLAR. I don't know.

Mr. DINGELL. Sir?

Mr. VITRANO. No.

Mr. DINGELL. Ma'am?

Ms. JONES. No.

Mr. DINGELL. Now, here are some questions about the database which are troubling us. And everybody, I think, is troubled. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of the accuracy of the information? Yes or no? Ms. Cox?

Ms. COX. I don't know.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. Yes.

Mr. VITRANO. Yes.

Ms. JONES. Generally, yes.

Mr. DINGELL. Thank you. Now, should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published? Yes or no? Ms. Cox, please? What is your opinion, just your best judgment on the matter, please?

Ms. COX. These questions are outside my expertise.

Mr. DINGELL. All right. Then I will not press you on it, ma'am. Ms. Millar?

Ms. MILLAR. Yes.

Mr. DINGELL. Mr. Vitrano?

Mr. VITRANO. Yes.

Mr. DINGELL. Ms. Jones?

Ms. JONES. Yes.

Mr. DINGELL. All right. Now, if a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should the dispute be resolved and by whom? If you please, Ms. Cox?

Ms. COX. I don't know.

Mr. DINGELL. Ms. Millar?

Ms. MILLAR. I think the CPSC should resolve the inaccuracy before posting the complaint to the database.

Mr. DINGELL. Mr. Vitrano?

Mr. VITRANO. CPSC should resolve it before posting.

Mr. DINGELL. Ms. Jones?

Ms. JONES. CPSC should resolve it before posting.

Mrs. BONO MACK. The gentleman's time has expired.

Mr. DINGELL. I thank you, Madam Chairman. I have one more great question. Could I ask unanimous consent to ask it, please?

Mrs. BONO MACK. Yes, without objection.

Mr. DINGELL. Thank you. The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe that the draft legislation's narrowing of eligibility to submit the complaints is necessary? Yes or no?

Ms. COX. Not necessary.

Mr. DINGELL. OK. Ms. Millar.

Ms. MILLAR. Necessary.

Mr. DINGELL. Mr. Vitrano?

Mr. VITRANO. Yes, it is necessary.

Mr. DINGELL. Ms. Jones?

Ms. JONES. Yes, it is necessary.

Mr. DINGELL. Madam Chairman, you have been most courteous. May I have an additional unanimous consent request? I have a splendid statement that I have labored long and hard on.

Mrs. BONO MACK. I have nothing but fondness and admiration for the distinguished chairman, but we still have another member and another panel to go and votes on the floor. So I will——

Mr. DINGELL. I am not delaying——

Mr. BUTTERFIELD. Madam Chair——

Mr. DINGELL [continuing]. Madam, I have a statement I would like to put in the record.

Mr. BUTTERFIELD. Whenever the chairman emeritus talks like that, he has a pleasant surprise for us. I would ask unanimous consent to yield to the chairman emeritus.

Mr. DINGELL. Thank you very much. No, it is just a statement that I want to put in the record, Madam.

Mrs. BONO MACK. Of course. Without objection.

[The information follows:]

Statement of
Representative John D. Dingell
Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
Hearing on "H.R. __, a bill to revise the Consumer Product Safety Improvement Act of 2008"

April 7, 2011

Thank you, Madam Chairman, for holding this important hearing. My concerns about the impracticability of certain provisions in the Consumer Product Safety Improvement Act (CPSIA) are a matter of public record and need not be revisited here. I commend you, Madam Chairman, for circulating draft legislation meant to remedy these concerns. I hope the Committee's deliberations on this matter will yield bi-partisan legislation that maintains the tenor of CPSIA's landmark consumer protections, yet at the same time grants the Consumer Product Safety Commission greater administrative flexibility and facilitates compliance with the Act.

I wish to stress that my support of legislation to amend CPSIA is contingent to a great extent on such legislation's having bi-partisan support. Further, my interest with respect to this Act has always been to avoid intractability in the face of common-sense ways to make CPSIA workable. To that end, I urge my colleagues on both sides of the aisle to cooperate on this matter, engage stakeholders, and produce a bill – much like the House's Consumer Product Safety Modernization Act – that the Committee and House will unanimously approve.

I look forward to hearing our witnesses' thoughts about the legislation pending our consideration today, as well as their general advice for addressing what some consider CPSIA's apparent shortcomings.

Thank you for your courtesy, Madam Chairman, and I yield back the balance of my time.

Mr. DINGELL. And I do thank my good friend for his kindness to me. Thank you, Madam Chairman.

Mrs. BONO MACK. Thank you. And reminder, I am new at this chairmanship, so I appreciate the kindness of the distinguished chairman emeritus but will recognize Dr. Cassidy for 5 minutes.

Mr. CASSIDY. I don't know. I am sorry. I was out when you all were making testimony so I don't know if anyone can address what I am about to ask. As I look at the epidemiology of lead poisoning, it seems to be not generally distributed, but it seems to he in certain populations. Those which are recent immigrants, for example, appear to have a disproportionate amount of lead toxicity. And in fact I was looking at something from a hospital in Los Angeles that found even within the Hispanic community there, there was three ZIP codes which were particularly impoverished ZIP codes in which there was even more. Now, assuming that toys are generally distributed but that the people who have problems with lead toxicity are concentrated in certain areas, it suggested to me that the culprit for those children who have increased lead, it may be geographic or related to how recently they came from another country without standards than it is almost anything else.

I toss that out not knowing if anyone can answer that nr if these are just musings. Anybody want to take a crack at that?

Ms. COX. I will take a crack at it. Exposure to old lead-based paint in homes is the primary source of lead exposure to children, and that has been the case for several decades. Current statistics are about 70 percent of elevated blood lead levels in children are caused by exposure to paint. The other 30 percent are not. Further——

Mr. CASSIDY. Now, wait. I am sorry. Just so I understand, so if you have a blood level of 100, just to pick a number, does that mean that 70 percent of that 100 is related to paint exposure and 30 percent to another environmental factor or does it mean that 70 percent of the children that have elevated lead levels have it due to paint?

Ms. COX. 70 percent of the children with elevated blood lead levels, they are able to trace back that exposure to paint.

Mr. CASSIDY. So the 30 percent, is that those for whom no point source can be identified or those for whom another point source is identified?

Ms. COX. In general, when there is a child with an elevated blood lead level, there is a huge effort to identify the source. So the number of unidentified ones is really small.

Mr. CASSIDY. And so again, as I look at this concentration among recent immigrants, it suggests to me that recent immigrant status is a separate factor. I did my medical residency in Los Angeles and we used to see all these diseases from other countries in Los Angeles, very odd diseases that we wouldn't see in Washington, D.C., for example, even though this is also a place of immigrants. So I guess to what is the impact of immigrant status? Is there exposure to lead that is occurring south of the border that we are importing?

Ms. COX. I am not aware of any statistics about immigrant status and lead exposure. I do know that because the deteriorating paint is a factor, you know, living in older housing or housing——

Mr. CASSIDY. OK, I got that.

Ms. COX [continuing]. That is not well-maintained——

Mr. CASSIDY. The 30 percent of folks for whom paint is not a factor—and I should know this but I have been trying to track it down and I apologize—what percent of those have a point source identified and what are those point sources?

Ms. COX. The point sources tend to be lead in soil, lead in water, and then lead in various kinds of consumer products.

Mr. CASSIDY. What, for example?

Ms. COX. Examples of consumer products?

Mr. CASSIDY. With lead that have been identified as a risk for children.

Ms. COX. Jewelry, toys, there is some lead-containing makeup that has been a problem. There is lead-containing foodware that has been a problem——

Mr. CASSIDY. I assume that some of this, though, must be older stuff. I mean I can remember playing with lead when I was a kid. Obviously, my mother didn't care for me. I am assuming that much of what is now available with or without these regulations that lead is gone. Is that a fair statement? I am looking at all of you all now because I can only imagine that my pencil that I used to chew on in third grade probably had lead in it.

Ms. COX. The regulation of lead over the last 40 years has been, you know, one of the country's greatest public health successes. So removing lead from paint, removing lead from gasoline, and then removing lead from other consumer products has had a dramatic reduction in the number of children with elevated blood lead levels. The goal of CDC was to get that level to 0 by 2010. It hasn't quite happened but——

Mr. CASSIDY. And if it is true that immigrants are the cause of a lot of this, it will never happen. I just say that because our tuberculosis problem will never go to 0 as long as we have people immigrating from Mexico because it is just endemic there. I am just trying to understand to what degree can we attribute products, you know, toys for this as opposed to everything else? Thank you for your time. Thank you.

Mrs. BONO MACK. I thank the gentleman and that concludes the panel. And I would like to thank Ms. Cox and Ms. Millar, Mr. Vitrano, and Ms. Jones for your time and testimony today. And I am sure we will be working together in the future on refining this legislation.

Mr. BUTTERFIELD. Madam Chairman, may I be recognized before the panel leaves?

Mrs. BONO MACK. Yes.

Mr. BUTTERFIELD. Earlier Ms. Blackburn requested Ms. Cox, if she would furnish financial information for her nonprofit organization, and at first I had a little heartburn about that, but after I thought about it, it is an appropriate request. It goes to her credibility as a witness today. As a former judge I guess I should know that. But I was wondering if it would be appropriate to ask the other three witnesses if they would similarly furnish the sources of their revenue for their organizations that they represent.

Mrs. BONO MACK. Well, I will remind the gentleman that you can submit any question you would like to any witness and that you have 10 days to do so and remind the gentleman also that

Members of Congress are allowed to ask any question that they would like of any witness and again remind you that you have that prerogative to do that in writing to the witnesses. And with that, again, if the gentleman will yield back.

Mr. BUTTERFIELD. He will. Thank you.

Mrs. BONO MACK. I thank the panelists again and would call for the third panel if we can get seated. We are going to have votes shortly on the floor so we would love to get started and see how much progress we can make. So a short break and then we will roll into the third panel.

Thank you. That was a quick transition. Thank you, staff. So now the third panel, I would like to thank you all very much for being here. We have the final four witnesses. First up, we have Frederick Locker of Locker, Greenberg, and Brainin, P.C. Our next witness is Charles Samuels of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. Also testifying will be Dan Marshall, Vice President of the Handmade Toy Alliance. And our fourth panelist today is Rachel Weintraub, Director of Product Safety and Senior Counsel for the Consumer Federation of America. Welcome everybody. You know the drill, 5 minutes, and you know where the lights are so we are going to begin, Mr. Samuels, with your 5 minutes. Thank you and welcome.

STATEMENTS OF CHARLES A. SAMUELS, MEMBER, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY, AND POPEO, P.C.; FREDERICK LOCKER, LOCKER, GREENBERG, AND BRAININ, P.C.; DAN MARSHALL, VICE PRESIDENT, HANDMADE TOY ALLIANCE, AND CO-OWNER, PEAPODS NATURAL TOYS AND BABY CARE; AND RACHEL WEINTRAUB, DIRECTOR OF PRODUCT SAFETY AND SENIOR COUNSEL, CONSUMER FEDERATION OF AMERICA

STATEMENT OF CHARLES A. SAMUELS

Mr. SAMUELS. Thank you, Chair Bono Mack, and members of the subcommittee. Thank you for the opportunity to testify. I have the privilege of serving as general counsel of the Association of Home Appliance Manufacturers, as well as representing companies on product safety matters.

I support a fully resourced, focused, and effective Commission with the tools to protect Americans from unsafe products. I supported the revamping of the federal product safety laws and I respect the hardworking and dedicated officials at the Commission. Unfortunately, parts of the law are overreaching, over-prescription, and distort the Agency's mission to the detriment of consumers and industry. The discussion draft makes great strides towards remedying the imbalances and deficiencies in the current law without doing violence to the core public policies.

I will focus on the database provision. Technology should be used to disseminate good and easily accessible information to consumers about product safety. It makes no sense, however, for so much of the resources of the Commission to be invested in this effort unless it provides useful and accurate information to the extent feasible. We cannot expect perfection, but we now have a database that can

be manipulated for purposes other than that intended. Vague, useless, and incorrect information can be placed online. This not only harms manufacturers, retailers, and importers, but harms consumers who receive bad information and cannot focus on truly unsafe products. Discrete changes can be made to the law, which will greatly improve the operation, utility, and fairness of the program.

First, the intent of the law is that posted reports of harm will come from those who suffer the harm, their family and legal and medical representatives. The database should not be a platform for manufacturers, trade associations, trial lawyers, or consumer groups who are trying to make policy points or enhance their economic status.

I support the tighter definition of "consumers" to restrict it to the persons who actually suffer the harm related to the use of the product and their representatives. I also support revising the term "public safety entities" that make clear that you are referring to public safety officials.

The requirement that the Commission ascertain the location and availability of a product is important for the manufacturer to evaluate the complaint or for the Commission to look further at the allegations. The Commission also should know the identity of the person who allegedly was harmed.

A major deficiency of the database is the agency decision to publish the report regardless of whether a good faith, substantial claim of material inaccuracy has been submitted but has not been resolved within 10 days. This is unfair, a lack of due process and absolutely not what we should be expecting from our Federal Government. We have great freedom in this country to blog and publicly report bout almost anything without much legal restriction, but the government should show more prudence and responsibility.

The draft properly provides that if a manufacturer claims a material inaccuracy and the Commission determines that the claim is "potentially valid," the Commission must resolve that inaccuracy before posting by communicating with the reporter, investigating the incident, or providing the manufacturer a reasonable period of time to investigate. This does not need to be a lengthy process. It is likely the vast majority of database reports will receive little or no response and, at most, there will be a response suitable to be placed on the database along with the consumer report. But in those cases where a company has gone to the trouble to evaluate and provide proof that a report is materially inaccurate, that ought to be resolved before the report is posted. Once it is posted, pulling it from the database later is of very limited utility and great harm can be done.

The existing database also is deficient in that it allows reports which are so unspecific as to a particular model that the information is useless, even deceptive. I support the language in the discussion draft that a manufacturer may respond that the report is insufficient for determining which of its products are the basis of the complaint and that that must be determined before the complaint is posted.

The present 10-day limitation for companies to evaluate and respond to a report and the Commission to resolve any issues is extraordinarily short and unreasonable. Even well-organized compa-

nies will have difficulty dealing with this time frame. Therefore, I recommend that the 10 days be increased to at least 15 days, which will have no material impact on the timing of postings or the value of the database.

Also, there is an indication that the Commission may be limiting its review of material inaccuracy only to those situations where there has been a misidentification of the product. That is definitely not the extent of material inaccuracy. The Commission's regulations state that material inaccuracy includes all relevant facts which significantly impact a consumer's decision on whether to purchase a product and that includes causation.

Congress should make clear to the Commission that second- and third-hand reports do not constitute reports of harm eligible for the database. And simple consumer complaints of dissatisfaction about the quality or performance of the product which are not safety-related should not be posted.

I hope that these comments are helpful. I would be pleased to answer your questions. Thank you.

[The prepared statement of Mr. Samuels follows:]

Testimony of

Charles A. Samuels

Before the House Energy and Commerce Committee,

Subcommittee on Commerce, Manufacturing and Trade

Hearing on Draft Bill to Revise the

Consumer Product Safety Improvement Act

April 7, 2011

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April 7, 2011

Summary

The CPSIA is an important contribution to consumer product safety. It has a number of defects, however, in that it is over-prescriptive, unduly restricts Commission discretion and lacks proportion and balance in dealing with safety risks. The draft legislation goes far in remedying these deficiencies while maintaining the strengthened and new authorities.

The concept of a publicly available database makes sense in the internet age as a tool for consumers. Unfortunately, this database, as prescribed by Congress and developed by the Commission, is not well designed to provide useful, accurate information to consumers or manufacturers. The existing database procedures do not comport with the original intent of the CPSIA which is that reports should only be posted from those who are harmed, their family or representatives or actual public safety agencies. Nor do the CPSC procedures require resolution of well-founded claims of material inaccuracy before reports are posted or require sufficient information such that manufacturers can respond to and evaluate the reports. The draft legislation resolution goes a long way to resolve these issues.

The legislation's tightening of the definitions of who may report on the database will improve and focus the database while retaining the important roles of consumer groups, trial attorneys, and industry representatives on CPSC matters. The legislation's requirements for resolution of claims of material inaccuracy before posting on the internet will add quality and fairness to the database, and the procedure for ascertaining specific models will enhance the value of the program to consumers, manufacturers and CPSC.

April 7, 2011

Testimony of
Charles A. Samuels
Before the House Energy and Commerce Committee,
Subcommittee on Commerce, Manufacturing and Trade
Hearing on Draft Bill to Revise the
Consumer Product Safety Improvement Act

Dear Chair Bono Mack and Members of the Subcommittee:

Thank you for the opportunity to testify on this important matter. Product safety regulation has been at the center of my professional interest for 25 years. I have the privilege of serving as General Counsel for the Association of Home Appliance Manufacturers and have represented many individual companies – manufacturers, retailers and importers -- before the CPSC and in Canada, Europe and elsewhere on product safety matters. Like my colleagues on this panel, I am a strong supporter of a fully resourced, focused and effective Commission which has the tools to protect Americans from unsafe products.

That is why I supported the revamping of the federal product safety laws which led to the Consumer Product Safety Improvement Act, and I believe that many of the provisions in the law were necessary and appropriate. The hard working and dedicated career and political officials at the Commission have been laboring to interpret and implement the new requirements.

Unfortunately, as well intentioned as it was, the legislation contains elements of over-reaching, over-prescription and distortion of the Agency's mission and obligations in ways that do not well serve consumers and are a great burden on regulated industry. There was a lack of appreciation that many of the issues that arose during the so-called "year of the recall" were mostly violations of existing law which simply needed full implementation and compliance.

The March 29, 2011 discussion draft makes great strides towards remedying the imbalances and deficiencies in the current law. Yet, the draft also does not do violence to the

core provisions of the law and, in my view, in some respects does not go far enough. Obviously, compromises and moderation are necessary to reach agreement and this draft is an excellent start. All the essential provisions of CPSIA would be intact and would be implemented as contemplated but in a more reasonable fashion. Like much legislation, 90 percent of the benefits of CPSIA are achieved with reasonable application of the core provisions and the more extreme or unreasonable provisions or interpretations of those provisions create great problems with little consumer benefit. This bill goes far to remedy that imbalance.

The Commission must remain capable of carrying out its mission and, where necessary, added authority and resources are appropriate. I support the expanded subpoena powers in Section 9 of the draft. Also, I support strengthening the provisions that make it unlawful for anyone, including industry, trial lawyers, consumers, or consumer groups, to make misrepresentations to the Commission regarding, but not limited to, the database. Our federal product safety system relies extensively on honesty and good faith reporting and where there are breaches of that obligation they should be penalized.

I will focus on the database provision. I support the policy that modern technology should be used to disseminate good and easily accessible information to consumers about product safety. Even under the law prior to CPSIA that type of database could have been created. In CPSIA, you instructed CPSC to build such a platform.

It makes no sense, however, for so much of the resources of this Commission to be invested in this effort unless it provides useful and quality information to the extent feasible. The database will never be perfect and it is unreasonable and not necessary that every piece of information placed on it be fully vetted beforehand by the CPSC. But, due to the over prescription in the legislation and some unfortunate interpretations by the Commission, we have

a database that can be manipulated for purposes other than that intended. Also, vague, useless and incorrect information can be placed on the database. This not only harms manufacturers, retailers and importers whose products are impugned but harms consumers who receive bad information and are not able to focus on those products where there are real safety problems.

Fortunately, discrete but significant changes can be made to the current law, as exemplified in this draft, which will greatly improve the operation, utility and fairness of the program while maintaining its essential characteristics to provide quick, useful information to consumers.

First, the spirit and even the letter of Section 6A(b) of the Consumer Product Safety Act requires that posted reports of harm should come from those who suffer harm or risk of harm, their family members, legal representatives and those in a position to directly know about the incident. Although they play huge roles in the activities of the CPSC, the database should not be a platform for the submissions of manufacturers, trade associations, trial lawyers or consumer groups who are trying to make policy or regulatory points, enhance their economic or competitive opportunities or advantages or simply provide third or fourth hand information. All of these folks, including myself, have important roles to play with the CPSC but not as reporters.

Therefore, in Section 8(a)(1)(A) of the draft bill, I support the tighter definition of "consumers" to restrict it to the persons who actually suffer harm or risk of harm related to the use of the product, their next of kin or members of their household, legal representatives or another person expressly authorized by any such person. The latter could be an advocacy group or anyone else.

I also support striking the term "public safety entities" which, unfortunately, the Commission has misconstrued, and making clear that you are restricting the reports to police,

fire, ambulance, emergency services, law enforcement and related public safety officials. Section 8(a)(1)(B) of the draft bill. Many of us consider ourselves to be representatives and advocates of public safety but this provision ought to be focused on governmental and health authorities and the like.

These revisions do not mean that the interest and information of competitors, trial lawyers and consumer groups are or should be irrelevant to the Commission. Certainly, those are sources of information that the Commission should gather and evaluate when considering whether there should be regulatory action or if there has been a violation of the law, a substantial product hazard or a defect, but such information, which is often indirect and biased, should not be presented to the public through the database. It, of course, may be disclosable through FOIA. Trial lawyers and consumer groups have sufficient means to present their views and do not need a government platform.

The requirement that the Commission attempt to ascertain from the reporter the location and availability of the product is an important requirement. Section 8(a)(2)(A) of the draft bill. For a manufacturer or retailer to attempt to respond and evaluate the complaint, or for the Commission to look further at the alleged incident, such information can be critical. We should all want the database to be used by manufacturers and retailers to consider whether there is a situation that needs to be remedied. Similarly, if the report is made by someone other than the victim, then the CPSC should know who the actual person harmed is. This is critical for follow up by the Commission and, where the identification is released, for follow up by retailers and manufacturers.

One of the major but unnecessary deficiencies of the database, as it has been implemented by the Commission, is the erroneous agency decision to publish the report

regardless of whether a good faith, substantial claim of material inaccuracy has been submitted but it has not been resolved within 10 days. This is unfair, a lack of due process and absolutely not what we should be expecting from our federal government. We have great freedom in this country to blog and publicly report about almost anything without much legal restriction, but the government should show more prudence and responsibility.

The draft properly provides that if a manufacturer notifies the Commission of a material inaccuracy in a report and the Commission determines that the claim is "potentially valid," the Commission must resolve that inaccuracy before posting. Section 8(b)(2)(B)(ii) of the draft bill. The Commission may communicate with the reporter, investigate the incident or provide the manufacturer a reasonable period of time to investigate and resolve the material inaccuracy claim. This should not be and does not need to be an endless process. It is highly likely, as was reported during the soft launch/pilot, that the vast majority of database reports will receive little or no response from the manufacturer and at most there will be a response suitable to be placed on the database along with the consumer report. But, in those cases where a company has gone to the effort to evaluate and provide positive proof that a report is materially inaccurate, that ought to be resolved before the report is posted. Once a posting is made, pulling it from the database later is of limited value given the realities of how the internet works and how it may already have affected consumers.

The database as now implemented also is significantly deficient in that it allows consumers to report allegations about products which do not specify a particular model of a product such that the information is useless, even deceptive, to the public and impossible for companies to evaluate. Under their corporate names and brands, many manufacturers and retailers have multiple -- dozens -- of models, which can be quite different, often manufactured

in different places. A database report that Brand A caused harm, when there may be many models and types of Brand A, makes meaningful response by the manufacturers, even putting explanatory material on the database, and internal evaluation often impossible. Therefore, I support the language in the discussion draft that a manufacturer may respond that the report is insufficient for determining which of the manufacturer's products are the basis of the complaint. Section 8(b)(1)(i) of the draft bill. But, a company must provide information to assist the person submitting the report to sufficiently identify or provide an adequate description of the report. If manufacturers sufficiently document this issue then the Commission should be able to work with the consumer to provide that information before the posting is made. Submitters should be required to provide a serial or model number where available and tracking label information for children's products.

I am confident that under these provisions a very high percentage of the reports still will go on the database very quickly, some with explanatory information from the companies. A small percentage -- where the product has been misidentified or where there is proof that the product did not or could not have caused the harm -- should be resolved in an expeditious way by the Commission which is experienced to do so. There should be a high but not impossible hurdle for companies to demonstrate why material should not be posted.

In this regard, the present 10-day limitation for companies to evaluate and respond to a report and for the Commission to resolve any issues is extraordinarily short and unreasonable. Even well-organized companies will have difficulty dealing with some of these reports, particularly where they are fragmentary and where no consumer identification is provided. I recommend that the ten days be increased to 15 days which will have no material impact on the

timing of postings or value of the database to consumers but provide some means or opportunity for companies to consider the information.

Also, there is an unfortunate and inappropriate indication from some at the Commission that, as a practical matter, the Commission is limiting its review of material inaccuracy in a narrow and cramped way to cover only those cases where there has been a misidentification of the product -- i.e., the Company does not make the type of product or the product related to the incident was another brand. Those cases are very important and will be often the simplest to resolve but that is definitely not the limit of material inaccuracy. The Commission's own regulations indicate an understanding that material inaccuracy includes all relevant facts that might significantly impact a consumer's decision on whether to purchase a product and therefore go to issues of causation. According to the CPSC, "materially inaccurate information is a report of harm" with "information that is false or misleading, and which is so substantial and important as to affect a reasonable consumer's decision making about the product."16 C.F.R. §1102.26(a).

It will often be impossible for the Commission to resolve causation issues and make a determination whether there is a material inaccuracy, but sometimes it will be clear and there will be sufficient proof that the product could not have caused the incident or the risk of harm. In those cases, inaccurate information should not be placed on a public database. Again, even if not in the public database, the report will be in the CPSC database for internal evaluative purposes which can lead to an investigation.

It does not require an amendment of the law, but Congress should make clear to the Commission that second and third hand reports do not constitute reports of harm eligible for the database. Also, consumer complaints of dissatisfaction about the quality or performance of the

product which do not relate to a report of harm should not be posted. These are concerning indications in these regards from the early database activities.

I hope that these comments are helpful, and I would be pleased to answer your questions. This important corrective legislation will rebalance the law while fully maintaining the benefits and protections to consumers.

Mrs. BONO MACK. Thank you. Briefly, we are going to go through Mr. Locker and then we are going to run to vote. So 5 minutes, Mr. Locker, please.

STATEMENT OF FREDERICK LOCKER

Mr. LOCKER. OK. Thank you. And I will try to make sure you don't waggle the gavel.

Chairman Bono Mack, Vice Chairman Butterfield, members of the subcommittee, thank you for the opportunity to appear before you on this important subject matter of practical, commonsense solutions—and I emphasize "solutions"—to unintended consequences involved in the implementation of the Consumer Product Safety Improvement Act of 2008, or as it has been come to be known as CPSIA.

Now, our firm works as safety counsel to the Craft and Hobby Association, Toy Industry Association, Juvenile Product Manufacturers Association, Halloween Industry Association, apparel makers, publishers and retailers. And for better and for worse, we have had a lot of experience in the last 2½ years with the problems with implementation of the law.

Now, we have been involved in developing product safety standards over many decades and we have also worked in collaboration with many foundations and consumer organizations to advocate the need for uniform product safety standards and initiatives, both in the United States and globally. We keenly recognize that sometimes in this rush to regulate, attention may be focused on relatively small risks associated with products while some very big risks remain unappreciated and unaddressed. In a world where perception is reality, where misinformation often drives perception, and where new, scary, and uncertain hazards can receive enormous amounts of attention very quickly, it is important to understand context for managing children's risks and for regulating them.

We understand, however, that there is no more important theme than protecting our population of consumers and in particular our children. As much work as we all do, there is always room for improvement in this regard. We may not always agree with everyone appearing before you today on how to achieve our common goals, but we always stand willing, ready, and able to work with everyone for the betterment of children's lives.

Now, in the past appearances before this committee, we have supported the legislative initiatives, including the concepts embodied in CPSIA. However, to the extent that implementation of provisions have resulted in regulations that depart from sensible risk-based decision-making, it has become clear to all involved on both sides of the aisle that Congress needs to act to restore a commonsense regulatory framework. The CPSC has strained under the burden, but despite admonitions from Congress that the agency was empowered with discretion to implement practical commonsense regulations on at least five or six separate occasions in the past, the Commission in a bipartisan fashion has readily acknowledged, as it has today, that its discretion has been limited without statutory changes.

CPSIA adopted an unduly prescriptive regime and as often happens, Congress can act with a sledgehammer instead of a scalpel

when trying to deal with issues. CPSIA adopted a set of absolute total limits on lead and phthalates. This House body, I note, didn't even consider the phthalate legislation that was grafted in the Senate and in conference. These wholesale limits were coupled with an exemption process that we all had hoped would work better but had proved to be impractical for lead and phthalates regulation.

In effect as a result and direct result of that, the stream of commerce and business suffered significantly as the imposition of these requirements was further deemed to apply in a retroactive manner to any previously produced goods entered into commerce when the laws and step-down levels went into effect. These confusing and burdensome testing schemes—which have yet to be fully and clearly enunciated as we sit here today—have resulted in additional marketplace confusion and cost.

So let me share just a few of the comments and proposals on the law that is before us today. Our comments are for the record—but in terms of the budget, it is clear that an era of restrained budgets and limited resources, the CPSC will need to allocate funds based upon risk/hazard analysis and sound scientific principles. In terms of lead, Congress recognized this approach when they adopted as a regulatory requirement, for example, the toy safety standard ASTM F–963 to which Congressman Schakowsky referenced. That standard, by the way, is a soluble migratable standard. It is not a total limits standard and has proved to be remarkably effective both in the United States—which is why Congress adopted it—Europe, and the rest of the world.

Exemptions for certain materials have been adopted by the CPSC but they have not gone far enough. So we favor the types of processes that have been adopted and proposed in the draft resolution in phthalates. In terms of phthalates, they need to have an inaccessibility recognized. There needs to be action on the Chronic Hazard Advisory Panel when they come to conclusions that action has to be quick.

[The prepared statement of Mr. Locker follows:]

STATEMENT OF

FREDERICK LOCKER

BEFORE THE SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND TRADE

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

PROTECTING CONSUMERS:
CURRENT ISSUES RELATED TO COMMON SENSE PRACTICAL PRODUCT SAFETY REGULATIONS & CPSIA REFORM

April 7, 2011

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Chairman Bono Mack, Vice Chairman Butterfield and members of the Subcommittee, thank you for the opportunity to provide comments about the important subject of practical common sense solutions to unintended consequences involved in the implementation of the Consumer Product Safety Improvement Act of 2008 (CPSIA) (Pub. L. No. 110-314). Our firm works as product safety counsel to the Craft& Hobby Association (CHA), Toy Industry Association (TIA), Juvenile Product Manufacturers Association (JPMA), Halloween Industry Association (HIA), Apparel makers, Publishers and Retailers of an array of children's products. I have been involved with developing product safety standards over many decades through relationships with the National Safety Council (NSC), National Bureau of Standards (NBS), American National Standards Institute (ANSI), ASTM International and International Organization for Standardization (ISO). We have also worked in collaboration with many foundations and consumer organizations and others to advocate the need for uniform product safety initiatives in the U.S. and internationally.

We keenly recognize that sometimes in the rush to regulate attention may be focused on relatively small risks associated with children's products while some very big risks remain underappreciated and unaddressed. In a world where perception is reality, where misinformation often drives perception, and where new, scary and uncertain hazards receive widespread attention, it is no wonder that policy makers can lack context for understanding and managing children's risks. Unfortunately, the net result is that we often collectively waste scarce financial resources at the expense of allocating them efficiently to make children's lives measurably safer. Further, this perpetuates a lack of coordination between groups that are all arguably committed

to helping children; focuses on individual issues and agendas instead of children themselves; and competition rather than cooperation for the resources to truly protect children. There is no more important theme than protecting our children. As much work as we all do, there is always room for improvement. We may not always agree with everyone appearing before you today on how to achieve our common goals, but we always stand willing and committed to work for the betterment of children's lives.

SUMMARY

In past appearances before this committee we have supported important legislative initiatives to expand the authority of the Consumer Product Safety Commission (CPSC) to effectively pursue it's mission of consumer protection. Along these lines, we believe that there are ways to make the Commission more effective and at the same time more efficient. Allow me to share a few proposals on ways the Commission can increase its effectiveness in protecting consumers while minimizing burdens on the manufacturing sector of this country.

CPSC's mission is to protect children and families against an unreasonable risk of injury and death from more than 15,000 types of consumer products from a wide range of product hazards. Their work is vital in that it addresses consumer product hazards through a framework of mandatory product safety standards; engagement in the voluntary or consensus standard-setting process; compilation of consumer injury data; issuance of safety guidelines; implementation of information and education programs in an effort to proactively avoid injuries; and product recalls and corrective actions when necessary. The agency is operating with a vastly improved budget as a result of the CPSIA. However, in an era of restrained budgets and limited resources CPSC will need to allocate funds based upon better risk hazard analysis and sound

scientific principles. Allowing them the same discretion afforded other agencies to do so, based upon real world public health risks, would be a step in the right direction. Statutory changes that permit the agency greater discretion as regards regulation of lead and phthalate exposure would allow the Commission to address unintended consequences of mandates imposed under the CPSIA. Adoption of consensus standards and deferral to existing ASTM product safety standard setting processes can efficiently result in flexible regulatory requirements that can more readily be adjusted based upon hazard data than historically stagnant standalone mandatory federal regulations. Congress should clearly provide for only prospective application of new rules and regulations under CPSIA.To assure that American Brands have access to foreign markets there will continue to be a need to support of increased coordination with other countries regarding alignment of standards with better inspection and enforcement coordination. In a global economy we can ill afford disparate requirements without reasonable basis or foundation. Similarly Congress should assure uniform standards apply nationwide. U.S. manufacturers in the consumer product industry presently face increasing global competition that is more intense than ever before. In such an economic environment, U.S. manufacturers (small and large) should not be disadvantaged by an unnecessarily intrusive and inefficient domestic and international regulatory regime.[1]

We supported many of the concepts reflected in the CPSIA to the extent effective good manufacturing standards and practices are recognized. However, to the extent that a myopic

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[1] Congress intended this when it established a requirement that only identical standards uniformly apply to the same product risks regulated under the Sec. 18 of the Federal Hazardous Substances Act ("FHSA" 15 U.S.C. § 1261n) and Sec. 26 of the Consumer Product safety Act ("CPSA" 15 U.S.C. § 2075). Even the European Union proposed that trade between EU countries would be boosted by making it more difficult for member states to block imports of specific products on the basis that they do not meet a national product safety standard. *Procedures Relating to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State and Repealing Decision 3052/95/EC*.

implementation of provisions have resulted in regulations that depart from sensible risk-based decision-making Congress needs to act to restore a common sense regulatory framework. CPSC has strained under the burden of unrealistic timelines for implementation of imposed regulations.

Despite admonitions from Congress that the agency was empowered with discretion to implement practical regulations, the Commission in a bi-partisan fashion has determined that it's discretion is limited without statutory changes[2]. CPSIA adopted an unduly prescriptive scheme of absolute limits on total lead and phthalates resulting in standards inconsistent with risk-based measures commonly adopted by regulatory agencies. These wholesale limits were coupled with an exemption process that has proven to be impracical for lead and phthalates regulation. The stream of commerce suffered significantly as the imposition of such requirements was deemed to apply in a retroactive manner to any previously produced goods entered into commerce. Confusing, burdensome testing schemes (yet to be fully and clearly established as we sit here today) have resulted in additional marketplace confusion and cost. Notwithstanding a dedicated effort the Commission, continues to strain under the requirements imposed upon it. An efficient U.S. marketplace favors clear regulations and test methods and abhors chaos. Unfortunately, two and half years after passage legislation that bars the CPSC from making common sense decisions about protecting the public has had the unintended effect of banning safe products while imposing needless, costly burdens on small businesses. We appreciate that this Committee has elected to respond by drafting legislation that affords the agency the discretion that it requires to implement regulations that provide children protection from actual harm but that accords

[2] For example see STATEMENT OF COMMISSIONER NANCY NORDON THE PROPOSED AMENDMENT ENTITLED*CONSUMER PRODUCT SAFETY ENHANCEMENT ACT OF 2010* March 18, 2010; STATEMENT ON LEAD REGULATION UNDER THE CPSIA COMMISSIONER ROBERT ADLER January 22, 2010. Both statements make it clear that Congressional action is required to adjust the CPSIA.

responsible businesses the opportunity to distribute safe products without being unreasonably overburdened.

Prospective Requirements. We support clarifications to CPSIA to assure that limits apply only prospectively to products manufactured after the effective date of any regulation implemented. In the absence of a clear and unmistakable congressional intent to apply provisions of the CPSIA retroactively to products previously manufactured and placed in the stream of commerce, there is a strong presumption that "retroactivity is not favored in the law," and that, as a result, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.[3]" Unfortunately, due to imposition of requirements on *any* products in commerce, regardless of when produced or imported, the provisions have been applied in a retroactive fashion that forced the destruction of hundreds of millions of dollars of safe goods, as they were swept off shelves, nothwithstanding the Commission's issuance of repeated stays of enforcement. This approach could also provide badly needed relief for charitable organizations and thrift stores.

We respectfully request that new standards developed under CPSIA apply *"only to product manufactured and introduced into interstate commerce after their effective date"*. In recent testimony before this committee the CPSC Chairman noted that all five Commissioners support changes to ensure prospective application of rules and regulations promulgated under CPSIA.We hope Congress will heed their call.

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[3] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 237 (1995); *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); and *Martin v. Hadix*, 527 U.S. 343 (1999). Compare: National Resources Defense Council, Inc. v. CPSC., 597 F.Supp.2d 370 (S.D.N.Y. 2009), requiring Congressional clarification OF CPSIA to assure prospective application.

Lead Limits. We have always favored risk-based regulation of potential hazard posed by real world exposure to a substance. Congress recognized this approach under CPSIA Section 106 when it it adopted as a regulatory requirement *ASTM F-963 Standard Consumer Safety Specification for Toy Safety*, which in turn regulates toxic heavy metals in toys from paints and similar surface coating based upon soluble extractable limits. This approach is currently embodied in the regulatory approaches under the Commissions administered FHSA and by other agencies, such as FDA and EPA. These are based upon risk-based approaches to managing potential hazardous lead exposure in an alternative fashion from CPSIA's Section 101 banning approach and duly consider reasonably foreseeable handling, use, and routes of exposure from products. With imposition of total content limits on lead in substrate, Congress departed from well-established scientific based models related to actual risk of exposure. Exacerbating this approach, CPSIA language failed to provide the safety valve needed to assure the Commission with reasonable discretion to provide for exceptions to rigid requirements[4]. This resulted in positions that seem removed from common sense, when products which do not result in an appreciable risk of exposure are never-the-less banned. Although the CPSIA purported to allow for exemptions the contraining language used in CPSIA Section 101(b)(1)[5] created a legal nullity as an exception based upon such requirement became impossible to obtain in practice when reasonably likely exposure with adverse health consequences was not a qualifier for exemption.

[4] In relation to "safety valves" for example brass tire valves which are intended to be durable and corrosion resistant can't be used on children's products, even though there is no risk of hazardous lead exposure to a child.

[5] The Commission may, by regulation, exclude a specific product or material from the [banned lead levels] if the Commission, after notice and a hearing, determines on the basis of the best-available objective, peer-reviewed, scientific evidence that lead in such product or material will neither –
(A) result in the absorption of ***any*** lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product; nor (B) have any other adverse impact on public health or safety.

Proposed legislation under consideration by this committee is a needed improvement, by providing time prior to further reduction limits and exemptions for certain metal materials certain metals (steel, copper and aluminum alloys) and materials that pose a *de minimis* risk, provided they are not small parts (as defined by widely used criteria under *16 CFR 1501, et seq*). Any product or material that does not result in anticipated adverse health effects based upon a reasonably likely exposure route should be exempt (as applicable under FHSA protocols already administered by the agency). The CPSC can establish a methodology to estimate the amount of lead a child would likely ingest, distinguishing between parts and substabnces that are reasonably likely to be placed in the mouth and those that cannot. A reasonable expansion in the amount of discretion granted to the Commission to provide exemptions from the lead bans in the CPSIA and allowance of time to *get it right* is justified.

We have long supported the limitations on lead in pain and note that the marketplace has met with great success in being able to achieve conformance to reduced limits tp 90 ppm under 16 CFR 1303, et seq.

Phthalates. The Commission should be directed and permitted to exempt from the phthalates limits under Section 108 of the CPSIA products or materials that are not reasonably likely to result in hazardous exposure. The proposed bill includes a much-needed exception for inaccessible component parts that contain phthalates, similar to the inaccessible component parts exemption from the lead limits, and allows the Commission to grant an exclusion when it determines that compliance with the limits is not necessary to protect children's health. We believe they have this authority, but clarification is needed to assure that they excercise it in a manner that reduces unreasonable test burdens on manufacturers. In practice the failure to make such requiremnet clear has resulted in needless costly phthalate testing of materials and parts to

which there exists no reasonble liklihood of exposure. The ban should be limited ban to accessible, ingestible parts and CPSC sholud be provided explicit authority to exempt certain products and materials from burdensome testing when it determines determines that compliance with the limit is simply not necessary to protect children's health. The definition of toys under the Section should be aligned with Section 106 requirements and scope definitions. Finally after requiring CPSC to expend funds to convene another Chronic Hazards Advisory Panel to assess health risks from exposure to restricted phthalates, the Commission should be required to act upon recommendations in a finite time or the bans should be subject to recission.

ASTM Standards. Adoption of consensus standards and deferral to existing ASTM product safety standard setting processes can efficiently result in flexible regulatory requirements that can more readily be adjusted based upon hazard data than historically stagnant standalone mandatory federal regulations. These standards are the bulwark of our national and even international safety system, and the Commission plays an important role in providing comments and proposals.[6] We believe the Commission can better manage staff input to standards organizations to prevent proposals which lack technical merit or otherwise cannot be justified as federal standards from incorporation in ASTM standards. We support greater deferral and adoption of effective ASTM standards for durable infant products in a manner similar to Section 106 of the act[7]. We also support updates to CPSIA Section 104 durable nursery product

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[6] CPSC has worked with stakeholders to develop effective consensus standards completing approximately 10 times as many voluntary standards as mandatory standards.

[7] An excellent example is their work with industry to revise the ASTM consensus baby walker safety standard to address injuries from stair falls. There has been a decrease in walker injuries of over 84 percent since 1995, likely due in large part to the effectiveness of such standard requirements. The commission projected societal costs decreased by about $600 million annually from this one action. Similarly, there was an 89 percent reduction in crib-related deaths from an estimated 200 in 1973 and an 82 percent reduction in poisoning deaths of children younger than 5 from drugs and household chemicals from 216 in 1972. Recent collaborative efforts have also resulted in further enhanced crib safety regulations.

standards to provide relief for licensed daycare centers that meet appropriate rules related to inspection and operation of their facilities. In general we support the existing definitions that limit the definition of consumer products under the CPSA, so as not to require the Commission to expend scarce resources regulating products subject to the jurisdiction of other agencies such as the FDA and NHTSA.

Reduce burdensome testing requirements. In our experience manufacturer and importers take their obligation obligation to meet applicable standards seriously. The consequences of failure to do so have greatly increased since passage of the CPSIA. Most U.S. based businesses take extraordinary measures to assure compliance of they face recalls, reputational risk, harm to their brands and relationships with customers and possible penalties for non-compliance. We have often noted that testing plays an important and ongoing role in assuring compliance compliance. However, good manufacturing and procurement practices, adherence to quality assurance procedure in production and viglence in qualification of material sourcing play an even greater role in assuring the safety and integrity of consumer products. Manufacturers producing products test them in production and then sample production lots continuously prior to shipping them. Major retailers duplicate this process on product orders. Most U.S based manufacturers and brand owners have a vested interest in developing and maintaining reputations as "safety conscious" companies.

We agree with other witnesses that micromanaging the test process by statute is not the best way to achieve the most cost-effective compliance, nor does it allow companies to rely on other compliance strategies to assure compliance. The draft bill offers important modifications to the reduce burdensome CPSIA testing scheme, recognizing that a system of compliance must

be predicated on the specifics of the product category and supply chain. CPSC should determine that accredited third party laboratory testing provides sufficient added safety benefits to justify the cost in lieu of materials that could be subject to certifications of complaince based upon independent testing. Additional criteria related to other test burdens when impracticable based upon laboratory capacity and logistics involving material availability within supply chains should be a consideration in establishing product or material specific test requirements or alternate test regimes. Alternate test rules as contenmplated under CPSIA should be permitted as optional for products and must be flexible based upon product categories and should permit representative sample and composite testing when appropriate. Additional efforts should be required to recognize and "safe harbor" best paretices already used in the supply chain.
We have filed extensive comments with CPSC in support of permissable reliance on supplier certifications as a mechanism to establish a reasonable basis of compliance with substance content limits for both sub-components and raw materials. Manufacturer certifications are a proven legal method to establish compliance under many laws, including but not limited to use of FDA complaint materials, the toxicological certification under the Labeling of Hazardous Art Materials Act (LHAMA), and continuing guarantees under the Flammable Fabrics Act (FFA) already administered by the agency.

Database Accuracy. Other witnesses may provided more extensive comments on database issues. However in order to assure the integrity of it's Database CPSC should continue to assure that only authorized reports are filed, duplicative reports eliminated and reports unrelated to actual or potential injury are duly eliminated , as required. Congress should assure that the CPSC maintain, and not disclaims, it's responsibility to assure that potentially valid claims of

"materially inaccuracy" are investigated and resolved in a reasonable time prior to posting in the database. As was noted at this committees recent hearing improvements should be required as to the sufficiency of data (ie. make, model number, mandated tracking identifiers already required by law on children's products), in order to provide more meaningful data. Finally, CPSC should act to clarify that brand licensors to the extent they are niot manufacturers, importers orf record or private labelers of products distributed by them are not misclassified as such in the database. .

CPSC Needs To Allocate Resources Based Upon Hazard Data In spite of remarkable progress that dramatically improved the length and quality of children's lives in the U.S. over the past century, today's children still face significant, real risks. For example, often-avoidable unintentional injuries take the lives of more than 1 out of every 10,000 children in the U.S. annually. That may not sound like much, but this includes over 150 infants that die before their first birthday in motor vehicle accidents and nearly 50 who drown in bathrooms[8]. This is why we would support dynamic new partnerships between stakeholders and the Commission to promote safety and safe consumer practices. Consumer information and education does not substitute for the essential responsibility of manufacturers to provide safe products, but it can help with a large percentage of accidents due to improper or irresponsible conduct or lack of supervision of minors. The Commission is fully authorized to embark on such programs, but encouragement from Congress should be provided

[8] Kimberly Thompson, M.S. SCP, Assoc. Professor of Risk Analysis and Decision Science, Children's Hospital Boston, Harvard Medical School Co-Founder/Director of Research Center on Media and Child Health; Director HSPH Kids Risk Project.

Thank you again for the opportunity to provide these comments. We appreciate the efforts of this committee to improve the CPSIA and expand the discretion afforded the Commission as it seeks to develop practical efficient and effective regulations to enhance children's product safety.

Mrs. BONO MACK. That is the red light and we have to run to the floor for a vote. And we will recess and reconvene immediately following the last vote in the series.

Mr. LOCKER. OK. Sorry.

Mrs. BONO MACK. I don't have the time. I tried last time and I was off by 20 minutes. So immediately following the last vote, we will return. We have a five-vote series.

Mr. LOCKER. Thank you.

[Recess.]

Mrs. BONO MACK. We are ready to begin. So we left off with Mr. Marshall and so we will recognize you for your 5 minutes.

STATEMENT OF DAN MARSHALL

Mr. MARSHALL. Thank you very much. Hello. My name is Dan Marshall. I am the founder and vice president of the Handmade Toy Alliance. The HTA represents 644 small businesses affected by the unintended consequences of the Consumer Product Safety Improvement Act. I would like to mention also that we receive no outside funding whatsoever. We are funded entirely by our members and some small donations that folks have made along the way. We are kind of a shoestring operation.

My wife and I own Peapods Natural Toy Store in St. Paul, Minnesota. I am here today with my daughter Abigail and fellow HTA Board members Rob Wilson of Challenge and Fun in Massachusetts and Randy Hertzler of euroSource in Pennsylvania.

The HTA began in November of 2008 after I began to understand how the newly passed CPSIA will decimate the small-batch manufacturers who supply our store. Since then, I have been working with hundreds of other small business owners to save small-batch manufacturers from regulatory burdens of the CPSIA, the greatest of which is the cost of mandated third-party testing. These fixed costs, which are easily bourn by mass-market manufacturers, who make tens of thousands of units at a time, are simply impossible for small businesses that make toys, children's clothing and accessories in batches of a few dozen at a time, often in home-based studios.

These required tests are not limited to lead testing. Toys, for example, will be subject to mandatory ASTM F–963 testing, which requires the destruction of multiple units of each toy. The CPSC's current schedule would mandate ASTM testing as soon as this October. Unless the CPSIA is reformed, hundreds of small American toymakers will not survive that date.

Unlike similar product safety legislation such as the Food Safety Modernization Act, FDA food labeling rules, or California's Proposition 65, the CPSIA makes no allowances whatsoever for small businesses, nor does it allow the CPSC any discretion in how it applies third-party testing requirements to various types of products. Bicycles, books, hand-knit sweaters, and wooden toy cars are all tested the same.

As a result, the CPSIA, as it stands now, is basically unenforceable. Key provisions have been stayed numerous times. The CPSC is slowly being transformed from a public safety guardian into an enforcer of procedures and technicalities dictated by Congress at huge cost. Congressional action has dramatically undermined the

CPSC, an agency which has effectively protected the American public for almost 40 years.

Meanwhile, we have watched numerous trustworthy businesses fold because of the CPSIA. Untold others have decided not to pursue their dreams as toymakers or crafters. We have even begun to see secondary effects such as the end of Mothering Magazine, which closed this February after 35 years, citing reduced ad revenues due to the CPSIA's impact on their advertisers. If the CPSIA is not amended, hundreds more small family businesses will perish for no good reason.

Thanks to the work of this committee, we have a way forward. Our alliance endorses the draft amendment because of the relief it provides to our members. This bill requires either an exemption from third-party testing or alternate testing procedures, such as XRF screening for lead in substrates, for products that are produced in small quantities. This is exactly what we have been asking for since the formation of our organization. Small-batch manufacturers would be given a safety valve which was originally left out of the CPSIA.

We desire a thoughtful and measured reform worthy of meaningful bipartisan discussions. These issues deserve a full hearing to ensure that a high degree of consumer protection is maintained. We do not wish to create loopholes that would benefit the types of irresponsible companies that created the toy safety scare in the first place.

We urge you to reach out to your colleagues in the Senate to reach a bipartisan agreement. The CPSIA was the product of a strong bipartisan effort in 2008 and its reform requires the same effort. We believe this discussion draft is a suitable foundation for that discussion. We urge both Houses of Congress to set aside differences and find a way to see this reform process through. Our family businesses are watching the process closely and we are depending on you.

In conclusion, on behalf of our members, I would like to thank this committee for addressing this important issue and urge you to quickly pass meaningful reform of the CPSIA. Thank you.

[The prepared statement of Mr. Marshall follows:]

Hello. My name is Dan Marshall. I am the Founder and Vice President of the Handmade Toy Alliance. The HTA represents 644 small businesses affected by the unintended consequences of the Consumer Product Safety Improvement Act (CPSIA) of 2008.

My wife Millie and I own Peapods Natural Toy Store in St. Paul, Minnesota. I am here today with my daughter Abigail and fellow HTA Board members Rob Wilson of Challenge and Fun in Massachusetts and Randy Hertzler of euroSource in Pennsylvania.

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As a result, the CPSIA as it stands is basically unenforceable. Key provisions have been stayed numerous times. The CPSC is slowly being transformed from public safety guardian into an enforcer of procedures and technicalities dictated by Congress at huge cost. Congressional action has dramatically undermined the CPSC, an agency which has effectively protected the American public for almost 40 years.

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In conclusion, on behalf of our members, I would like to thank this committee for addressing this important issue and urge you to quickly pass meaningful reform of the CPSIA. Thank you.

Mrs. BONO MACK. Thank you very much. Ms. Weintraub, your 5 minutes.

STATEMENT OF RACHEL WEINTRAUB

Ms. WEINTRAUB. Chairman Bono Mack, Ranking Member Butterfield, Representative Schakowsky, I am Rachel Weintraub, Director of Product Safety and Senior Counsel for Consumer Federation of America. I offer this testimony on behalf of CFA as well as Consumers Union, Kids In Danger, National Research Center for Women and Families, Union of Concerned Scientists, and the U.S. Public Interest Research Group. I thank you for inviting me to testify today.

The CPSIA institutes the most significant improvements to the Consumer Product Safety Commission since the Agency was established. The millions of recalls of toys for excessive lead and tiny powerful magnets, children's jewelry because of high lead levels, and cribs because of durability problems cause consumers to question the effectiveness of our Nation's safety net. The CPSIA has restored consumer confidence by requiring children's products to be tested for safety by banning lead and certain phthalates and toys and by creating a publicly accessible consumer complaint database and authorizing necessary resources to CPSC.

The consumer community has stated previously that any changes made to the CPSIA must not weaken product safety standards and must not weaken public health protections. The current discussion draft fails this litmus test unfortunately. This discussion draft is not narrowly tailored, but rather carves gaping loopholes in the consumer protections created by the CPSIA. It covers fewer children's products, undermines the lead and phthalate standards, substantially weakens the third-party testing requirements, and makes the consumer complaint database vastly less useful for consumers. I will highlight some of the most critical provisions of the discussion draft in my testimony.

We oppose an effort to weaken the scope of the protections of the CPSIA. The discussion draft implies that only those products for children of some younger age, we presume, should be afforded protections by the CPSIA. Congress embraced the belief that there is a shared toy box, which we know reflects the reality of what is true in many homes across this country. School-age children are at risk from lead exposure and from hazards posed by powerful magnets in toys, for example. If those toys are not required to meet any lead limit or meet the standard for magnetic toys, the potential for harm is large. Further, the voluntary standard for toys, ASTM F–963, covers toys intended for children under age 14 years of age.

The third-party testing provision of the CPSIA will be eliminated almost entirely by the discussion draft. Third-party testing is necessary to confirm compliance with safety rules and prevents hazards before they enter the marketplace. While the discussion draft preserves third-party testing for lead in paint, full-size cribs, non-full-size cribs, pacifiers, small parts, and children's metal jewelry, the fact that all infant durable products other than cribs will not be subject to third-party testing is untenable. And there is even ambiguity about the crib standard.

The provision makes it very difficult for CPSC to require third-party testing for other products. The rule-makings required in this section require a cost analysis while ignoring the benefits of lives saved, injuries avoided, or healthcare costs reduced as a result of the testing requirement. And no time frame is established for these rule-makings. This section lists products that can never be required to undergo third-party testing but fails to define them. While we understand that a narrowly-targeted exemption for third-party testing provisions may be the only solution for small-batch manufacturers, the lack of definition and an alternative testing mechanism to ensure safety makes it impossible to determine the appropriateness of this relief.

The discussion draft puts babies at risk in childcare facilities by allowing fixed-side cribs to remain in use if there is required supervision. Slowly removing the drop-side cribs misses numerous other hazards that the new crib standard addresses such as hardware failures, material integrity problems, mattress support failures, slat hazards, and corner posts. This provision drastically weakens the consumer protections of the CPSIA and will keep babies in known unsafe cribs.

The consumer complaint database will give consumers access to lifesaving information and will help CPSC to more nimbly identify and act upon safety hazards. CPSC's rule is responsive to the public interest needs for disclosure and protective of a manufacturer's effort to protect their brand and confidential business information. The database includes more checks on the information and more opportunities for a manufacturer to comment than other similar government agency databases.

The discussion draft tips the balance that the database rule has achieved by limiting who can report to the database, unnecessarily increasing the types of information consumers must report before their complaint can be considered for posting, requires consumers to unwittingly engage in a dialogue with a manufacturer about the reported harm rather than simply reporting the incident to the CPSC, stays the reporting of information until final decisions about the sufficiency and accuracy of the information are made, and will substantially increase the time it will take for information to be posted publicly. This will discourage reporting by consumers to the database and decrease the utility of this important consumer protection.

I thank you for your consideration and am happy to take questions.

[The statement of Ms. Weintraub follows:]

Consumer Federation of America

Testimony of

Rachel Weintraub

Director of Product Safety and Senior Counsel

Consumer Federation of America

Before the

Subcommittee on Commerce, Manufacturing and Trade

of the

House Committee on Energy and Commerce

Legislative Hearing – Discussion Draft CPSIA Amendments

Rayburn House Office Building 2123

April 7, 2011

Summary of Testimony

I. Introduction

II. CPSIA's passage was a significant step forward for consumer protection.

III. CPSC and CPSIA Successes

1. Only since passage of the CPSIA has there been an effort made to strengthen the voluntary and mandatory standards and require testing and verification of new cribs.
2. The consumer incident database will provide transparency and provide useful information about products.
3. Product Registration cards will inform consumers about recalls.

IV. Proposed Revisions in Discussion Draft

1. Definition of a Children's Product- Protections Must Remain for Children 12 and Younger.
2. Application of Lead Limit
    a. Alternative Limit and De Minimis Exception
        i. Alternative Limits will weaken current lead standards
        ii. The de minimis standard will require time consuming risk analysis for a known toxin.
    b. Lead limit exemption for used children's products is too broad.
3. Third party testing requirements are undermined significantly.
4. Cribs in child care facilities will be permitted to violate strong crib standard.
5. Phthalate standard is weakened considerably.
6. Exemption authority for tracking labels is too broad.
7. Database provision is significantly narrowed limiting its effectiveness.
8. We object to the provision making this Discussion Draft entirely retroactive.

V. Conclusion

Chairman Bono Mack, Ranking Member Butterfield, and members of the Subcommittee on Commerce, Manufacturing, and Trade. I am Rachel Weintraub, Director of Product Safety and Senior Counsel at Consumer Federation of America (CFA). The Consumer Federation of America is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. I offer this testimony on behalf of Consumer Federation of America as well as Consumers Union, Kids In Danger, National Research Center for Women & Families, Union of Concerned Scientists, and the U.S. Public Interest Research Group.

As organizations dedicated to working to protect consumers from unsafe products, I offer testimony today to articulate our serious concerns about the Discussion Draft that amends the Consumer Product Safety Improvement Act of 2008 (CPSIA).

I. Introduction

The bi-partisan CPSIA passed overwhelmingly in the House on July 30, 2008 by a vote of 424-1, in the Senate on July 31, 2008 by a vote of 89-3 and was signed into law by President Bush on August 14, 2008. Before this law passed, Congress undertook a year-long deliberative process to consider the implications of this act: there were approximately 15 hearings and markups in the House and Senate covering issues and products related to the CPSIA, and once each chamber passed its version of the bill, there was a conference in regular order between both Houses of Congress. This law institutes the most significant improvements to the Consumer Product Safety Commission (CPSC) since the agency was established in the 1970's.

II. CPSIA's Significance, New Requirements and Implementation

The CPSIA's passage followed a period of record numbers of recalls of hazardous products that injured, sickened, or killed children. Consumers had lost faith in the safety of consumer products, particularly children's products. The approximately 25 million toys recalled for excessive levels of lead paint, tiny powerful magnets, and other hazardous chemicals, the recalls of children's jewelry because of high lead levels, and the recalls of millions of cribs because of durability issues caused consumers to question whether our safety net was working to protect them.

The bill's passage was also in response to a weakened federal oversight agency, one without enough resources, which failed in its meager efforts to protect the public's health and safety.

In response to this dismal picture, Congress infused the CPSC with new authority and more resources. It has been almost three years since the CPSIA was passed. This law has already made products safer and when fully implemented will increase safety dramatically by requiring that toys and infant products be tested for safety before they are sold, and by banning lead and certain phthalates in toys (although implementation of the testing requirement has been delayed by the CPSC). The law also created a publicly accessible consumer complaint database and authorizes resources CPSC needs to protect the public, such as enabling it to hire additional staff.

III. CPSC and CPSIA Successes

1. Mandatory Crib Standard

There have already been important successes as a result of the CPSIA. One of the most notable examples is the mandatory crib standard that is required by section 104 of the CPSIA. Pervasive design flaws have lead to the recall of more than 10 million cribs over the past three and a half

years. It was essential that the CPSC place safe sleep environments at the top of their mandatory standards-setting list.

Recalls and corrective actions for cribs have been issued for non-compliance with safety standards; strangulation hazards; risk of head entrapment when side rails, spindles, and slats in side rails become loose or break; risk of suffocation; choking hazards; risk of falling; and danger of laceration when fingers become trapped in folding drop gates.[1]

While the previous voluntary crib standards effectively banned the drop-side design in new cribs, only since passage of the CPSIA has there been an effort made to strengthen the voluntary and mandatory standards and require testing and verification of new cribs. The final CPSC crib standard incorporates many provisions that consumer advocates have been supporting for years that replicate the real world use of cribs, such as durability tests, mattress support tests, and tests for the effectiveness of hardware. The resulting CPSC standard, that passed CPSC unanimously, is a strong one and is a successful outcome of the CPSIA. Section 104(c) of the CPSIA seeks to address hazards posed by older model cribs by removing them from the market. This section applies to cribs sold new and used, cribs used in child care facilities, and cribs used in public accommodations such as hotels and motels. The application of this provision means that older cribs that pose significant risks to children will be taken out of the stream of commerce. This provision is based upon laws already in existence in numerous states including Arizona, Arkansas, California, Colorado, Illinois, Louisiana, Michigan, Minnesota, Oregon, Pennsylvania, Vermont and Washington. This provision extends the protections previously offered in just these states to the entire nation to ensure that children sleep in cribs that meet the most recent and most protective crib safety standards.

[1] Kids in Danger, http://www.kidsindanger.org/prodhazards/recalls/cribs.asp

2. **Consumer Incident Database**

Another success of the CPSIA is the implementation of the consumer product safety information database. CPSC was required by Section 212 of the CPSIA to establish the database. As a result of the CPSC staff's leadership and commitment to the effectiveness of the database, consumers will have access to lifesaving information and the agency will more nimbly be able to identify and act upon safety hazards. CPSC staff worked hard to formulate CPSC's final rule in a manner that is consistent with Congress' intent, responsive to the public interest need for disclosure, and protective of a manufacturer's effort to protect their brand and confidential business information. The database includes more checks on the information and more opportunities for a manufacturer to comment than other similar government agency databases.

Consumers have been in the dark about the dangers of products regulated by CPSC. CPSC has collected incident data from consumers in a manner similar to how it is collected as part of the new database. However, the difference is that prior to the launch of the database, when consumers went to CPSC's web site to look for information, it was hidden. All that they could find typically related to a previous recall. If the Commission had been alerted to the dangers of a product but has yet to conduct a recall, the product's hazard might never have been known to the public.

The database changed that. Public access to information is vital to safety. Simply allowing consumers access to the safety record of products will increase safety and encourage the speedy removal or redesign of unsafe products. Making it simple for consumers to report into a single database the problems they encounter with products also helps the Commission to do its job of

protecting the public from unsafe products more efficiently, which can help save government resources. Launched on March 11, 2011, the first reports were posted last week in the database.

3. Product Registration

The CPSIA requires that infant durable products, such as cribs, strollers and high chairs, include a product registration card in their packaging and provide an opportunity to register online. This will give manufacturers information necessary to directly contact consumers in the event of a recall or other product safety issue.

The requirements for the product registration cards and an online registration program are contained in Section 104 of the CPSIA, which incorporates the Danny Keysar Child Safety Notification Act. Danny, whose parents founded Kids In Danger, died in 1998 when the portable crib he slept in at a child care center collapsed and strangled him. The crib had been recalled five years earlier, but no one at the child care center, including the mom who donated the crib, had heard of the recall. Too many consumers never hear about a recall of a product that they have in their home. In fact, only 10 to 30 percent of product recalls receive a consumer response. This leaves most consumers in contact with recalled products. Registering products is an important step that will increase the number of consumers who hear about a recall.

IV. Proposed Revisions in Discussion Draft

We understand that the Discussion Draft was written in response to requests for flexibility and exceptions from many CPSIA provisions raised by various manufacturer and retailer entities, including micro businesses, large corporations and trade associations. The CPSC itself has requested additional discretion to implement certain CPSIA provisions, particularly regarding the lead requirements. We are open to discussions about finding ways to address the precise needs of

micro-businesses while also protecting public health. However, this Discussion Draft goes well beyond additional discretion and weakens, eliminates or alters significant provisions of the CPSIA, rendering them vastly less protective of the public health and consumers. The most significant successes of the CPSIA are weakened significantly by this Discussion Draft. This Discussion Draft is not narrowly tailored but rather carves gaping loopholes in the consumer protections created by the CPSIA. I will discuss our concerns with the Discussion Draft section by section.

1. **Definition of a Children's Product- Protections Must Remain for Children 12 and Younger**

We oppose an effort to weaken the scope of the protections in the CPSIA. The Discussion Draft rejects the current scope of CPSIA and instead implies that only those products for children of some younger age, we presume, should be afforded protections by the CPSIA. This approach of covering fewer children was rejected by Congress when it passed the CPSIA. Congress embraced the belief that there is a "shared toy box" in many families' homes. We agree with this view, as it reflects the reality of what we know to be true in many homes across the United States. Children of younger ages play with the toys of their older siblings. Younger children mouth their older siblings' toys. The implications of this change are significant. No matter how conscientious a parent, or how well educated the family is about segregating toys for each child, it is inevitable that younger children will obtain access to older children's toys. School aged children are at risk from lead exposure and from hazards posed by powerful magnets in toys. If those toys are not required to meet any lead limit, or meet the standard for magnetic toys, the potential for harm is large and the potential for consumer concern is also considerable.

Further, the voluntary standard for toys – ASTM F 963 includes an even broader scope to cover toys intended for children under 14. This means that many companies are already complying with voluntary safety standards that encompass toys intended for children under age 14. Thus, the reality that children's toys and products are often shared by children within a family, plus the fact that many within the industry are already complying with a higher age standard, requires the scope of the CPSIA to remain as it is.

2. **Application of Lead Limit**

Section 2(a) of the Discussion Draft extends the limit for compliance with the 100 ppm lead limit and technological feasibility analysis for an additional year. We oppose this provision. At a recent CPSC hearing on this issue, many organizations testifying stated that testing to 100 ppm was technologically feasible and that companies were already complying with that standard. Companies have also had almost 3 years to prepare for compliance with the 100 ppm standard. There is no justifiable reason to delay this standard.

Section 2(b) of the Discussion Draft reverses the CPSIA's requirement that all children's products meet the new lead limits, and then requires only certain categories of products, established by CPSC at their discretion, to be subject to any lead limit. Rather than applying the lead limits to all children's products and excluding only a select-few, this provision would establish a new, less protective standard for many categories of children's products. Except for the few categories that have to meet the current CPSIA lead limits, the rest would only have to meet a higher allowable lead limit of 600 ppm lead only if CPSC holds a hearing and makes a determination that lead in that product or class presents an unreasonable risk to children's health.

We oppose this provision for numerous reasons. First, the lead limit of 600 ppm is too high and children's products are already easily meeting the current 300 ppm standard; second, "unreasonable risk to children's health" is not defined; and third, CPSC has so much discretion as to what to cover in this section that it is unclear what in fact would be covered and in what time-frame. This approach gives neither adequate protection to public health nor assurance to parents and caregivers that they can trust the products they bring into their homes – a problem that helped spur passage of the CPSIA in the first place.

Section 2(c) of the Discussion Draft changes the current language to apply the lead limits to the date of manufacture (as opposed to the date of sale). Unfortunately, because this provision modifies section 101(a), it means that manufacturers are allowed to sell their stock of products that do not even meet the 600 ppm limit if their products were manufactured before February 2009. This provision goes too far in allowing products with dangerously high lead limits to be sold to consumers. Any gains that were made in re-establishing trust in the safety of children's products would be diminished. Consumers may have no way of knowing what lead limit a product on the shelf would meet, if any, further confusing consumers trying to protect their children from lead exposure.

a. <u>Alternative Limit and De Minimis Exception</u>

Section 2(d) rejects the previous bright line test for lead and eliminates section 101(b)(1) of the CPSIA by establishing new alternative limits for metal products and establishing a "de minimis" exception for all other materials.

i. Alternative Limits

The alternative limit for children's products made of steel, copper, or aluminum alloys would be some level yet to be determined that is measured in parts per million unless the product or part is a small part or can break and create a small part. For these small parts made of metal, the limit would be 100 ppm if found to be technologically feasible. Unfortunately, this language is problematic. While the 100 ppm standard is consistent with CPSIA and thus does not weaken current law, it is important to know what the lead limit is for non-small part metal products. Raising the amount of allowable lead in metal items that are not "small parts" is a concern, because children mouth larger products. In addition, this language would expose children to higher levels of lead and not seek to minimize exposure from other parts of that same product even if these products involve common hand-to-mouth interaction by children.

For all non-metal products, if the product is a small part or can break and create a small part, it would have to meet the 100 ppm standard if it is technologically feasible. This section does not change the current 100 ppm limit, but it only applies to small parts and not to other non-metal children's products such as vinyl books or bibs that are often mouthed by children.

The Discussion Draft also makes an unsupportable distinction between choking hazards and non-choking hazards. Under long-standing law, all products intended for babies, toddlers and young children cannot contain small parts, a provision that was not altered by this Discussion Draft. Thus, products designed to be mouthed by babies such as teething rings, baby spoons and sippy cups would fall outside of the 100 ppm test and fall under the "de minimis" standard unless they contained metal, which could expose children to higher lead levels. To protect children from

lead in such non-small-part containing products, the Discussion Draft requires CPSC to undertake extensive review—all for a well known, well documented neuro-toxin.

ii. De Minimis Standard

The definition of "de minimis" is not defined other than being measured in micrograms per day and requires a rulemaking by the CPSC to be revised. This would require a complex risk assessment to determine the exposure level and would require many assumptions to be made that could be incorrect. The testing for this type of exposure limit is time consuming, expensive and subject to inaccuracies, poor repeatability and reproducibility making compliance a challenge unwelcome by the CPSC, retailers, and industry alike. It puts CPSC in the position it was in before CPSIA passed—unable to direct its resources to protect consumers from known and significant hazards. The current requirement for measuring total lead content is a clearer, less expensive, and quicker method for determining compliance with lead limits.

Section 2 of the Discussion Draft also requires the CPSC, by rule, to establish a methodology for estimating lead ingestion. We see at least two problems with this approach: CPSC is not required to do this in a certain time period, which leaves rulemaking open to long-term delays; and CPSC is directed only to distinguish between parts that can be placed in the mouth and parts that cannot be placed in the mouth. In the absence of a methodology promulgated by CPSC, any reasonable methodology that is documented is acceptable to estimate lead ingestion. As a result, unless and until the CPSC establishes a new lead-ingestion limit, a manufacturer can use almost any test, no matter how weak, to assess the danger posed to a child who ingests lead in a component part. The lack of a time frame and the lack of a standard provided to estimate lead ingestion is not protective of the public health.

Finally, the "de minimis" provision also reverses the presumption for the safety of products and allows products to be sold and be exempt from testing for lead unless the CPSC finds otherwise. This would mean that the CPSC would not have to act until a child had been harmed by a lead-laden product or until an entity tested the product and brought it to the attention of the CPSC. This is a profoundly misguided approach because almost all lead exposure except for acute lead toxicity silently impacts victims - decreasing IQ points and affecting behavior. As we witnessed in the years before the CPSIA, the record number of lead-laden products that were sold and later recalled from the market proves that this approach resulted in an unreasonable risk of injury to consumers. The approach to lead-laden children's products proposed in this Discussion Draft will amount to a waste of Commission resources, has been rejected by Congress previously as not being sufficiently protective of public health, creates uncertainty for consumers and for manufacturers, and far exceeds the flexibility that the CPSC requested.

b. **Lead Limit Application to Used Children's Products**

This provision further weakens the lead standard by establishing that the lead limits do not apply to certain used children's products. While this provision is based upon language in the Consumer Product Safety Enhancement Act, (CPSEA) a bill introduced last year by Representative Waxman to narrowly address concerns raised by certain product safety stakeholders, it limits the consumer protections in the original language that exempted vinyl products from this provision and removes CPSC's discretion to add other products to this list.

3. **Section 3- Application of Third Party Testing Requirements**

The third party testing provision of the CPSIA will be eliminated almost entirely by the Discussion Draft. The Discussion Draft does preserve third party testing for lead in paint; full

size cribs; non full size cribs; pacifiers; small parts; and children's metal jewelry.[2] This provision makes it very difficult for CPSC to require third party testing for other products beyond this limited list of products. CPSC is permitted to issue a rule to require third party testing for a product, but that rule can only move forward if CPSC has completed an accreditation of conformity assessment bodies and determined the adequacy of the testing capacity of the accreditation bodies. Further, the rulemaking must consider the costs of the regulation and be limited by imposing the "least possible burden" of the costs of regulations while ignoring the benefits of lives saved, injuries avoided or health care costs reduced as a result of the testing requirement. Further, no time-frame is established for these rulemakings.

This section also enumerates those products that can never be required to undergo third party testing: works of art and one of a kind products; specialty products for the disabled (all are not defined); and products that are produced in such small quantities that the cost of testing by an independent third party is not "economically practicable." The definition of a small quantity is yet to be determined. This provision no longer requires CPSC to promulgate the "15 Month Rule." This so-called "15-month rule" is important because it ensures that manufacturers are continually testing their products to the most up-to-date standards, and that safety is not slipping through the cracks in later batches of product runs.

Independent third party testing is proactive, and is better for both consumers and manufacturers: it builds safety into the supply chain early on, with the intent of avoiding the need for expensive recalls *after* children have been injured or killed. We understand that a narrowly targeted exception to the third party testing provision may be the only solution for small batch

[2] Unfortunately, even within this small list there is ambiguity: for cribs, a robust standard was promulgated by CPSC in December 2010—a significant success of the CPSIA. This Discussion draft, however, at the end of this section, prohibits CPSC from enforcing standards that became effective after August 14th 2009 and further references a portion of the Code of Federal Regulations that has since been moved, rendering the status of the standard to which cribs would be tested in question.

manufacturers who make few products and cannot absorb costs of testing, and we are willing to have a discussion about this issue. However, with the definition of small batch manufacturer still undefined it is impossible to determine the appropriateness of this relief for truly small manufacturers. Further, it is unreasonable to provide exemptions for an undefined class of products, called "specialty products for the disabled." Children in the disability community are more likely to mouth products at older ages. Products for this community should be tested to prove compliance.

Further, this provision overreaches by eliminating third party testing for all but a few product categories. In particular, the fact that all infant durable products other than cribs will not be subject to third party testing is untenable.

Finally, third party testing is not a new concept. Many retailers rely upon third party testing results before stocking their store shelves. Some toy manufacturers have used third party conformity assessment laboratories for compliance testing for many years. The CPSIA appropriately applied a testing requirement to all children's products subject to mandatory standards, and created minimum testing criteria.

4. **Section 4- Application of and Process for Updating Durable Nursery Products Standards**

This provision requires cribs in licensed child care facilities to comply with the new crib standard but does not require these child care facilities to comply with revisions to this standard in the future. While we understand that the cost of replacing cribs can be a significant challenge, CPSC has already recognized this and has given child care facilities until late 2012 to comply

with this standard. CPSC should be given discretion to require compliance with future revisions to the crib standard in case there are significant changes that address emerging hazards.

Even more critical is the concern that fixed-side cribs in child care facilities will not be required to meet the new crib standard if certain state or local laws are in place. These laws that are purported to make up for crib dangers include: that a child cannot be in crib for substantial periods if awake; a child over 12 months of age cannot be in the crib; and a requirement that adults are present when an infant is in the crib. Unfortunately, the supervision required by state laws cannot prevent the often silent deaths and injuries when babies are in hazardous cribs. In addition, these state laws frequently vary for center-based versus family-based child care. Further, focusing solely on removing drop-side cribs misses many other hazards that the new crib rule addressed such as hardware failures, material integrity problems, mattress support failures, slat distance hazards and corner posts. This provision drastically weakens the consumer protections in the CPSIA and will put babies at risk.

The Discussion Draft includes a provision for updating infant durable safety standards. While it relies on the text of the CPSEA, it differs by eliminating a provision allowing CPSC to issue a standard that is more stringent and more protective of the public health than the revised voluntary crib standard. CPSC must be able to revise a standard in a way that best protects the public health. Tying the agency's hands in this way is not in the public interest.

5. **Section 6-Application of Phthalate Standard**

Section 6 amends the CPSIA's phthalate provision in a variety of ways. Most significantly, it creates large exemptions where, by rule, CPSC can carve out toys or child care articles from both the prohibition and interim bans where the Commission finds "compliance with the prohibition is

not necessary to protect children's health," and makes the provision prospective, allowing manufacturers to sell their non-compliant products. In contrast to every other rulemaking this Discussion Draft requires, this provision includes a very tight timeline, including a time by which a rulemaking must be started that makes a rule almost impossible to complete.

The phthalate provision in CPSIA protects our children from the cumulative risks of hormonal chemicals that affect genital development and have been associated with testicular cancer and other fatal diseases and serious conditions. Narrowing the definition of the scope of the products covered by the phthalate provision, creating large opportunities to exempt products from coverage and making a rulemaking difficult to accomplish successfully will undermine the health protection of the original phthalate provision of the CPSIA.

6. **Section 7- Exemption Authority for Tracking Labels Requirement**

Section 7 gives CPSC the ability to exclude products or classes of products from tracking label requirements if CPSC determines that it is not "economically practicable" to have tracking labels, and allows CPSC to establish alternatives for those products exempted. When a product poses a hazard to a consumer, a consumer needs information to notify CPSC and the manufacturer of the hazard and CPSC must be able to identify products. In fact, it is this type of information that manufacturers argue is necessary for filing "complete" reports to the database. When Liam Johns died in 2005, his crib, made by Simplicity, but labeled "Graco" went uninvestigated for two years because of confusion resulting from a lack of information on the product. At least two other babies died during this time. Especially because of the high rate of licensing in children's products, tracking labels are imperative, both to adequately identify a product involved in a hazard and to accurately report to the database or manufacturers. Tracking

labels provide critical information and this Discussion Draft creates a mechanism through which manufacturers may not have to comply with this provision.

7. **Section 8- Database**

The consumer incident database is a significant success of the CPSC. Yet this Discussion Draft goes far in limiting the utility and the benefit of the database. The flaws in this section are many: it limits who can report, unnecessarily increases the types of information consumers must report before their complaint can be considered for posting, requires consumers to unwittingly engage in a dialogue with the manufacturer about the reported harm rather than simply reporting the incident to the CPSC; stays the reporting of information until final decisions about the sufficiency and accuracy of the information are made; and will substantially increase the time it will take for information to be posted publicly. This goes much too far and will act to discourage reporting by consumers to the database.

Like other efforts to minimize the effectiveness of the database, this Discussion Draft narrows the definition of who can successfully report to the database, permitting essentially only those related to the person who suffered harm or else requiring authorization by that person, as well as changing the definition of a public safety entity to exclude consumer groups, among others. Among many other new confounding requirements, the provision now allows for another claim of "insufficiency of information," that is not defined and not necessary. This claim of "insufficiency" is ripe for abuse by manufacturers seeking to suppress information about their product. This provision fails to take into account a consumer's limited time to report such harm and a consumer's desire, especially one who suffered a loss as a result of a product hazard, to not want to engage in a conversation, which may or may not be respectful, with a manufacturer.

Finally, this provision makes it a prohibited act for a consumer to misrepresent information submitted in the database. This provision is unnecessary, given that the database already requires verification of the accuracy report by the submitter. This Discussion Draft clearly rejects the need for transparency and seeks to maintain the status quo by rendering the database imbalanced in favor of maintaining the secrecy of harms resulting from use of consumer products.

8. **Section 11- Effective Date**

The final provision of the Discussion Draft makes this entire bill retroactive to August 2008. We oppose this provision due to its vitiation of critical consumer protections that have already taken effect and rules already promulgated.

V. **Conclusion**

This Discussion Draft is a broad attack on the most important provisions of the CPSIA: it narrows the scope of products covered by the CPSIA; weakens the lead standard; drastically limits third party testing requirements; allows unsafe cribs to be used in child care facilities, limits the phthalate provision; preserves the secrecy of harms caused by consumer products by making the database less useful and more difficult for consumers; requires rulemakings while not requiring timelines except in one instance that makes compliance untenable and renders the entire Discussion Draft retroactive. Unfortunately, this moves back the clock on safety and puts children at risk.

Mrs. BONO MACK. Thank you very much. All right. The chair recognizes herself for 5 minutes for the first round of questions.

And I would like to ask Mr. Marshall, please, would you be willing to register with the Commission in order to qualify for this small-batch exemption to the third-party testing requirements?

Mr. MARSHALL. I think that would be a fair tradeoff so that the CPSC would know who the small-batch manufacturers are and it would be consistent with how the FDA approaches food labeling laws. So yes.

Mrs. BONO MACK. Thank you. And you also mentioned the other laws that have provisions to accommodate the different circumstances of small-batch manufacturers. Can you say more about the approaches that you believe are the best?

Mr. MARSHALL. Well, the issue with third-party testing is cost, so I think it makes sense to create exemptions based on the number of units produced per year. That seems like the most logical way to us to get at the cost versus the output of a particular manufacturer.

Mrs. BONO MACK. Thank you. Ms. Weintraub, first of all, your testimony—you and I have not read the legislation at all in the same way—but you testified that the CPSIA became law as a result of "a period of record numbers of recalls of hazardous products that injured, sickened, or killed children." What I remember most are the lead-in-paint recalls and no one here will ever argue that lead-in-paint restrictions should ever be loosened. "However, the most significant problems with this bill relate to lead in substrate." Putting aside metal jewelry, again, restrictions for which we do not intend to loosen, were there any children injured, sickened, or killed by lead in substrate, and if so, how many and can you provide verified statistics of those injuries?

Ms. WEINTRAUB. I can't provide verified statistics of those injuries because many of those injuries are silent. They could cause—and likely have caused but we just don't know—neurological impairments, decreases in IQ——

Mrs. BONO MACK. You are saying they are all speculative injuries that you——

Ms. WEINTRAUB. No, I wouldn't say that they are speculative——

Mrs. BONO MACK. But they are speculative?

Ms. WEINTRAUB [continuing]. But they are very difficult to document.

Mrs. BONO MACK. All right. And—again, you and I read the legislation entirely differently—contrary to what you said in your testimony, the discussion draft does not deprive consumers of third-party testing. It gives the Commission authority to decide what should be third-party tested. You know, what I have heard from the commissioners is that they need a little bit more common sense, the ability to apply common sense. You completely disagree with that notion and what I see in the legislation and what you see are entirely different?

Ms. WEINTRAUB. Well, I am not entirely sure what you see, but what I see is a system where there is a list of products that are subject to third-party testing, a list of products that can never be subject to third-party testing, and then a very rigorous rule-making

without any timelines that is required in order for other products to be third-party tested.

Mrs. BONO MACK. You are saying that there are products that can never be tested?

Ms. WEINTRAUB. My understanding was that there is a list in this discussion draft that includes——

Mrs. BONO MACK. Have you seen the discussion draft?

Ms. WEINTRAUB. Yes, I have seen it.

Mrs. BONO MACK. OK, but your understanding—I am sorry. You confused me right there. You said your understanding is that——

Ms. WEINTRAUB. Well, you are disagreeing with my interpretation so——

Mrs. BONO MACK. Well, and you disagreed with mine so I——

Ms. WEINTRAUB. Well, the way that I read the discussion draft is that there are a list of products which are undefined, products for children with disability, one-of-a-kind products, works of art, and products manufactured by small-batch manufacturers that would never be subject to——

Mrs. BONO MACK. Well, nothing is excluded from testing and the Commission can decide to impose the testing. But just moving on a little bit to Mr. Samuels.

You state that the Commission has made some unfortunate interpretations in implementing the database. What interpretations are you referring to and are they corrected by this legislation?

Mr. SAMUELS. Thank you very much. Two very troublesome interpretations is their unnecessary—in fact, I think really improper—increase of the number of parties that can make reports of harm. So that includes trial lawyers; it includes consumer groups that may not be direct representatives of someone that is harmed. It is totally improper and your draft limits it to those people really harmed and their representatives, which is what the database is supposed to be all about.

The second thing is a very unfortunate interpretation that even if a manufacturer has claimed a material inaccuracy in a report that it isn't even their product, that if the 20-day clock runs out, they are going to post it anyway, even if they have failed to resolve it. That is unfair and unnecessary and your draft does a very good job on dealing with that.

Mrs. BONO MACK. Thank you. I just want to finish my last 9 seconds by saying that I believe the database has room for improvement and we can do all of these things. But I also want to go on the record that I support the database. I think there is some consternation from the other side that I don't. But I think it is very flawed and we should make sure that it serves both the public and make sure that we continue to make "made in America" matter again. So with that I am happy to recognize Mr. Butterfield for his 5 minutes.

Mr. BUTTERFIELD. Thank you, Madam Chairman. Ms. Weintraub, well, you are probably well aware that the existing law that we passed a couple of years ago sets clear lines on total lead content that becomes increasingly stringent over time. The purpose of decreasing the amount of lead allowed in children's products over time was to gradually get these products closer to a total lead level that would not result in at least one form of neurological dam-

age, and that is the loss of IQ. Some manufacturers, however, have been complaining ever since the law went into effect, many of whom were at the table when the law was being written, that there is no way they can make their products without certain components that exceed the limits and that those components don't put children's health at risk.

The discussion draft that we have seen and that you acknowledge that you have seen attempts to give these manufacturers relief from the lead content limits. However, it does so in a very broad and far-reaching way that not only lets those who claim they need lead for their products to function properly to exceed the limits, but lets anyone who wants to continue using lead to do so as long as they are willing to play a game of risk with children's health.

The de minimis ingestion-based standard in the draft is available for any component part so long as it isn't a small part. And there is no consideration of whether lead needs to be in that particular component.

My question to you is to the extent there is bipartisan sentiment that Congress should grant manufacturers some form of relief from the lead content limits, do you agree or disagree that any such exception must, as a fundamental matter, consider whether that product needs to have lead in it to function properly?

Ms. WEINTRAUB. I agree.

Mr. BUTTERFIELD. Let me skip over a couple of questions. I will stay with you if you will. Tucked away at the very end of the Republican discussion draft is a one-sentence section regarding the effective date of the amendments in the draft. Although that section is at the very end and only one sentence long, what this section says is actually quite important. As I understand it from my staff, what this sentence says is that anyone who is currently in compliance with any part of CPSIA gets a free pass. Would you agree or disagree with that and would you elaborate for me, please?

Ms. WEINTRAUB. I do agree. I think that provision that you are referencing is truly retroactive provision of this law. I think the term "retroactivity" as it applies to other lead standards I think is legally not accurate. But in this case I think this is true retroactivity. The one sentence actually states that this draft will go back to the time that the CPSIA was passed in August of 2008.

Mr. BUTTERFIELD. OK. I want to get to the database in the few seconds that I have left and this is a rather long question. This is going to be too lengthy for me to complete in the time allotted, but would you speak to the database that we rolled out a few weeks ago and tell us your conclusions on it?

Ms. WEINTRAUB. Sure. The consumer complaint database is a very important consumer protection. It is so important because consumers have been in the dark about product safety. There is many incidents that we know about and obviously others that we couldn't possibly know where consumers were just completely in the dark, that manufacturers had information about a safety problem with the product. CPSC may or may not have known and consumers continued to use the product. They were in the dark. They were under a veil of ignorance and weren't able to make the right choices for their families because they just didn't know about inci-

dents that sometimes were pervasive and affected many, many people.

So what the database seeks to do is equal this playing field a little bit. It still requires CPSC to go to manufacturers outside of the database before they can release information about particular products. But it requires a very specific number of fields of information that really narrow the information so that information has to be very targeted to the type of harm, a description of the product, and really provide useful information to consumers.

And unlike other government databases, it provides a place where manufacturers can comment simultaneously. If you go on the database today, you will see a consumer filed a comment and then in the same page the manufacturer files a comment, which is significant.

Mr. BUTTERFIELD. Thank you. I yield back.

Mrs. BONO MACK. I thank the gentleman. And the chair now recognizes Mr. Olson for 5 minutes.

Mr. OLSON. I thank the Chair, and I thank the witnesses for your knowledge, for your patience, and your persistence.

And my first question is going to be for you, Ms. Weintraub. What is more dangerous, a product of 10,000 parts per million lead that does not leach enough lead to result in a measurable increase in a child's blood lead level, or a product that contains 100 parts per million lead that leaches enough lead to result in a measurable increase in a child's blood lead level?

Ms. WEINTRAUB. I think it depends on a number of scenarios, so I am not sure. I could get back to you.

Mr. OLSON. OK. So you can't tell me between 10,000 parts per million or 100 parts per million?

Ms. WEINTRAUB. I think, you know, there is many factors that go into that sort of analysis. So I would like to review the information and get back to you if I could.

Mr. OLSON. OK. Thank you. I would appreciate that. Is there a mechanism to aid CPSIA to prevent these safe products to be sold to children under age 12?

Ms. WEINTRAUB. I am sorry. Can you repeat that?

Mr. OLSON. I can, yes, ma'am. Is there a mechanism to aid CPSIA to prevent these safe products to be sold for children under age 12—safe lead products?

Ms. WEINTRAUB. Well, I am not sure that I agree with underlying assumption of the question, but products intended for children 12 and under have to meet the current lead standards, as well as the other mandatory standards that are relevant to those products.

Mr. OLSON. OK. Thank you for that answer. A couple more questions. You testified that Congress took over a year in a deliberate process to consider the implications of this law. Unfortunately, as much as we would like to think we are, we are not immune to error. We are not omniscient. I would bet the vast majority, if not all the Members of Congress, had no idea we would be essentially banning bicycles, jungle gyms, and golf equipment—in a time of a child obesity crisis—banning science equipment, like microscopes and organic geology sets—again, in a time when students are falling behind in the sciences—or banning musical instruments in a

time when our students are also falling behind in the arts. Did you know this law would ban those products?

Ms. WEINTRAUB. I think what is important to note is that lead is not necessary to be in products. And if it is in fact necessary, I think that should be part of any analysis that would give flexibility for any type of exemption, because the important thing to focus on from the consumer perspective is that when consumers are purchasing a product for their child, a toy, they don't expect that they will be exposing them to risk. And especially when it comes to lead, it is impossible for a consumer to identify whether there is lead in that product. So the consumer is really relying on the manufacturer and also relying upon Congress and the CPSC to make choices that will protect consumers.

Mr. OLSON. And we are doing that, ma'am, with all due respect. And one final question. You testified that CPSIA became law as a result of "a period of record numbers of recalls of hazardous products that injured, sickened, or killed children." What I remember most are the lead-in-paint recalls. And no one here will argue that lead-in-paint restrictions should be loosened. No one. However, the most significant problems with this bill relate to lead in substrate. Putting aside metal jewelry, again, restrictions for which we do not intend to loosen, were there any children injured, sickened, or killed by lead in substrate? How many and can you provide verified statistics of those injuries?

Ms. WEINTRAUB. I believe I answered a similar question previously and I will answer the same information that, unfortunately, I am sure that there were injuries, there were harms to public health, but it is very difficult to document because these harms and these injuries occur as neurological impacts to effects of behavior and decreases in IQ. So it is very hard to document. But to say that there has been no harm from lead in substrate I think is not accurate.

Mr. OLSON. I appreciate those answers again. I would submit to you that it is important we know those answers before we take action. We should be able to document it. I yield back my time.

Mrs. BONO MACK. Would the gentleman yield, actually, for your final minutes? I would like to ask a follow-up question if might to Mr. Locker and take the final minute. So you state the regulations have departed from sensible risk-based decision-making at the Commission and the law does not grant them the ability to make commonsense decisions—there are those words "common sense" again—but commonsense decisions that has resulted in banning safe products. How do you know the products are safe?

Mr. LOCKER. That comment related to the ability of the Commission to grant exceptions based upon data that was available to them. I mean the Commission is not going to act to grant exceptions if there was exposure—as Mr. Howell testified under the Federal Hazardous Substances Act—to any hazardous substance. So in that situation the problem is not that the Commission can't make that determination. The problem has been that the language in the statute, which you now seek to correct, provides the Commission cannot make the decision if there is any lead that comes from the product. And that creates a Catch-22. So what we are saying is that when the Commission can determine that there is no extract-

able lead from the product that presents a hazard, the examples of the ATV fender, the bicycle fender, brass latches on safety devices maybe in car seats and strollers, when there is no actual human health risk, they should be able to say that these are exempt or excluded products. So far they can't and the way, you know, many of our clients know they are safe is they do do testing. They do do extraction testing. They do do formulations. They avoid hazardous substances where possible because under the Federal Hazardous Substances Act for children's products, they have to.

Mrs. BONO MACK. Thank you. All right. The balance of the time has expired. I will recognize Ms. Schakowsky for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Madam Chairman. I wanted to make it clear particularly to Mr. Marshall that Mr. Waxman, who at the time in April of 2010, who was chairman of the full committee, released a discussion draft that gave targeted relief to industry while maintaining important protections, which I am sure you agree are important for the health and safety of children brought about by this legislation. I was very involved in it. At the time Mr. Rush wasn't here for health reasons and I helped negotiate the bill and I worked with Chairman Barton and afterwards, you know, things happened. And you see some problems and so Mr. Waxman introduced this draft that would make some changes.

And at the time the draft was supported by the National Association of Manufacturers, the Retail Industry Leaders Association, the Motorcycle Industry Council, the Handmade Toy Alliance, and Goodwill Industries. And Chairman Tenenbaum wrote that the Waxman discussion draft would provide CPSC with the flexibility needed to implement the law. And then at that time the Republican minority refused to support the legislation and it didn't move forward in the 111th Congress. So I want to make the point that we understand that there are some things that need to be tweaked. We want to do it but we don't want to blow up the bill.

This has been an issue so dear to my heart, and I did want to ask Ms. Weintraub an important question. The draft bill exempts most children's products, including durable nursery goods—which I have been working on for many sessions—from third-party testing but then says that cribs will be tested. However, the current language remains ambiguous on cribs. Can you talk about this ambiguity? If the bill were to become law, could parents be assured that the crib they are using is safe?

Ms. WEINTRAUB. Sure. Yes, I agree that there is ambiguity. On the one hand, in the list of products that clarifies that there is third-party testing, cribs and non-full-size cribs are included, but yet there is a reference to a C.F.R. that seems to have moved. So it is a little bit confusing. But then further confusing there is another provision later on—I believe it is in the third-party section—which says that this would stay all standards having to do with third-party testing that were passed since some date in 2009. So there is definitely confusion about whether cribs would be required to be tested to the new robust crib standard.

Ms. SCHAKOWSKY. There is another part. The bill would eliminate the requirement that daycares and hotels in certain states use newer, safer cribs. And I have subsequently become friends with Linda Ginzel, mother of Danny Keysar, whose son died a really

tragic accident. And I had in my hand the letter from her that I wanted to read just one paragraph.

"We founded Kids In Danger in 1998 after the death of our beloved son Danny in a poorly-designed inadequately-tested and recalled portable crib. Danny was 16 months old when the top rails of the Playskool Travel-Lite crib he slept in at his licensed childcare home collapsed around his neck, strangling him. He was the 12th child to die in cribs of this design."

So, you know, is it necessary to eliminate that requirement?

Ms. WEINTRAUB. No, it is incredibly problematic. In terms of what the draft bill does for childcare facilities, it seems to be allowing all fixed-side cribs and the new robust crib standard does much more than eliminate drop-sides. It adds many important provisions that ensure the durability of the crib so that cribs can actually wear, reflecting how children use cribs has to do with slat integrity, has to do with mattress support, and the integrity of the hardware. So by just saying that all fixed-side cribs can be used in daycares, it unfortunately isn't capturing the universe of those cribs that we have reason to be concerned about.

Ms. SCHAKOWSKY. Let me just say in the seconds I have left, Madam Chairman, that I know that you care very much about the safety issues and just I for one would love to be able to work with you to address some of the problems that we are hearing and to work to come up with some kind of a compromise.

Mrs. BONO MACK. The gentlelady yields. I thank her very much for the spirit and I look forward to working with you and I acknowledge your expertise and your passion over the years in this and I can say, I think, just in listening to these past few seconds, I think there is some misinterpretation of this. But this is a draft discussion. Sometimes I feel it is almost like a Mad Libs when we were kids. There are blanks in here for this very reason. And I would never dream of doing this without working with you. So I thank you very much for your comment. And now the chair recognizes Mr. McKinley for his 5 minutes.

Mr. MCKINLEY. Thank you, Madam Chairman. Ms. Weintraub, I have got a couple questions for you. Apparently, the chairman and others on the committee, they asked you about substantiating the claims that children have been "injured, sickened, or killed" by toys with lead in its substrate. And you have responded that these injuries are, by and large, silent and undocumented. How do we know they exist if they are silent and undocumented? And could you provide us some documentation that supports this, how many people have and with names or circumstances?

Ms. WEINTRAUB. We know that lead exposure to children causes a range of neurological——

Mr. MCKINLEY. I am looking for some specifics because you made the statement. That is why I am just trying to——

Ms. WEINTRAUB. Yes, so first, the——

Mr. MCKINLEY. I don't want the generalities. That is what happens around here. I am new at this game and everyone likes to talk in the abstract. I am an engineer. I want to deal in details. So when you make that statement, I want you to prove it.

Ms. WEINTRAUB. Sure. Well, first, the statement that I made applied to a full range of products. And when I talked about the inju-

ries and deaths, I was also talking about magnet-toy deaths, as well as injuries from other toxic chemicals.

Mr. MCKINLEY. Can you document it?

Ms. WEINTRAUB. It is very difficult to document if a child——

Mr. MCKINLEY. Well, then you shouldn't be making that statement.

Ms. WEINTRAUB. I can provide you with scientific studies that will——

Mr. MCKINLEY. Let me go on my second question for you. Last week we had at the request, perhaps, or insistence of the administration and the Congressman from California, we included language in a broadband oversight bill to take care of the false and erroneous claims against people for waste, fraud, abuse, and precisely to protect these companies' reputations. We used Congressman Waxman's own language that he had inserted in a radio spectrum bill that he had produced last year. So we were using specifics. And then last year there was a data security bill that the Republicans were trying to put in to a consumers' right bill to protect access to databases, protect it for security for people's reputations. I have got a company in my area that has cried out on this. He has already had legal advice that is suggesting that he could be accused anonymously by people using false names put up there against him and he won't be able to clear his company name.

Shouldn't companies who manufacture consumer products not be provided the same ability to protect their reputations from erroneous or false claims as the companies who receive broadband like we just did?

Ms. WEINTRAUB. I think there are very similar protection that is not identical. But first of all, on the consumer complaint database, complaints cannot be anonymous.

Mr. MCKINLEY. Would you work with us on that? Is that something that you think we should be doing? Shouldn't we be protecting everyone and not just certain people?

Ms. WEINTRAUB. I think there are adequate protections already. And already in order for a claim to be filed and posted on the database, a consumer needs to verify that what they are saying is true.

Mr. MCKINLEY. Their counsel doesn't agree with you on that. That is why we need to do this language. We need to have something in there to be able to take care of that because we are looking for something that is consistent with it. But the last question I have——

Ms. WEINTRAUB. Well, I am happy to take a look at——

Mr. MCKINLEY [continuing]. Is, Mr. Marshall, if I could—back to you. You know, one of the things we were looking for in this hearing were some data because there are a lot of blanks. And you heard the chairman talk about it.

And on page 11 it says the term "produced in small quantities means not more than 'blank' number of units of the same product." What would you recommend is a number that we should use in that?

Mr. MARSHALL. I think that could be a range of numbers. I think on an outside I think 10,000 units per year would be the highest we would like to see.

Mr. MCKINLEY. One thousand?

Mr. MARSHALL. Ten thousand is the highest.

Mr. MCKINLEY. Ten thousand?

Mr. MARSHALL. Yes. But it has to do with——

Mr. MCKINLEY. And that maybe I am dealing more with your company, what you all produce.

Mr. MARSHALL. Well, I own a toy store and my wife and I, we buy from small-batch manufacturers.

Mr. MCKINLEY. OK.

Mr. MARSHALL. But that is a number that we are willing to discuss.

Mr. MCKINLEY. Ten thousand.

Mr. MARSHALL. As a high number. That would be the highest that we would want to see that number. It could be a range of numbers below that as well.

Mr. MCKINLEY. OK. I yield back my time.

Mrs. BONO MACK. I thank the gentleman. And seeing no other members present, I believe that we are now ready to wrap it up. I ask unanimous consent that these 16 letters be made a part of the record, all of which have been vetted previously by the minority. Without objection.

[The information follows:]

Statement on behalf of
American Apparel & Footwear Association

Congressional Hearing on Discussion Draft of H.R. ____,
a bill that would revise the Consumer Product Safety Improvement Act
April 7, 2011

Subcommittee on Commerce, Manufacturing, and Trade
Committee on Energy and Commerce
Unite States House of Representatives

The following comments are submitted on behalf of the American Apparel & Footwear Association (AAFA) -- the national trade association of the apparel and footwear industries, and their suppliers -- regarding the House Subcommittee on Commerce, Manufacturing and Trade's draft legislation to amend the Consumer Product Safety Improvement Act (CPSIA) of 2008.

AAFA and its members strongly support a product safety system that effectively ensures that safe and compliant products are designed, produced, marketed, and sold. Even before the passage of the CPSIA, AAFA has worked to educate the apparel and footwear industry on important product safety compliance initiatives. For example, for several years, we have published a Restricted Substances List (RSL), that is now translated into several languages, that helps companies understand international product safety standards and implement a chemical management program. The RSL is published on a semi-annual basis and is available to anyone without cost.

Furthermore, well before the CPSIA was conceived, AAFA staff and member companies have been active participants in many of the Consumer Product Safety Commission (CPSC) regulatory activities and have worked closely with the Commission's staff to ensure that the regulations were crafted in such a way that they address specific safety risks while not hindering the ability of companies to make safe and compliant products. As a result of this on-going partnership, some of the critical CPSIA implementation issues faced by textile, apparel, and footwear businesses have been addressed. Unfortunately, many problems remain, many of which cannot be fixed through the regulatory process.

The proposed amendment to the CPSIA is a significant step forward in the process to fix many of the unintended consequences of the CPSIA. These unintended consequences have caused considerable disruption to businesses over the past few years. Furthermore, the amendment preserves many of the CPSIA's much needed improvements to consumer product safety regulation and enforcement. The draft language, which we strongly support, represents a thoughtful balance that protects consumers without unduly burdening industry with unnecessary regulations and requirements. Below are specific comments on several provisions in the draft amendment and additional comments on areas of improvement not addressed by the amendment.

Section 1: Definition of Children's Product

By expanding the definition of a "children's product" to products intended primarily for children 12 years of age or younger, the CPSIA created a lot of confusion for products that were marketed to "tweens." Manufacturers are still unclear whether these products are children's products or not. Moreover, this expansive definition of children's product meant that regulations like the lead standard would be applied equally to all age groups even if the behavioral characteristics of the age groups are vastly different. For example, the lead standard applies equally to the sole of a baby's shoe as it does to the sole of a 10 year old's shoe – even though 10 year olds will not likely be putting their shoes in their mouths. AAFA therefore strongly supports the amendment's intentions to drop the age limit down to where the Senate had proposed during the drafting of the CPSIA – age 7 and under.

Section 2: Application of Lead Limit

Section 2 of the amendment addresses several key issues with the lead standard that have been extremely problematic for the apparel and footwear industries. Overall, the amendment helps tailor the lead standard to appropriately take into account risk. AAFA supports several key components including the extension of the deadline for lead limit, changing to a prospective application of the lead limit and the inclusion of an alternative limit and *de minimis* exception. These aspects are a good start in relieving the crushing burden on companies, while still ensuring consumer product safety but there are other concerns that must be addressed.

Changing the lead limit to be a prospective application is a change that AAFA and other industry groups have been requesting for many years. A retroactively applied lead limit has resulted in safe and compliant products that have been deemed safe one day and "banned hazardous substances" the next. Companies had to remove millions of dollars worth of inventory from shelves for minor problems such as non-compliant zipper stoppers on the bottom of the fly on children's pants. The result has been a huge unnecessary financial loss for companies that have diligently complied with CPSC regulations and have taken additional steps beyond regulatory requirements to ensure the safety of their products. As stated by CPSC Commissioner Adler, "Retroactivity imposes penalties for past behavior otherwise permissible at the time the behavior occurred – with no ability to modify the actions deemed impermissible. This is strongly disfavored in the law. In fact, the Consumer Product Safety Act expressly bars the agency from imposing safety standards retroactively."[1]

We further support language that postpones the application of the 100ppm lead content standard for a year to give the CPSC time to finish technological feasibility determinations. As the CPSC has not yet issued any determinations on whether products can or cannot meet the 100ppm lead content limit, manufacturers do not know whether they will need to comply with the standard. Consequently, manufacturers are destroying safe inventory even if tests have come back only slightly above 100ppm. As a general rule, regulations should be applied in a transparent, timely manner to be fair to businesses. Furthermore, we believe the amendment should apply the 100ppm lead content standard to specific products or materials *only if* the CPSC makes a determination that meeting 100ppm is technologically feasible and is necessary for public health and safety.

Making the 100ppm lead content limit applicable only if the CPSC determines that it is technologically feasible and necessary to protect public health and safety will provide significant relief to manufacturers whose products are not meeting 100ppm due to testing variances. Lead testing is *never* exact, a single product that is sent to three different laboratories will likely return with three different results. Moreover, companies are struggling with test results that come back just slightly above the 100ppm lead standard. Including a standard error that takes into account statistical error would save a company from having to destroy an entire product line because one test reached 101 ppm. It is our understanding that no test will ever give you a standard deviation of zero so including room for testing error is the only way to make "reasonable testing" just that, reasonable.

[1] http://www.cpsc.gov/pr/adler01222010.pdf

We are also very supportive of both the *de minimis* exception and the alternative limit for steel, copper and aluminum alloys. In particular, the apparel and footwear industries have been struggling with several issues that would be solved by a *de minimis* exception, from crystals to fabric being used as a barrier for inaccessible components. Under the *de minimis* exemption many items that ***do not*** pose a risk to children, like the soles of children's shoes, would be exempt due to the absorption of lead falling below any *de minimis* limit that is introduced.

In addition, the *de minimis* standard could solve some regulatory issues that the apparel and footwear industry has been facing. For example, the CPSC came out with a methodology for determining components inaccessible and therefore not covered by the lead standard. This methodology included language saying that fabric could act as a barrier for inaccessible components provided that the inaccessible component is not less than five centimeters in any one dimension. While the intent was to cover components that could be swallowed (like fabric covered buttons), the language of the regulation ended up making the fabric inaccessibility exception useless for the apparel and footwear industry as no component in the apparel and footwear industry is greater than five centimeters in all dimensions. Therefore, components like the shanks in children's shoes and the zipper stopper in children's pants (even if the fly has been bartacked over so a child could not touch the zipper stopper) are still covered by the lead standard even if a child could not touch let alone mouth the inaccessible component.

In addition to the *de minimis* exemption, we recommend the accompanying conference report address state regulations such as California Proposition 65. Proposition 65 has been a particular burden on industry. In the last few years alone, the apparel and footwear industry has been ensnared in costly and time consuming litigation brought by private litigants pursuant to Proposition 65. While industry is struggling to do the right thing and comply with Proposition 65, simply stated, there is no clear guidance on how to comply with the safe harbor limits (which are measured in micrograms per day) contained within Proposition 65. Instead, there has been regulation through litigation resulting in companies spending tens of thousands of dollars to buy into legal settlements that provide little to no improvement to public safety. Report language should clarify that any methodology that comes out of the CPSC to determine the *de minimis* standard should be applicable for state standard compliance as well. This will provide manufacturers a clear path to Proposition 65 compliance.

Section 3: Application of Third Party Testing Requirements

We are extremely supportive of the changes provided in Section 3 of the proposed amendment. AAFA and its members believe that testing is a crucial element of an effective quality control program and we strongly support provisions within the amendment that provide manufacturers with flexibility to implement their own testing programs. Prior to the implementation of the CPSIA, apparel and footwear manufacturers had in place long-standing quality control programs that have developed over time based on the unique circumstances of the product, production of the product and the manufacturer. These programs were effective and did not need to be changed. To demonstrate, in 2007 (the so-called "year of the recall") only 0.0424% of all apparel and footwear sold in the United States were involved in a recall.[2] Moreover, most apparel and footwear recalls were, and continue to be, drawstring violations – a compliance issue that results from lack of information and not a lack of testing.

While the amendment provides much-needed flexibility for third party testing requirements, it does not address any of the issues that non-children's product manufacturers are facing. Prior to the implementation of the CPSIA, all apparel was subject to the Flammable Fabrics Act (FFA) and FFA testing. 16 C.F.R. Part 1610 laid out testing and certification requirements for manufacturers. These rules were promulgated through significant discussion among industry, consumer product safety advocates, the CPSC, flammability experts and testing facilities who worked together to determine what test methods are appropriate to assess fabric compliance with flammability standards. Now, Section 14(a) paragraph (1) of the CPSA requires non-children's product manufacturers to issue a General Conformity Certification based on a "reasonable testing program" that certifies compliance with the applicable product safety standards. As the CPSC has issued two rulemaking that define what a "reasonable testing program"

[2] CPSC recall data, AAFA statistics http://www.apparelandfootwear.org/statistics.asp

entails, manufactures now have to comply with *three* different regulations.[3] Not only is this unnecessary as there was significant compliance with the testing requirements for FFA prior to the CPSIA, but this is extremely burdensome and an inefficient use of manufacturer resources.

Requiring compliance with multiple rulemakings will not make products safer. Instead, it diverts resources that could be more effectively spent on other quality control operations that may not be required by the proposed rulemakings. Therefore, we propose that Section 3(b)'s title (page 9 line 5) be amended to, "Testing Requirements" (as the amended Section 14(b) of the CPSA affects more than just third party testing, it impacts general testing requirements as well). In addition, we propose that the "Rulemaking Considerations" such as the cost-benefit analysis proposed in Section 3(b)(3)(D) (page 11, line 16) be applied to Section 3(b)(1) (page 9, line 9). Additional testing requirements should only be applied to consumer product safety standards if they are necessary. We therefore suggest that the "Rulemaking Considerations" proposed in Section 3(b)(3)(D) include the following, "that, on the basis of investigations or research, any testing requirements pursuant to this paragraph are needed to protect the public against unreasonable risk of injury."

Including this language will also prevent the CPSC from imposing the proposed "Testing and Labeling Pertaining to Product Certification" and requirements laid out in the "Condition and Requirements for Testing Component Parts of Consumer Products" to other long-established testing standards like the children's sleepwear standard and to children's products subject to FFA. As with adult apparel subject to FFA requirements, children's products subject to the children's sleepwear standard and the FFA have had testing requirements in place for many years – testing requirements that are effective because they are functional and appropriately tailored to the standards.

Requiring childrenswear manufacturers to comply with all three regulations simply to demonstrate compliance with the underlying safety standard is not only overly burdensome, but sometimes, the regulations can be contradictory and extremely confusing. For example, in the proposed "Testing and Labeling Pertaining to Product Certification" rulemaking, §1107.22 requires manufacturers to submit random samples for periodic testing so that, "each sample in the production population [has] an equal probability of being selected." However, according to the "Laboratory Test Manual for 16 CFR Parts 1615 and 1616: Standards for the Flammability of Children's Sleepwear," the normal sampling plan for fabric production unit testing requires the manufacturer to "take one sample from the beginning of the first fabric piece in the unit and the other sample from the end of the last fabric piece in the unit."

In another example, the CPSC Small Business Ombudsman's office issued a guidance document titled, "Lifting the Stay of Enforcement of Certification Requirements for Non-Children's Clothing Textiles, Carpets and Rugs, and Vinyl Plastic Film." The document sought to clarify how "continuing guaranties" (certifications of compliance allowed by the FFA which are similar to supplier-issued General Conformity Certifications) relate to General Conformity Certification. The document states, "For non-children's clothing textiles, carpets and rugs, and vinyl plastic film, manufacturers may rely on their suppliers' guarantees if furnished in good faith and with written assurances from the supplier that the product has been subjected to a reasonable testing program." Industry is still yet unclear as to whether continuing guarantees can be used for children's products. Furthermore, according to the CPSC FAQ on continuing guaranties, "The issuance of a guaranty must be based on reasonable and representative tests conducted in accordance with applicable flammability standards..." Therefore, a manufacturer has to certify that the continuing guaranty is based on a reasonable testing program when, in fact, a continuing guaranty can only be issued if it is based on reasonable and representative tests. As a result, in an effort to help clarify two conflicting standards, the FAQ created an additional compliance layer, an additional paperwork requirement and more confusion.

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[3] Manufacturers will need to comply with 1) 16 C.F.R. part 1610, "Standard for the Flammability of Clothing Textiles," 2) proposed 16 C.F.R. part 1107, "Testing and Labeling Pertaining to Product Certification," and, for those suppliers who are using supplier certification, 3) proposed 16 C.F.R. part 1109 "Testing and Labeling Pertaining to Product Certification."

Finally, many consumer groups are concerned that without third party testing, manufacturers will not undertake the necessary steps to ensure compliance with such standards as the lead standard or the phthalate standard. We strongly disagree with these concerns. To start, the CPSC has not issued any recalls of children's apparel or footwear for violations the lead substrate standard since the passage of the CPSIA. Thus, industry has effectively ensured that only products compliant with the lead standard reach the marketplace. This is despite the fact that currently, third party testing and certification requirements for the lead substrate and phthalate standards have been stayed. However, during this stay of testing and certification, companies have implemented robust, efficient and effective testing programs throughout their supply chains to check production and ensure product compliance. Members use both third party testing facilities as well as various technologies at the production line to immediately test for a problem and, if they happen to encounter one, deal with it right away. We believe that implementing strict, one-size-fits-all testing requirements for thousands of types of consumer products and supply chains is an ineffective regulatory burden on companies. Companies know their supply chains best and know the most effective way to ensure product compliance. The stay of testing and certification has shown that regulatory flexibility is important so that companies can utilize the most effective and efficient testing methods available.

Section 6: Application of Phthalates Standard

In relation to Section 6, Application of Phthalates Standard, AAFA strongly supports the language in Section 6(c)(1) limiting the application of the phthalate regulation to accessible plasticized component parts in children's toys and child care articles. Unlike chemicals like lead, which is a naturally occurring element, phthalates are intentionally added to products. Therefore, as the CPSC recognized in the "Statement of Policy: Testing of Component Parts with respect to Section 108 of the CPSIA,"[4] testing should be limited to materials and components that could contain phthalates. Requiring testing for components that do not risk phthalate contamination is a wasteful and inefficient use of quality control resources. We also suggest the section be strengthened with either bill or report language that exempts manufacturers from the phthalate standard who have strong supply chain control and chemical management processes in place and know that phthalates will not be used in the production of their products.

In addition, the definition of a "child care article" and "children's toys" as it pertains to phthalate standards should be clarified in either bill or conference report language. The CPSC general counsel has declared that that footwear and most apparel are not covered by the definition of a "children's toy" or "child care articles" and therefore not subject to the CPSIA phthalate ban. Congress should include language to clarify that products such as footwear, apparel and fashion accessories are not considered children's toys and child care articles to strengthen this guidance.

Furthermore, report or bill language should be included to harmonize the definition of a child care article with pre-existing phthalate regulations such as the European Union Phthalate Directive which states, "The main purpose of pyjamas is to dress children when sleeping and **not to facilitate sleep.** Pyjamas should therefore be regarded as textiles and, like other textiles, do not fall under the scope of the Directive" (emphasis added).[5] Not only is harmonization of product safety standards important for businesses to be able to effectively conduct business, but quite simply pajamas are not child care articles. Children do not interact with pajamas in the same way as they interact with other child care articles such as teethers, pacifiers or bottles. Child care articles are actively handled and mouthed. While children may wear pajamas when asleep, pajamas are not likely to be mouthed – especially when the child is asleep. Therefore, pajamas do not pose a risk to children and should not be covered in the definition of child care articles.

[4] http://www.cpsc.gov/about/cpsia/sect108.html#test

[5] Guidance Document on the interpretation of the concept "which can be placed in the mouth" as laid down in the Annex to the 22nd amendment of Council Directive 76/769/EEC: http://ec.europa.eu/enterprise/chemicals/legislation/marketstr/guidance_document_final.pdf

Section 7: Exemption Authority for Tracking Labels Requirement

Overall, we are supportive of giving the CPSC the authority to create exemptions or alternative requirements to the tracking label requirement "if the Commission determines that it is not economically practicable for such product or class of products to bear the marks." We believe that in addition, the Commission should have the authority to make exceptions or alternative requirements if the CPSC believes sufficient information is already available on the consumer product. The predominant purpose of the tracking label requirement is to help consumers, retailers and manufacturers identify a product in the event of a recall. Prior to the CPSIA, in most, if not all cases a picture would sufficiently identify the product being recalled. In fact, most apparel and footwear recalls are drawstrings in children's upper outerwear – a hazard easily identifiable even without a picture. Therefore, requiring additional tracking information serves no purpose other than requiring manufacturers to comply with yet another regulation.

Section 8: Requirements for Public Database

The consumer database has the potential to provide consumers with meaningful information about the products that they purchase as long as this information is accurate and based on first hand reports and proper investigation. However, as it is currently implemented, the database does not have sufficient checks in place to ensure the accuracy of the information posted. Materially inaccurate information serves no one, is detrimental to businesses and can ultimately do more harm than good to public safety. We are strongly supportive of provisions of the amendment that we believe will improve the database for all stakeholders.

To start, we strongly support narrowing the definition of "consumers" and requiring verification that the submitter is "the consumer who used the product that gave rise to the harm, the user's next of kin, a member of the user's household, the legal representative of the user, or another person expressly authorized by any such person." Individuals posting to the database should have as much information as possible to ensure the accuracy of the information posted. Those who have not actually purchased the product, third parties and casual observers are much less likely to have specific information about the product or the incident itself. This information is also important so that consumers can easily identify products involved in the incident. Moreover, limiting the scope of submitters will help deter individuals who do not have a personal, vested interest in product safety and consumer protection and who may have improper motives.

To that end, we also support the inclusion of Section 8(c), "Misrepresentation Prohibited." Honest reporting is a vital element of the success of the database. Furthermore, a submitter who intentionally posts false information can cause a business irreparable damage. The amendment is necessary to discourage maliciously false information from being reported on the database.

In addition, the amendment's provisions to ensure the adequacy and accuracy of information posted takes significant steps to make the database a credible, useful and reliable resource for consumers. It is important for consumers using the database and for manufacturers to be able to specifically identify the consumer product referred to in the report of harm. Without this specificity, consumers may not be able to determine whether their product or a product they are considering purchasing is the same as the product named in the incident report. Moreover, the current strict timeline between when a manufacturer receives the report of harm and when the report of harm must be posted to the database does not give manufacturers and the CPSC sufficient time to review for material inaccuracies. The amendment gives all parties more time to collect necessary information to ensure the database entries are both accurate and complete.

The amendment should also remove "...***or any risk*** of injury, illness, or death as determined by the Commission, relating to the use of a consumer product" (emphasis added) from the definition of "harm." AAFA and its members strongly believe that "risk of harm" should be strictly determined by the CPSC. For example, reports of "risk of harm" could include reports of products "violating" inapplicable product safety standards. Someone could observe a child using a general use product, like a computer, test the computer for lead content, and make an unfounded determination that the computer's lead content presents a risk of injury – even if the computer is not subject to the lead standard. The Commission is in

charge of determining what is "safe" and "unsafe" – *not* the general public and any reports of risk of harm on the ".gov" database should come ***only*** from the Commission (through voluntary recall notices or other official Commission statements). However, the CPSC should be encouraged to collect reports of risk of harm for their own regulatory and investigation purposes and post the information to the database if they make a determination that there is an actual "risk of harm." Reports of risk of harm from other sources will likely result in additional burden on the CPSC, overpopulation of reports that are not in the public interest, and cause damage to both the database's and the Commission's credibility.

Preemption

The amendment does not address preemption issues and we strongly believe that the amendment should include language clarifying that the CPSIA fully preempts state and local product safety rules. Companies find it increasingly difficult to manage the conflicting and ever growing number of state regulations that are being promulgated. Companies labor to comply with the CPSIA only to find out – often after the fact – that they are not in compliance with a little known state standard. To comply with drawstring limitations, companies must meet conflicting standards established at the federal level and in the states of New York and Wisconsin. And this is just the tip of the iceberg, with new rules coming online in Washington State, Illinois, Connecticut, Maine, and elsewhere. With regard to CPSIA, California Proposition 65, in particular, has created significant difficulties because it relies upon different standards and product coverage, even though it purports to address product safety as well. We believe Congress made a mistake when it exempted out Proposition 65 from the CPSIA. We urge you to make federal preemption stronger so that it clearly preempts all state and local product safety related measures so we can achieve a single, harmonized national product safety standard.

Conclusion

Thank you for holding this extremely important hearing to discuss the much needed and well thought out amendment to the CPSIA. While it was absolutely necessary for Congress to reform consumer product safety regulations in 2008, many of the new requirements have caused a devastating economic impact to the apparel and footwear industry. We are pleased that Congress has recognized the need to amend the legislation to address implementation concerns and establish a strong, risk-based regulatory regime that protects public safety but does not unduly burden compliant companies.

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BETHESDA, MD 20814

April 6, 2011

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, DC 20515

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce,
Manufacturing and Trade
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable G.K. Butterfield
Ranking Member
Subcommittee on Commerce,
Manufacturing and Trade
Committee on Energy and Commerce
U.S. House of Representatives
2322A Rayburn House Office Building
Washington, DC 20515

Dear Chairman Upton, Ranking Member Waxman, Chairman Bono Mack, and Ranking Member Butterfield:

As the majority of Commissioners of the U.S. Consumer Product Safety Commission (CPSC), we write to express our serious concerns with significant portions of the discussion draft circulated by the staff of the U.S. House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade (the Subcommittee), which would revoke key protections in the Consumer Product Safety Improvement Act of 2008 (CPSIA) and endanger the health and safety of American consumers, especially children.

Almost three years have passed since Congress nearly unanimously passed (424-1 in the House and 89-3 in the Senate), and President George W. Bush signed into law, the landmark CPSIA legislation. This legislation reinvigorated the CPSC and established a strong consumer product safety net that the American public demanded after the "Year of the Recall" in 2007, when millions of violative toys were recalled from American consumers. The Subcommittee draft bill seeks to reverse some of the significant steps made toward providing for a safer marketplace and would turn back the clock to the pre-CPSIA era when harmful products made their way into the stream of commerce and into the hands of innocent children.

Under the new protections established by the CPSIA, mothers and fathers now have more peace of mind knowing that during the day their young children play with toys that should no longer carry the same risks of harm. At night, those same boys and girls are likely to be in a much safer sleep environment. Moreover, on March 11, 2011, we ushered American consumers into a new era of government transparency and empowerment with the launch of the CPSIA-mandated publicly searchable consumer product database. Under this provision of the CPSIA, consumers can go online and search a centralized database for reports of actual harm or for reports of potential harm involving the consumer products they own or are considering purchasing.

We understand that Congress must be mindful of the effect of regulations on the business sector. However, the reversal of several of the core provisions of the CPSIA would likely diminish the health and safety of our nation's consumers. We cannot support such a reversal. Moreover, many responsible companies, especially here in the United States, have already taken the steps necessary to meet the law's requirements, built safety into their products, and proven that manufacturers and retailers can thrive under this new and improved consumer product safety framework. It would be unfortunate, indeed, at this time to penalize those who have come into compliance with the law and to reward those less conscientious by undoing these safety features of the CPSIA.

We recognize that some provisions within the CPSIA can be improved. In the past, the Commission has unanimously requested that Congress grant us flexibility to ease some of the administrative burdens the CPSIA has placed on manufacturers, particularly smaller businesses, without sacrificing safety. We continue to support those requested changes. The Subcommittee's draft bill, however, is not consistent with this approach. More specifically, although by no means an exhaustive list, certain provisions in the draft bill cause us great concern:

- Reducing Safety for Primary School Children: We believe that as children grow and age, the idea that they should continue to have access to safe products is—and should be—a noncontroversial one. Congress, through the CPSIA, made the policy judgment that all of our children ages twelve years and younger should be afforded greater protections. We agree with that policy judgment.

- Lead: The CPSIA set one of the most protective lead limits for children's products in the world. The public health community continues to hold its overwhelming consensus: There is no known safe level of lead. We oppose any change to the law that would lead to an increase in the doses of lead to which our children are exposed on a daily basis, particularly when the marketplace has for the most part already adjusted to lower lead levels and is well on its way to getting the lead out of children's products.

- Third Party Testing: The CPSIA requires that some objective oversight and safeguards be established for assuring that children's products meet all applicable safety standards. We have previously acknowledged the need for some targeted relief for small crafters and similar small businesses from some testing requirements and, where product safety would not be compromised, provided relief where we have been able to do so. Nevertheless, one simple fact remains: Parents should have some independent assurance that all products, whether made abroad or in the United States, are safe for their children to use.

- Cribs: The Commission spoke with one voice in 2010, when it unanimously approved the most pro-safety crib standard in the world and decided that whether an infant or toddler is at home or in a child care center, a crib should always be the safest place for a child to sleep. We cannot support a measure that places any child in a potentially life-threatening situation by allowing cribs that are decades past needing to be replaced to be used in many child care centers throughout the country.

- Database: For 38 years, the American public was kept in the dark with respect to crucial consumer product safety data that the CPSC possessed. The veil on this information was lifted on March 11, 2011, when the CPSC launched the public consumer product safety database (SaferProducts.gov). Saferproducts.gov serves as a resource for consumers to learn what other consumers already know about dangerous or potentially dangerous products and emerging hazards. We believe that consumers will be informed by the information in the database and empowered to make their own decisions to help keep their families safe. We are against any proposal that would shut the door on the open and transparent approach currently available through SaferProducts.gov and hide this vital consumer product safety information from the public once again.

We remain open to working with the Congress on adjusting aspects of the CPSIA. Nevertheless, while it is true that no one, including us, wishes to over-regulate, we similarly cannot support under-protecting the American consumer, particularly our nation's children.

Very truly yours,

Inez M. Tenenbaum
Chairman

Thomas H. Moore
Commissioner

Robert S. Adler
Commissioner

cc: The Honorable Marsha Blackburn (*Vice Chair*)
The Honorable Cliff Stearns
The Honorable Charlie Bass
The Honorable Gregg Harper
The Honorable Leonard Lance
The Honorable Bill Cassidy
The Honorable Brett Guthrie
The Honorable Pete Olson
The Honorable David McKinley
The Honorable Mike Pompeo
The Honorable Adam Kinzinger
The Honorable Joe Barton
The Honorable Charles A. Gonzalez
The Honorable Jim Matheson
The Honorable John D. Dingell
The Honorable Edolphus Towns
The Honorable Bobby L. Rush
The Honorable Jan Schakowsky
The Honorable Mike Ross

Goodwill

[redacted]

The Honorable Mary Bono Mack, Chair
House Committee on Energy and Commerce
Commerce, Manufacturing and Trade Subcommittee
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable G.K. Butterfield, Ranking
House Committee on Energy and Commerce
Commerce, Manufacturing and Trade Subcommittee
2322A Rayburn House Office Building
Washington, D.C. 20515

April 6, 2011

Dear Madam Chair Ranking Member:

On behalf of Goodwill Industries International and its network of local Goodwill agencies throughout the United States, I am writing today to thank you and your staff for sharing recent discussion drafts of legislation that seeks to amend the Consumer Product Safety Improvement Act (CPSIA) and includes provisions that would address Goodwill's concerns about retroactively applying the CPSIA's sales ban on children's products manufactured before the law's implementation. Goodwill believes that the provisions pertaining to the selling of used children's products included in the most recent discussion draft (attached) would allow Goodwill stores to sell used children's apparel within the letter of the law and in good conscience.

Goodwill's first priority is the safety of its customers and the people it serves. Goodwill has a long history of working in good faith with the Consumer Product Safety Commission (CPSC) to prevent unsafe products from being sold in its stores. This commitment to protecting our customers is further demonstrated by Goodwill's continued partnership with the CPSC to educate the public, and inform and train our retail professionals to comply with CPSIA. Goodwill believes that this collaborative public awareness campaign has been extremely helpful in educating shoppers and employees about the hazards of certain products and proper recall procedures.

Goodwill looks forward to our continued work with the subcommittee and the full House Energy and Commerce Committee. Please feel free to contact me at (202) 333-5501 or Seth Turner, Goodwill's Senior Director of Government Affairs and Public Policy at seth.turner@goodwill.org or (240) 333-5508.

Again, thank you for your efforts to craft a solution.

Sincerely,

Jim Gibbons
President and CEO

CC:
The Hon. Fred Upton, Chair of the House Energy and Commerce Subcommittee
The Hon. Henry Waxman, Ranking Member of the House Energy and Commerce Subcommittee
The Hon. John D. Rockefeller, Chair of the Senate Commerce Science and Transportation Committee
The Hon. Kay Bailey Hutchison, Ranking Member of the Senate Commerce Science and Transportation Committee
The Hon. Mark Pryor, Chair of the Senate Consumer Protection, Product Safety, and Insurance Subcommittee
The Hon. Roger Wicker, Ranking Member of the Senate Consumer Protection, Product Safety, and Insurance Subcommittee

(attachment)

Attachment

EXCLUSION OF CERTAIN USED CHILDREN'S PRODUCTS.—

''(A) GENERAL EXCLUSION.—The lead limits established under subsection (a) shall not apply to a used children's product.

''(B) DEFINITION.—The term 'used children's product' means a children's product that was obtained by the seller for use and not for the purpose of resale or was obtained by the seller, either directly or indirectly, from a person who obtained such children's product for use and not for the purpose of resale. Such term also includes a children's product that was donated to the seller for charitable distribution or resale to support charitable purposes. Such term shall not include—

(i) children's metal jewelry; or

'(ii) any children's product for which the donating party or the seller has actual knowledge that the product is in violation of the lead limits in this section;

For purposes of this definition, the term 'seller' includes a person who lends or donates a used children's product.''.

April 1, 2011

Mr John "Gib" Mullan
2125 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Mullan:

As President of the Hobby Manufacturers Association (HMA), I would like to personally thank the Republican Party for undertaking the clarification and re-definition of segments of the CPSIA as it relates to toy products. While not directly involved in the toy industry, hobby manufacturers must often operate under similar guidelines as those who manufacture toys, and therefore the clarification and re-defining of certain points of the CPSIA are of critical importance to the HMA and the hobby industry in general.

I have read the "discussion draft" suggesting proposed amendments to the CPSIA as written by the 1st session of the 112th Congress on March 29, 2011 and, on behalf of HMA member manufacturers, I wish to provide some commentary and input to some of the proposed amendments contained in the draft.

1) The draft contains language concerning lowering the age as to what is considered to be a toy used by children. The HMA proposes to amend from age 12 to age 7 based on the fact that by age 7 children are generally no longer chewing on or placing toys into their mouths. In addition, by age 7, many youngsters are already building snap-together model kits, flying model rockets at school or camp, and enjoying basic radio control cars and airplanes.

2) The HMA supports the proposed amendment to exempt products produced in small quantities from much of the testing which the original CPSIA required. It is apparent that the definition of "small quantities" is not yet defined in the draft. The HMA proposes that quantity be 7,500. The hobby industry is considerably smaller than the toy industry and our products are manufactured in low thousands, and not in hundreds of thousands or millions. In fact, a large part of the hobby industry consists of small manufacturers in small workshops or minimal manufacturing facilities producing short runs of products for modelers and collectors, often by hand or with basic tools and/or machines. The vast majority of these products are targeted to the adult modeler; however, under the original CPSIA guidelines, they could still fall within the "toy" category. One of the major concerns the HMA has regarding the CPSIA is that the required level of testing would be burdensome to the majority of small hobby product manufacturers and the costs of compliance would outweigh any potential profit to be made by producing the products. Revising this part of the CPSIA would enable those smaller companies to remain in business while still ensuring that the products are safely produced.

3) While the HMA agrees that tracking labels are of utmost importance in order to determine the origin of products, we maintain that in certain instances affixing tracking information directly on to products may not be practicable. A large percentage of hobby products are scale miniatures of real-life items such as houses and vehicles for model railroads, small collector cars and planes, and model kits. We are in favor of placing tracking information on the packages for these items if placing them on the product itself becomes unreasonable and impractical due to their smaller sizes.

On behalf of the HMA as well as the hobby industry as a whole, I offer my sincere thanks for your undertaking of the amendment of the CPSIA in order to make it more practical for hobby industry manufacturers to fully comply with the new regulations. I look forward to obtaining a copy of the final amendment so that members of the HMA may become aware of the changes and support them.

If you have any questions or if I may be of further assistance, please call me at (856) 435-1555.

Sincerely,

Michael S Bass
President – Stevens International
President – Hobby Manufacturers Association

cc: Patricia Koziol, Executive Director - HMA
Adam Tager, Member Model Railroad Division, HMA

170 Kinnelon Rd., Ste, 33, Kinnelon, NJ 07405
Tel: 973-283-9088; Fax: 973-838-7124; Web: www.hmahobby.org; Email: pat.koziol@hmahobby.org

National Center for Healthy Housing

April 5, 2011

The Honorable Fred Upton
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
Washington, DC 20515

Subject: Improvements to the Consumer Product Safety Improvement Act on Lead Testing

Dear Chairman Upton:

I am writing this letter to address a technical and scientific matter that can help protect children and increase the reliability and feasibility of testing under the Consumer Product Safety Improvement Act. As you are considering changes to the Act, the protections in this law should be fully preserved and implemented on schedule, because it has been a success in helping to prevent childhood lead poisoning.

For over 20 years, I have led scientific research on childhood lead poisoning prevention. From 1995-2004, I served as the Director of the HUD office that led the nation's efforts to address childhood lead poisoning from paint in housing. I was the principal author of the lead poisoning report from the President's Task Force on Environmental Health and Safety Risks to Children and the HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (the seminal technical document in the field). I was also responsible for creating the quality control system to ensure that portable lead-based paint X-Ray Fluorescence (XRF) Analyzers can be used in a valid and scientifically defensible manner to enable residents and owners to have confidence in residential lead paint testing results.

The current CPSIA legislation seems to allow only laboratory-based destructive testing, making it practically impossible for parents to test their children's toys and other children's products in a non-destructive manner. It also unnecessarily limits the ability of manufacturers and others to conduct the large number of tests needed to protect children.

Years ago, HUD wrestled with a problem similar to that now facing the Consumer Product Safety Commission: how to test a massive number of items for lead in a way that effectively ensures child safety. Millions of homes, each one containing a hundred or more painted surfaces, needed to be tested to determine if lead-based paint hazards were present. Title X of the 1992 Housing and Community Development Act (also known as the Residential Lead Hazard Reduction Act) provided a lead-based paint

standard in two units of measure: loading (milligrams of lead per square centimeter of surface area - mg/cm^2) and concentration (parts per million by weight - ppm). While loading is the preferred measure, Title X (which I helped to craft) allowed both measures. Loading is independent of the number of non-leaded paint layers, avoiding a dilution problem. In other words, a layer of lead based paint covered by many layers of non-lead-based paint might not be detected using a laboratory test that reports only ppm, because the weight of the non-leaded layers would mask (dilute) the presence of lead paint. Loading does not suffer from this problem, because the amount of lead within a measured surface area does not change, regardless of how many layers of non-leaded paint there are. But loading does require accurate measurement of the surface area. As a practical matter, for some surfaces for which the surface area cannot be measured, ppm is the only reliable measure that can be used. Therefore, both units of measure are used.

When I was at HUD, we settled on a solution: portable X-Ray Fluorescence (XRF) technology and a quality control system that published the tolerance limits for each commercially available brand of XRF instrument on the market, combined with a laboratory quality control system. We tested the XRF instruments on hundreds of real-world paint samples on a variety of substrates and determined how well they worked. We published the results in "Performance Characteristics Sheets," for each type of XRF on the market. These are now in active use by thousands of licensed or certified lead-based paint inspectors and risk assessors across the country. It also stimulated the development of a new generation of instruments because we were able to create a level playing field in which instrument manufacturers could compete. Today, XRFs are widely understood to be reliable ways of determining the presence of lead-based paint in housing. They are typically used in conjunction with laboratory paint chip testing, for which EPA has established the National Lead Laboratory Accreditation Program. Both XRF and laboratory methods have their uses. Together, these actions have produced valid, reliable testing methods in which parents, building owners, inspectors and others have confidence.

As the CPSC looks for a way to test many thousands of products for lead content, the current law is unnecessarily limiting. While the CPSIA sets a standard of 2 micrograms of lead per square centimeter (2 $\mu g/cm^2$) for small painted areas that are less than 1 square centimeter, it does not allow this standard for larger areas. There is no scientifically valid reason to limit the size of the area for this standard. The important question is whether measurements (either by XRF or laboratory-based technologies), are reliable and supported by a good quality control/quality assurance system, such as that in place for lead-based paint testing.

Therefore, I suggest two actions for your consideration:

First, delete the current language requiring that 2 $\mu g/cm^2$ be used only for small surface areas and replace it with language that permits use of either the 90 ppm or 2 $\mu g/cm^2$ standard, regardless of the size of the surface being tested. If the materials being tested have lead at levels less than 90 ppm or 2 $\mu g/cm^2$, they would be deemed to be in compliance, regardless of the size of the area being tested. Second, CPSC (or possibly EPA and HUD) should be required to establish a quality control system to ensure that both laboratory testing and XRF testing for consumer products for children are both

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accurate and precise for coatings, substrates and other components of children's products. Both laboratory and XRF technologies have their respective strengths and weaknesses that can be controlled. Such a quality control system would help to ensure that sampling and analytical error for both methodologies is minimized, increasing consumer and manufacturer confidence in testing results.

It is vital that this Act not be weakened. The current provisions and testing requirements can be implemented on schedule. I believe this technical improvement can help make the law even more effective in protecting children. While the nation has made considerable progress in childhood lead poisoning prevention, there are still far too many children poisoned each year and there are still far too many sources of lead exposure that can and should be eliminated.

Please feel free to contact me if I can be of additional assistance. I can be reached at 202-607-0938 or djacobs@nchh.org. I am happy to work with the committee on this language, as well as provide additional background on the reasoning behind it. Thank you for your consideration.

Sincerely,

David E. Jacobs

David E. Jacobs, PhD, CIH
Research Director, National Center for Healthy Housing

Subcommittee on Commerce, Manufacturing, and Trade
Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20515

April 6, 2011

Re: Hearing on Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act

Dear Chairman Bono Mack, Ranking Member Butterfield, and Members of the Subcommittee:

Our undersigned groups write to you regarding our serious concerns about the Discussion Draft amending the Consumer Product Safety Improvement Act (CPSIA), which is the subject of a hearing before your Subcommittee tomorrow, April 7th. We have concerns that the approach in this Discussion Draft will undermine the critical public health protections provided by the CPSIA.

The CPSIA was passed with an overwhelming bipartisan majority in 2008. It was crafted over the course of a year of deliberations, and was the congressional response to the recalls of millions of toys and other children's products for excessive lead levels, ingestion hazards, and other health risks. The CPSIA created, for the first time, a requirement that children's products be tested for safety *before* they get to store shelves. It set into place limits on lead in children's products, set safety standards for infant durable products, banned certain phthalates, and created a public database where consumers could report product safety hazards they have experienced. The law revived the Consumer Product Safety Commission (CPSC), an agency that had neither the resources nor the authorities to adequately protect children from the hazardous products.

Since passage of the CPSIA, there have been calls for a modification of some of the law's provisions to address the needs of makers of handmade children's products. The Discussion Draft, however, goes far beyond that and reverses several key components of the CPSIA. Below are just some of the serious concerns that we have about this draft:

1) **Undermines safety testing for children's products:** It would reverse the requirement that all children's products be tested for safety, and would confine the requirement of pre-market testing to only a few select categories of products. Other products – such as strollers, high chairs, bath seats, and all toys -- would be safety-tested only if the CPSC undertook an extensive series of steps, including a cost benefit analysis that emphasizes the costs of testing while minimizing the benefits to public health and safety. Requiring independent third-party testing of all children's products builds safety into the supply chain early, and prevents costly recalls and unnecessary injury.

2) **Undermines lead protections:** It would dramatically weaken the lead limits of the CPSIA by only applying the law's current lead limits to paint on children's products and small parts that could be ingested. It would set a different, subjective standard (risk analysis) for all other children's products, including those that could be mouthed, such as vinyl bibs. We know that even small amounts of lead can cause a drop in children's IQ.

Lead is a known toxin, and we should have a single, strong standard that aims to keep it out of children's products.

3) **Undermines which children get the law's protection:** It would presumably lower the age scope of the CPSIA from its current protections for all children's products primarily intended for children age 12 and younger. This is inconsistent with the current ASTM toy safety standard, which covers toys intended for children under age 14, and it ignores the reality of the "shared toy box" – that young kids will, even with close parental supervision – play with the products that belong to their older siblings.

4) **Undermines the effectiveness of the new crib safety standard:** It would indefinitely delay, or possibly prevent, the implementation of the bipartisan, strong crib safety testing standards passed by the CPSC in December 2010 for cribs in child care facilities, and makes testing to that new standard uncertain.

5) **Undermines the phthalates ban:** It would allow large, undefined exemptions to both the prohibition and interim bans on phthalates in toys and child care articles. It would also, contrary to all other rulemakings in the Discussion Draft, require the CPSC to act within a very tight timeframe if the recommendations of the body assessing the safety of phthalates (the Chronic Health Advisory Panel, or CHAP) are to become law. This requirement is needless since the CPSIA already requires the CPSC to quickly act on a rulemaking; its only effect would be to make it difficult to permanently ban additional phthalates in toys and child care articles.

6) **Undermines life-saving tracking information:** It creates potentially large exemptions from the requirement that children's products have tracking labels, which will limit a consumer's ability to know whether their product is the subject of a recall, and to report vital product information to the CPSC database and manufacturers. Tracking labels can help save lives: When Liam Johns died in 2005, his crib, made by Simplicity, but labeled "Graco" went uninvestigated for two years because of confusion resulting from a lack of information on the product. At least two other babies died during this time.

7) **Undermines the new, public safety product hazard database:** The brand-new CPSC database for the first time allows consumer complaints about product safety problems to be posted publicly, after a screening process, while also giving manufacturers and private labelers ample opportunity to view and comment upon these reports before they are posted. This database will help consumers research products they are considering purchasing, will help the CPSC more efficiently identify emerging hazard trends, and can help prevent unnecessary deaths and injuries. However, the provisions in this Discussion Draft would place onerous burdens on the person making the complaint, thereby discouraging parties with valuable safety information from reporting. It would also remove the ability of consumer groups to report to the database. These changes would in turn keep valuable safety information out of the hands of parents and caregivers.

We urge you to reject the approach proposed by the Discussion Draft. It goes too far and will not adequately protect children from product safety hazards.

Sincerely,

Breast Cancer Fund

Center for Health Environment and Justice

Citizens' Environmental Coalition

Consumer Federation of America

Consumers Union

Demos

Illinois Public Interest Research Group

Indiana Toxics Action

Kids in Danger

Maryland Public Interest Research Group

National Research Center for Women and Families

Natural Resources Defense Counsel

Partnership for Working Families

Public Citizen

U.S. Public Interest Research Group

Union of Concerned Scientists

Vermont Public Interest Research Group

Women's Voices for the Earth

KIDS IN DANGER℠

Protecting Children by Improving Children's Product Safety

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Boaz Keysar, PhD
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Nancy A. Cowles
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April 5, 2011

The Honorable Fred Upton, Chairman, House Committee on Energy and Commerce
The Honorable Mary Bono Mack, Chairman, Subcommittee on Commerce, Manufacturing and Trade
The Honorable Henry Waxman, Ranking Member, House Committee on Energy and Commerce
The Honorable G.K. Butterfield, Ranking Member, Subcommittee on Commerce, Manufacturing and Trade

The Honorable Marsha Blackburn
The Honorable Cliff Stearns
The Honorable Charlie Bass
The Honorable Gregg Harper
The Honorable Leonard Lance
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The Honorable Brett Guthrie
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The Honorable Joe Barton
The Honorable Charles A. Gonzalez
The Honorable Jim Matheson
The Honorable John D. Dingell
The Honorable Edolphus Towns
The Honorable Bobby L. Rush
The Honorable Janice Schakowsky
The Honorable Mike Ross

Dear Chairman Bono Mack, Ranking Member Butterfield and members of the House Subcommittee on Commerce, Manufacturing and Trade,

We founded Kids In Danger in 1998 after the death of our beloved son Danny in a poorly designed, inadequately tested and recalled portable crib. Danny was 16 months old when the top rails of the Playskool Travel-Lite crib he slept in at his licensed child care home collapsed around his neck, strangling him. He was the 12th child to die in cribs of this design.

We have worked tirelessly from that time to improve our broken children's product safety system. This was a system where untested and dangerous children's products make it easily into the marketplace, their flaws tragically discovered by our children. After years of effort, we rejoiced in 2008 when **the Danny Keysar Child Product Safety Notification Act** was included in **the Consumer Product Safety Improvement Act** and signed into law.

This portion of the CPSIA assured parents that for the first time, cribs, strollers, high chairs and other juvenile products had to be independently tested for safety before we brought them into our homes to use with our

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children. Strong new standards would be adopted for juvenile products that would assure that the required testing would find potential flaws and make sure the products were safe for use. Very dear to our hearts were the provisions that ensured that child care facilities and other public accommodations could only offer children safe cribs that met federal standards. Danny died in a licensed child care home that had just been inspected by the state days before. And finally, parents would be given the opportunity to register their products with the manufacturer either through a postage paid card or online – making sure they would learn of recalls.

We are so disheartened to learn that this committee is considering erasing many of these gains.

In addition to many other onerous changes that reduce the safety of all products our children use, we ask you to reconsider this assault on the Danny Keysar Act.

This proposal strips the requirement for independent testing from all infant and toddler products, except for testing cribs to the old standards that eliminated gaps between slats, but little else. But for strollers, high chairs, play yards and more, our children will again be the test dummies for safety. Companies may say they employ their own testing, but we saw where that got us with the 10 million cribs recalled in the last four years and dozens of deaths each year in nursery products.

We are not opposed to allowing child care facilities that replace their older cribs to meet the mandatory standard passed in December, to avoid replacing those cribs every time a change is made to the standard. But combined with a requirement that allows many child care facilities to continue to use older model, possibly unsafe fixed sided cribs, these provisions erase the safety we so hoped the Danny Keysar Act would provide. First, a state requirement of supervision doesn't always equal optimum supervision in the field, and secondly, we all know supervision is no match for dangerous cribs. Danny died in a loving, licensed child care – not from lack of supervision, but because his crib was deadly. When a baby suffocates or strangles, it is usually with little or no noise. Babies have died when parents have been in the same room.

Will you take our concerns into consideration as you look to roll back these safety provisions? We feel strongly that all products in section 104 of the CPSIA (infant and toddler durable products – cribs, strollers, high chairs, etc) should be subject to third party testing with no exceptions. These are products parents and caregivers buy to keep their children safe. They involve many parts and hardware and can be very dangerous if defective. Let's not go back to the days of baby test dummies – let's make sure the products are safe before we use them for our children.

While it may not be reasonable to ask child care providers to replace all cribs every time there is a minor change to the crib standards, there should be a means by which CPSC can require that if necessary. If another flaw in cribs erupts as the drop-side issue did

over the past few years, CPSC should have the ability to require safe cribs in child care settings.

The new mandatory crib standard does so much more than ban drop-sides. In fact, it is unlikely that the drop-side cribs on the market over the past decade that led to millions of products being recalled and dozens of deaths could meet this standard – thereby eliminating the need to even officially ban them. The new standards will make sure crib hardware is sturdy, mattress supports and slats can stand up to real world use and that cribs, used to protect an unattended child, can keep a child safe. Allowing all matter of cribs, safe and unsafe, to remain in child care – just because they don't have a drop-side is a clear attempt to gut the safety improvements of the past few years. Child care is varied and diverse. It is unreasonable to have an exemption for fixed sided cribs without knowing the condition of the crib, when it was made and what standards it does meet.

Please, don't retreat on safety. As parents who have paid the ultimate price for unsafe products, we know you don't want to see more children suffer as our son did. Giving flexibility to CPSC to enforce safety provisions is one thing, but this wholesale reversal of crucial safety provisions sends us back to a scenario we know leaves children at risk.

Sincerely,

Linda Ginzel and Boaz Keysar
Co-founders, Kids In Danger

Linda.ginzel@chicagobooth.edu
Boaz@uchicago.edu

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
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COMMISSIONER

TEL: (301) 504-7901
FAX: (301) 504-0057

April 7, 2011

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
U.S. House of Representatives
104 Cannon House Office Building
Washington, DC 20515

Dear Chairman Bono Mack:

This letter is to provide comments for the record on the discussion draft amending the Consumer Product Safety Improvements Act (CPSIA). I believe that the draft legislation would solve many of the problems with the CPSIA that have become so evident, including what are clearly unintended consequences of the law. It is time to get our agency back on track and focusing on real safety issues, not imagined ones.

While the CPSIA gave the agency important tools for protecting the public, it also took away flexibility the agency needs to do its job in a sensible and rational way. For example, the lead provisions, the definition of "children's products" and the testing and certification provisions of the new law, working together, have directed the agency to results that impose unwarranted regulatory burdens while not resulting in an appreciable safety payback. In addition, we are aware of products that do not present a safety issue which have now been driven off the market because of this law. Consumers are not benefited by such a result.

I recommend that any final legislation include the following necessary changes to the current law:

- The lead exclusions need to be amended to give agency more flexibility to address unintended consequences.
    - The "Functional Purpose" language, suggested by some, does not provide adequate relief because it is subjective, costly, and favors big companies. It is also very resource-intensive for the agency.

- The amendment needs to recognize the expertise of the agency to define what is an unacceptable risk based on whether the child's interaction with the product results in measurable increase in blood lead levels.
- Migration of lead limit from 300 ppm to 100 ppm (effective in August, 2011) should be repealed. The Agency can set an appropriate lower level if dictated by safety.
- The scope of the lead provisions is too broad. The law treats all children – from infants to preteens – the same even though their product interaction is quite different and risks are different. The scope should be narrowed to apply to products intended for younger children (recognizing that the agency has inherent authority to deal with risks, regardless of source, to older children).

- The lead and phthalates provisions need to be amended so that the law applies prospectively, rather than retroactively. The retroactive provisions of the law have resulted in forcing billions of dollars worth of safe products off the market.

- The existing mandatory third party testing requirements for all children's products impose a significant burden especially on small businesses. Testing and labeling provisions need to be amended to minimize the damaging impact on product makers while protecting consumers. Rather than requiring third party testing in every instance, agency should be able to set reasonable and appropriate testing and labeling requirements that provide reasonable assurance of compliance with underlying safety standards.

- Regulations should be subject to cost/benefit analysis. Although historically the agency has followed the direction of the President in doing cost/benefit analysis, the current commission has chosen not to do this. Regulators need information on both the costs and benefits of proposed regulations to make sensible decisions. The quality of our regulations has suffered because we have not done the hard work to understand the impact of our actions.

- The Public Database provisions should be amended to include only complaints from consumers who bought or used the product or relevant public health or other public agencies; enhance the ability of businesses to respond to complaints; and include the duty of the agency to assure accuracy of any information made public.

The discussion draft would go a long way to solving the obvious problems with the CPSIA. Claims that the draft reverses progress are both wrong and deliberately misleading. The facts are that it brings some rationality back into the process. I hope that Congress will move swiftly to pass constructive legislation.

Sincerely,

Nancy A. Nord
Commissioner

April 5, 2011

G. K. Butterfield, Jr.
House Subcommittee on Commerce, Trade, and Manufacturing
Washington, D.C.

Dear Representative Butterfield,

On December 19, 2002, my 13-month-old daughter, Elizabeth (Ellie), died in a poorly and dangerously designed play yard. Recently, I wrote to committees, representatives, and senators in an effort to protect a database, required by the CPSIA, that plays an imperative role in keeping children safe by notifying parents of products that pose dangerous risks to children. Now, I am to learn that efforts to keep children safe are again threatened, this time by eliminating essential, deserved ***requirements*** that protect our children.

Specifically, I am referring to the committee's attempts to 1) eliminate the requirement for independent testing of children's products and 2) a measure that will weaken standards for cribs in daycare provider facilities. **Ladies and gentlemen of the committee, I am outraged at these propositions and you do a severe injustice to Danny Keysar's memory, as well as Ellie's and all other children whose lives were lost or bodies injured due to unsafe products, if you strip these imperative portions of the Danny Keysar Child Product Safety Notification Act.**

Eliminating the need for independent testing is in itself a death trap for children. Allowing companies to provide their own testing is erroneous and ineffectual. If a manufacturer's self testing and evaluation were adequate, we wouldn't have the thousands of recalls and warnings issued because their products failed to comply with standards or failed to keep a child out of harm's way. A manufacturer, whose goals are purely profit driven, cannot be trusted to efficiently and appropriately evaluate their own product safety without the risk of severe bias.

Had independent testing requirements been implemented prior to Ellie's death, I firmly believe Ellie would be bubbly, beautiful, nine-year-old girl, today because the product that took her life would never have made it to the store shelves without necessary modifications, like a locking mechanism and a less hazardous design. The manufacturer did not "find" the flaw, but several independent investors after the fact, certainly did. In fact, after her death, I was shocked to learn that this testing standard was never required!

Ask the parents of those children who died in cribs that were expected to be safe because cribs have required standards whether they feel that manufactures self analysis is a sufficient safe guard for product safety. The recent massive recall of drop-side cribs proves this to be otherwise. As parents, and as consumers we expect that all possible flaws have been researched and tested adequately. When we

buy a product, we have a right to expect that the particular product complies with a high quality of standards, given the products is designed and made for our precious child.

When we place our child in the trust of childcare providers, we maintain that same expectation. Daycare facilities require sufficiently trained and certified personnel as should the products they use in their facilities should require the same standard of safely and quality. The current threat to weaken requirements for cribs in use at childcare facilities is a dangerous risk that poses too many hazards. Only requiring drop side cribs to be eliminated from use in provider facilitates, implies that there aren't other dangerously designed cribs in use, and that is too risky an implication, allowing for too many dangerously gray areas. The cost childcare providers pay to replace unsafe products doesn't come close to the cost they will pay if a child dies in their care, due to an unsafe product they provided. The Danny Kesyar Child Product Safety Act not only provides protection for children, it protects the livelihood of child care providers by keeping them up to date with standards that parents expect of them.

There are too many of us parents whose children were injured or killed due to manufacturer carelessness and inadequate testing of their products. A child is priceless, beyond what any definition might attach itself to profit. Companies who make children's products should be held to the highest standards and accept accountability for their product at every moment. I can't ever escape from the pain of my grief, replace the permanent hole in my life that once was my toddling, smiling child. Manufacturers shouldn't escape the requirements of such instrumental standards.

I don't know whether Ellie was destined to be a ballerina or a professional race car driver. I also don't know what she might have looked like on her 9th birthday this past November, or what her laughter might sound like. What I do know is that Elizabeth's death lies in the hands manufacturers whose inadequate testing and attempts to cut costs resulted in the death of my little girl. Allowing these cuts to pass will then put the death of more children in your hands.

Sincerely,

Lisa L. Olney (f.k.a. Davis)
14 Bellmore Dr.
Orford, NH 03777

In Memory of
Elizabeth Morgan Davis
November 4, 2001 – December 19, 2002

April 5, 2011

Mary Bono Mack, Chair
House Subcommittee on Commerce, Trade, and Manufacturing
Washington, D.C.

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Sincerely,

Lisa L. Olney (f.k.a. Davis)
14 Bellmore Dr.
Orford, NH 03777

In Memory of
Elizabeth Morgan Davis
November 4, 2001 – December 19, 2002

UNIVERSITY OF Cincinnati

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April 5, 2011

The Honorable Fred Upton
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
Washington, DC 20515

By E-mail: Attention John Gibson Mullan gib.mullan@mail.house.gov

Dear Chairman Upton:

The Consumer Product Safety Commission Improvement Act was a major public health legislative accomplishment and has done much to protect the health of children and others. Our research was among the first to document the presence of lead in currently produced paints in a number of developing countries and to warn of the threat they represented as painted products were imported into the United States. We and others are continuing this research and have now found lead paint available in each of the twenty countries whose paints have been tested.

As you consider changes to strengthen the Consumer Product Safety Improvement Act, I would like to respectfully suggest a provision that has the potential to greatly expand the nation's capability to monitor compliance and thereby increase protection of the health of children and others.

For many years, colleagues and I have engaged in research to develop lead exposure assessment procedures using a variety of portable X-Ray Fluorescence (XRF) analyzers and other technologies and to develop and evaluate lead-based paint hazard reduction programs. The research with XRF use laid the groundwork for the development of an official method for the measurement of airborne lead by field portable XRF analysis. Other research demonstrated that analysis of soil by XRF produced results comparable to those by laboratory methods. Our current research on analysis of new paint indicates that modern XRF analyzers are capable of measuring lead at the two micrograms of lead per square centimeter level (2 $\mu g/cm^2$) as permitted in the current law for small areas. XRF analysis can measure lead in these units at this level for surfaces of any size, not just small areas where that standard is allowed by the current law.

UNIVERSITY OF Cincinnati

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The CPSC could help achieve its goal of expanding the testing of painted products in a major way if the current law was modified to permit the use of a standard of 2 micrograms per square centimeter (2 $\mu g/cm^2$) for areas of any size.

The current CPSIA legislative and regulatory structure seems to allow only laboratory-based destructive testing for other than small areas, making it practically impossible for parents to test their children's toys and other children's products in a non-destructive manner. It also unnecessarily limits the ability of manufacturers, health departments and others to conduct the large number of tests needed to protect children. Many health departments, importers, consumer goods wholesale and retail establishments and others could use trained individuals to screen for compliance using hand held portable XRF technology if this change was made. This would greatly expand the protection offered to children and others by the CPSCIA.

I would be happy to assist the Committee in any way possible to make some improvements in this excellent legislation.

Thank you for your consideration.

Sincerely,

Scott Clark, PhD, PE, CIH
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ThermoFisher
SCIENTIFIC

The world leader in Serving Science

April 6, 2011

The Honorable Fred Upton
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Upton:

On behalf of Thermo Fisher Scientific Inc., thank you for taking a leadership role in considering changes to the Consumer Product Safety Improvement Act (CPSIA). I would like to respectfully suggest a way to improve manufacturers', retailers' and importers' ability to inspect consumer goods for lead content, while providing a level of protection for children that we all seek. Handheld X-Ray Fluorescence (XRF) is portable, cost-effective, non-destructive, accurate and widely accepted as a tool to test for lead in both substrate and paint. **Allowing broader use of XRF by industry will ensure that more children's products are tested and proven to be compliant.**

Thermo Fisher is the world leader in serving science. The company enables its customers to make the world healthier, cleaner and safer by providing analytical instruments, equipment, reagents and consumables, software and services for research, analysis, discovery and diagnostics. Our analytical products include instruments that use XRF technology to analyze and detect the elemental composition of materials.

Lessons from EPA & HUD's Effort to Make Homes Safe from Lead Paint

The original ban on lead in paint became U.S. law in 1978, setting a limit for lead in units of "ppm" (parts per million). This is a common unit of measure for laboratory-based analytical methods. But lab-based techniques are not portable and, therefore, not well suited to inspect homes, schools, offices and public buildings. Recognizing this, EPA and HUD partnered with the scientific instrument industry in the early 1990's to develop the first handheld XRF spectrometer for the inspection of lead paint in the field.

In order to truly enable field-deployable XRF technology, **EPA and HUD wrote enforcement regulations for lead in paint that allowed an alternate standard of lead**: 1 milligram per square centimeter. Nearly 20 years ago, EPA and HUD recognized that they could drive far more testing for lead paint by setting this *parallel – and equally protective standard* and thus enabling use of portable, cost-effective, accurate and non-destructive XRF testing in buildings nationwide.

The core technical hurdle behind the CPSIA's lead limit for painted surfaces on children's products is similar to that faced by EPA and HUD decades ago. Today, Congress and the CPSC want to encourage extensive testing to ensure that lead is not present in products given to children. In order to solve the testing conundrum, **Congress can take a simple, small step to allow a parallel – and equally protective – standard for lead that is as safe as the parts per million limits.**

Thermo Fisher Analyzers LLC | 300 Middlesex Turnpike Building 9 | Billerica, MA 01821 USA | +1 978-670-7460 +1 978 670-7430 fax | www.thermo.com/niton 800-875-1578 (toll free)

Thermo Fisher
SCIENTIFIC

CPSC Experience with Handheld XRF for CPSIA Compliance

The CPSC and Customs and Border Protection (CBP) are using handheld XRF for inspection of goods at the CPSC's lab and U.S. ports of entry. They understand that the technology is capable of quickly testing products – including painted products – for lead, allowing scientifically accurate yet quick decisions about whether to clear a shipment.

It is my firm belief that virtually every children's product found to violate lead limits over the past several years would have been – or in fact was – caught by a handheld XRF scan in less than one minute. This is the kind of technology required to protect children from lead exposure in the millions of consumer products that must be inspected each year.

CPSIA XRF-related Language

In considering original passage of CPSIA, Congress understood the lessons from EPA and HUD's efforts many years before. And, as such, the CPSIA sets a limit for lead in small painted areas of 2 micrograms per square centimeter (2 ug/cm2). However, limiting this standard to "small" areas is unnecessary, arbitrary and without scientific basis. And, the limitation creates an opening for problematic products to reach the marketplace. As such, **I encourage you now to apply this same 2 ug/cm2 standard to any painted surface.**

Taking this simple, practical step will enable a significant increase in testing and result in more safer products. This additional testing can be performed by handheld XRF, which has already gained wide acceptance as an integral part of reasonable testing programs across industry. **Manufacturers, retailers and importers seek a practical, cost-effective and defensible method to test their products accurately and efficiently. Handheld XRF provides that answer.**

With over 15 years of experience in applying XRF technology for the testing of environmental toxins, I want to assure the committee and the Congress of the efficacy and validity of what is proposed, namely allowing broad use of a lead standard in micrograms per square centimeter. Additionally, please consider the experience of the EPA and HUD and the success the U.S. government has had by enabling maximum testing of homes and other buildings to reduce lead hazards.

In closing, I appreciate your consideration and would be pleased to discuss this issue directly with you, the committee, your staff and others who are interested in protecting children from the hazards of lead and other heavy metals.

Sincerely,

Bob Wopperer
Senior Director, Marketing and Business Development
bob.wopperer@thermofisher.com

Michele Witte
129 Commonwealth Avenue, Merrick, New York 11566
michelewitte@gmail.com

April 3, 2011

RE: Independent testing on infant and toddler products

Dear Chairman Bono-Mack and Ranking Member Butterfield:

All products in section 104 of the CPSIA (infant and toddler durable products – cribs, strollers, high chairs, etc) should be subject to independent, third-party testing with no exceptions. If a simple, independent "shake" test was done before the distribution of the Child Craft crib I bought for my children, the flaw within the crib design that is responsible for the death of my first born son would have been detected and corrected. When I woke up on the morning of December 12th 1997, I found my son, Tyler Jonathan, with his neck caught between the side rail and headboard of his drop side crib. Sometime after his one am bottle, a single screw became loose creating a gap wide enough to entrap his neck. When this happened, the side of his crib became a spring-loaded vice, strangling him to death instantly. The very last image I have of my precious son is that of him trapped and killed by a crib that I thought was his one and only safe haven.

Tyler's crib was purchased new, meeting CPSC standards, and had the JPMA seal of approval. This enrages me. When my mother first announced that she wanted to buy a crib for her first grandchild I was so excited. We went from store to store searching for the perfect crib. My mother spent hundreds of dollars on a very pretty crib that matched the paint in my nursery and had the convenience of a side that lowered. I am not very tall. When we decided on that particular crib I falsely believed that I was making an informed decision to purchase a safe crib that looked pretty and was convenient. If I knew that the crib I purchased was built with hardware that a ten month old could shake loose, suffocating and strangling babies in the middle of the night, I would NOT have purchased the death trap that is responsible for the death of my Tyler. Tyler's crib was not tested for safety and I, as a consumer, assumed it was because of that JPMA seal and the fact that the crib was falsely advertised as "#1 in safety."

My family and I went to Washington, DC this past December near the anniversary of my son's death. We were there to celebrate. The CPSC was to announce the fact that it unanimously voted YES to new crib regulations that would ban the distribution of cribs like my son's: cribs that are unsafe for our littlest consumers. Finally, standards will be in place that will force manufacturers to sell child products that meet and exceed new and improved safety standards. To think that if these standards were in place in the 1990s my son would be alive today, arguing with his siblings about who gets the last portion of mashed potatoes. Our lives were torn apart when Tyler died. It is horrific that simple testing and stronger hardware could have saved him. I urge this subcommittee to protect children like Tyler and allow the CPSIA regulations to assure child product safety.

Sincerely,

Michele Witte

FULFILLING CPSIA'S MISSION – YKK'S STATEMENT IN SUPPORT FOR A MORE EFFICIENT STATUTORY SCHEME

APRIL 6, 2011

INTRODUCTION

My name is Jim Reed, and I am the Chief Legal Counsel for YKK Corporation of America. YKK Corporation is a leading manufacturer of zippers, buttons, snaps, webbing and other fastening components. YKK has supplied these components to the apparel industry for more than 50 years. YKK is a family owned business that has grown into a global operation through its commitment to quality, innovation and customer service.

YKK'S COMMITMENT TO THE U.S.

We opened our first U.S. office in New York in 1960, and opened our first U.S. manufacturing facility in Georgia in 1973. YKK now employs over 1,800 people in the U.S. in its plants and offices in Alabama, California, Florida, Georgia, Illinois, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas and Washington.

YKK'S FAMILIES IN THE U.S.

"YKK" is best known as those three initials on zipper pulls, but we are much more than that. We are American workers, and, more importantly, we are parents, as fiercely protective of our children as other parents.

YKK's Tape Craft Corporation has 180 employees in Oxford, Alabama, making webbing of all kinds since 1946. They have struggled over the last several years due to the recession, but through the incredible effort of the employees in the plant, they are returning to profitability.

YKK Snap Fasteners America Inc., formerly known as Universal Fasteners, has been making buttons for over 100 years. Its 200 employees in Lawrenceburg, Kentucky, are competing with foreign manufacturers with much lower labor costs. The YSU team succeeds through the quality of their products, their innovation and their manufacturing know-how.

YKK (U.S.A.) Inc.'s home base is in Macon, Georgia, where they have more than 700 employees making zippers. It is one of the largest YKK production facilities in the world, where a great number of our employees have over 20 years' experience. They are very much a family business there, where they can boast of a multi-generational employee base.

YKK's families have made safe products for decades. We are proud of the work we do, and believe we have earned the right to continue making safe products without the crushing weight of excessive regulation.

YKK SUPPORTS THE CPSIA

As parents, YKK's employees support the mission of the Consumer Product Safety Improvement Act. We support the lead levels imposed by the law, and our products have always been below those federally mandated levels. In fact, we have already reduced the lead levels in our substrate to less than 90 ppm, well ahead of the August 2011 target date. We are not seeking exemptions from or exceptions to these requirements.

We feel the CPSIA has already made noteworthy contributions to overall product safety. The increased penalties imposed by the CPSIA, for example, seem to have had a significant impact on manufacturers and importers. The threat of a $100,000 fine per product (with the potential to rise to $15,000,000) and potential criminal liability have a powerful deterrent effect. In addition, the powers granted State Attorneys General, whistleblowers and consumers to bring their own claims greatly increase the range of potential enforcers. From a manufacturer's perspective, noncompliance is simply no longer an option. To this extent, the CPSIA has already succeeded in its mission to ensure the safety of children's products.

CPSIA'S CONTINUING CHALLENGES AND OPPORTUNITIES

For any important piece of legislation covering a broad range of products, it takes time to determine what the unintended consequences are and where adjustments may be necessary. The objective of the CPSIA is to make children's products safer, but it will have the unintended consequence of putting manufacturers out of business. Congress, the CPSC and other stakeholders have thoroughly examined the issues of the law over the last three years. The time has come for us to make the necessary adjustments to the CPSIA. We at YKK applaud this latest draft amendment by the House Subcommittee and feel it makes tremendous strides in resolving the toughest issues around the CPSIA.

THE CHALLENGE OF THIRD PARTY TESTING

Of all the useful provisions in the amendment, YKK believes the changes to the third party testing requirements does the most to resolve the greatest challenges of the CPSIA. The third party testing requirements of the law in its current form are devastatingly burdensome. This latest proposed amendment strikes the appropriate balance by focusing third party testing on those most critical areas previously highlighted by Congress and the CPSC, such as lead paint, metal jewelry and cribs. The amendment also gives the CPSC the ability to expand third party testing to other areas as necessary.

The current requirement imposing third party testing on all children's products, no matter how fundamentally safe, will put manufacturers out of business without adding significant value to the underlying safety of children's products. YKK, for instance, is not seeking to exempt its products from the lead standards, and is not shying away from those increased responsibilities. YKK's products can meet the underlying safety requirements of the law, but we have not been able to "certify" our components under the law because of the current excessive third party testing requirements.

It is hard to understand the extent to which excessive third party testing creates problems for manufacturers like YKK without understanding a little bit about the complexity and scope of the manufacturing process. We offer over 375,000 different types of zippers. We offer these zippers in 578 different stock colors, but we also make zippers in thousands of different custom colors each year in order to meet our customers' seasonal requirements.

On an average day, our team in Macon, Georgia, will manufacture 4.5 million sliders in 50 different styles, and this is before they add unique zipper pulls or apply some of the 4,000 different custom colors we offer. On that same day, they will make 300,000 different cut zippers in 100 different styles. They will also produce 180,000 meters of zipper chain, and 40 tons of brass wire.

Our team in Lawrenceburg, Kentucky, currently offers more than 10,000 different types of buttons. During the course of the average workday, this team will make almost 200 different types of buttons. To further complicate the process, the button designs they offer are continuously changing. They develop up to 150 new designs each week to keep up with customers' demands for new and unique looks.

For the most part, the components YKK manufactures are not child-specific; the same zipper going into an adult's pair of jeans will also go into a child's pair of jeans. Although only a small portion of YKK's products will actually end up in children's products in the U.S. (we estimate less than 2%), we will not know which ones they are. As a consequence, YKK has no choice but to treat ALL of its components as if they were going into children's products, compounding the impact of excessive third party testing requirements.

The burden of excessive third party testing is all the more frustrating when one considers that YKK has a decades-long track record for making safe products. YKK's commitment to quality and safety is widely recognized in the industry, and is a primary reason for our success. We stand behind these commitments with rigorous internal testing protocols. In a single year, our Macon quality team will conduct over 5,000 lead tests. We believe these processes are sufficient to ensure the safety of our products, and our record supports this position.

THE COST OF EXCESSIVE THIRD PARTY TESTING

YKK's products meet the underlying safety requirements of the CPSIA, but we cannot certify these products as "CPSIA compliant" because of the excessive third party testing requirements. The enormous complexity of the global supply chain and the tremendous variables in the manufacturing process make third party testing of all products and components in all their variations impossible. YKK has therefore been forced to tell its customers "no" when it comes to CPSIA certification. The fact that there is no underlying safety problem with the products makes the dilemma all the more frustrating.

Our ability to maintain manufacturing in the U.S. requires a focus on those things that make U.S. manufacturers competitive: (1) total customer service (meeting all the needs of the customer, no matter how complex), (2) customization, (3) speed to market and (4)

innovation. Telling our customers "no" to CPSIA certification will push them away from us, which will in turn reduce our orders. Lost orders will lead to lost jobs, and a race to the bottom through pricing wars. These pricing wars are best fought in low cost labor markets like Mexico, Vietnam and Bangladesh. The bottom line is that the excessive third party testing requirements of the CPSIA add little underlying safety value, but will put manufacturers in the U.S. out of business.

CONCLUSION

YKK is confident in the ability of its products to meet the substantive underlying safety requirements of the CPSIA. YKK's testing procedures have been developed over the decades to fulfill the specific requirements of our products and the industries we serve.

We think the change to the third party testing requirements under the proposed amendment is the right way to ensure our children are protected, while avoiding putting manufacturers out of business with overly burdensome regulation.

YKK is here in the U.S. to attest to the fact that American manufacturing is not dead. We have been to the brink, and are fighting our way back, but the recovery is tenuous. Please do not push us back down with untenable regulatory burdens such as excessive third party testing.

Mrs. BONO MACK. All right. And as we wrap things up again, I want to thank our panelists for your patience today, your indulgence certainly through those long series of votes. I would like to thank you for your commitment to this very important issue. I look forward to hearing your thoughts further as we move this legislation forward.

But I would like to be perfectly clear. Our only goal is to correct the unintended consequences of CPSIA. This draft does not undermine the current law. Again, we are trying to fix the problems that we know of in CPSIA, hopefully get some common sense back into this thing. We are simply working to make it better for all Americans and to provide the Consumer Product Safety Commission with the flexibility that it is asking for.

As the mother of two children and three stepchildren, I am completely committed—like everybody in this room is—to the safety of children everywhere. So I hope we can put these political differences aside and pass a bill that will make them prouder and safer. The ranking member and I continue to have discussions about our hope and willingness to work together to get a good bill through Congress that not only we can be proud of but the American people can as well.

So I remind members they have 10 business days to submit their questions for the record and I ask the witnesses to please respond to any questions they receive. And the hearing is now adjourned. Thank you again.

[Whereupon, at 3:55 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Statement of Rep. Ed Towns (NY-10)
Before the US House of Representatives
Energy and Commerce Committee
Sub Committee on Commerce, Manufacturing and Trade.

Thank you Chairman Bono-Mack and Ranking Member Butterfield for holding this hearing today on the discussion draft to the Consumer Product Safety Improvement Act. CPSIA was passed in the 110th congress to help protect consumers against dangerous products that may do them harm. This legislation affects a broad spectrum of our economy, from the manufacturers of toys to the children that play with them. Our constituents want to know that we are doing everything in our power to make sure their children are kept safe. This is why I am seriously troubled by the proposed fixes to the legislation

that was passed during the 110th congress by a large bi-partisan majority.

Safety should be the number one goal of this committee. When we set aside the needs of our constituents to lift up the needs of special interests, we as members of congress must reevaluate what we hold dear. Consumers must be assured that children's products sold on the open market are safe. The proposed legislative fixes to CPSIA fall well below the safety standard set by the original legislation. I urge my colleagues to consider the consequences of this legislation because it will not ensure the safety of our children. I also understand that the original legislation had unintended consequences for manufacturers and small businesses however the legislation before us today is misguided in its approach.

During the 111th congress the Democratic majority had several months of consultation with industry officials to alleviate the burden placed on them by CPSIA's new standards and regulations. These common sense reforms such as allowing flexibility for the CPSC to exempt specific products and exclude for certain used children's products were supported by many of the stake holders that are here today but unfortunately these common sense reforms were not able to garner the support needed to move forward.

The draft legislation we are considering today will have a serious affect on the safety of our children and I urge my colleagues to work together to protect the standards of safety that our constituents demand of us.

Thank you Madam Chair, I yield back my time.

[DISCUSSION DRAFT]

MARCH 29, 2011

112TH CONGRESS
1ST SESSION

H. R. _____

To amend the consumer product safety laws...[*to be provided*]

IN THE HOUSE OF REPRESENTATIVES

_____ introduced the following bill, which was referred to the Committee on _____

A BILL

To amend the consumer product safety laws...[*to be provided*]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITION OF CHILDREN'S PRODUCT.

(a) DEFINITION.—Section 3(a)(2) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(2)) is amended—

(1) in the matter preceding subparagraph (A)—

(A) by striking "intended primarily for children 12 years of age or younger" and in-

serting "primarily intended for use by children [ ] years of age or younger"; and

(3) by striking "intended for a child 12 years of age or younger" and inserting "intended for use by a child [ ] years of age or younger";

(2) in subparagraph (B), by striking "children 12 years of age or younger" and inserting "children [ ] years of age or younger"; and

(3) in subparagraph (C), by striking "child 12 years of age or younger" and inserting "child [ ] years of age or younger".

(b) TECHNICAL AMENDMENT.—Section 101(a)(1) of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 1278a(a)(1)) is amended by striking "(as defined in section 3(a)(16) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(16)))" and inserting "(as defined in section 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052(a)))".

SEC. 2. APPLICATION OF LEAD LIMIT.

(a) EXTENSION OF DEADLINE FOR LEAD LIMIT.—Section 101(a)(2) of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 1278a(a)(2)) is amended—

(1) in subparagraph (C), by striking "3 years" and inserting "4 years"; and

(2) in subparagraph (D), by striking "3 years" and inserting "4 years".

(b) AUTHORITY TO APPLY LIMITS TO OTHER PRODUCTS.—Such section is further amended by adding at the end the following:

"(F) AUTHORITY TO APPLY LIMITS TO OTHER PRODUCTS.—The Commission may, by regulation, apply the limit set forth in subparagraph (A) to any consumer product other than a children's product (as such terms are defined in section 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052(a))) that is designed or primarily intended for use by children 12 years of age or younger, or to any class of such consumer products, if it determines after a hearing that the lead content in such product or class of products presents an unreasonable risk to children's health.".

(c) PROSPECTIVE APPLICATION OF LEAD LIMIT FOR CHILDREN'S PRODUCTS.—Section 101(a) of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 1278a(a)) is further amended by adding at the end the following:

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"(3) APPLICATION.—Each limit set forth in paragraph (2) shall apply only to a children's product (as defined in section 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052(a))) that is manufactured after the effective date of such respective limit.".

(d) ALTERNATIVE LIMIT AND DE MINIMIS EXCEPTION. Section 101(b) of such Act (15 U.S.C. 1278a(b)(1)) is amended—

(1) by redesignating paragraphs (2) through 5 as paragraphs (3) through (6), respectively; and

(2) by striking paragraph (1) and inserting the following:

"(1) ALTERNATIVE LIMIT FOR CERTAIN MATERIALS AND DE MINIMIS EXCEPTION FOR CERTAIN PARTS.—

"(A) ALTERNATIVE LIMIT.—For a component part of a children's product that is made of steel, copper, or aluminum alloys, the limit referred to in subsection (a)(1) shall be [ ] parts per million unless—

"(i) the product into which such part is incorporated fits entirely within the small parts cylinder described in section

1501.4 of title 16, Code of Federal Regulations; or

"(ii) after any necessary assembly of the product and after the product has been subjected to reasonably foreseeable conditions of use and abuse, the part or any portion of the part becomes detached from the product and such part or portion of the part fits entirely within such cylinder.

"(B) DE MINIMIS EXCEPTION.—

"(i) IN GENERAL.—The limits established under subsection (a) shall not apply to any component part of a children's product if, under reasonably foreseeable conditions of use and abuse, it is unlikely that a child who is exposed to the product would ingest more than a de minimis amount of lead, unless—

"(I) the product into which such part is incorporated fits entirely within the small parts cylinder described in section 1501.4 of title 16, Code of Federal Regulations; or

"(II) after any necessary assembly of the product and after the prod-

met has been subjected to reasonably foreseeable conditions of use and abuse, the part or any portion of the part becomes detached from the product and such part or portion of the part fits entirely within such cylinder.

"(ii) METHODOLOGY FOR ESTIMATING AMOUNT OF LEAD INGESTED.—

"(I) ESTABLISHMENT BY COMMISSION.—The Commission shall, by regulation, establish a methodology for estimating the amount of lead a child would likely ingest from exposure to a component part. Such methodology shall distinguish, at a minimum, between parts that can be placed in the mouth and parts that cannot be placed in the mouth.

"(II) INTERIM METHODOLOGY.—Until the Commission has issued a final rule under subclause (I), a manufacturer may use any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part.

The manufacturer shall document the methodology used.

"(iii) DE MINIMIS AMOUNT DEFINED.—In this subparagraph, the term 'de minimis amount' means [ ] micrograms per day. The Commission may revise such amount by regulation.

"(2) EXCLUSION OF CERTAIN USED CHILDREN'S PRODUCTS. –

"(A) GENERAL EXCLUSION.—The lead limits established under subsection (a) shall not apply to a used children's product.

"(B) DEFINITION.—The term 'used children's product' means a children's product that was obtained by the seller for use and not for the purpose of resale or was obtained by the seller, either directly or indirectly, from a person who obtained such children's product for use and not for the purpose of resale. Such term also includes a children's product that was donated to the seller for charitable distribution or resale to support charitable purposes. Such term shall not include—

"(i) children's metal jewelry; or

"(ii) any children's product for which the donating party or the seller has actual knowledge that the product is in violation of the lead limits in this section; or

For purposes of this definition, the term 'seller' includes a person who lends or donates a used children's product.".

SEC. 3. APPLICATION OF THIRD PARTY TESTING REQUIREMENTS.

(a) APPLICABLE CHILDREN'S PRODUCTS.—Section 14(a) of the Consumer Product Safety Act (15 U.S.C. 2063(a)) is amended—

(1) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by inserting "described in clauses (i) through (iv) of paragraph (3)(B)" after "a children's product safety rule";

(B) in subparagraph (B), by striking "the children's product safety rule" and inserting "such children's product safety rule"; and

(C) by striking the flush sentence following subparagraph (B); and

(2) in paragraph (3)—

(A) in subparagraph (A), by inserting "described in clauses (i) through (iv) of subpara-

graph (B)" after "a children's product safety rule"; and

(B) in subparagraph (B), by striking clauses (v) and (vi).

(b) THIRD PARTY TESTING REQUIREMENTS.—Section 14(b) of the Consumer Product Safety Act (15 U.S.C. 2063(b)) is amended to read as follows:

"(b) TESTING PROGRAMS.—

"(1) IN GENERAL.—The Commission may, by rule, prescribe reasonable testing programs to be used as the basis for certification under subsection (a).

"(2) TESTING BY AN INDEPENDENT THIRD PARTY.—Any test or testing program on the basis of which a certificate is issued under subsection (a) may, at the option of the person required to certify the product, be conducted by an independent third party qualified to perform such tests, unless the Commission, by rule and in accordance with paragraph (3), requires testing by an independent third party for—

"(A) a particular rule, regulation, standard, ban;

"(B) any portion of a particular rule, regulation, standard, or ban; or

"(C) a particular class of products.

"(3) REQUIREMENTS FOR TESTING BY AN INDEPENDENT THIRD PARTY.—The Commission may not require testing by an independent third party under paragraph (2) until the Commission has completed each of the following:

"(A) ACCREDITATION OF CONFORMITY ASSESSMENT BODIES.—Established and published notice of the requirements for accreditation of third party conformity assessment bodies who are determined to be qualified by the Commission to conduct such testing.

"(B) TESTING CAPACITY.—Determined that the testing capacity of the accredited third part conformity assessment bodies is sufficient to prevent unreasonable delays due to testing.

"(C) EXEMPTIONS AND ALTERNATE TESTING PROCEDURES.—

"(i) IN GENERAL.—Established, by rule—

"(I) exemptions for works of art and other one-of-a-kind products; and

"(II) exemptions or alternative testing procedures for the certification of specialty products for the disabled,

and products that are produced in small quantities such that the cost of testing by an independent third party is not economically practicable.

"(ii) PRODUCED IN SMALL QUANTITIES DEFINED.—In this subparagraph, the term 'produced in small quantities' means that not more than [ ] units of the same product (or substantially similar products) are produced in one year by a manufacturer and any affiliated manufacturer. A manufacturer may not subdivide the production of such manufacturer into small quantities in order to evade third party testing requirements.

"(D) RULEMAKING CONSIDERATIONS.—Made a reasoned determination—

"(i) that the benefits from requiring third-party testing justify the costs (recognizing that some costs are difficult to quantify); and

"(ii) that any rule issued pursuant to this paragraph is tailored to impose the least possible burden, taking into account

to the extent practicable, the costs of cumulative regulations.

"(4) REVIEW OF PREVIOUS RULES. The Commission may not enforce a third party testing requirement that became effective during the period after August 14, 2009, and before the date of the enactment of the [Act of 2011] (or that was stayed by the Commission during such period) until the Commission has reviewed such requirement and promulgated any revisions as necessary to ensure compliance with the requirements of paragraph (3).".

(c) CONTINUING TESTING. Section 14(d)(2) of the Consumer Product Safety Act (15 U.S.C. 2063(d)(2)) is amended—

(1) in the matter preceding subparagraph (A), by striking "Not later than 15 months after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the" and inserting "The";

(2) in the matter preceding subparagraph (A), by striking "shall";

(3) in subparagraph (A), by striking "initiate" and inserting "not later than 15 months after the date of enactment of the Consumer Product Safety Improvement Act of 2008, shall initiate"; and

(4) in subparagraph (B), by striking "establish" and inserting "may establish".

SEC. 4. APPLICATION OF AND PROCESS FOR UPDATING DURABLE NURSERY PRODUCTS STANDARDS.

(a) APPLICATION OF STANDARD.—Section 104 of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 2056a) is amended—

(1) in subsection (c), by redesignating paragraph (3) as paragraph (4) and inserting after paragraph (2) the following:

"(3) APPLICATION.—

"(A) IN GENERAL.—Paragraph (1) shall not apply to any revision of the standard promulgated under subsection (b)(1)(B) subsequent to the initial promulgation of a standard under such subsection.

"(B) SPECIAL RULE FOR FIXED-SIDE CRIBS SUBJECT TO CERTAIN STATE OR LOCAL LAW REQUIREMENTS.—Paragraph (1) shall not apply to a fixed-side crib offered or provided for use in a licensed child care facility that is subject to the following requirements under the law of a State or a political subdivision of a State:

"(i) The facility may not allow a child to remain in a crib for any significant amount of time while the child is awake.

"(ii) The facility may not place in a crib a child over the age of [12 months].

"(iii) An adult must be present whenever a child is in a crib.".

(b) UPDATING STANDARD.—Section 104(b) of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 2056a(b)) is amended by adding at the end the following:

"(4) PROCESS FOR CONSIDERING SUBSEQUENT REVISIONS TO VOLUNTARY STANDARD.—

"(A) NOTICE OF ADOPTION OF VOLUNTARY STANDARD.—When the Commission promulgates a consumer product safety standard under this subsection that is based, in whole or in part, on a voluntary standard, the Commission shall notify the organization that issued the voluntary standard of the Commission's action and shall provide a copy of the consumer product safety standard to the organization.

"(B) COMMISSION ACTION ON REVISED VOLUNTARY STANDARD.—If an organization re-

vises a standard that has been adopted, in whole or in part, as a consumer product safety standard under subparagraph (A), it shall notify the Commission. The revised voluntary standard shall be considered to be a consumer product safety standard issued by the Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the date on which the organization notifies the Commission (or such later date specified by the Commission in the Federal Register) unless, within 90 days after receiving that notice, the Commission notifies the organization that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard and that the Commission is retaining the existing consumer product safety standard.".

SEC. 5. APPLICATION OF SECTION 106 TO FDA-REGULATED PRODUCTS.

Section 106(a) of the Consumer Product Safety Improvement Act (15 U.S.C. 2056b(a)) is amended by inserting "or any provision that restates or incorporates a regulation promulgated by the Food and Drug Adminis-

tration or any statute administered by the Food and Drug Administration" after "or by statute".

SEC. 6. APPLICATION OF PHTHALATES STANDARD.

(a) PROSPECTIVE APPLICATION, ACCESSIBLE, PLASTICIZED COMPONENT PARTS.—Section 108 of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 2057c) is amended—

(1) by redesignating subsections (c) through (e) as subsections (d) through (f), respectively; and

(2) by inserting after subsection (b) the following:

"(c) APPLICATION.—

"(1) ACCESSIBLE COMPONENT PARTS.—Subsections (a) and (b)(1) and any rule promulgated under subsection (b)(3) shall apply to any children's toy or child care article containing any accessible, plasticized component part that is manufactured after the respective effective dates in each such subsection and any such final rule.

"(2) COMMISSION AUTHORITY.—The Commission may, by rule, exempt any children's toy or child care article described in paragraph (1) or any class of such products or materials used in such products from any of the prohibitions under subsections (a) and (b)(1) and any rule promulgated under sub-

section (b)(3) where the Commission determines that compliance with any such prohibition is not necessary to protect children's health.".

(b) EFFECT OF CONCLUSIONS OF THE CHRONIC HAZARD ADVISORY PANEL.—Section 108(b)(3) of such Act (15 U.S.C. 2057c(b)(3)) is amended—

(1) by striking "Not later than" and inserting the following:

"(A) RULEMAKING REQUIRED.—Not later than";

(2) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(3) in clause (i) (as so redesignated), by inserting "or terminate such prohibition" after "margin of safety"; and

(4) by adding at the end the following:

"(B) DEADLINE AND EFFECT ON PROHIBITION.—If the Commission does not commence a rulemaking proceeding within 90 days after receiving the report required by paragraph (2)(C) or does not issue a final rule as required by subparagraph (A) within [_____] after receiving such report, the prohibition in paragraph (1) shall terminate.".

(c) DEFINITIONS.—Section 108(f) of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. 2057c(f)) (as redesignated by subsection (a)) is amended—

(1) in paragraph (1)—

(A) in subparagraph (B), by striking "consumer product" and all that follows and inserting "children's product that is subject to the standard made mandatory by section 106(b) or any successor standard";

(B) in subparagraphs (C), by striking "consumer product" and inserting "children's product"; and

(C) in subparagraph (D)—

(i) by striking "consumer product" and inserting "children's product";

(ii) by striking "section 3(a)(1)" and inserting "section 3(a)"; and

(iii) by striking "2052(a)(1)" and inserting "2052(a)"; and

(2) by amending paragraph (2) to read as follows:

"(2) DETERMINATION GUIDELINES.—For purposes of this section, a toy can be placed in a child's mouth if any part of the toy can actually be brought

to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children's product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth.".

SEC. 7. EXEMPTION AUTHORITY FOR TRACKING LABELS REQUIREMENT.

Section 14(a)(5) of the Consumer Product Safety Act (15 U.S.C. 2063(a)(5)) is amended—

(1) by striking "Effective 1 year" and inserting "(A) Effective 1 year";

(2) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively; and

(3) by adding at the end the following:

"(B) The Commission may, by regulation, exclude a specific product or class of products from the requirements in subparagraph (A) if the Commission determines that it is not economically practicable for such product or class of products to bear the marks required by such subparagraph. The Commission may establish alternative requirements for any product or class of products excluded under the preceding sentence consistent with the purposes described in clauses (i) and (ii) of subparagraph (A).".

SEC. 8. REQUIREMENTS FOR PUBLIC DATABASE.

(a) REQUIREMENTS FOR SUBMISSIONS TO THE DATABASE.—Section 6A(b) of the Consumer Product Safety Act (15 U.S.C. 2055a(b)) is amended—

(1) in paragraph (1)(A)—

(A) in clause (i), by striking "consumers" and inserting "persons who suffer harm or risk of harm related to the use of a product, their next of kin or members of their household, their legal representative, or another person expressly authorized by any such person"; and

(B) in clause (v), by striking "public safety entities" and inserting "police, fire, ambulance, emergency medical services, Federal, State, and local law enforcement entities, and other related public safety officials"; and

(2) in paragraph (2)(B)—

(A) in clause (i), by inserting "and its location and availability" after "concerned";

(B) in clause (iv), by inserting "and if such person is not the person harmed by the product, the name and contact information of the person who suffered the harm or risk of harm related to the use of the product" after "report"; and

(C) in clause (v), by inserting "that such person is the consumer who used the product that gave rise to the harm, the user's next of kin, a member of the user's household, the legal representative of the user, or another person expressly authorized by any such person and" after "person submitting the information".

(b) ADEQUACY AND ACCURACY OF INFORMATION REPORTED TO THE PUBLIC DATABASE.—Section 6A(c)(2) of the Consumer Product Safety Act (15 U.S.C. 2055a(c)(2)) is amended—

(1) in subparagraph (A), by striking "to submit" and all that follows and inserting "to—

"(i) notify the Commission within [___] days after receipt of the report that the information provided in the report is insufficient for determining which of the manufacturer's products is the subject of the complaint, in which case the manufacturer shall provide the Commission (and the person submitting the complaint, if that person has consented to disclosure of contact information) with information to assist the person submitting the report to

sufficiently identify or provide an adequate description of the product;

"(ii) notify the Commission within [____] days after receipt of the report that the information provided in the report is materially inaccurate and to provide the Commission with any additional information supporting the manufacturer's claim of inaccuracy; and

"(iii) submit other comments to the Commission on the information contained in such report."; and

(2) by redesignating subparagraphs (B) and (C) as subparagraphs (C) and (D), respectively, and inserting after subparagraph (A) the following:

"(B) ACTION BY THE COMMISSION.—

"(i) INSUFFICIENT INFORMATION.—If a manufacturer notifies the Commission of the insufficiency of the information in a report pursuant to subparagraph (A)(i), the Commission shall provide the information provided by the manufacturer to the person submitting the report (unless such information has already been provided directly by the manufacturer) and seek to

obtain from such person an adequate description of the product.

"(ii) MATERIALLY INACCURATE INFORMATION.—If a manufacturer notifies the Commission of a material inaccuracy in a report pursuant to subparagraph (A)(ii), and the Commission determines that the claim is potentially valid, the Commission shall seek to resolve the inaccuracy by any of the following:

"(I) Obtaining from the person submitting the report such additional information necessary to correct the inaccuracy.

"(II) Investigating the incident giving rise to the report in order to correct any such inaccuracy.

"(III) Providing the manufacturer a reasonable period of time to investigate and provide additional information to correct any inaccuracy.

"(iii) STAY ON INCLUSION IN DATABASE.—The Commission shall not include in the database a report described in clauses (i) or (ii) until the product can be

specifically identified and any material inaccuracy corrected.".

(c) MISREPRESENTATION PROHIBITED.—Section 19(a)(13) of the Consumer Product Safety Act by inserting "related to a submission of information to the database established under section 6A, or" after "misrepresentation to such an officer or employee".

SEC. 9. SUBPOENA AUTHORITY.

Section 27(b) of the Consumer Product Safety Act (15 U.S.C. 2076(b)) is amended—

(1) in paragraph (3), by inserting "and physical" after "documentary";

(2) in paragraph (8), by striking "and";

(3) by redesignating paragraph (9) as paragraph (10) and inserting after paragraph (8) the following:

"(9) to delegate to the general counsel of the Commission the authority to issue subpoenas solely to Federal, State, or local government agencies for evidence described in paragraph (3); and"; and

(4) in paragraph (10) (as so redesignated), by inserting "(except as provided in paragraph (9))" after "paragraph (3)".

SEC. 10. AVAILABILITY OF CERTAIN PERSONAL AND MEDICAL INFORMATION TO THE CPSC.

Section 5 of the Consumer Product Safety Act (15 U.S.C. 2054) is amended by adding at the end the following new subsection:

"(e) AVAILABILITY OF PERSONAL AND MEDICAL INFORMATION UNDER HIPAA.—In order to carry out its investigative and enforcement activities under this Act and under any of the Acts enforced by the Commission, the Commission shall be deemed a public health authority within the meaning of section 164.512(b)(i) of title 45, Code of Federal Regulations, for purposes of permitted disclosures of protected health information authorized under such section. For purposes of such section information about deaths, injuries, diseases, and other health impairments possibly relating to consumer products shall be deemed protected health information authorized to be disclosed to such public health authorities under such section.".

SEC. 11. EFFECTIVE DATE.

The amendments made by this Act shall be treated as having taken effect on the date of enactment of the Consumer Product Safety Improvement Act of 2008.

American Academy of Pediatrics

DEDICATED TO THE HEALTH OF ALL CHILDREN™

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June 8, 2011

The Honorable Mary Bono Mack
Chair
Subcommittee on Commerce, Trade and Consumer Protection
Committee on Energy and Commerce
Washington, D.C. 20515

Dear Chairwoman Bono Mack:

Thank you for the opportunity to answer additional questions related to my testimony before the Subcommittee on Commerce, Manufacturing, and Trade on April 7, 2011, at the hearing entitled "Discussion Draft of H.R. ..., a bill that would revise the Consumer Product Safety Improvement Act."

Attached you will find responses to the questions submitted by members of the Subcommittee. If you require further information, please contact Kristen Mizzi with the American Academy of Pediatrics at 202/347-8600.

Sincerely,

Dana Best, MD MPH FAAP

Attachment

cc: The Honorable G. K. Butterfield, Ranking Member,
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Mary Bono Mack

1. ***You have testified that your analysis became the basis for choosing the lead levels in CPSIA. Was your analysis ever published in a peer-reviewed journal?***

The American Academy of Pediatrics' recommendations on lead limits for children's products were developed by the environmental health pediatricians who serve on the AAP's Committee on Environmental Health and reviewed and approved by the AAP leadership. As testimony, it is considered official AAP policy and given equal weight to our policy statements. AAP policy statements are developed by board-appointed expert committees and then published in the AAP's scholarly journal, *Pediatrics*. Publication in *Pediatrics* would have been redundant because the recommendations had already been reviewed extensively by experts and were approved as policy by Academy leadership.

2. ***On page 5 of your written testimony, you state that children who already have an elevated blood lead level may lose IQ points more readily than those with no detectable blood lead level. How do you reconcile this with the "key studies" you mention on page 3 of your testimony, which you interpret as showing greater IQ loss from one to ten micrograms per deciliter than for a change from ten to twenty micrograms per deciliter?***

Neurological damage from lead exposure does not take place on a strictly linear dose-response curve. The impacts of lead exposure on children with no detectable lead level are currently unknown; lead exposure at the lowest levels may cause some loss of IQ points, or it may not begin to cause harm until blood lead levels reach at least 3 micrograms per deciliter (mcg/dL), the level at which studies now confirm that IQ loss begins to take place. As blood lead levels increase from 3 to 10 mcg/dL, approximately 1 IQ point is lost for every increase of 1 mcg/dL. Above a blood lead level of 10 mcg/dL, the loss of IQ points proceeds less rapidly. When a blood lead level of 10 mcg/dL is reached, the child is expected to have lost approximately 7 IQ points; as blood lead level rises further, the IQ loss continues to accumulate but at a slower rate.

3. ***You mentioned that the Food and Drug Administration has long had a recommendation that daily intake of lead be no more than 6 micrograms per day for children age 6 and younger. Does the FDA have a different recommendation for older children? What is the recommendation for adults? Is there a separate recommendation for pregnant women?***

The Food and Drug Administration (FDA) issues a range of recommendations for daily tolerable lead intake. It should be noted, however, that these are daily intakes for food only, which do not take into account other possible exposures from sources like air, dust, and consumer products. These intake levels recognize the fact that it is impossible to

remove lead from food in cases where, for example, a plant absorbs lead from the soil. The FDA's current daily tolerable intake levels for lead are as follows:

Provisional Total Tolerable Intake Levels for Lead (Pb)

Population Group	PTTI (µg Pb/day)
Young children (0-6 years)	6
Older children (7+ years)	15
Pregnant or lactating women	25
Adult women	75

4. ***You mentioned that older children sometimes put ballpoint pens or jewelry in their mouths. You also mentioned that toys may be shared among multiple children in the same household. But aren't there many items which older children do not mouth and to which young children rarely, if ever, have access?***

It is likely that there are children's products which older children do not mouth and to which younger children rarely have access. Older children may, however, still be exposed to lead from hand-to-mouth contact (i.e. touching an object and then putting their hands in their mouths or eating with their hands). Given that lead exposure poses a significant hazard and usually can be replaced by safer alternatives in children's products, the AAP recommends ensuring that all children's products contain the lowest possible levels of lead.

5. ***Are you familiar with the studies claiming that eating junk food can cause the loss of IQ? Did the IQ studies on lead control for junk food?***

In February 2011, Northstone et.al. published a study in *the Journal of Epidemiology & Community Health* titled, "Are dietary patterns in childhood associated with IQ at 8 years of age? A population-based cohort study." The study concluded, "There is evidence that a poor diet associated with high fat, sugar and processed food content in early childhood may be associated with small reductions in IQ in later childhood, while a healthy diet, associated with high intakes of nutrient rich foods described at about the time of IQ assessment may be associated with small increases in IQ." In essence, poor diet and lower IQ tend to be found together, but the study designs examining "junk food" have not been robust enough to determine specific dietary nutrient differences causing IQ changes in the children.

It should not come as a surprise that poor nutrition during key periods of early brain development would cause IQ loss. Other studies have demonstrated the importance of balanced nutrition on children's developmental abilities. Poor nutrition can also contribute to a child's vulnerability to lead exposure. Children with nutritional deficiencies, particularly with regard to iron, are known to absorb lead into their bodies at a higher rate and therefore suffer a greater degree of associated harm.

6. ***How many "potent neurotoxins" are known to science?***

"Potent neurotoxin" is not a term of classification for hazardous substances. The Environmental Protection Agency publishes a consolidated list of approximately two thousand chemicals and other substances subject to the Emergency Planning and Community Right-to-Know Act, Comprehensive Environmental Response, Compensation and Liability Act, and Section 112(r) of the Clean Air Act that includes lead and numerous compounds of lead. These substances are not, however, further classified based on the body systems or functions they impact.

6. Has science been able to identify a safe level for most toxins, lead being exceptional?

Many known toxins are poorly studied, particularly in sensitive populations like children and pregnant women. This lack of data should not, however, be interpreted as evidence of safety. For some substances, science has identified a level below which no human health harm can be identified or detected with current research techniques. For example, the Food Quality Protection Act of 1996 (FQPA) sets a health-based standard of "reasonable certainty of no harm" that requires EPA, when setting tolerances for pesticide residue, to take into account cumulative sources of exposure (e.g., occupational, drinking water) as well as exposure to other pesticides with a common mechanism of toxicity. FQPA also requires an explicit determination that a given tolerance is safe for children and imposes an additional safety factor of up to tenfold to account for uncertainty in data relative to children.

7. You testified before the CPSC regarding the technological feasibility of the 100 parts per million standard. You testified that lead affecting one half of one percent of all children – even those older than age 12 – could potentially affect 3.75 million children. How did you reach that conclusion? You also stated that swallowing an object containing 300 parts per million lead would raise a child's blood lead level enough to lower his IQ 4 points. Could you please explain? How much lead were you assuming the child ingested?

My testimony before the Consumer Product Safety Commission on February 16, 2011 stated:

Based on the AAP's previously-noted calculations, an object containing 77ppm of lead is capable of raising a child's blood lead level to a level that would result in the loss of one IQ point. Please note that this is not meant to be interpreted as a definitive statement for each exposed individual; rather, it is a public health statement representing what will be true for the majority of children. Individual children will have factors that either increase or decrease their vulnerability.

For the majority of children, ingestion of an item containing 300ppm of lead would result in the loss of almost 4 (3.9) IQ points. Ingestion of an object containing 100ppm lead would result in the loss of just over one (1.3) IQ points.

Given that the ingestion of an item containing 300ppm of lead will cause the loss of 1 IQ point for each 77ppm of exposure, an object weighing one gram (about one standard paper clip) could cause the loss of almost 4 IQ points (300/77=3.896).

If one limits calculations only to the roughly 50 million children under the age of 12, one-half of one percent of all such children would mean that approximately 250,000 children would be affected – the equivalent of the entire population of Olympia, Washington.

8. ***When you testified before the Committee on the original introduced bill in November 2007, the legislation contained a lead standard that was similar to the current total lead standard with a final total lead standard of 100 ppm, but also provided an alternative soluble lead standard if any part did not exceed 90 ppm. You testified in support of the standard:***

> *H.R. 4040 allows manufacturers to choose between satisfying one of two standards for lead content in children's products. Manufacturers may choose to limit total lead content to a level that is initially set at 600 parts per million and is reduced to 250 parts per million after two years, then to 100 parts per million another two years later. Alternatively, manufacturers may choose to limit soluble lead content to 90 parts per million.* ***"The standards of 90 and 100 parts per million are significant goals which, if met, will measurably reduce exposure to lead in children's products.***

Your only comments seemed to have been to ensure the solubility standard was set by the CPSC to be rigorous. Would you still support a solubility standard? Is solubility a more accurate calculation of potential lead exposure? Isn't the "dose make the poison" more applicable to a soluble standard than a total lead standard? Is there any difference between a solubility standard and the de minimis exposure standard in the legislative draft?

Given that no standard existed to limit lead in any part of a children's product except paint prior to 2008, the limits in the original draft of H.R. 4040 were indeed a major step forward. The AAP's November 2007 testimony also noted, "The results of lead tests on products can vary considerably depending upon the methodology used to assess solubility. Further, the relationship of solubility to bioavailability and absorption will

vary by method used to determine solubility. … the lead standard that drops from 600 to 100 parts per million should state explicitly that it refers to total lead."

Based on a thorough exploration of the issues over the past four years, the AAP considers a total lead standard to be superior to a soluble lead standard. Individual children have factors that either increase or decrease their vulnerability to lead exposure; the federal standard should be protective of all children, including those most vulnerable.

As noted in a question above, the health effects of lead do not adhere to a linear dose-response relationship, meaning that "the dose makes the poison" is not necessarily an accurate representation of its health effects.

There could be a significant difference between a solubility standard and the 'de minimis' exposure standard proposed in the legislative draft. The discussion draft failed to provide any definition of what constitutes a 'de minimis' risk. The National Institutes of Health Toxicology Glossary defines risk de minimis as, "Risk that is negligible and too small to be of societal concern… can also mean 'virtually safe.'" There is no scientific basis for deeming any level of lead exposure to be 'virtually safe.' If such a level of lead exposure exists, research has not identified it to date.

The Honorable G. K. Butterfield

1. ***Please provide a discussion of the relationship between the hand-to-mouth behavior of children and lead ingestion. In particular, address the following:***

   a. ***Is hand-to-mouth behavior the primary route for lead ingestion by children?***

   b. ***Please explain how lead is ingested from hand-to-mouth behavior.***

   c. ***Please discuss any research regarding the relationship between hand-to-mouth behavior and blood lead levels.***

Children engage in a range of normal mouthing behaviors from infancy through school age and sometimes into adolescence. Exposure to lead can take place through ingestion of objects containing lead (such as paint chips), hand-to-mouth behavior, breathing airborne lead, and consumption of lead in food and drink, including water. Lead is ingested from hand-to-mouth behavior when lead gets on the child's hands and the child then puts his hands in his mouth or eats with his hands.

A voluminous literature exists documenting children's mouthing behaviors, some of which also explores the impact of those behaviors on blood lead levels. One particularly high quality study involved observation of children playing in a yard; researchers video-observed their hand-to-mouth behavior and then evaluated relationship of oral behaviors to children's blood lead levels. Children with higher hand-to-mouth occurrences had correspondingly higher blood lead levels. Investigators video-observed children ages 1-5

years putting a hand in their mouth 7 times hourly (maximum 67 times/hour) and an object or food in their mouth 17 times hourly (maximum 125 times/hour).[i]

2. Please provide a discussion of any research regarding the mouthing behaviors of older children, in particular those between ages 6 and 12.

A review of reports that describe children's mouthing was published by the U.S. Environmental Protection Agency (EPA) in 2009.[ii] The EPA report has a significant quantity of similar data, with frequency of oral behaviors and minutes/day of mouthing. The amount of lead that would be transferred to a child may depend on mouthing behavior (times/hour and minutes/day) and the transfer rate of lead from the object to the hand (if the object is touched and not directly mouthed). Children as old as 10-12 years put their hand in their mouth an average of 4 times hourly. This rate is much higher among younger children, and exposures from mouthing behaviors can be occurring for several hours daily per child. Even for adult workers, hand lead is associated with blood lead level.[iii]

In addition, the Centers for Disease Control and Prevention's Mortality and Morbidity Weekly Report (CDC MMWR) has published cases of lead poisoning not related to ingestion of objects. Most recently, the MMWR published a case study of a toddler poisoned by a metal charm on a necklace he wore and mouthed regularly.[iv] The MMWR has also published cases of lead poisoning from eating off lead-tainted dishware;[v] lead dust contamination of family vehicles;[vi] and exposure to lead at a firing range among adolescent members of a shooting team.[vii]

3. Please provide a discussion of any research regarding the mouthing behaviors of disabled children.

Children with certain developmental delays and other disabilities are known to be at risk for mouthing behaviors that persist in frequency and duration beyond those exhibited by non-disabled children. Given the wide array of different sorts of special health care needs, however, it would be difficult to craft a study that could accurately represent mouthing behaviors of all children with disabilities. The studies that exist in this area tend to focus on mouthing behaviors associated with specific disabilities and mitigation of these behaviors.

4. Robert J. Howell, the Assistant Executive Director for the Office of Hazard Identification and Reduction at the Consumer Product Safety Commission, in response to questioning from the Subcommittee contended that "one would expect that the risk [from lead-bearing items] decreases as you move from swallowing to mouthing, from mouthing to touching. And the management of that risk at that point then becomes a decision on how the child interacts with the product."

a. This seems to suggest that if a child cannot swallow the lead-bearing item, the child's risk of harm is inherently low. Do you agree? If not, please discuss the

harms associated with mouthing (i.e. sucking or licking) or touching lead-bearing items.

b. This concept also suggests that all children will play with that item the same way. Do different aged children play with the same item in different ways?

While the risk of lead exposure may be lower from mouthing than from ingestion, such exposure is not necessarily "inherently low." As noted in the response to the preceding question, significant lead exposures have been documented from a number of sources that would not have been obvious hazards. In addition, children of different ages will play or interact with the same item in different and sometimes unexpected ways.

5. The final statutory total lead content limit of 100 ppm set to take effect in August is more than double the 40 ppm recommendation that the American Academy of Pediatrics developed following a rigorous scientific review in response to a request from Congress to make specific recommendations regarding lead content in products. Nonetheless, some manufacturers, such as those of ATVs and bikes, have convincingly argued that they cannot make products that are durable and affordable without certain components that exceed the lead limits.

a. ***I understand the AAP would prefer to see lead eliminated from consumer products, but to the extent that there is bipartisan agreement that Congress should create an exemption process to provide targeted relief from the lead limits for the narrow universe of manufacturers who contend they cannot reasonably comply, do you agree any exception process must, as a fundamental matter, consider whether a particular product needs to have lead in it?***

The American Academy of Pediatrics would urge Congress not to permit levels of lead in excess of the CPSIA's limits in any children's product for which safer, effective alternatives exist. The CPSIA's section 101(b) specifically provided for the exclusion of certain materials or products if it could be demonstrated that exposure to the lead involved would not adversely impact child health. If Section 101(b) has proven to be unworkable, it should be revised to serve the purpose that Congress intended.

6. ***I understand that some materials used in children's products can crack and degrade over time, and that this is particularly true of vinyl and plastic products. As this happens, the amount of lead and other substances available for ingestion is greater than when the product was new.***

a. Can you please confirm that vinyl and plastic products behave in this way and provide any additional information you think may be useful to understanding this degradation and exposure process?

b. Are you aware of any other materials that exhibit similar characteristics to vinyl and plastic (i.e. material that can crack and degrade over time and release more lead or other harmful substances than when new)? Please describe these materials and what happens as those material ages.

c. Assuming we applied the de minimis exception in the Republican discussion draft, should foreseeable use and abuse include degradation of a material? And if so, how would you account for that in the estimation of the amount of lead a child is likely to ingest from that material?

It is correct that many materials containing lead will deteriorate over time and liberate higher levels of lead than when they were new or first produced. While the AAP can provide some information in this regard, more detailed authoritative information can best be obtained from chemical or biomolecular engineers.

7. *During the hearing, the Subcommittee heard repeatedly that the traditional model for the regulation of lead and other harmful substances has been to use risk assessment, and that manufacturers should be allowed to apply this model to children's products. However, last year this Subcommittee in a hearing regarding the regulation of toxic substances received testimony arguing that the traditional risk assessment model is not appropriate for substances that are persistent, bioaccumulative and toxic (PBTs) because these characteristics affect how the environment and human body treat these substances and make exposure inevitable. I understand that lead is a PBT.*

a. Can you please confirm that lead is a PBT?

b. Can you please discuss the characteristics of PBTs that make the traditional risk assessment approach for limiting exposure an inappropriate model for dealing with lead?

c. Do you agree with the Centers for Disease Control's recommendation that the nonessential uses of lead in consumer products should be restricted or eliminated to prevent exposure to this harmful substance?

Lead is classified as persistant, bioaccumulative and toxic (PBT), and releases must be reported to EPA's Toxic Release Inventory. Traditional risk assessment tends to examine one-time exposures in isolation from other exposures. In the case of lead and other PBT substances, individual low-level exposures accumulate over time to reach harmful levels. Children may be exposed to lead through the air, water, soil, household sources like paint, and consumer products. As a result, these cumulative exposures may raise a child's blood lead level to a dangerous point even though no single exposure occurs at high levels. The AAP fully agrees with the CDC's recommendation that nonessential uses of lead in consumer products be restricted or eliminated to prevent exposure.

8. *The Republican discussion draft draws a distinction between lead-containing products and parts that can and cannot be swallowed, with items that can be swallowed remaining subject to the health-protective lead content limits in CPSIA. The basis for determining whether an item can be swallowed is the "small parts cylinder" described*

in regulations that I understand are aimed at preventing children under 3 from choking on or swallowing small objects.

a. ***Do you believe the "small parts cylinder" is an appropriate tool for determining whether children over 3 years old can swallow an object?***

b. ***Are you aware of any cases where children over 3 years old swallowed objects that likely would <u>not</u> fit into the small parts cylinder (and therefore not be deemed a small part capable of being swallowed and not subject to CPSIA's strict lead content limits)? Please describe those cases and provide any additional available documentation.***

The small parts cylinder is a widely-used and well-established tool for determining whether children *under* the age of 3 years can swallow or choke on an item. The small parts cylinder is not designed for determining choking hazards for children *over* the age of 3 years.

The AAP does not maintain individual case reports or conduct studies related to incidents of choking hazards or ingestion of non-food items.

9. ***The Republican discussion draft provides that manufacturers of "specialty products for the disabled" must either be excluded from any third-party testing rules CPSC may issue under the onerous process setup in the draft or be allowed to comply through alternative testing procedures. The draft provides no definition for the term "specialty products for the disabled." I understand that certain toys are recommended and marketed as particularly useful for engaging disabled children; however, these toys are available and appealing to all children.***

a. ***Are you aware of any toys or other similar children's products (i.e. <u>not</u> medical or other adaptive devices for the disabled) that are intended only for disabled children and that are not appealing or susceptible to being played with by all children?***

b. ***Are you aware of any toys or other similar children's products (i.e. <u>not</u> medical or other adaptive devices for the disabled) that the medical community recognizes as "specialty products for the disabled"?***

c. ***Assuming this Subcommittee or CPSC is capable of identifying "specialty products for the disabled," would it concern you if manufacturers of products specifically for disabled children were held to a lower bar or no bar at all with respect to assuring the safety of these products? Please explain these concerns.***

It is unclear what may be considered to be "specialty products for the disabled." The AAP does not closely monitor the marketplace of toys designed specifically for children with special health care needs. However, any products designed for children with special health care needs should be held to the same high safety standards as other children's products.

The Honorable John Dingell

1. ***CPSIA defines a "children's product" as one "(primarily) intended for a child 12 years of age or younger." The discussion draft would change this definition to "intended for use by a child [age to be determined] years or younger." What effect would the words "for use by" have on the number and type of products covered by this definition?***

It would appear that this change in wording could exclude from coverage products that are not specifically used by the child, but may be used by a parent or caregiver in caring for the child. Such products might include bathing products, changing table and diapering supplies, or décor items.

2. ***The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a de minimus amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."***

   a. ***Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?***

   b. ***Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?***

   c. ***If so, do you believe this is could pose a risk to the health of children who use such products?***

The CPSIA requires all manufacturers to comply with a limit on total lead in children's products, which does not vary based upon any estimate of the amount of lead a child would likely ingest from exposure to a component part. As a result, it would seem unlikely that any manufacturer is currently attempting to estimate exposure, since such calculations would be irrelevant to compliance. The term "reasonable methodology" is ambiguous; manufacturers could conceivably use a wide range of methodologies, which would in turn result in a significant variance in test results. Any practice that resulted in a child's exposure to elevated lead levels could pose a risk to that child's health.

[i] Ko S, Schaefer P, Vicario C, Binns H. Safer Yards Project. Relationships of video assessments of touching and mouthing behaviors during outdoor play in urban residential yards to parental perceptions of child behaviors and blood lead levels. *J Expo Sci Environ Epidemiol*. 2007 Jan; 17(1):47-57.
http://www.ncbi.nlm.nih.gov/pubmed/16941017

[ii] U.S. Environmental Protection Agency. Child-Specific Exposure Factors Handbook. August 2009. (EPA/600/R-08/135).

[iii] Rodrigues E, Virji M, McClean M, Weinberg J, Woskie S, Pepper L. Personal exposure, behavior, and work site conditions as determinants of blood lead among bridge painters. *J Occup Environ Hyg*. 2010 Feb;7(2):80-7.

[iv] Lead Poisoning of a Child Associated with the Use of a Cambodian Amulet – New York City, 2009. *MMWR*. January 28, 2011. 60(03);69-71.
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[v] Childhood Lead Poisoning from Commercially Manufactured French Ceramic Dinnerware – New York City, 2003. *MMWR*, July 9, 2004. 53(26);584-586.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5326a4.htm

[vi] Childhood Lead Poisoning Associated with Lead Dust Contamination of Family Vehicles and Child Safety Seats – Maine, 2008. *MMWR*. August 21, 2009. 58(32);890-893.
http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5832a2.htm

[vii] Lead Exposure from Indoor Firing Ranges Among Students on Shooting Teams – Alaska, 2002-2004. MMWR. June 17, 2005. 54(23);577-579.
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May 6, 2011

Representative Mary Bono Mack
Chairman, Subcommittee on Commerce, Manufacturing, and Trade
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115

VIA E-MAIL

RE: Responses to Member questions regarding Dr. Beck's April 17 2011 testimony at the hearing titled "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act."

Dear Representative Bono Mack:

Attached are my responses to the Member questions submitted on April 27, 2011. As requested, I have included the full text of each question, followed by my response.

Please do not hesitate to contact me with any questions. Thank you again for the opportunity to provide testimony at the Subcommittee on Commerce, Manufacturing, and Trade Hearing.

Sincerely yours,

GRADIENT

Barbara D. Beck, Ph.D., DABT, FATS
Principal

email: bbeck@gradientcorp.com

Attachment A – Responses to Member Questions

The Honorable Mary Bono Mack

1. *Can children's products that have higher total lead content nevertheless pose a lower risk than products with lower total lead content? Please explain.*

Dr. Beck Response:

Yes, it is possible that some children's products that have a higher total lead content may result in a lower risk than products with lower total lead content. As I explained in my written testimony (Beck, 2011), the actual risk would be based on numerous factors, including the actual dose of lead, exposure duration and frequency, exposure route (for example, through the skin *versus* mouthing), lead intake (the amount of lead available for absorption by the skin, lungs, or the gastro-intestinal tract), solubility of lead, and subsequent uptake (absorbed dose).

2. *You state a soluble lead standard is generally preferable to a standard based on total lead because it more accurately reflects the amount of lead that could be released from the product.*

   a. *Does that mean the current total lead standard does not account for the amount of lead that can be released from a product? How then would you grade the effectiveness of a total lead standard in protecting health?*

Dr. Beck Response:

The effectiveness of the current total lead standard is uncertain because it is not directly linked to exposure. The current standard is therefore less relevant to health protection than a standard based on actual exposure. Rather than focus on the effectiveness of a total lead standard in protecting public health, it would be better to consider a standard that is more directly linked to actual potential exposures of the population of interest.

   b. *Why should exposure be taken into account instead of a simple numeric limit?*

Dr. Beck Response:

It is important to take exposure into account instead of a simple numeric limit. Simple numeric limits based on concentration are not directly linked to health. Thus, it is very difficult to evaluate their effectiveness. In contrast, a more effective approach would be to develop a standard by setting a target blood lead increment, then calculating the amount of lead released from a toy or other product that would limit any impact to be at or below the target blood lead increment. Health-based limits for lead in other media, such as air, water, or soil, have been developed in this same manner, using exposure parameters specific to that medium (see, for example, US EPA, 2001, 2002).

The Honorable G. K. Butterfield

For each project listed on the curriculum vitae you provided to the Subcommittee, please identify the specific law firm and client or specific entity for which you provided any services and the amounts paid to you or Gradient for these services.

Dr. Beck Response:

This is confidential business information. Thus, I am unable to meet this request.

The Honorable John Dingell

1. *CPSIA defines a "children's product" as one "(primarily) intended for a child 12 years of age or younger." The discussion draft would change this definition to "intended for use by a child [age to be determined] years or younger." What effect would the words "for use by" have on the number and type of products covered by this definition?*

Dr. Beck Response:

I am uncertain as to the intent of this question. Thus, I am unable to provide an answer at this time.

2. *The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a de minimus amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."*

    a. *Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?*

Dr. Beck Response:

I am not aware of a uniform methodology currently in use by manufacturers. However, in my written testimony (Beck, 2011), I do point to some possible methods to consider as a basis for developing such a methodology, including CPSC's saline extraction method for evaluating cadmium leaching from metal jewelry during a mouthing scenario (CPSC, 2010), or a modification of CPSC's method for assessing migration of diisononyl phthalate (DINP) from polyvinyl chloride (PVC) children's products (CPSC, 1998).

b. *Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?*

Dr. Beck Response:

Yes, the term "reasonable methodology" may be ambiguous and could lead to variance in test results. I recommend that the language of the Bill be revised to recommend the development of guidance and criteria for a reasonable and appropriate methodology for evaluating mouthing exposure to children's products. Sample extraction and preparation methods should be recommended with the objective of achieving comparable testing results. I would also propose that CPSC be tasked with oversight and development of the "reasonable methodology." As described in my written testimony (Beck, 2011), there are some existing saliva extraction methods that could potentially be used to evaluate mouthing exposure to children's products.

c. *If so, do you believe this is could pose a risk to the health of children who use such products?*

Dr. Beck Response:

If a reasonable methodology is clearly defined in the Bill, there should be no impact on risk or health.

References

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House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
Hearing: "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act"
April 7, 2011

Responses of Robert J. Howell to Questions for the Record

Questions from the Honorable Mary Bono Mack

1. **How does the CPSC staff go about deciding whether a chemical substance poses a risk to children? What factors are important?**

   For substances not regulated by specific statutory provisions, such as lead, the Federal Hazardous Substances Act (FHSA) generally requires assessment of exposure and risk, considering reasonably foreseeable handling and use. Assessments are generally conducted on a case-by-case basis, considering the specific characteristics of the product, the intended consumers of the product, and the interaction between the consumer and the product. The CPSC Health Sciences, Engineering Sciences Human Factors, and Laboratory Sciences Chemistry Division staff conducts these assessments.

   For a specific product, staff assesses the toxicity of the chemical, conducts a dose-response assessment, and derives limits for exposure that, if exceeded, could result in adverse health effects (acceptable daily intake). Staff also conducts testing of products to estimate the level of exposure to the chemical that could occur during use, and then evaluates whether a consumer might experience excess exposure during use of the product. CPSC Chronic Hazard Guidelines provide definitions and guidance for the analysis of toxicity and exposure information (http://www.cpsc.gov/BUSINFO/chronic.pdf).

   Many different factors may be important to consider in an evaluation of toxicity, dose-response, and exposure. Staff assesses the relevance and quality of available toxicity data for a chemical, including information on adverse effects in exposed people, when available, and whether certain populations of people, such as children, may be more or less susceptible to experiencing adverse effects. Staff then assesses whether the data are sufficient to describe the relationship between exposure or dose and the occurrence of adverse health effects. The analysis also considers whether a chemical poses a risk because of the likelihood that a child could be exposed to it from the use of the product.

2. **When the CPSC staff evaluates chemical substances in consumer products, is there a particular age it focuses on? How do you take children's age into account?**

   The scientific assessment of a product is generally a case-by-case evaluation of the product which considers the intended or likely consumer and the expected behaviors associated with the product (this is also known as Human Factors staff analysis). Excess exposure would be expected to be more likely to occur with certain conditions and behaviors. For example, children under three years of age have the highest rates of mouthing behaviors (i.e., placing objects in the mouth, or handing objects and then placing fingers or parts of hands in the

mouth) and accidental or intentional ingestion of objects. The rate of mouthing and swallowing objects decreases significantly through childhood.

Children's exposure to a chemical from a product tends to be the highest in situations involving ingestion of a product, compared to touching or handling a product, or inhalation, because of the action of stomach acid that could leach a chemical from the product. In adults, exposures to chemicals in products may be more likely to occur through routes other than ingestion of the product, and again are product-specific.

Certain product types might be more likely to be associated with excess exposure in young children. For example, small jewelry items may be frequently mouthed or even swallowed. Moreover, certain materials may result in more exposure than others may; e.g., metals tend to be more soluble in stomach acid than plastics.

Therefore, prioritization of staff project work may focus on products for younger children or on products with expected behaviors and exposure patterns that might result in excess exposure, or on both of these factors. Routine analysis of products obtained by CPSC is based on all of the considerations above, and is specific to the product being evaluated.

3. Does lead affect humans differently at different ages? If so, how?

Factors related to exposure to lead may be more important than the toxicity of lead in different populations. For example, children under three years of age have the highest rates of mouthing behaviors (i.e., placing objects in the mouth, or handing objects and them placing fingers or parts of hands in the mouth) and accidental or intentional ingestion of objects. The rate of mouthing and swallowing objects decreases significantly through childhood. Therefore, the youngest children have the highest exposures to lead (other than occupational exposures in adults).

With respect to lead toxicology, the scientific literature includes studies of children of all ages, but predominantly younger children, probably because of the knowledge of children's sensitivity to lead compared to adults. The susceptibility of children stems both from factors relating to physiology, such as their immature and developing nervous system, and rapid growth and development rate, and to common childhood behaviors that tend to increase exposure, such as mouthing, ingesting objects, and hand-to mouth activity. In addition, lead accumulates in the body, so that exposures at younger ages may result in adverse health effects later in life.

Among children of all ages, the relationship between a specific age and vulnerability to lead toxicity is not well understood, so that no specific window of exceptional susceptibility has been defined. Further, available information does not support a conclusion that there are populations not at risk to effects from lead exposure. Literature on the toxic effects of lead exposure in adults has expanded in recent years, showing consistent associations between lead exposure and increased risk of health effects involving the organs systems such as the cardiovascular system and kidneys, as well as neurocognitive effects. Thus, lead exposure can cause adverse health effects in people of all ages.

In general, children are susceptible to the effects of lead throughout childhood and beyond. While the specific effects and the relationship between the level of exposure and the outcome are likely related to the age of the exposed person, detailed information is not available to clearly separate vulnerable children by age.

4. **The Commission set higher lead limits for certain metal alloys in electronic products for children. When the Commission granted a stay of the lead content limits for ATVs and bicycles, it set temporary limits at the same or very similar levels. In the Commission's view, does the lead content allowed in these products pose a significant risk to children? Please explain why or why not.**

Section 101(b)(4) of the CPSIA provides that if the Commission determines that it is not technologically feasible for certain electronic devices to meet the lead content limit, the Commission must issue requirements or minimize the potential for exposure to and accessibility of lead in such electronic devices. Accordingly, by rule, the Commission established that it is currently not technologically feasible for certain component parts of electronics to meet the CPSIA lead limits (e.g., cathode ray tube glass) which are necessary for the proper electronic functioning of the component part.

The exempted parts of electronic devices and the parts of ATVs and bicycles with lead content that might exceed the statutory lead limits are generally parts of products that are not expected to be frequently contacted or to be mouthed or swallowed by children. Because exposure to the exempted parts would be minimal, very little, if any, exposure to lead that might be present in the part of product is likely.

5. **The Government of Canada is in the process of addressing lead in consumer products. How does Canada's new approach compare to ours? Does it treat different types of products differently based on exposure?**

A new regulation in Canada applies to what is referred to as "Group 1 products," which are products used in the mouth (other than kitchen utensils which are considered separately) or by children under three. The total lead content limit is 90 mg/kg (ppm) for accessible parts, but there is an exemption if the lead is necessary, cannot be substituted, and the migratable lead is no more than 90 mg/kg (based on the tests specified in the toy safety standard EN 71-3).

The regulatory analysis for this regulation includes the conclusion that stakeholders have no issue with the regulation after it was amended to apply only to accessible parts and to allow for exemptions based on lead migration. The analysis includes a discussion of component parts that are not expected to have a lot of contact by children and that therefore justify the exemption clause (e.g. wheel axles on toy cars/trucks, the heads of nuts, bolts, screws, and other fasteners, and the tips of inner tube valves on tricycle wheels).

Canada is also proposing regulations for "Group 2" products, which would include products for children ages 3-13 years. The proposal is also for a 90 mg/kg total lead content.

Information on the Canadian government website indicates that a consultation will begin this year, providing for stakeholder input.

In the U.S., the Consumer Product Safety Improvement Act of 2008 restricts lead in children's products to 300 ppm, based on the total lead content by weight, for any part of the product. As of August 14, 2011, the limit will change to 100 ppm, unless the Commission determines that the lower limit is not technologically feasible for a product or product category. A children's product is defined as a consumer product designed or intended primarily for children 12 years of age or younger.

The law exempts inaccessible component parts from the lead restrictions, and authorized the Commission to address the technological feasibility of certain electronic devices. With regard to electronic devices, the Commission has provided for exemptions and alternate requirements for certain electronic parts where use of lead is necessary for the proper electronic functioning of the component part.

The law also contains an exception for certain products or materials where the Commission determines, after notice and hearing, that lead in the product or material will not result in the absorption of any lead into the human body. To date, the Commission has not been able to make any exceptions under this provision.

6. **The Commission has approved the use of x-ray fluorescence (XRF) devices to measure lead content in homogeneous plastics. To what extent can these devices be used to measure lead content in metal parts of products?**

In addition to approving the use of x-ray fluorescence (XRF) for lead content in homogeneous plastics, the Commission also recently approved the use of high-definition XRF for determining compliance with the standard for lead (Pb) in paint and other similar surface coatings. *See Third Party Testing for Certain Children's Products: Notice of Requirements for Accreditation of Third Party Conformity Assessment Bodies – Lead Paint*, 76 *Fed. Reg.* 18,645 (April 5, 2011).

To date, CPSC has not approved any XRF method for testing the compliance of children's products to the limits for lead in metal substrate set forth in Section 101 of the CPSIA. While XRF technology has the potential to measure lead in metal products, *in situ* measurements of consumer products are made difficult due to the common occurrence of electroplating and other inhomogeneities. XRF has very limited penetration depth into metals, and lead in the base metal can be "hidden" by the coating layer.

CPSC staff has published guidance on this issue: Study on the Effectiveness, Precision, and Reliability of X-ray Fluorescence Spectrometry and Other Alternative Methods for Measuring Lead in Paint, August 2009, available at http://www.cpsc.gov/about/cpsia/leadinpaintmeasure.pdf. An update, "Update on Use of X-ray Fluorescence Spectrometry for Measuring Lead in Paint" (December, 2010) is also available at http://www.cpsc.gov/about/cpsia/leadinpaintmeasure_update.pdf.

7. **What methodology does the Commission use to measure the total lead content in metal alloys? How long does the process take? In general terms, what methodology would the Commission use to determine the amount of lead a child would be exposed to from a metal part that can be mouthed but not swallowed?**

The CPSC staff employ Test Method: CPSC-CH-E1001-8.1 Standard Operating Procedure for Determining Total Lead (Pb) in Metal Children's Products (including Children's Metal Jewelry), Revision June 21, 2010 [http://www.cpsc.gov/about/cpsia/CPSC-CH-E1001-08_1.pdf].

The general approach is to grind any accessible component part of a sample to a powder, digest completely in a combination of hot concentrated nitric and hydrochloric acids and analyze by Inductively Coupled Plasma – Optical Emission Spectroscopy (ICP-OES). Other analytical methods such as Inductively Coupled Plasma – Mass Spectrometry (ICP-MS) and Flame Atomic Absorption Spectroscopy (FLAA) and Graphite Furnace Atomic Absorption Spectroscopy (GFAA) may be used under appropriate conditions as an alternative to ICP-OES using applicable, recognized analytical techniques for the alternative method. The time required for testing one sample is more than the time required per sample when testing many, as there are economies of scale as a "production line" is set up. A single chemist can test one sample in one full day, with about one hour of hands-on work and the balance being waiting time while processes complete themselves. That same chemist could test 10 metal items in a full day with perhaps two hours of hands-on work. Analysis time may vary depending on the complexity of the results.

Under current law, CPSC staff rely on the regulations limiting total lead content of children's products. Were staff to evaluate possible lead exposure from mouthing but not swallowing objects, the test methodology would depend on the object and manner in which a child interacts with it. For a piece of metal jewelry, such as a large pendant, which is too large to be swallowed, but would fit inside the mouth, CPSC staff have historically relied on extractions using a saline solution of 0.9 percent sodium chloride in water. For these extractions, a weight of saline equal to 50 times the weight of the jewelry would be used to evaluate how much lead leached out in a period of time. For items of this type, staff has used a time of six hours for the extraction. The methodology is essentially that given in the Cadmium extraction method given at http://www.cpsc.gov/library/foia/foia11/os/cadmiumjewelrytest.pdf, with a 0.9 percent saline solution used in place of acid and with a duration of six hours.

For very large items that could have a portion placed in the mouth, staff has sometimes used only a portion that would correspond to a child's mouth size. For example, when looking at lead in vinyl bibs, staff used a 25 cm^2 portion of the vinyl sheeting, which is the approximate size of a child's mouth. For electroplated metal items though, cutting the sample to a smaller size exposes the base metal directly, which would alter the leaching of lead compared to an intact electroplated coating. The methodology for a sample like that could involve suspending the sample so that only a portion of it was wetted by the extraction solution, but with the item maintained intact.

8. In its rulemaking on continued compliance testing, does the Commission have a legal obligation to consider the costs of the testing programs it requires? Does the Commission have a legal obligation to consider the costs in relation to the benefits of such testing? Please provide citations or copies of any statutes, regulations, Executive Orders or other sources of law bearing on this issue.

The underlying statute determines whether the CPSC engages in a cost-benefit analysis for a particular rule. For example, section 9(c) of the Consumer Product Safety Act (CPSA) requires a description of the potential benefits and costs of a proposed rule, "including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs." Section 9 of the CPSA establishes the procedure for consumer product safety rules. Section 3 of the Federal Hazardous Substances Act (FHSA) establishes the rulemaking procedures under the FHSA and contains language that is almost identical to section 9(c) of the CPSA.

In contrast, the general rulemaking authority for the Consumer Product Safety Improvement Act of 2008 (CPSIA) does not contain a cost-benefit analysis requirement for rules issued pursuant to the CPSIA. Because the rule in question was issued under the CPSIA, there was no legal obligation to consider costs or costs in relation to benefits.

Nevertheless, in developing the rule, staff was sensitive to cost concerns (as evidenced by the proposed rule's provisions regarding periodic testing and low volume production), and a related rule (pertaining to component part testing) was designed to reduce testing costs by allowing for the testing and certification of components. For example, if a manufacturer used the same component in two different products, the component part testing rule would enable the manufacturer to test the component once and apply the test results or certification to the two products rather than test the same component twice (once for each product).

Additionally, for all rules that are published pursuant to the notice and comment rulemaking requirements of the Administrative Procedure Act or other laws, we comply with the Regulatory Flexibility Act. This statute requires us to evaluate whether the rule will have a significant economic impact on a substantial number of small entities. While this analysis is not as comprehensive as a cost-benefit analysis, it does consider the potential beneficial and adverse impacts on small businesses.

9. Has the Commission ever postponed compliance with a third-party testing requirement due to concerns about whether there was enough available testing capacity? If so, please describe the circumstances.

Yes. The Commission has stayed enforcement for testing and certification of youth model ATV's because current testing capacity is inadequate to support industry demand.

10. Is the Commission staff aware of any deaths in fixed-side cribs in licensed child-care facilities? If so, did the Commission find evidence of a defect in the design or

manufacture of the crib? If the Commission conducted investigations of such cases, please provide a copy of all reports relating to the investigation.

Based on a review of the data going back as far as 1997, there are no reported fatal incidents known to have occurred in a total fixed-side crib that were attributed to a structural failure of the crib, in a child care environment. A fixed-side crib is defined as one without a movable side (i.e., a side that lowers or otherwise moves to provide easier access to the occupant).

However, CPSC staff is aware of five fatalities that were associated with a structural failure of a stationary (non-movable) side of a drop-side, drop-gate or unknown style crib. All five occurred in home day care environments, three of which were known to be licensed.

The three incidents involving a drop-gate crib were similar in that a folding side (used to collapse the crib for storage) separated from the corner post due to a missing screw. All three of these incidents involved the same make and style crib.

The incident involving a drop-side crib occurred when a bolted connection on the stationary side (opposite the drop-side) came loose.

The unknown incident has only one picture showing the detached corner of the crib where the incident took place. It is clear that detached side is not a movable side, but the picture does not provide enough information to determine whether the crib contains a drop-side or drop-gate.

Thus, no movable sides (either a drop side or drop gate) were directly involved in any the five deaths. All the crib failures were determined to be associated with missing hardware. Because of the construction and integrity of cribs containing movable sides, however, the presence of a movable side on these cribs cannot be ruled out as a contributory factor.

11. Has the Commission made a determination that all fixed-side cribs currently in use or currently for sale in commerce are unsafe unless they comply with the new crib standard? If so, does the Commission intend to order or negotiate recalls of those cribs?

In December of 2010, the Commission issued a safety standard for cribs as directed by section 104 of the CPSIA. 75 Fed. Reg. 81766 (Dec. 28, 2010). As required by section 104(b) of the CPSIA, CPSC's crib rule is substantially the same as the relevant voluntary standards, ASTM F 1169-10 (full-size cribs) and ASTM F 406-10a (non-full-size cribs). Both of these ASTM standards prohibit traditional drop side cribs. Because CPSC's crib rule incorporates by reference the ASTM standards, with some modifications, it also prohibits traditional drop side cribs. The Commission did not make a finding that all fixed side cribs are unsafe. Rather, it followed the statutory mandate to issue a mandatory crib rule substantially the same as or more stringent than the voluntary standards.

It should also be noted that the new mandatory crib rule contains numerous other provisions from the voluntary standard that improve crib safety, such as requirements for enhanced

hardware, mattress supports, and slats. Again, the Commission did not make a specific finding that cribs that do not conform to these requirements are unsafe, but recognized, in issuing the rule, that these enhancements addressed issues identified by the voluntary standards committee and will likely reduce the risk of injury.

The Commission has negotiated many recalls of cribs over the past several years. These recalls have been focused on particular cribs that may pose specific hazards and can be found on saferproducts.gov. The voluntary standards group, aware of the hazards addressed by these recalls, worked to ensure the standard also addressed those hazards, including the unreasonable risk of injuries presented by drop side cribs, hardware failures, and mattress support failure.

12. There have been conflicting press reports as to whether the Commission is resolving claims of "material inaccuracy" before posting "reports of harm". The Commission's proposed rule stated that it would not post reports until such claims were resolved but in the preamble to the final rule, it said that it lacked authority to postpone the posting beyond the tenth day. Nevertheless, some have said that the Commission does not post reports within 10 days where the manufacturer to which the report was sent indicates it did not, in fact, make the product. Can you please explain how these issues are being resolved? In particular, please clarify whether the Commission believes that the requirement to post in 10 days does not apply where certain claims of material inaccuracy are raised. If the requirement to post within 10 days does not apply in certain cases, does the Commission nevertheless have discretion to post the report of harm in such cases or does it believe that it legally must resolve certain types of claims before posting?

A claim that a report of harm (report) contains potentially materially inaccurate information (MII) is resolved by the CPSC as required by section 6A of the Consumer Product Safety Act (CPSA) and the Commission's regulation at 16 C.F.R. 1102.26 and 1102.28. Section 6A(c)(3)(A) of the CPSA requires the Commission to publish reports that meet statutory minimum requirements "not later than the 10th business day after the date on which the Commission transmits the report . . ." to the identified manufacturer, importer, or private labeler (collectively referred to herein as the manufacturer). Thus, the 10-business day report publication date is calculated based on the date CPSC sends a report that meets the minimum requirements for publication to the manufacturer of the consumer product.

If a manufacturer files an MII claim before the end of the 10 business days, there are two instances when the CPSC may withhold a report beyond this 10 business day report publication date: (1) CPSC makes a decision, within the 10 business days prior to posting a report, that the report contains materially inaccurate information (Section 6A(c)(4)(A) of the CPSA); or (2) CPSC is in the process of determining whether a Report meets the eight minimum requirements for publication (Sections 6A(b)(2)(B), 6A(c)(1), and 6A(c)(3)(A) of the CPSA).

MII claims received thus far can be divided into three types: (1) identification of a wrong manufacturer of the product; (2) submission of inaccurate information on the report, other

than the manufacturer; and (3) allegation that CPSC lacks jurisdiction over the product or that the submitter has failed to identify a harm or risk of harm related to the use of the product. The type of claim submitted bears on how the claim is resolved and whether it affects the report publication date.

For example, the identification of a manufacturer has both substantive and procedural connotations. Manufacturer name is a required field for a report to be published in the Database; if the name is removed, rather than corrected, the report is ineligible for publication. Moreover, the 10-business day report publication date is calculated based on the date a manufacturer is notified. If a manufacturer name is corrected, the report publication date must be re-calculated based on notice to the correct manufacturer. A description of the procedures related to each type of claim appears below.

MII claims alleging that the wrong manufacturer has been identified are generally made quickly by the business receiving the report, and can be handled quickly by the CPSC. A staff member verifies the information provided in the MII claim, and then replaces the incorrect business name with the corrected name. CPSC may lawfully withhold publication of such a report to correct the manufacturer name and to notify the corrected manufacturer of the report. Neither the law nor the CPSC's regulation requires the CPSC to post a report 10 business days after notifying an *incorrect* manufacturer. In fact, section 1102.28 of the final rule states that when the wrong manufacturer is notified, the 10-business day clock for posting a report will be reset when the correct manufacturer is notified, so that the correctly identified manufacturer has 10 business days to review and respond to the report before it is published. The law requires this result, because the report publication date is calculated based on the date the manufacturer of the consumer product is notified.

Similarly, with regard to MII claims that are not alleging a wrong manufacturer, if the CPSC makes a decision on an MII claim prior to posting the report and concludes that a report contains materially inaccurate information, it must correct the inaccuracy before publishing the report. If such correction extends the report publication date beyond the 10th business day, it is a lawful extension because the CPSC has already determined that inaccurate information in the report must be corrected. Although CPSC is not required by law to make MII claim decisions within the 10-business day period before a report is posted, CPSC attempts to resolve all timely made MII claims before a Report is published. If we cannot make a decision on an MII claim by the report publication date, the report will be published, as is, on the 10th business day after the manufacturer was notified. If CPSC determines that a report contains materially inaccurate information after it is published, the law requires us to correct the report within seven business days of such determination.

Finally, manufacturers have been using the MII claim function in the Business Portal to challenge more than just the accuracy of the information contained on a report. Some businesses have made claims that a report does not meet the eight minimum requirements for publication. Typically, these types of claims allege that the CPSC lacks jurisdiction over the product, or that the report does not describe a harm or risk of harm.

Unlike a true MII claim, the essence of these types of claims is not necessarily inaccuracy of the information on the report. Rather, these claims are essentially positing that even if all of the information on the report is true, the report fails to satisfy the statutory minimum requirements for publication. While we try to resolve any dispute of eligibility within the 10-business day time period before posting a report, when a credible claim is made that a report is ineligible for publication, the CPSC may lawfully withhold publication until a decision on whether CPSC has jurisdiction over the product, or whether the submitter has described a risk of harm, is made.

CPSC is considering whether to create another process in the Business Portal for firms to challenge the eight minimum requirements for publication, as these types of claims do not generally involve consideration of whether information in the report is materially inaccurate. Rather, such claims involve an assessment of whether the information in the report, if taken as true, is sufficient to meet eligibility requirements for publication.

13. How many reports of harm have been received by CPSC between the official launch of the database (on or about March 11, 2011) and April 14, 2011? How many reports have been transmitted to manufacturers? How many responses were received from manufacturers? How many claims of "material inaccuracy" were made? How many of the reports that were challenged as "materially inaccurate" were posted before the claim was resolved by CPSC?

During the period March 11, 2011, through April 15, 2011, CPSC received 2012 reports in submitter categories that are potentially eligible for the public database. Of these, 798 reports have qualified as reports of harm, which are eligible for publication in the database. The number of qualified reports of harm can be expected to rise slightly over time as additional consent and verification forms are returned for reports submitted through channels other than CPSC's public portal. 797 of the qualified reports of harm have been transmitted to manufacturers. To date we have received 331 manufacturer comments, 85 claims of materially inaccurate information, and no confidential information claims related to these 797 reports. Four reports were published before the claim of materially inaccurate information was resolved by CPSC and 11 claims were submitted after publication.

14. How many reports of harm relate to an incident that is more than one year old?

Fifty seven of the 798 qualified reports of harm received between March 11, 2011, and April 14, 2011, describe an incident that occurred more than a year before the report submission date.

15. How many reports of harm relate to an incident involving a product that has previously been recalled? Do any of them involve an incident occurring after the recall?

Our system does not yet link reports of harm to recalls, so it is not possible to determine how many reports of harm involve previously recalled products. We have received reports describing incidents occurring after a recall and in some cases, manufacturers have posted comments alerting the submitter and readers to the existence of a recall on the product.

Questions from the Honorable G. K. Butterfield

1. **In response to questioning from the Subcommittee, you contended that "one would expect that the risk [from lead-bearing items] decreases as you move from swallowing to mouthing, from mouthing to touching. And the management of that risk at that point then becomes a decision on how the child interacts with the product." Your response suggests that you believe risk assessment is an appropriate approach for regulating lead in children's products.**

   Last year, this Subcommittee in a hearing regarding the regulation of toxic substances received testimony that convincingly suggests that the traditional risk assessment model is not appropriate for substances that are persistent, bioaccumulative and toxic (PBTs) because these characteristics affect how the environment and human body treat these substances and make exposure inevitable. I understand that lead is a PBT.

   a. **Please discuss your familiarity, or that of your staff, with PBTs in general and the emerging school of thought that risk assessment is not appropriate for PBTs.**

      CPSC staff is aware of the challenges related to evaluating chemicals that are persistent and bioaccumulative, but believe that on a case-by-case basis, potential chemical exposures from products can be assessed using the tools available within the broad field of risk assessment. The Federal Hazardous Substances Act, one of the federal laws that provide CPSC the authority to regulate hazardous products, states the conditions under which a product can be deemed a hazardous substance or a banned hazardous substance. Such determinations require assessment of exposure and risk.

      Accordingly, staff applies appropriate risk assessment procedures to evaluations of products containing specific chemicals, although lead in children's products is regulated based on lead content as provided by section 101 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Approaches to risk assessment of persistent or bioaccumulative chemicals include assessing a specific consumer product exposure in the context of other sources of exposure, including potential changes in exposure over time.

   b. **Please discuss what consideration CPSC gives to whether a substance present in a consumer product is a PBT and whether it presents an unreasonable risk of injury to consumers.**

      One of the basic principles of toxicology is that there are conditions of exposure to chemicals, including the level of exposure, that determine whether the exposure could result in adverse health effects (i.e., not all exposures to a chemical are hazardous). When appropriate, CPSC staff considers "background" exposures and other specific exposure sources when evaluating a consumer product containing the chemical.

      In the case of lead, prior to the enactment of the CPSIA, staff evaluated lead in children's products based on a risk assessment that assessed the effects of lead exposure from

products in the context of the overall level of exposure to lead in the population from other sources, using blood lead levels as the measure of exposure.

c. **Do you agree with the Centers for Disease Control's recommendation that the nonessential uses of lead in consumer products should be restricted or eliminated to prevent exposure to this harmful substance?**

CPSC staff agree with recommendations to reduce wherever possible exposures to harmful chemicals. In many cases where the use of a product could cause substantial personal injury or substantial illness, the Commission has restricted uses of chemicals in products, using its regulatory authority under the Federal Hazardous Substances Act.

2. **In response to questioning from the Subcommittee regarding implementation of the de minimis exception proposed in the Republican discussion draft, you testified that CPSC would have to develop multiple methodologies for manufacturers to determine whether they qualify for the exception given the variety of children products and the different ways children might be expected to interact with those products. However, you stated that developing these several methodologies would not require a substantial investment of CPSC's limited resources.**

a. **Please explain why you believe developing multiple methodologies to account for how children interact with an unknown and ever changing universe of products would not require the investment of substantial resources by CPSC. In framing your response, please also account for the fact that CPSC generally applied its own risk assessment methods on a case-by-case and after-market basis, and not on a market-wide and pre-market basis.**

The proposed language calls for the Commission to establish, by regulation, a methodology for estimating the amount of lead a child would likely ingest from exposure to a component part. Developing multiple methodologies for manufacturers to determine whether they quality for the proposed *de minimis* exception would not require the investment of substantial resources by CPSC staff because the testing methodologies required to determine the amount of potentially toxic heavy metals that can leach from various materials have been in use at CPSC for many years.

For example, the general methodology outlined in CPSC's Cadmium extraction method, which can be found at http://www.cpsc.gov/library/foia/foia11/os/cadmiumjewelrytest.pdf, can be used to determine the amount of lead that would be extracted from a component part if ingested. Replacing the acid solution with a 0.9 percent saline solution, and adjusting the duration period to six hours, would be used to determine the amount of lead that would be extracted from a component part that is mouthed.

3. **In response to a question from the Subcommittee regarding the cost of third-party testing for a bicycle, you stated that "the cost to test a $50 bicycle for all the applicable standards would run somewhere in excess of $10,000."**

a. **Please clarify this response by providing a list of all standards applicable to a children's bike and that indicates whether a third-party testing requirement regarding that standard has been stayed by the Commission.**

Children's bicycles are covered by the bicycle safety standard, which is codified at 16 CFR Part 1512 – Requirements for Bicycles. The stay of enforcement for this standard has expired, except for bicycles with non-quill type stems. Bicycles with non-quill type stems are currently excluded from the requirement to certify compliance with the handlebar stem insertion mark requirement of 16 CFR Part 1512.

Any paint used on a children's bicycle must meet the lead-in-paint standard, which is codified at 16 CFR Part 1303--Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint. The third-party testing requirement for lead-in-paint has not been stayed.

Each accessible component of a children's bicycle is subject to the requirements for children's products containing lead, Section 101 of the Consumer Product Safety Improvement Act. According to the owner of a bicycle testing laboratory, a typical multispeed children's bicycle will have 140 to 150 accessible parts that must be tested for lead content. The third-party testing requirements pertaining to this standard have been stayed through December 31, 2011.

b. **Please clarify this response by providing information, in general, about how many bikes you would expect to be part of a production run. How many of these do you believe are now being third-party tested to any applicable standards? How many of these would you expect to be third-party tested if all testing requirements were in effect?**

Our information about how many bikes would be expected to be part of a production run is limited. However, based on the available information, we expect annual production runs may range from several hundred (or even fewer) units for some models to several thousand or more for other models.

We would expect that all children's bicycles that are being manufactured or imported today would be third-party tested for compliance with the standards that are not currently subject to stays, which are the requirements for bicycles (16 CFR Part 1512) and the lead-in-paint standard (16 CFR Part 1303). Although the third party testing requirements for lead content have been stayed, CPSC has received testimony that some manufacturers are obtaining third party test results for lead content of their components to ensure that they meet the legal requirements of Section 101 of the CPSIA.

Questions from the Honorable John Dingell

1. **CPSIA defines a "children's product" as one "(primarily) intended for a child 12 years of age or younger." The discussion draft would change this definition to "intended for use by a child [age to be determined] years or younger." What effect would the words "for use by" have on the number and type of products covered by this definition?**

   The interpretative rule on the definition of "children's product" already considers the effect of the words "for use by a child." (75 FR 63067) In that interpretative rule, the Commission stated that a determination of whether a product is a "children's product" will be based on consideration of the four specified statutory factors. These factors include: 1) a statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable; 2) whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger; 3) whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger and 4) the Age Determination Guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

   Because the statutory factors incorporate the concept of "use" by the child, the Commission interpreted "for use" by children 12 years or younger generally to mean that children will physically interact with such products based on the reasonably foreseeable use of such products. For example, a diaper would be considered a children's product because a child will interact or have direct physical contact with the diaper, but a diaper bag would be used by the caregiver, and not considered a children's product. The words "for use by" by themselves would not have any impact on the number and types of products covered by this definition.

2. **The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a de minimus amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."**

   a. **Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?**

      CPSC staff is not aware of a uniform "reasonable methodology" currently in use by manufacturers of children's product.

   b. **Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?**

It is possible that ambiguity in the definition of "reasonable methodology" could lead to the use of different test methodologies, which would likely lead to some variance in test results across manufacturers of similar products.

c. If so, do you believe this is could pose a risk to the health of children who use such products?

The potential impact of the variance in test results on the health of children cannot be determined without knowledge of the level of variation and determination of the *de minimis* amount.

3. The draft legislation would allow the CPSC, subject to conditions, to require third party testing for children's products. Under the draft bill, the CPSC could require third party testing only if the Commission first verifies the testing capacity of "accredited third party conformity assessment bodies," as well as establishes and publishes notice of the requirements for accreditation of such assessment bodies.

a. Is it your understanding that the term "accredited third party conformity assessment bodies" includes both domestic and international bodies?

Yes. The term conformity assessment body for purposes of third party testing required by the CPSIA is more commonly known as a testing laboratory, and includes domestic and international bodies.

b. If so, how many such assessment bodies are there worldwide?

As of April 26, 2011, the CPSC has accepted the accreditation of over 300 testing laboratories (worldwide) and posted these laboratories on the CPSC website. There are many more testing laboratories worldwide, an unknown portion of which may have an interest in conducting testing for CPSC rules.

c. Further, does the Commission have the resources with which to verify the testing capacity of all third party conformity assessment bodies?

Verifying testing capacity may involve a detailed assessment of the market for the particular product in question and an assessment of the number and testing capacity of available laboratories that have an interest in conducting the testing. The resources are difficult to estimate and could depend on the product safety rule.

d. Moreover, is it your understanding of the draft legislation that the Commission would have to accredit all third party conformity assessment bodies?

The language of the draft legislation does not appear to require the Commission to accredit all third party conformity assessment bodies. Section 3(b) of the language of the draft legislation would not allow the Commission to require testing by an independent third party until two conditions have been met: (1) a notice of requirements has been

established and published for accreditation of third party conformity assessment bodies who are determined to be qualified by the Commission to conduct third party testing; and, (2) the Commission has determined that there is sufficient testing capacity by accredited third party conformity assessment bodies to prevent unreasonable delays due to testing.

The draft legislation appears to maintain the same process currently used by the Commission for accreditation of third party conformity assessment bodies. Currently, the Commission establishes the baseline criteria for accreditation of a third party conformity assessment body for a particular children's product safety rule when it publishes a notice of requirements.

Interested third party conformity assessment bodies submit applications under a particular notice of requirements to the Commission to demonstrate that they meet the criteria necessary to have their accreditation accepted by the Commission. The Commission accredits only third party conformity assessment bodies that submit applications for acceptance of their accreditation and that meet the requirements for accreditation.

e. If so, do you believe the Commission has the resources with which to accomplish this?

If the draft legislation allows the Commission to designate outside entities to conduct the accreditations and for the CPSC to recognize or accept those accreditations (as the CPSIA currently allows), then the resource burden is considerably less than if the CPSC itself had to conduct the accreditations. The CPSC by itself does not have the resources to conduct accreditations of conformity assessment bodies.

f. In summary, do you believe the practical effect of these requirements would be that the Commission would seldom, if ever, require third party testing of children's products?

Depending on the flexibility afforded by revised legislation in how the CPSC establishes third party testing and conformity assessment body accreditation rules (refer to answer above) the CPSC may consider third party testing after examining the risk associated with non-compliance, the history of non-compliance, the burdens and complexity associated with third party testing, and other factors. The detailed cost-benefit analysis findings required under section 3(b) of the draft legislation, however, make it highly unlikely that the Commission could ever impose third-party testing requirements beyond those specifically permitted under section 3(a) of the draft bill.

4. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?

No, this is not an accurate statement of the law. Section 6A(c)(3)(A) of the CPSA requires the Commission to publish reports that meet the minimum requirements for publication "not later

than the 10th business day after the date on which the Commission transmits the report . . ." to the identified manufacturer, importer, or private labeler (collectively referred to herein as the manufacturer). One of the minimum requirements for publication is that the submitter verifies the truth and accuracy of the report. A report will not be published without that verification.

If a business receiving notice of a submitted report alleges that information in the report is materially inaccurate, they have the burden of proof to establish their claim. Information on the report is considered part of a verified report unless and until someone demonstrates otherwise. The CPSC endeavors to make a decision on all timely submitted "materially inaccurate information" claims before the report publication date. Thus far, we have been successful at resolving these claims in a reasonably short time frame.

If CPSC makes a decision on a materially inaccurate information claim after a report is published, the law requires that the CPSC correct the inaccuracy in the Database within seven business days. While the mere allegation of an inaccuracy cannot delay publication, manufacturers can, and have been, stating their position with regard to the report in their comment that displays in the database along with the report. Thus, regardless of the CPSC's determination on an MII claim, manufacturers have a way to allege inaccuracies in any report that can be seen and read by the public as soon as the Report is published.

Finally, the CPSC does not guarantee that every piece of information in the database is accurate. The statute requires that we post a clear and conspicuous notice to people using the database that the CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database.

5. Is it your understanding that section 5 of the draft bill exempts FDA-regulated products from CPSIA's mandatory toy safety standards?

a. Are FDA-regulated products already exempt from CPSC regulations? If so, why is this exemption necessary?

While drugs, devices, cosmetics, and foods cannot be "consumer products" under section 3(a)(5) of the Consumer Product Safety Act, the draft bill would eliminate potential confusion over the provisions in ASTM F963 that are to be considered "consumer product safety standards."

ASTM F963 refers to various FDA regulations pertaining to food and cosmetics, and section 106 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) declares that the provisions of ASTM F963, with certain limited exceptions, "shall be considered consumer product safety standards issued by the Commission under section 9 of the Consumer Product Safety Act." The omission of the FDA regulations from the limited exceptions in section 106 of the CPSIA creates uncertainty as to whether the FDA regulations are "consumer product safety standards" pursuant to section 106 of the CPSIA.

If the FDA regulations are to be considered "consumer product safety standards," then additional uncertainty exists as to CPSC's ability to enforce the FDA regulations and whether CPSC would need to engage in joint rulemaking with FDA whenever FDA revises those regulations. Furthermore, because children's products that are subject to a children's product safety rule are subject to third party testing under existing law, questions have arisen as to whether manufacturers need to have third party testing to demonstrate compliance with the FDA regulations.

b. Further, what types of products would section 5's exemption include, and why should they be exempted from CPSIA's mandatory toy safety standards?

The effect of the exemption would be to clarify that FDA retains authority over food, food additives, color additives, and cosmetics that are supplied with toys and that CPSC has authority over the toys covered by ASTM F963. For example, ASTM F963 states that food products supplied with toys must be manufactured and packaged in compliance with FDA's good manufacturing practice regulations that apply to food. If FDA's good manufacturing practice regulations for foods are considered "consumer product safety standards," then CPSC would need to enforce those regulations and also issue a notice of requirements to provide for third party testing to demonstrate compliance with those FDA regulations.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
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Majority (202) 225–2927
Minority (202) 225–3641

April 27, 2011

Ms. Caroline Cox
Research Director
Center for Environmental Health
2201 Broadway, Suite 302
Oakland, CA 94612

Dear Ms. Cox,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on April 7, 2011, to testify at the hearing entitled "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, May 11, 2011. Please also e-mail your responses to the Legislative Clerk in Word format at Alex.Yergin@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade

cc: The Honorable G. K. Butterfield, Ranking Member,
Subcommittee on Commerce, Manufacturing, and Trade

Attachments

The Honorable Mary Bono Mack

1. **You state you prefer a total lead (concentration) standard rather than an exposure standard. Do you maintain that a concentration standard for total lead is always more health protective than a standard that regulates how much lead is actually available to a child?**

   Yes. There is no way to test accurately and consistently for "how much lead is actually available to a child." Thus, a total lead test, which is far more likely to be accurate and consistent, is also more health protective. Total lead testing is relatively inexpensive and can be done quickly, so it is easier for product manufacturers, vendors, and retailers to do comprehensive testing. This means that supply chain problems are corrected more quickly resulting in more health protective products.

2. **You mentioned FDA's warning about children's lunch boxes containing lead, claiming that FDA interpreted CPSC's data differently than CPSC itself. How many lunchbox recalls did FDA order after it reviewed CPSC's data?**

   At the time, there was no single federal rule on lead in children's products. Given this regulatory uncertainty, FDA took action by sending a strongly worded warning to lunchbox makers, alerting them to the lead problem and advising them that since "some migration of lead [from lunchbox interiors] to food…may be reasonably expected, we urge companies to refrain from marketing such lead-containing lunchboxes." We are not aware that FDA ordered recalls

3. Your discussion of lunchboxes suggests that FDA would disapprove of a risk-based lead standard and insist on a total lead content standard. Does FDA have any concentration-based total content standard for lead? Does FDA have any standards that control the amount of lead a child would actually be exposed to?

   We have not made any suggestions about what FDA's thinking is on the matter. FDA has total content standards for lead in food, including food for consumption by children, and has developed guidelines for total lead content of candy intended for small children. With respect to the lunch boxes made with lead-containing vinyl FDA stated, "According to the CPSC data, a small amount of the lead present in the interior linings of the lunchboxes is transferable by a swipe test. This implies that a small amount of lead may reasonably be expected to transfer to food that contacts the interior lining and could be deemed to be an unsafe food additive within the meaning of section 409 of the FD&C Act, and therefore adulterated within the meaning of section 402(a)(2)(C) of the statute."

3. **On page 2 of your testimony, you list six categories of products that you found before the law was passed. Are you aware that half of them are within FDA's jurisdiction?**

   Yes, we are aware of FDA's jurisdiction. Our work is based on California law, and in each of these cases the products were in violation of California lead standards.

4. **You mentioned that CEH has found some 46 products that did not comply with the lead limits applicable under CPSIA. Did CEH provide details of its findings to CPSC on each of these items? If so, how quickly does CEH typically notify CPSC after obtaining test results? Does CEH prvide samples? How many of the 46 products did CPSC recall?**

   Our compliance testing is administered under a grant from the California attorney general's office. Under the terms of the grant, we report our findings to their office. It is our understanding that the attorney general's office reports to CPSC and follows up with them regarding potential recalls when they feel it is appropriate. In our experience, CPSC does its own product research rather than relying on CEH-purchased products from California. CPSC cooperated with companies on recalls of six products that were identified by CEH.

5. **Has CEH ever sought a CPSC recall of a product based on lead in metal parts other than jewelry?**

   Between 1999-2001, CEH found high levels of lead in the metal outflow pipes in several brands of home water filters. The filter industry reformulated the pipes to eliminate the lead. Since it was several years ago we are not sure if there was communication with CPSC.

6. **Have you found x-ray fluorescence devices equally useful for screening plastics and metals?**

   Yes. With an experienced operator and attention to testing homogeneous samples. the XRF is equally useful for screening both plastics and metal.

<u>The Honorable G. K. Butterfield</u>

1. **During the hearing, the Subcommittee heard repeatedly that the traditional model for the regulation of lead and other harmful substances has been to use risk assessment, and that manufacturers should be allowed to apply this model to children's products. However, last year this Subcommittee in a hearing regarding the regulation of toxic substances received testimony arguing that the traditional risk assessment model is not appropriate for substances that are persistent, bioaccumulative and toxic (PBTs) because these characteristics affect how the environment and human body treat these substances and make exposure inevitable. I understand that lead is a PBT.**

   a. **Can you please confirm that lead is a PBT?**

Lead is identified by US EPA as a PBT chemical under the Toxics Release Inventory program. See http://www.epa.gov/tri/trichemicals/pbt%20chemicals/pbt_chem_list.htm.

b. Can you please discuss the characteristics of PBTs that make the traditional risk assessment approach for limiting exposure an inappropriate model for dealing with lead?

Risk assessment traditionally identifies the health hazards of the chemical of interest and the estimated exposure to that chemical. The risk assessment process compares the estimated exposure to the amount of the chemical that causes the relevant health hazard to determine a "safe" level of exposure. This is a challenging, or even impossible, process for PBT chemicals, because exposures of concern are not only current exposures, but exposures far into the future as the chemical moves through humans and the environment. Accurately predicting those exposures is beyond current scientific knowledge. For lead it is even more challenging to complete a risk assessment because, as EPA has stated, "There is no level of lead exposure that can yet be identified, with confidence, as clearly not being associated with some risk of deleterious health effects." In this situation, the only acceptable exposure is zero.

2. It is an established fact that lead occurs naturally at low levels in the environment, but it is also a fact that we have added lead to the environment by adding it to products like paint, gasoline, and even consumer products. It is also widely recognized that Americans produce large amounts of trash, including by throwing away products such as toys and other children's products. The result is that lead-laced toys and other children's products end up in landfills, where the lead can leach into soil and then into water and then into the food supply. From there, it is a straight route into the body.

a. Would you agree that use of lead in a child's product not only poses a direct threat to the health and safety of that child, but presents an ongoing and potentially more potent threat? Please explain.

The Agency for Toxic Substances and Disease Registry estimates that environmental lead levels are 1000 times higher than they were 300 years ago. The cause of this increase is "human activity," including past use of leaded gasoline and lead-based paint as well as current use of lead in consumer products. Once this lead is in the environment, children are exposed to it when they breathe air, drink water, eat food, play, etc. This lead exposure is to a certain extent cumulative because lead can be stored for long periods in bones. There is widespread agreement that prevention, reducing lead exposure by reducing the sources of lead exposure, is the best way to protect children.

The Honorable John Dingell

1. **The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a de minimus amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."**

   a. **Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?**

   Currently the ASTM toy safety standard describes a methodology for estimating ingestion of lead from paint and other surface coatings. CPSC has suggested methodology for estimating ingestion of lead from metal jewelry. Uniform methodologies for other materials and other children's products do not yet exist.

   b. **Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?**

   It is virtually certain.

   c. **If so, do you believe this is could pose a risk to the health of children who use such products?**

   Yes. The risk of lead-tainted products ending up in children's hands, and possibly in their mouths, would increase dramatically.

2. **The draft legislation would allow the CPSC, subject to conditions, to require third party testing for children's products. Under the draft bill, the CPSC could require third party testing only if the Commission first verifies the testing capacity of "accredited third party conformity assessment bodies," as well as establishes and publishes notice of the requirements for accreditation of such assessment bodies.**

   a. **Is it your understanding that the term "accredited third party conformity assessment bodies" includes both domestic and international bodies?**

   Yes.

   b. **If so, how many such assessment bodies are there worldwide?**

Each assessment body is certified for certain kinds of testing. There are 29 US labs and 124 international labs certified for at least one of the CPSC lead test protocols.

c. Further, does the Commission have the resources with which to verify the testing capacity of all third party conformity assessment bodies?

It seems unlikely.

d. Moreover, is it your understanding of the draft legislation that the Commission would have to accredit all third party conformity assessment bodies?

Yes.

e. If so, do you believe the Commission has the resources with which to accomplish this?

No. The Commission has in the past stated that it is under-resources already.

f. In summary, do you believe the practical effect of these requirements would be that the Commission would seldom, if ever, require third party testing of children's products?

That seems highly likely.

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May 11, 2011

Via Electronic Mail: Alex.Yergin@mail.house.gov

The Honorable Mary Bono Mack, Chairman
The Honorable G. K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade
Committee On Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: Discussion Draft of H.R. _____, a bill that would revise the Consumer Product Safety Improvement Act; Response to Questions

Dear Chairman Bono-Mack and Ranking Member Butterfield:

Thank you for the opportunity to appear before the Subcommittee on April 7, 2011. I welcomed the opportunity to express my personal views about necessary revisions to the Consumer Product Safety Improvement Act of 2008 (CPSIA) to maintain strong protections for children's health and safety, consistent with recognized science-based approaches to managing risk used by many different agencies, while reducing unnecessary and costly burdens on regulated businesses. We provide responses to your additional questions below.

The Honorable Mary Bono Mack

1. **Does the FDA, CDC or other public health agencies recognize that humans can tolerate different amounts of lead at different ages?**

   Yes. The federal Food and Drug Administration (FDA) has adopted Provisional Tolerable Daily Intake (PTDI) limits[1] that vary depending on age for potential ingestion of lead through the diet. These levels are based on daily intake limits, which assume that these amounts will be consumed on a daily basis. The limits are:

   - children 0-6: 6 µg/day;
   - children over 6: 15 µg/day;
   - pregnant or childbearing women: 25 µg/day;
   - other adults: 75 µg/day.

[1] PTDI's are levels that are expected to give rise to a 1 µg/dL increase in blood lead levels in children and women of childbearing years, and a 3 µg/dL rise for others.

The U.S. Environmental Protection Agency's (EPA) Integrated Exposure Uptake Biokinetic (IEUBK) model predicts that low intakes of lead in the range of 1 – 2 µg/day would be difficult to detect because it is difficult to detect an impact of 2 µg/dL. The Centers for Disease Control (CDC) recommends that laboratories set internal quality control limits on blood lead measurements to +/- 2 µg/dL.[2]

2. What does "food grade" mean in terms of lead? Should items that are recognized by FDA as "food grade" be accepted by CPSC as having low lead?

Yes, materials safe for contact with food must be low in lead. Materials in contact with food used as, for example, food packaging (whether single or repeated use) are regulated as "food." "Food" is defined under Section 201(f) of the Federal Food, Drug and Cosmetic Act (FFDCA) as "(1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article."[3] In turn, a "food additive" is defined under Section 201(s) of the Act as "any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component … of any food …."[4] These provisions therefore establish that materials, and components of materials, in contact with food are subject to the requirements of the FFDCA.

Under Section 402(a)(1) of the FFDCA, a "food" is deemed to be adulterated if it "bears or contains any poisonous or deleterious substances that may render [the food] injurious to health." By virtue of Section 201(s), and its definition of "food additive," components of a food package are considered to be "food" subject to regulation by FDA if there is the potential for such components to migrate into food. FDA's Good Manufacturing Practices (GMP) regulation for food-contact materials requires that a food-contact material must be "of a purity suitable for its intended use."[5] Food-contact items that contain lead or other impurities that potentially migrate to food at unsafe levels would not be considered suitably pure under FDA's regulations because the lead could potentially adulterate the food.[6]

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2 *Interpreting and Managing Blood Lead Levels < 10 µg dL in Children and Reducing Childhood Exposures to Lead*, Recommendations of CDC Advisory Committee on Childhood Lead Poisoning Prevention, November 2, 2007, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5608a1.htm.

3 21 U.S.C. §321(f).

4 21 U.S.C. §321(s).

5 21 C.F.R. §174.5(a)(2).

6 For these reasons, the Commission concluded that it would not make lead content determinations on foods used in consumer products. *See* 74 Fed. Reg 43031 at 43034 (August 26, 2009).

In addition to FDA regulations implementing the FFDCA, packaging products (both for foods and for non-foods) are subject to limits on total heavy metals, including lead, under the Coalition of Northeastern Governors (CONEG) Model Toxics in Packaging Legislation. These laws (1) prohibit the intentional use of *any amount* of lead, cadmium, mercury, and hexavalent chromium in packaging or individual packaging components, such as inks, adhesives, coatings, or labels,[7] and (2) restrict the total *combined* trace concentration level of unintentionally added lead, mercury, cadmium, and hexavalent chromium in packaging to no more than 100 parts per million (ppm) by weight. Nineteen states[8] have toxics in packaging laws based on the Model Legislation.[9] If regulated materials are unintentionally present, for example, as a contaminant in raw material feedstocks, the total concentration is limited to less than 100 ppm for the sum of all four metals in any package or individual packaging components. Thus, CONEG's standards require that total lead cannot exceed a maximum of 100 ppm lead, assuming that no other covered heavy metal is present. These limits are currently subject to enforcement by state authorities.[10] We are not aware of enforcement actions associated with food packaging under these state toxics in packaging laws. Materials that meet FDA requirements for food contact and/or CONEG requirements for packaging should be deemed low lead.

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7 In particular, Section 3 of the Model Legislation defines "package" as containers providing a means of marketing, protecting, or handling a product and includes unit packages as well as intermediate packages and shipping containers, cross-referencing the packaging definitions found in ASTM D996 (American Society for Testing and Materials). The definition includes, but is not limited to, unsealed receptacles such as carrying cases, crates, cups, and other trays and wrappers. A "packaging component" is defined as any individual assembled part of a package including, but not limited to, any interior or exterior blocking, bracing, cushioning, coatings, closures, inks, and labels.

8 These states include California, Connecticut, Florida, Georgia, Illinois, Iowa, Maryland, Maine, Minnesota, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

9 A copy of the Model Legislation is available at: http://www.toxicsinpackaging.org/model_legislation.html.

10 In August 2008, for example, retailer Forever 21, Inc. agreed to pay a total of $115,000 to the California Department of Toxic Substances Control (DTSC) to resolve allegations that the retailer had acquired and used plastic bags that failed to meet the state's restrictions on certain heavy metals, including lead. The final consent order is available at: http://www.dtsc.ca.gov/HazardousWaste/Projects/upload/Forever21_ENF_CO.pdf.

The Honorable G. K. Butterfield

1. **Please provide a list of every association or other entity that you have represented, consulted, or provided any other form of paid services with respect to any issues arising under the CPSIA in any forum and the amounts paid to you or your firm for these services.**

   I was asked by the Subcommittee staff to participate in the April 7 hearing in my capacity as an individual attorney with experience before a variety of different federal regulatory agencies, including the CPSC. I was not compensated for the preparation of my testimony or my appearance before the Subcommittee. I am a registered lobbyist on CPSIA matters only for the Fashion Jewelry and Accessories Trade Association; lobbying reports are on file and publicly available.

The Honorable John Dingell

1. **The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a de minimus amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."**

   a. **Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?**

   The CPSC and other health agencies use well-recognized techniques to evaluate potential exposures to chemicals and other substances in a variety of situations. Tests are available to assess surface migration, airborne migration, off-gassing, hand-to-mouth, mouthing, and ingestion exposures.[1] Specifically, CPSC has previously conducted lead migration tests to assess expected exposure conditions during reasonably foreseeable use and abuse conditions, such as wipe tests, simulating hand-to-mouth exposure; saliva tests simulating exposure by mouthing; acid extraction tests simulating exposure through accidental ingestion. Because CPSIA adopts a total content limit those tests are not currently used by the CPSC, but similar

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[1] The log summary of a public meeting between CPSC, the Environmental Protection Agency, and the American Chemistry Council held on January 10, 2011 references some of these methods. See http://www.cpsc.gov/LIBRARY/FOIA/meetings/mtg11/epa01312011.pdf.

tests are done to evaluate exposure to phthalates and phthalates alternatives,[12] or to other substances. The CPSC recently updated a test method to simulate potential exposure to cadmium from ingestion of children's metal jewelry, for example.[13] Moreover, by adopting the toy safety standard, ASTM F-963, as a mandatory requirement, CPSIA requires testing of surface coatings of toys for heavy metals using a 2-hour extraction test. In short, a variety of scientifically acceptable methods to evaluate exposure using various migration tests suitable to the type of exposure and material are available.

b. Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?

No, within the limits of normal inter-laboratory variability. Extensive round robin testing of the migration procedure adopted under ASTM F-963 yielded information on specific statistical uncertainty factors that should be applied for particular metals subjected to the test. While experience has shown that there can be significant inter-laboratory variability in total lead or phthalate content tests, as the same materials do not yield identical results when tested in different laboratories, statistical uncertainty factors have not been adopted for total content tests. This issue could be addressed through round robin testing and additional method standardization by CPSC. Material variability could also be a factor as substances like lead may not always be evenly dispersed in the material tested.

c. If so, do you believe this is could pose a risk to the health of children who use such products?

No. Scientific approaches to establish inter-laboratory uncertainty factors are available and should be adopted for both total content and migration tests.

2. The draft legislation would allow the CPSC, subject to conditions, to require third party testing for children's products. Under the draft bill, the CPSC could require third party testing only if the Commission first verifies the testing capacity of "accredited third party conformity assessment bodies," as well as establishes and publishes notice of the requirements for accreditation of such assessment bodies.

a. Is it your understanding that the term "accredited third party conformity assessment bodies" includes both domestic and international bodies?

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[12] See Staff Memorandum, Phthalates and Phthalate Substitute in Children's Toys, March 31, 2010, available at http://www.cpsc.gov/ABOUT/Cpsia/phthallab.pdf.

[13] Method CPSC-CH-E1001-11, Standard Operating Procedure for Determining Cadmium Extractability from Children's Metal Jewelry. See http://www.cpsc.gov/LIBRARY/FOIA/FOIA13/os/cadmiumjewelrytest.pdf.

Yes, provided they meet the accreditation criteria.

b. If so, how many such assessment bodies are there worldwide?

Information on the total number of third party assessment laboratories currently accredited by the CPSC is available at the CPSC website; however, not every laboratory is certified or accredited to conduct every test that may be required pursuant to CPSC laws and regulations. The searchable database of laboratories is available at http://www.cpsc.gov/cgi-bin/labsearch/.

c. Further, does the Commission have the resources with which to verify the testing capacity of all third party conformity assessment bodies?

I have no knowledge of the Commission's resources to undertake this task.

d. Moreover, is it your understanding of the draft legislation that the Commission would have to accredit all third party conformity assessment bodies?

The Commission must determine that the third party conformity assessment body has the technical ability to conduct the relevant test or tests for which accreditation is sought *and* has the capacity to handle testing before accreditation is conferred by CPSC under the draft legislation. Third-party conformity assessment bodies that do not meet these requirements cannot receive accreditation. Manufacturers may use only a CPSC- accredited laboratory where legislation or rules require third party testing to support a certificate of compliance.

e. If so, do you believe the Commission has the resources with which to accomplish this?

I have no knowledge of the Commission's resources to accomplish this task.

f. In summary, do you believe the practical effect of these requirements would be that the Commission would seldom, if ever, require third party testing of children's products?

I am unable to speculate on the frequency with which the Commission would require third party testing beyond categories already covered. It will depend on the specifics of the test requirements, qualifications and capacity of third party assessment bodies who seek to be accredited to conduct such tests, and other factors.

3. I have several questions concerning the public database mandated by CPSIA.

a. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?

Yes.

b. Should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published?

Yes.

c. If a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should that dispute be resolved and by whom?

The CPSC should resolve the dispute by evaluating the facts presented to it.

d. The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe the draft legislation's narrowing of eligibility to submit complaints is necessary?

Yes. This change should help minimize duplicative complaints and assure that actual incidents, rather than speculative risks, are posted to the database.

I trust these responses are helpful.

Respectfully submitted,

Sheila A. Millar

Motorcycle Industry Council

May 10, 2011

VIA ELECTRONIC MAIL AND REGULAR MAIL

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: Reponses to Questions for the Record from The Honorable John Dingell
"Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act," April 7, 2011

Dear Chair Bono Mack:

Attached please find my responses to the questions for the record from The Honorable John Dingell.

Thank you for the opportunity to testify at the hearing entitled "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act" on April 7, 2011.

Respectfully submitted,

Paul C. Vitrano
General Counsel

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Responses to Additional Questions for the Record from The Honorable John Dingell

1. The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a *de minimus* amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."

a. Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?

No.

b. Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?

While some variation in test results from different methodologies is possible, with respect to methodologies that provide a reasonable basis for estimating the amount of lead a child would likely ingest from exposure to a component part during reasonably foreseeable use and abuse of a particular product, we would not expect a wide variance in test results across manufacturers.

c. If so, do you believe this could pose a risk to the health of children who use such products?

No. See response to b. above.

2. The draft legislation would allow the CPSC, subject to conditions, to require third party testing for children's products. Under the draft bill, the CPSC could require third party testing only if the Commission first verifies the testing capacity of "accredited third party conformity assessment bodies," as well as establishes and publishes notice of the requirements for accreditation of such assessment bodies.

a. Is it your understanding that the term "accredited third party conformity assessment bodies" includes both domestic and international bodies?

Yes.

b. If so, how many such assessment bodies are there worldwide?

Yes. Unknown. The CPSC website includes a list which currently contains more than 330 third party laboratories that have been accredited by the Commission for assessing conformity with various children's product safety rules.

c. Further, does the Commission have the resources with which to verify the testing capacity of all third party conformity assessment bodies?

Unknown. This question is better addressed to the Commission.

d. Moreover, is it your understanding of the draft legislation that the Commission would have to accredit all third party conformity assessment bodies?

Under the draft legislation, a manufacturer is required to use a third party conformity assessment body that has been accredited by CPSC to meet its testing and certification obligations with respect to specified children's product safety rules. A manufacturer could use an unaccredited third party to test for conformity with other product safety rules unless the Commission requires that manufacturers use an accredited third party to test for and certify conformity with particular additional safety rules or for particular classes of products.

e. If so, do you believe the Commission has the resources with which to accomplish this?

Unknown. This question is better addressed to the Commission.

f. In summary, do you believe the practical effect of these requirements would be that the Commission would seldom, if ever, require third party testing of children's products?

No.

3. I have several questions concerning the public database mandated by CPSIA.

a. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?

The CPSC's final rule implementing the public database under the CPSIA provides that the Commission will publish a report of harm which meets specified minimum requirements for publication in the database not later than 10 business days after such report is transmitted to the manufacturer for review. *See* 16 C.F.R. Sections 1102.10(d) and 1102.28(a). This will be the case even in situations where there is a pending but as yet unresolved request by the manufacturer that materially inaccurate information be removed from the report or the report itself not be published because it is materially inaccurate.

b. Should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published?

Yes. Fundamental due process requires that a manufacturer be given a reasonable opportunity to do so.

c. If a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should that dispute be resolved and by whom?

A pending manufacturer request for removal of materially inaccurate information from a report of harm should be resolved prior to publication of the report. Such a request should be resolved in the first instance by the CPSC staff implementing the public database, with the manufacturer having the right to appeal an initial denial of the request to the CPSC General Counsel for a final agency decision with the right to seek further relief through judicial means.

d. The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe the draft legislation's narrowing of eligibility to submit complaints is necessary?

Yes. CPSC's rule implementing the database originally proposed an additional category of "others" that dramatically and improperly expanded the scope of persons who could submit reports of harm. In response to comments objecting to this improper expansion of potential reporters, CPSC simply folded the "others" category into the rule's definition of "consumers." This is not what Congress intended and must be corrected. As a point of clarification, the draft legislation amends the CPSIA to permit persons who suffer harm or risk of harm related to use of a consumer product, their next of kin or members of their household, their legal representative, or another person expressly authorized by them to submit a report of harm for publication in the database.

RESPONSES TO QUESTIONS FOR THE RECORD OF THE APRIL 7, 2011 HEARING BEFORE THE SUBCOMMITTEE ON COMMERCE, MANUFACTURING AND TRADE
COMMITTEE ON ENERGY AND COMMERCE

ERIKA Z. JONES
ON BEHALF OF
BICYCLE PRODUCT SUPPLIERS ASSOCIATION

The Honorable Mary Bono Mack

1. In your testimony, you state that there is too much variability in certain metal alloys to ensure that bicycles meet the next drop-down to 100 parts per million (ppm). Why is the lead content of alloys difficult to control?

   RESPONSE: Common alloys of aluminum, iron and copper used in bicycle manufacturing are sourced in Asia and typically have recycled metal content. Inevitably some lead finds its way into these alloys as a contaminant. Studies conducted by a CPSC certified third party laboratory have confirmed that the amount of lead in these alloys can vary above or below 100 ppm even within a single component part. The results of these studies have been submitted to the U.S. CPSC's docket on the 100 ppm issue. Use of virgin materials or other metal alloys such as certain grades of low-lead stainless steel is precluded by the high price of these materials, which would make the final product prohibitively expensive.

2. Under current law, how many different parts of a bike are accessible and need to be tested to the lead limits?

   RESPONSE: While the precise number varies from bicycle model to bicycle model, a typical bicycle has approximately 140 "accessible" component parts, as the term "accessible" has been defined by the U.S. CPSC.

3. Do you see other opportunities to reduce testing costs without undercutting the benefits?

   RESPONSE: Section 101 of CPSIA applies the lead substrate limits to all components of children's products except "any component part ... that is not accessible to a child through normal and reasonably foreseeable use and abuse of such product as determined by the Commission." The Commission has determined that all components that can be contacted by a specified probe are "accessible" for purposes of this requirement.

   In the case of bicycles and other outdoor recreational products, narrowing or modifying the definition of "accessible" to parts which are likely to be touched or mouthed during use of the product would narrow the list of component parts to those which are likely to

pose a risk of lead exposure to the child user. For example, contact points on a bicycle required for its use include the handlebars, brake levers, grips, and saddle. Most of the metal alloy parts are part of the structural frame or drive train of the bicycle and are likely to be touched only incidentally, if ever, during use.

The Honorable G. K. Butterfield

1. Dr. Best testified that "in the case of lead, there is no benefit to *exposure*." (Emphasis added.) In your testimony, you took issue with this statement, arguing: "I would like to address a comment made by . . . Dr. Best, who made a comment that there is no benefit to lead and therefore it should be inherently unnecessary. Lead in the quantities that we see it in metal alloys that are used in bicycles provide a tremendous benefit."

   Dr. Best's statement concerns the lack of any benefits to human health from exposure to lead, and not the benefits that accrue with respect to the affordability or durability of a product.

   a. Are you aware of any direct benefits to human health from exposure to lead?

   RESPONSE: In BPSA's view, there are many benefits to human health from the continued wide availability in the market of affordable bicycles for children. While BPSA strongly believes that there is no risk to human health from the extremely low levels of lead in metal alloys used in bicycles, the CPSC's current interpretation of CPSIA deems virtually all components of children's bicycles to be "accessible," and therefore subject to the lead substrate standard. Under this interpretation, the mere *presence* of lead has been equated to *exposure* to lead, even in minuscule quantities that cannot be measured in human blood. This is the reason why the CPSC denied the BPSA petition for a limited exclusion from the lead substrate standard in 2009, and it was in this context that Dr. Best's comment required a response.

2. In response to questioning from the Subcommittee, you argued that manufacturers have not been given enough time to comply with the 100 ppm lead content standard because it will apply "immediately on August 11[, 2011.]" You went on to state: "Normally, manufacturers are given lead time to plan for the new regulation, to redesign their products, to absorb the costs in a more orderly fashion, and to work out their inventory so that products sold after the effective date reach retail shelves in a compliant fashion. That is the proper, orderly way to regulate products for safety improvement, not to disrupt the market with these very abrupt changes that do not permit that kind of orderly transition."

   a. Is it correct that the text of CPSIA makes clear to manufacturers that three years from the date of enactment their products are expected to comply the 100 ppm lead content standard?

RESPONSE: No. The CPSIA requires the CPSC to lower the standard unless it makes a determination that application of the standard to a particular product or component part is "not technologically feasible." This provides no clear guidance for manufacturers of products who have struggled, so far unsuccessfully, to bring their products fully and consistently into compliance with a 100ppm lead substrate limit. If the manufacturer cannot now meet the standard, they have two choices as the August deadline approaches: (1) they can try and persuade the CPSC that this potential lack of compliance is because it is "not technologically feasible" to do so and wait for the Commission to rule and hope the ruling is favorable; or (2) they can cease making the products and suffer economic injury.

The Honorable John Dingell

1. The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a *de minimus* amount of lead. The draft legislation further requires the Commission to establish procedures for estimating the amount of lead a child would ingest from a given children's product. However, while the Commission establishes such procedures, the draft legislation would permit manufacturers to use "any reasonable methodology to estimate the amount of lead a child would likely ingest from exposure to a component part."

    a. Are you aware of a uniform reasonable methodology in use by manufacturers of children's products?

RESPONSE: BPSA's 2009 petition for a limited exclusion from the lead substrate standards relied on expert analysis of lead exposure, in which BPSA's retained expert (Dr. Beck, who also testified before this Subcommittee on April 7) used a reasonable methodology to estimate the increase in blood lead level based on means of exposure and absorption. BPSA is unaware of the extent to which this (or any other) methodology is uniformly in use by manufacturers of children's products.

    b. Is it possible the ambiguity of the term "reasonable methodology" could lead to a wide variance in test results across manufacturers of similar products?

RESPONSE: While use of different methodologies could lead to differing results, this would only be a temporary issue until the CPSC developed a uniform test procedure.

    c. If so, do you believe this could pose a risk to the health of children who use such products?

RESPONSE: No. Products that clearly pose the highest risk of lead ingestion (such as small items of jewelry or materials like leaded paints) will not be affected by the proposed changes to section 101(b), which address products with an inherently low risk of ingestion.

2. The draft legislation would allow the CPSC, subject to conditions, to require third party testing for children's products. Under the draft bill, the CPSC could require third party testing only if the Commission first verifies the testing capacity of "accredited third party conformity assessment bodies," as well as establishes and publishes notice of the requirements for accreditation of such assessment bodies.

   a. Is it your understanding that the term "accredited third party conformity assessment bodies" includes both domestic and international bodies?

RESPONSE: Yes.

   b. If so, how many such assessment bodies are there worldwide?

RESPONSE: The CPSC website lists all currently accredited third party conformity assessment bodies. BPSA does not have any additional information about the number of third party conformity assessment bodies.

   c. Further, does the Commission have the resources with which to verify the testing capacity of all third party conformity assessment bodies?

RESPONSE: BPSA is not familiar with the details of the resources available to the Commission for this task.

   d. Moreover, is it your understanding of the draft legislation that the Commission would have to accredit all third party conformity assessment bodies?

RESPONSE: No; the Commission would have to accredit only those third party conformity assessment bodies that meet the Commission's qualification standards for accreditation and the substantive standards set forth in the draft legislation. As is the case with the current law, the draft would require the Commission to accredit third party conformity assessment bodies before manufacturers could rely on tests performed by those bodies to support a certification of compliance.

   e. If so, do you believe the Commission has the resources with which to accomplish this?

RESPONSE: BPSA is not familiar with the details of the resources available to the Commission for this task.

f. In summary, do you believe the practical effect of these requirements would be that the Commission would seldom, if ever, require third party testing of children's products?

RESPONSE: No. Over the past few years, the testing industry has responded to the CPSIA and other international regulatory requirements by adding laboratories and capacity so that today the demand for testing resources for the bicycle industry is largely being met. However, whenever a new requirement is established or becomes effective, there needs to be sufficient time allowed for the testing industry to respond. When the testing entity is a third party laboratory, by definition manufacturers cannot control the finances or business decisions of those independent entities in deciding whether to apply for CPSC certification. The CPSC should have discretion to grant relief from the third party testing requirements when there are no certified labs or an insufficient number of certified labs to handle the testing requirements of the industry.

3. I have several questions concerning the public database mandated by CPSIA.

a. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?

RESPONSE: Yes.

b. Should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published?

RESPONSE: Yes.

c. If a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should that dispute be resolved and by whom?

RESPONSE: The CPSC should be required to resolve disputes about accuracy before product complaints are posted on the public website.

d. The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe the draft legislation's narrowing of eligibility to submit complaints is necessary?

RESPONSE: Yes. This will avoid the filing of unfounded complaints by persons or organizations that lack direct knowledge of the circumstances.'

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May 11, 2011

Via Electronic Mail: Alex.Yergin@mail.house.gov

The Honorable Mary Bono Mack, Chairman
The Honorable G. K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade
Committee On Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6615

Re: Discussion Draft of H.R. _____, a bill that would revise the Consumer Product Safety Improvement Act: Response to Questions

Dear Chairman Bono-Mack and Ranking Member Butterfield:

Please find my responses to the questions by Mr. Dingell and Mr. Butterfield.

a. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?

CPSIA has been interpreted, unfortunately, by the Commission to require the posting of information to the database even if the Commission has failed to resolve a timely and substantial claim of material inaccuracy submitted by the manufacturer. This is unfair and an inappropriate policy for a federal agency. There should be a higher premium placed by CPSC on valid, accurate, and useful information than could be found in blogs and other posts on the internet. Today, the Commission states that it is making these decisions within several days from the time the manufacturer replies so it is practical and there will be no hardship for the Commission to resolve these claims expeditiously.

b. Should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published?

Yes, a timely and substantial claim by a manufacturer that a submission is inaccurate should be resolved by the Commission before any public posting. This is likely to occur only in a relatively few cases and can be resolved expeditiously by the Commission.

c. If a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should that dispute be resolved and by whom?

The Commission has great experience in determining and evaluating the quality and accuracy of information. It is quite capable of quickly determining, for example, whether

a product has been misidentified or an alleged unsafe condition or injury causation is clearly incorrect. Other groups will continue to be able to communicate their concerns to the Commission outside of the database.

d. The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe the draft legislation's narrowing of eligibility to submit complaints is necessary?

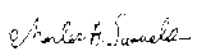
The draft legislation properly refocuses the universe of database submitters to those Congress originally intended – injured persons, their family and their representatives, first responders or medical personnel who have direct and substantial knowledge of an alleged risk or event of harm. Other persons are entitled to their opinions and advocacy, but the purpose of the public database is not to create an opinion forum. That function is filled by many groups, media and internet sites

Mr. Butterfield

Q: Please provide a list of every association or other entity that you have represented, consulted, or provided any other form of paid services with respect to any issues arising under the CPSIA in any forum and the amounts paid to you or your firm for these services.

A: I was asked by the Committee to testify on my own behalf as an expert on CPSC law and procedure. As I stated in my testimony, I am General Counsel for the Association of Home Appliance Manufacturers, and I have registered as a lobbyist for that organization. There is no other entity for which I lobby on CPSC or related matters.

Sincerely,



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May 11, 2011

Via Electronic Mail: Alex.Yergin@mail.house.gov

The Honorable Mary Bono Mack, Chairman
The Honorable G. K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade
Committee On Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6615

Re: Response to Supplemental Questions re Discussion Draft of H.R. _____, a bill that would revise the Consumer Product Safety Improvement Act

Dear Chairman Bono-Mack and Ranking Member Butterfield:

Thank you again for your invitation of the Subcommittee to appear and provide testimony before the Subcommittee on Commerce, Manufacturing, and Trade on April 7, 2011, to testify at the hearing entitled "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act." Please find my responses to the supplemental questions by Mr. Dingell and Mr. Butterfield.

The Honorable John Dingell

1. *I have several questions concerning the public database mandated by CPSIA.*

   a. *Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?*

   A. CPSIA has been interpreted by the Commission to limit its discretion to investigate the veracity and accuracy of complaints prior their posting to the database. The default presumption under the Commission database rule is that posting is required, without discretion, even if the Commission has failed to resolve a timely claim of material inaccuracy submitted by the manufacturer. The presumption under the rule is that CPSC is required to post within 10 business days of its mailing or making such complaint available to the affected manufacturer, importer of record or private labeler for comment. This limits the CPSC from asserting discretion as is customarily afforded independent federal regulatory agencies to reasonably investigate such claims. CPSC should be

afforded the discretion to assure that valid, accurate information is posted on a database put forth under the imprimatur of the U.S. Government, notwithstanding disclaimers and limitations of liability contained therein.

b. *Should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published?*

A. Yes, a timely claim by a manufacturer that a submission is materially inaccurate, so as to be false misleading or unfair should be required to be affirmatively resolved by the Commission prior to public posting. Since such requirement is first predicated upon a legitimate claim of material inaccuracy, under penalty of law, if the claim itself is false the Commission can be required and should be afforded the opportunity to validate the complaint prior to posting. This seems fundamentally fair.

c. *If a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should that dispute be resolved and by whom?*

A. The Commission already has experienced staff capable of reviewing hazard data, conducting investigations of hazards and discerning factual so as to screen data to assure reasonable accuracy of information. This was one of the very reasons for support of increased funding for the agency with the passage of the CPSIA.

d. *The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe the draft legislation's narrowing of eligibility to submit complaints is necessary?*

A. The draft legislation seeks to assure that duplicate complaints and issues related to "hearsay" complaints are resolved. We support database submissions by those persons reasonably intended by Congress to be eligible to submit claims namely injured person, their family and their representatives, first responders or medical personnel who have direct and substantial knowledge of an alleged risk or event of harm. Requirements that hew to the original purpose of Congress, yet provide a way for duplicative or hearsay information to be weaned from the database, will allow CPSC staff to better use their limited resources.

The Honorable G. K. Butterfield

1. Please provide a list of every association or other entity that you have represented, consulted, or provided any other form of paid services with respect to any issues arising under the CPSIA in any forum and the amounts paid to you or your firm for these services.

A. In my testimony I noted firm works as independent legal counsel to the Craft& Hobby Association (CHA), Toy Industry Association (TIA), Juvenile Product Manufacturers Association (JPMA), Halloween Industry Association (HIA), and individual companies.

These services include but are not limited to issues arising under the CPSIA. Indeed most of our legal services are unrelated to the CPSIA. Our client Associations employ independent or staff registered lobbyists. We have noted that our services are broader than just dealing with CPSIA issues. It was in my individual capacity that as a legal practitioner dealing with children's product safety standards and issues beyond the pale of the CPSIA that I was requested to appear and testify before this Subcommittee. I did not charge any client a fee for services to do so. In the aggregate I estimate that no more than $50,000. annually has been allocated in relation to fees providing member information, education, seminars, bulletins and specific client advice (subject to attorney client privilege) or in rendering technical and legal advice specifically related to CPSIA required rulemakings (conducted independently in accordance with due process requirements of the Administrative Procedure Act as part of the CPSC's rulemaking function).

2. *I understand that you represent the Juvenile Products Manufacturers Association (JPMA).*

   a. *Does JPMA have a third-party testing program for the durable nursery products for which the Republican discussion draft removes mandatory third-party testing requirements?*

A. Yes, the JPMA does have a Certification Program that includes testing by third party designated laboratories as part of the program. The program also will permit reliance on alternate test and component part test rules, related to selection and testing or representative samples from production and reliance upon component supplier certifications, to the extent permitted by the Consumer Product Safety Commission (CPSC). The revised discussion draft as currently being circulated would not eliminate such program or preclude the program's inclusion of testing requirements by independent third party internationally accredited testing laboratories. The CPSC is afforded the discretion to require such testing as part of a suitable quality assurance program under the current draft rules under discussion. As we understand the current draft third party testing as a component of such Certification program would not be eliminated.

   b. *Does JPMA support third-party testing for durable nursery products?*

A. First and foremost JPMA supports sound quality assurance programs and procedures as part of sourcing materials and in the production of products so that testing when the product is already entered into U.S. Commerce is obviated. Verification third party or firewalled laboratory testing as part of such production process is supported as part of its Certification Program. This is distinct from a requirement that the CPSC accredit laboratories performing such testing, if such accreditation process creates production bottlenecks or sourcing issues. CPSC should be afforded the discretion to recognize existing valid NIST recognized international accreditations for such laboratories; this could streamline the process and be used to avoid bottlenecks in sourcing, production and distribution of goods in commerce. JPMA supports affording the Commission the authority to prescribe reasonable testing programs, such as its Certification program, to be used as the basis for certification under CPSIA. In addition JPMA supports reasonable requirements that assure availability and capacity of internationally accredited, NIST recognized laboratories sufficient to timely conduct testing, so as not to impede the free flow of trade or create bottlenecks in the supply

chain. This is especially important to assure consumer supply and availability of new durable juvenile products that will be subject to increasingly stringent mandatory safety regulations under Section 104 of the Consumer Product Safety Improvement Act of 2008. We also support the flexibility needed by the Commission to assure that congressionally specified alternate test rules are recognized and implemented as part of this process.

Thank you for your additional inquiries.

Sincerely,

Frederick Locker

Frederick Locker

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

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April 27, 2011

Mr. Dan Marshall
Vice President, Handmade Toy Alliance
Co-Owner, Peapods Natural Toys & Baby Care
2290 Como Avenue
St. Paul, MN 55108

Dear Mr. Marshall,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on April 7, 2011, to testify at the hearing entitled "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, May 11, 2011. Your responses can be emailed to the Legislative Clerk, in Word or PDF format, at Alex.Yergin@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade

cc: The Honorable G. K. Butterfield, Ranking Member,
Subcommittee on Commerce, Manufacturing, and Trade

Attachments

May 9, 2011

The Honorable Fred Upton,
Chairman, Commerce and Energy Committee

The Honorable Mary Bono Mack
Chair, Subcommittee on Commerce, Manufacturing and Trade

The Honorable G K. Butterfield
Ranking Member, Subcommittee on Commerce, Manufacturing and Trade

The Honorable John Dingell
Member, Subcommittee on Commerce, Manufacturing and Trade

Re: Questions for the Record from the April 7 Hearing on Reform of the Consumer Product Safety Improvement Act (CPSIA)

The Honorable G. K. Butterfield

1. During your oral testimony you stated that the Handmade Toy Alliance endorsed the Republican discussion draft "because of the relief it provides to our members." You went on to suggest that the draft provides your members an exemption from third-party testing or that your members would be allowed to follow alternative testing procedures. My understanding, based on the advice of lawyers on my staff, and on Chairman Bono Mack's opening statement, is that the draft does not provide any relief to your members from the mandatory third-party requirements for five specific products or hazards: (1) lead paint; (2) lead in children's metal jewelry; (3) small parts; (4) compliance with crib standards; and (5) compliance with pacifier standards. Relief is only available to your members from any additional testing requirements that CPSC might require in the future through the rulemaking process outlined in the draft. Small crafters will still have to have their children's products third-party tested for lead in metal jewelry, small parts, and compliance with the crib standards. In addition, ASTM F-963 will remain a mandatory standard, so your members will still have to comply with all of ASTM F-963 and certify that they have done so.

a. Assuming my understanding is accurate, do you and your members still support the Republican discussion draft even though it does not provide full relief from compliance with CPSIA? If so, please explain why.

First and foremost, we wish to restate that our primary goal is the passage of meaningful CPSIA reform

as soon as possible. Although the discussion draft would provide relief for our members in key areas, we remain concerned about many other provisions of the CPSIA which unfairly disadvantage small businesses. These include retroactivity, labeling requirements, the 100ppm lead content standard, lack of harmonization with the European Union, and testing requirements for small parts and lead in paint. In the interest of expediency, we have chosen to focus our efforts on providing the most relief for as many of our members as possible.

Our ideal solution to the unintended consequences of the CPSIA is outlined in our platform located at http://www.handmadetoyalliance.org/Resources/TheHTAPlatform.aspx . The discussion draft proposes relief through CPSC rulemaking as you indicate, but with the protecting stipulations that the benefits of third party testing justify the costs; that rules impose the least possible burden; and that an exemption is provided by default in the absence of rulemaking. These stipulations make compliance achievable for our membership. However, our preference remains a legislative exemption for micro-businesses.

Our purpose from the beginning of our organization has always been to mitigate the costs of third party testing on small batch children's product manufacturers. The CPSIA established requirements for many types of tests for many different types of products. In speaking with our members, our analysis is that the greatest burdens we face are mandatory third party testing for lead in substrate and ASTM F-963 testing for toys, both of which are scheduled to be implemented by the end of this year. We are not seeking exemptions from the standards themselves, but from the third party testing requirements. In both cases, we believe that small batch manufacturers should be allowed to self-certify based on a reasonable testing program. The discussion draft would make this possible.

We are not pursuing exemptions from testing requirements for lead in paint, metal jewelry, or crib standards. In the case of the lead in paint and metal jewelry standards, we recognize two realities. First, these were the two areas which caused the majority of product safety concerns prior to the enactment of the CPSIA. Second, although we disagree with the need for testing American and European products for lead in paint violations because lead paint has been outlawed in those countries for over 30 years, we recognize that the damage to these companies has already been done. The lead in paint testing requirement has been in place for almost a year and a half. Several respected companies have already ceased operations as a result. The damage has already been done. We hope that component-based testing will mitigate the cost of lead in paint testing in the future.

We are not at this time concerned with the crib standard. None of our members manufacturer cribs.

As for the small parts testing requirement, we believe that the CPSC can and should develop alternative testing methods which would allow small-batch manufacturers to self-certify. This standard is very straightforward and relatively easy to test for. In a perfect bill, the small parts standard would not be excluded from the exemptions available to small batch manufacturers.

Once again, we urge the House and the Senate to work together to mitigate the overwhelmingly negative impact of the CPSIA on small businesses.

The Honorable John Dingell

1. The draft legislation amends section 101(b) of CPSIA to exempt components of children's products from the Act's lead limits if such components do not cause a child to ingest more than a de minimus amount of lead. The legislation would require the Commission to specify procedures for manufacturers to test and estimate this de minimus amount. Do you believe small manufacturers and handcrafters will

be able to afford and/or carry out such test procedures?

No. We do not believe that small batch manufacturers will be able to avail themselves of the *de minimus* exemption process. The costs involved in meeting the requirements of this process would be beyond the reach of our members. However, we hope that the CPSC will rule on *de minimus* applications made by larger companies in such a way that smaller businesses may benefit as well. For example, if the CPSC rules that a given company's leaded crystal rhinestones meet the *de minimus* standards, we hope that it will make its ruling categorically, so that *all* manufacturers which use leaded crystals may also benefit. We would hope that committee report language would communicate the expectation that *de minimus* rulings should be made as generally as possible and not limited to only a specific product made by a specific manufacturer.

Responses from Rachel Weintraub to Questions for the Record from Hearing on "Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act," April 7, 2011

Questions from the Honorable Mary Bono Mack

Question

1. Which is more dangerous: a children's product containing 10,000 ppm lead that does not leach enough lead to result in a measurable increase in a child's blood lead level, or a product that contains 100ppm lead that leaches enough lead to result in a measurable increase in a child's blood lead level?

Answer

The first example is potentially dangerous and the second is definitely dangerous. If a child already has a moderately elevated blood level, exposure to a product that may not leach enough lead alone to measurably increase blood lead level could, in combination with other exposures, result in an increase in blood lead levels. Depending upon the composition of the item, it could leach higher levels of lead over time as the materials deteriorated. In addition, there are unexpected circumstances, such as a child ingesting a product, that can lead to higher absorption than expected. Given the long-established toxicity of lead to children's brains, the American Academy of Pediatrics strongly recommends eliminating all unnecessary sources of exposure.

Question

2. Do you think the Consumer Product Safety Commission should focus its efforts primarily on products where it can prevent the most harm to the public?

Answer

The Consumer Product Safety Commission should balance numerous factors when it prioritizes its work. The factors that should be balanced include: if the harm is preventable, how pervasive the harm is, and CPSC's resources and expertise available to address the harm. Importantly, as the only agency standing between consumers and potentially deadly products, as CPSC weighs numerous factors in determining what issues to address, CPSC cannot afford to completely ignore any hazard.

Question

3. You made a claim that the discussion draft will "keep babies in known unsafe cribs." Which cribs did you have in mind? What is your basis for claiming that they are unsafe? If they are known to be unsafe, why has CPSC not undertaken a recall (in which case, the costs of purchasing a new crib might be borne by the manufacturer of the unsafe product instead of the purchaser)?

Answer

Because the Discussion Draft will allow non-drop side cribs to be used in day care facilities if in compliance with state supervision laws, cribs that have other types of hazards could still be used. Cribs that have slats that are too far apart or corner posts are known hazards to babies. Cribs that have these elements have not been recalled by CPSC but rather voluntary standards have prohibited them over the years. CPSC has never recalled cribs because they do not meet the newer voluntary standard or even when they didn't meet the older mandatory standard.

Question

4. How does an inaccurate report aid a consumer in making a smart purchase?

Answer

This question presumes that there will be inaccurate reports in the database. I am not aware of data supporting the proposition that reports will not be accurate. The database includes criteria that require eight specific fields of information and allows manufacturers not only to place a comment on a posting but also to make a claim that the information in the report is materially inaccurate. We understand from the CPSC that manufacturers have been claiming material inaccuracy for about 20 percent of claims and that for more than half of them the claim involves a misidentification of the manufacturer. We understand that these claims are being resolved before they are being posted.

Question

5. How does an incomplete report aid a consumer in making a smart purchase? For instance, there are over 100 GRACO baby chair models. How does a report that identifies a product as GRACO, rather than by specific model, help a consumer?

Answer

First, the type of situation that this question presents is not reflective of the vast majority of information received in the database thus far. In fact, we understand from CPSC that over 80 percent of the reports submitted to the database contain model numbers.

Second, information such as this could help a consumer by confirming a similar hazard pattern that may have occurred to them or by reinforcing that steps should be taken to ensure against a potential hazard. For example, if the issue had to do with a tray breaking or not securing properly, it could remind a parent to always make sure that the tray is correctly latched, that the tray cannot be used as an effective restraint, and that the straps should always be used.

Question

6. You testified that "many organizations testi[ied] that testing to 100ppm was technologically feasible and that companies were already complying with that standard." The issue is not whether it can be tested but whether companies can consistently reach that very low level in metal-containing products and a number of organizations testified at that same proceeding that it is not feasible. Why are your organizations right when those that actually manufacture the products are wrong?

Answer

In my written testimony, I stated that, "At a recent CPSC hearing on this issue, many organizations testifying stated that testing to 100 ppm was technologically feasible and that companies were already complying with that standard." Further, Jay Howell who also testified before you on April 7, 2011, stated in his written testimony that,

> "In a recent Commission hearing on the technological feasibility of reducing lead limits to 100 ppm, a representative of SGA, a global inspection, verification, testing, and certification company, presented a statistical analysis of lead content testing data (89,273 data points) collected primarily from its Shenzen laboratory that specializes in the testing of children's toys and other children's products. In its analysis, SGS found that 96.29 percent of metal components tested at or below 100 ppm lead."

Thus, Mr. Howell's testimony expanded upon and confirmed my point that data is proving that compliance with the 100 ppm lead level is technologically feasible. This is the critical question since the CPSIA includes in section 101(a)(2)(c) that, the lead limit for children's products will be 100 ppm "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category."

Question

7. You criticize the phthalate provisions of this draft and I have a couple of questions on that.

   a. First, you disagree with the provision because the CSPC can carve out products where the prohibition on phthalates is not necessary to protect children's health. However, you also testified that the point of CPSIA is to protect children's health. If a prohibition does not exist to protect health – in what you consider a public health law - why should it remain on the books?

Answer

The phthalate provision in the Discussion Draft weakens public health by potentially reducing the number of products that would be required to meet the phthalate standard.As I stated in my written testimony, "The phthalate provision in CPSIA protects our children from the cumulative risks of hormonal chemicals that affect genital development and have been associated with testicular cancer and other fatal diseases and serious conditions. Narrowing the definition of the scope of the products covered by the phthalate provision and creating large opportunities to exempt products from coverage will undermine the health protection of the original phthalate provision of the CPSIA."

Question

   b. Second, you criticize the "tight timeline" in which this bill would require to act on the interim prohibition established in CPSIA once the Chronic Hazard Advisory Panel issues its report. However, this draft only requires that the CPSC commence its rulemaking in 90 days. What is your recommendation on a timeframe in which the CPSC should conclude its rulemaking on this matter? Begin in 90 days and end in 6 months…12 months…18 months?

Answer

The phthalate provision is the only provision in the Discussion Draft that contains a timeline at all. While the phthalate provision requires CPSC to begin a rulemaking in 90 days it also requires the rulemaking to be completed in a time yet to be determined. There is no clear reason why CPSC and industry should have to review the CHAP report and initiate a rulemaking within 90 days. As for the time frame in which CPSC should conclude its rulemaking, the CPSIA is already clear that the Commission must complete that within 180 days. The question is: how can Congress justify forcing the lifting of a ban of potentially toxic substances – regardless of what the science says- if the Commission doesn't conclude its rulemaking in 180 days?

Question from the Honorable Pete Olsen

1. Ms. Weintraub – the Chairman, myself, and Mr. McKinley all asked you during the hearing to provide us with verified statistics of the lead-in-substrate injuries you spoke of in your testimony. Because we did not receive an answer, I would like to ask you again - for the record - to provide us with verified statistics of instances where any children have been injured, sickened or killed by lead-in-substrate. Please substantiate these claims.

Answer

According to the CDC, "Approximately 250,000 U.S. children aged 1-5 years have blood lead levels greater than 10 micrograms of lead per deciliter of blood, the level at which CDC recommends public health actions be initiated. Lead poisoning can affect nearly every system in the body. Because lead poisoning often occurs with no obvious symptoms, it frequently goes unrecognized."[1] Since lead exposure often occurs without obvious symptoms, it is difficult to pinpoint the causes of the lead exposure. There are known symptoms of lead exposure. These include reduced I.Q., hyperactivity, behavioral problems, learning disabilities, health problems such as brain damage, and potential damage to the central nervous system, kidneys, and reproductive system."

CDC does not break down its data to identify whether children have been injured or killed by lead in the substrate of children's product but does list toys and children's jewelry as a source of potential lead exposure among other sources.

While chronic lead exposure is vastly more common, rare instances of acute lead exposure have been documented from consumer products, including a death to a child in Minnesota after swallowing a charm that was almost entirely lead,[1] and a report of a child suffering severe adverse health impacts in Oregon, after he swallowed a charm bought from a vending machine that was 38.8 percent lead.[2]

The goal of the lead provision in the CPSIA is to continue the successful work of the broad public health community that has reduced lead exposure to children and focus on known sources of lead in consumer products. The CPSIA seeks to help create a generation of safer children.

Questions from the Honorable G. K. Butterfield

Question

1. Prior to CPSIA, assurance for the safety of children's product safety relied on blind trust. Parents relied on what they thought were reputable and well-established companies to put only safe products into the marketplace. But those companies, in many cases, relied on the word of overseas suppliers to ensure the safety of their products. There was no mandatory system of independent verification. The recalls of 2007 and 2008 proved faith in manufacturers and suppliers to do the right thing was not an adequate safeguard for children's health and safety. I understand that the mandatory independent third-party testing required by CPSIA is all about independent verification of the safety of children's products.

    a. Please explain why a system that requires independent verification is particularly important when it comes to the safety of children's product.

Answer

The goal of independent safety verification is to prevent safety hazards before the product comes onto the market. The previous system in place before passage of the CPSIA relied upon a system that was essentially, "trust and maybe, possibly, verify" product safety recalls, and a hope that manufacturers were complying with existing voluntary standards. This system failed consumers. The recalls of 2007 and 2008 highlighted these failures and illustrated the need for a better more meaningful system in place.

Voluntary recalls were virtually the only method for CPSC to address product safety hazards before CPSIA passed. This was inadequate for two main reasons. First, the recall is reactive. The harm already

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[1] http://www.cdc.gov/mmwr/preview/mmwrhtml/mm55d323a1.htm
[2] http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5323a5.htm

occurred, the product is already in consumer's homes and in children's hands. The recall process is a reaction to the known product hazards. Second, recalls aren't always effective. Recall compliance rates rarely exceed 20 or 30 percent. So, even when there is a reactive recall, not all the consumers who need to know about it actually find out about it and take the product out of their home.

Independent third party testing is important for children's products because it is proactive, it requires that manufacturers take efforts to ensure compliance with safety standards, and it seeks to prevent conflicts of interests that could emerge in non-independent testing. To best protect consumers from product hazards, products should be required to be tested for safety compliance with existing mandatory standards *before* they can enter the stream of commerce, and potentially pose risks to children. CPSC does not enter manufacturing facilities and is hard pressed, due to its budget, to police the marketplace even after products are in the stream of commerce. Therefore, to ensure that products meet the toy, lead, phthalate and infant durable product standards of the CPSIA, third- party testing is necessary.

The third-party testing requirement is proactive and helps ensure that products for vulnerable consumers, children, are safe from an earlier stage in the supply chain – as opposed to conducting costly recalls after consumers have been exposed to the hazard. This will save consumer lives and prevent costly recalls. For over 30 years, until the passage of the CPSIA, third-party testing was not required. In essence, the CPSC and consumers had to hope that products met the required standards. This wasn't happening and children suffered as a result. Relying on manufacturer assurances of safety has put children at risk: for example, CPSC relied upon assurances of magnet toy manufacturers that the toys they sold to the public *after* recalls would not pose the same hazards to children as the recalled toys. However, the same recalled toys continued to be sold without any changes to improve safety, because there was no third-party testing to check that manufacturers were following the law.

Question

b. Please explain why certification by manufacturers to mandatory safety standards – the system in place prior to enactment of CPSIA that still remains part of a manufacturer's compliance obligations – or even the increased civil penalties enacted under CPSIA are not enough to ensure that manufacturers comply with children's product safety rules.

Answer

Certification by manufacturers of mandatory safety standards and increased civil penalties are, alone, not enough to ensure that manufacturers comply with children's product safety rules because relying upon the manufacturers to ensure that their products will comply with the mandatory standards, of which there were very few before CPSIA was passed, failed to prevent millions of non compliant and potentially hazardous products from entering the marketplace. Certification is not necessarily a process conducted by an independent third party. In order to ensure that the product meets the standards, another entity without a financial interest in the sale of the product must be involved in ensuring compliance.

The increased civil penalties of the CPSC, just like product recalls, are reactive and occur much too late in the life cycle of a product, only after the violations have occurred and the safety hazard has exposed consumers to a risk of harm. While civil penalties need to be robust to deter wrongful conduct, it remains an important aspect of a robust product safety system. Civil penalties alone do not require specific actions to ensure compliance with safety standards.

Questions from the Honorable John Dingell

Question

1. I have several questions concerning the public database mandated by CPSIA.

a. Is it your understanding that CPSIA requires all information submitted to the consumer complaint database to be published online within 10 days of its receipt, regardless of such information's accuracy?

Answer

No, confidential business information will not be published in the database. Further, if reports are not complete, such that each of the all eight fields of information are not included, the reports are not posted, the time line is not yet started and CPSC works to complete the information provided. Once the fields are complete, the time clock begins to run.

Question

b. Should a manufacturer be given the opportunity to contest the accuracy of a consumer complaint before it is published?

Answer

Manufacturers already have the opportunity to contest the accuracy of a consumer complaint before it is published and the manufacturer has the ability to post a comment that would appear on the report indicating a concern about the accuracy of a report.

Question

c. If a manufacturer is allowed to dispute the accuracy of the information in a consumer's complaint, how should that dispute be resolved and by whom?

Answer

CPSC should resolve any dispute that arises based upon information provided by the manufacturer and by the consumer.

Question

d. The draft legislation amends CPSIA to permit only persons directly harmed by a consumer product, their family, their legal representative, or another person authorized on their behalf to submit a complaint to the database. Previously, CPSIA permitted anyone to submit complaints about a consumer product. Do you believe the draft legislation's narrowing of eligibility to submit complaints is necessary?

Answer

No. The draft legislation's narrowing of who can report to the database is not necessary.

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[i] http://www.cdc.gov/nceh/lead/

[ii] http://www.leadsafeillinois.org/facts/ripple-effects.asp

THE VIEWS OF THE INDEPENDENT AGENCIES ON REGULATORY REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JULY 7, 2011

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THE VIEWS OF THE INDEPENDENT AGENCIES ON REGULATORY REFORM

THURSDAY, JULY 7, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:35 a.m., in room 2322 of the Rayburn House Office Building, Hon. Cliff Stearns (chairman of the subcommittee) presiding.

Members present: Representatives Stearns, Terry, Burgess, Blackburn, Bilbray, Scalise, Gardner, Griffith, Barton, DeGette, Schakowsky, Castor, Markey, Green, Christensen, and Waxman (ex officio).

Staff present: Allison Busbee, Legislative Clerk; Stacy Cline, Counsel, Oversight; Todd Harrison, Chief Counsel, Oversight & Investigations; Brian McCullough, Senior Professional Staff Member, Commerce, Manufacturing, and Trade; Andrew Powaleny, Press Assistant; Alan Slobodin, Deputy Chief Counsel, Oversight; Sam Spector, Counsel, Oversight; Kristin Amerling, Democratic Chief Counsel and Oversight Staff Director; Michelle Ash, Democratic Chief Counsel, Commerce, Manufacturing, and Trade; Phil Barnett, Democratic Staff Director; Tiffany Benjamin, Democratic Investigative Counsel; Jocelyn Gutierrez, DOE Detailee; Karen Lightfoot, Democratic Communications Director, and Senior Policy Advisor; Felipe Mendoza, Democratic Counsel; Ali Neubauer, Democratic Investigator; and Roger Sherman; Democratic Chief Counsel, Communications and Technology.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, everybody. The Subcommittee on Oversight and Investigation will come to order, and there will be an opportunity for each of us to give an opening statement, and I shall open with mine.

President Obama's Executive Order 13563 states that agencies must take into account the costs and benefits of proposed regulations; use the least burdensome methods to achieve regulatory goals; maximize net benefits; and evaluate alternatives to direct regulation.

The Order also requires agencies to conduct periodic reviews of significant regulations to determine whether they are outmoded, ineffective, insufficient, or excessively burdensome. These retrospective reviews have been required for more than 30 years, and

if conducted as intended, could be a crucial tool in reducing the burden of regulation on our economy today.

As chairman of this subcommittee, I have set out to ensure that these goals are simply achieved. Regulations cost money, and in today's weak economy, we cannot afford such burdens when they are totally unnecessary. During our June 3rd hearing, Mr. Cass Sunstein of OMB indicated that although independent agencies were not bound to comply with the Executive order, he believed that they should.

Unfortunately, none of the independent agencies under the committee's jurisdiction have to date complied with the Executive order.

We are holding this hearing today to ask the CPSC, the FCC, the FTC and FERC to explain why they did not submit a regulatory review plan to Cass Sunstein by May 18th, as they were asked to do. While each of these agencies engages in some degree of regulatory review, none of them conduct the kind of top-to-bottom, regular retrospective review that will help to unburden our economy.

The CPSC, perhaps more than any other agency today, seems determined, in our opinion, to pass regulations without even a hint of regulatory humility. Commissioner Northup will testify that CPSC regulations are estimated to cost industry billions of dollars with no cost-benefit analysis done to justify those regulations and no analysis done to show improved safety for our children. Commissioner Northup has also submitted for the record today a list of businesses that have closed their doors in part because of CPSC regulations.

Now, we realize many of the CPSC's most damaging regulations are required by the CPSIA, which has had a number of unintended consequences. Until Congress can act to reform that law, we would hope the CPSC would use its discretion where possible to comply with the President of the United States Executive order. Where CPSC doesn't have discretion, we would hope the CPSC Democrat commissioners would be cooperative in helping this committee identify where they need more discretion rather than sending last-minute partisan letters meant to derail the reform process.

Meanwhile, Congress asserted deregulatory goals in regard to the FTC decades ago, removing its authority to operate under the Administrative Procedure Act and instead instituting Mag-Moss procedures, created under a Democratic Congress to halt the agency from further significant rulemaking. Today, the agency resorts to rulemaking through orders and guidelines that do not undergo a notice and comment process.

Although FERC does not issue a large number of regulations, there is room to improve in its rulemaking and regulatory review also. FERC regulations call for broad ranges of data sets without a clear indication on how the agency utilizes this information. It has not conducted a top-to-bottom review of its regulations since the Clinton Administration. And it is unclear what, if any, cost-benefit analysis is done of the impact its policies have on the energy industry and consumers.

Now, as for the FCC, in drafting both the Communications and Telecommunications Acts, Congress emphasized the importance of deregulation. The FCC is required to review its telecommunications

regulations every 2 years and its media ownership rules every 4 years. But these reviews fall short of what the President and this committee have asked agencies to do. They only cover a narrow set of rules at the FCC and the commission can't seem to get these reviews done on time, and the commission hasn't repealed or modified any significant regulations in recent review periods. Perhaps that is because the commission is too busy taking conclusion-driven actions, such as the Net Neutrality Order and the Chairman's Section 706 report.

So my colleagues, I look forward to learning more about what each agency will do to adopt the principles of the President's Executive order. I hope the format of this hearing gives you all the opportunity to learn about what other agencies are doing to improve these processes.

[The prepared statement of Mr. Stearns follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS

President Obama's Executive Order 13563 states that agencies must take into account costs and benefits of proposed regulations; use the least burdensome methods to achieve regulatory goals; maximize net benefits; and evalnate alternatives to direct regulation. The Order also requires agencies to conduct periodic reviews of significant regulations to determine whether they are outmoded, ineffective, insufficient, or excessively burdensome. These retrospective reviews have been required for more than 30 years, and if conducted as intended, could be a crucial tool in reducing the burden of regulation on our economy.

As Chairman of this Subcommittee I have set out to ensure that these goals are achieved. Regulations cost money, and in today's economy we cannot afford such burdens when they are unnecessary. During our June 3 hearing, Cass Sunstein of OMB indicated that although independent agencies were uot bound to comply with the Executive order, he believed that they should. Unfortuuately, uone of the indepeudeut ageucies uuder the Committee's jurisdiction have to date complied with the Executive order.

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As for the FCC, in drafting both the Communications and Telecommunications Acts, Congress emphasized the importance of deregulation. The FCC is required to review its telecommunications regulations every two years and its media ownership rules every four years. But these reviews fall short of what the President and this Committee have asked agencies to do. They only cover a narrow set of rules at the FCC. The Commission can't seem to get these reviews done on time. And the Commission hasn't repealed or modified any significant regulations in recent review periods. Perhaps that's because the Commission is too busy taking conclusion driven actions, such as the Net Neutrality order and the Chairman's Section 706 report.

I look forward to learning more about what each agency will do to adopt the principles of the President's Executive order. I hope the format of this hearing gives you all the opportunity to learn abont what other agencies are doing to improve their processes.

Mr. STEARNS. With that, I yield to the ranking member, Ms. DeGette.

OPENING STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Ms. DEGETTE. Thank you so much, Mr. Chairman.

This is the fourth in a series of hearings examining the government's regulatory review process, and I frankly am pleased to hear you today embrace the President's Executive order that sets forth principles of regulation protecting public health, welfare, safety and the environment while at the same time promoting economic growth and competitiveness. I thought that Cass Sunstein was an excellent witness talking to us about how we can all agree on a bipartisan basis that we should eliminate unnecessary regulations at the agencies.

Now, today we have witnesses, and I am happy to welcome all of them, particularly our former colleague, Congresswoman Northup, and these witnesses represent four important independent federal agencies: the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, and the Federal Trade Commission. Now, Congress created these agencies as independent entities, and so therefore, as you noted, Mr. Chairman, they are not covered explicitly by the President's Executive order on regulatory review. But it is important, though, for the subcommittee and the public to understand whether the independent regulatory review processes at these agencies are effective and efficient.

I would like to correct the record. Mr. Sunstein when he testified, he said he had urged these independent agencies to conduct regulatory review processes but he did not say that they should submit reports to him like the agencies under the purview of the Executive order, so I was a little confused, Mr. Chairman, when you had said that somehow they should submit reports because not only are they not required to but Mr. Sunstein himself does not believe that these agencies are directly subject to the Executive order and that is an order to pervert any President, Democrat or Republican, from overreaching their authority.

Now, as we hear from these agencies on their regulatory review efforts, I think we need to keep a few thoughts in mind. First of all, these agencies were created originally as independent entities

to insulate them from political influence and we have given them decision-making flexibilities that other agencies do not have. Secondly, irrespective of the Executive order, as I mentioned, there are a number of statutory requirements concerning transparency and efficiency in the regulatory process that already apply to the independent agencies. For example, the Regulatory Flexibility Act requires federal agencies, including independent agencies, to analyze the impact of their rules on small organizations. The Administrative Procedure Act broadly lays out the scheme under which agencies propose and finalize regulations, and provides for public participation in the rulemaking process.

Finally, it is important to remember that the underlying mission of all of the agencies before us today is to ensure the safety and the health of all of our citizens. While we should make sure that the regulations they propose are well crafted and not overly burdensome, we should also acknowledge the importance of the work hey do and the regulations they promulgate. For example, this year, the FCC issued a report and order to adopt a rule requiring mobile providers to enter data roaming arrangements with other providers, allowing consumers to remain connected when they travel outside of their provider's coverage area. FTC recently established the Do Not Call registry, which lets consumers choose whether they want to receive calls from telemarketers. This is wildly popular with my constituents, by the way. And every day, FERC acts as a neutral adjudicatory body handling extremely complicated technical issues on the electricity market.

But I want to talk just in the last minute that I have about the recent proposals on the other side of the aisle that would undermine the Consumer Product Safety Commission and some of the other good work that they have done. Three years ago, this committee and this Congress worked hard in a significantly bipartisan manner to put meaningful reforms for consumers into the Consumer Product Safety Improvement Act. This has yielded unbelievable benefits. The CPSC has initiated a wide range of recent efforts to protect children from mandatory standards to cribs to the problem of dangerous toys to banning certain phthalates, and on and on. And this evidence shows that it is beginning to happen.

So I think it is important to notice that these reforms were worked out by this committee in one of the last great efforts that was completely bipartisan. We should embrace that. If there are problems with the way the regulations are being promulgated, we need to talk about that, but eliminating these important consumer product safety provisions is simply not an option.

Thank you, Mr. Chairman.

[The prepared statement of Ms. DeGette follows:]

PREPARED STATEMENT OF HON. DIANA DEGETTE

Today, we are holding the fourth in a series of hearings examining the Federal Government's regulatory review process. The Subcommittee has been focused in particular on President Obama's Executive order setting forth principles of regulation that include protecting public health, welfare, safety, and the environment while promoting economic growth and competitiveness; and providing for public participation and transparency.

The witnesses before us today represent fonr important federal agencies: the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the

Federal Communications Commission, and the Federal Trade Commission. Because Congress created these agencies as independent entities, they are not covered by the President's Executive order on regulatory review. It is important, however, for the Subcommittee and the public to understand whether the regulatory process employed by each of these agencies is effective and efficient.

As we hear from these agencies on their regulatory review efforts, we should keep a few thoughts in mind. First, Congress created these agencies as independent entities to insulate them from political inflnence and granted them decisionmaking flexibilities other agencies do not have.

Second, irrespective of the Executive order there are a number of statutory requirements concerning transparency and efficiency in the regnlatory process that already apply to the independent agencies. For example, the Regulatory Flexibility Act requires federal agencies, including independent agencies, to analyze the impact of their rules on small organizations. The Administrative Procedure Act broadly lays out the scheme under which agencies propose and finalize regulations, and provides for public participation in the rulemaking process.

Finally, it is important to remember that the underlying mission of all of the agencies before us today is to ensure the health and safety of our citizens. While we should make certain the regulations they propose are well crafted, we must also acknowledge the importance of the work that they do and the regulations they promulgate. For example:

o This year, FCC issued a report and order to adopt a rule requiring mobile providers to enter data roaming arrangements with other providers, allowing consumers to remain connected when they travel outside of their provider's coverage area.

o FTC recently established the Do-Not-Call registry, allowing consumers to choose whether they want to receive calls from telemarketers.

o CPSC has initiated a wide range of recent efforts to protect our children, from developing mandatory standards for cribs . to addressing the problem of dangerous toys . to banning certain phthalates in children's products.

o And every day, FERC acts as a neutral adjudicatory body handling extremely complicated technical issues concerning onr electricity market. Through its work the Commission limits regional disparities in electricity, natural gas, and oil pricing.

I am pleased that we have before us today Commissioners from both parties. One of the ways Congress ensured bipartisan input at these agencies was to provide that no more than three Commissioners at the agencies can be of the same party. I hope that the Subcommittee will use this opportunity to hear a variety of perspectives on how to hest ensure an effective regulatory process at the independent agencies, and that avoid focusing on policy or personality disagreements among Commissioners. I look forward to hearing from our distinguished witnesses.

Mr. STEARNS. I thank the gentlelady.

The gentleman from Nebraska, Mr. Terry, is recognized for 3 minutes.

OPENING STATEMENT OF HON. LEE TERRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. TERRY. Well, thank you, Mr. Chairman. I appreciate you holding this important regulatory reform hearing.

I applauded the President when he issued his Executive order creating this cost-benefit analysis and look towards creation of jobs versus elimination of jobs by regulation, and I feel that it is time that the independent agencies adopt this and that is why I have introduced H.R. 2204, the Employment Act, which will require that all major regulations include a statement of the number of jobs created, lost, or sent overseas because of the new rules and regulations. Under this Act, all major federal action significantly affecting jobs and job opportunities require rigorous analysis compared to that given to the environmental impacts, and this legislation would establish a policy that jobs are important as is public health and the environment. And this would be an issue of, you could take into effect the jobs lost by certain American toy companies when we fig-

ure out that children don't eat ATVs but yet banning children ATVs could have an impact on jobs.

Now, we have already seen the problems caused by regulators not paying enough attention to the effect their actions have on jobs. In my own district, regulations enacted by the Consumer Product Safety Commission acting far beyond its authority or intent of this law, what I feel isn't one of the most important ones, it is important but I think it may be an example of one of the most poorly written bills too. For example, Wes and Willie's. I shouldn't have used their name but it is a local small business making children's clothes, some of which they have contracted to have done in China as well as Omaha. Does it really make sense that the same design has to be tested on every size of tee shirt, different color of tee shirts? Does it make sense that they have to add 10 tee shirts together assuming a child is going to completely eat 10 tee shirts in one sitting? None of this really makes sense.

So this type of system where it is one size fits all, Mattel versus Wes and Willie's, it really doesn't make a lot of sense. I have found out the irony is that many of these rules don't really protect the consumers but just make it more difficult to do their job, really putting small businesses in particular on the brink of extinction because of these unnecessary rules and regulations.

So I appreciate this hearing so we can protect, and I will give my time back to the chairman.

Mr. STEARNS. I thank the gentleman, and I yield 2 minutes to the gentlelady from Tennessee, Mrs. Blackburn.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and welcome to our witnesses. We appreciate that you are here to talk with us about the President's Executive Order 13563 and its non-application to the independent agencies.

These agencies have refused to voluntarily comply with the order to require justification for the cost and the burdens of their regulations. Some agencies believe that their political ends justify their regulatory means and that their insulation from the traditional checks and balances is a blank check for them to pursue hyperactivist causes. Bureaucrats bolted a restrictor plate to our economic engine and they really have flagged private sector job growth to the pits and now they are resisting voluntary compliance with the Obama order because failing to justify their costly regulations means Congress and the American people are going to raise more questions instead of delegating more power and authority.

Now, these agencies don't know how to make the best individual decisions for us, what foods we eat, what toys we buy, what privacy settings we want on our mobile devices or what light bulbs we prefer to use in our homes. These agencies that use explicit regulatory intimidation and threats of government taking to impose voluntary regulations on job creators aren't even willing to hold themselves to the same standard. They refuse. We need to hold these agencies accountable. Let us ensure greater efforts are taken to balance the economic harms with the agencies that these agencies are causing on our economic growth and jobs, and I yield back.

Mr. STEARNS. The gentlelady yields back, and I recognize the distinguished ranking member, Mr. Waxman, for 5 minutes for his opening statement.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman.

This is the fourth hearing this subcommittee has had on the issue of regulations. The others have been on the President's Executive order, and the third focused on health regulations that were recently adopted. Now we are looking at the independent regulatory agencies. The President's Executive order applies to those agencies that are under the Office of Management and Budget. They are not independent. The agencies before us are determined by law to be independent. That doesn't mean they don't take into consideration costs and benefits when they issue regulations. They have to have notice and comment and get full input. I think that what we need to do is to make sure we don't have regulations that are unnecessary but these hearings that we have had devolved into forums for questioning health, environment, and consumer protection laws that my colleagues on the Republican side of the aisle find objectionable. I was struck by the comments of the last speaker that we don't want these independent agencies, they don't make good decisions, they don't know how to make the best decisions, they are using regulatory intimidation on jobs creators. I can think of no other expression of hyper view of all this. We shouldn't have a lopsided focus on the costs with no seeming consideration of the benefits, and we haven't had hearings that have resulted in any substantial legislation or important oversight findings.

Now, the four independent agencies have done a lot to make the lives of American citizens better. The Consumer Product Safety Commission recently launched a new consumer complaint database, which allows parents and concerned consumers to obtain important product safety information and which will improve CPSC's ability to identify trends in product hazards more efficiently. Just this morning, I released the first analysis of the product safety database. We found that in its first 3 months of operation, the database has already logged over 1,600 incident reports, including reports of almost 500 injuries or fatalities. And consumers visiting the online database have conducted almost 1.8 million product searches. Now, maybe some of these manufacturers don't want anybody looking over their shoulder but that is not the job of these agencies to do what the manufacturers want. Their job at the CPSC is to protect the consumers.

Mr. Chairman, I would ask unanimous consent that this report be included as part of the committee record.

Mr. STEARNS. Will the gentleman hold? I think we just have a copy of it.

Mr. WAXMAN. I will withdraw my——

Mr. STEARNS. Just withdraw until we have a chance to look at it.

Mr. WAXMAN. The FCC just proposed rulemaking to require cell phone companies to provide usage alerts that warn consumers of unexpected charges on their bills. Less than 7 months ago, the agency adopted a crucial rule to protect the openness of the Internet. I think these are two very important accomplishments, and Ms. DeGette pointed out others. The FTC has recently adopted

rules to protect homeowners from scams falsely promising relief from mortgage payments. In the last year alone, the FTC's Bureau of Consumer Protection filed over 60 cases to protect the rights of consumers. Is this intimidation? It seems to me these agencies are doing their job, and we want to keep them independent from the political pressure that you can see clearly in the comments of members of this committee. FERC protects consumers from price gouging in the electricity and energy markets.

These accomplishments are important. They save money for the American public, prevent fraud and improve public safety and public health. They may offend powerful companies that would like to take advantage of consumers, and which may have support by some members of Congress in carrying their water, but that is no reason for us to browbeat the agencies. The focus of our oversight should be to help these agencies advance the goal of enhancing the lives of the American family.

Our committee is responsible in the area of legislation in some key areas: health care for seniors, setting our Nation's energy policy, promoting telecommunications innovation and competitiveness, and ensuring appropriate consumer protections for American families and children. The oversight work of this subcommittee should shed light on how to best legislate in these and other important subjects.

That is why there are real costs when this committee focuses its time on partisan wheel spinning and messaging. We lose the opportunity to move legislation that will promote jobs, promote economic security and protect the health, safety and welfare of the American public.

I hope that we make good use of our time today with the commissioners, and I urge the chairman and all members to support their efforts on behalf of the American public, and I yield back the balance of my time.

[The prepared statement of Mr. Waxman follows:]

PREPARED STATEMENT OF HON. HENRY A. WAXMAN

Today, this subcommittee is holding its fourth hearing on regulatory reform. The first two hearings focused on the President's Executive order on regulatory review. The third hearing focused on the Administration's recent health regulations.

This time we are focusing ou four independent agencies—the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Federal Trade Commission—which are not subject to the President's Executive order.

I support efforts to ensure that federal regulations are clearly drafted and narrowly tailored, and I believe in transparency and eliminating needless regulation. But the focus of the Subcommittee's hearings on regulatory review thus far has not been on improving the regulatory process. These hearings have devolved into forums for questioning health, environment, and consumer protection laws that my colleagues on the other side of the aisle find objectionable. These sessions also have been marked by a lopsided focus on costs with no seeming consideration of benefits. And they have not resulted in any substantial legislation or important oversight findings.

The four independent agencies before us have done a lot to make the lives of American citizens better.

The Consumer Product Safety Commission recently lannched a new consumer complaint database, which allows parents and concerned consumers to obtain important product safety information and which will improve CPSC's ability to identify trends in product hazards more efficiently. Just this morning, I released the first analysis of the product safety database. We found that in its first three months of

operation, the database has already logged over 1,600 incident reports, including reports of almost 500 injnries or fatalities. And consnmers visiting the online database have conducted almost 1.8 million product searches.

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These accomplishments are important. They save money for the American public, prevent fraud, and improve public safety and puhlic health. They may offend powerful companies that would like to take advantage of consumers, but that is no reason for us to browbeat the agencies. The focus of our oversight should be to help these agencies advance the goal of enhancing the lives of American families.

Our Committee is responsible for forging legislation in key areas: providing health care for seniors; setting our nation's energy policy; promoting telecommunications innovation and competitiveness; and ensuring appropriate consumer protections for American families and children. The oversight work of this Subcommittee should shed light on how to best legislate in these and other important areas.

That is why there are real costs when the Committee focuses its time on partisan wheel-spinning aud messagiug: we lose the opportunity to move legislatiou that will promote jobs, promote the economic security, and protect the health, safety, and welfare of the Americau public.

I hope the Subcommittee makes good use of our time today with the Commissioners, and I urge the Chairman and all members to support their efforts on behalf of American families.

Mr. STEARNS. I thank the gentleman, and all opening statements are concluded.

I ask unanimous consent that the written opening statement of Mr. Upton and others who wish to provide opening statements for this hearing be made part of the record. Without objection, the documents will be entered into the record.

[The prepared statements of Mr. Upton and Mrs. Myrick follow:]

PREPARED STATEMENT OF HON. FRED UPTON

In January, President Obama issued Executive Order 13563 aud joined a goverument-wide dialogue about regulatory reform. While he is not the first president who has tried to tackle this challenge, his stated commitmeut to reiuing in overregulation was a hopeful first step this year. Regulatory relief is essential to a strong ecouomic recovery and boostiug job creatiou. That's why it plays a leading role in the GOP's Plan for America's Job Creators.

Five months later, however, I must say that I am disappointed with the Executive order's results. The President's stated goals are far from beiug realized aud nowhere is that more true than among the independent regulatory agencies.

The Office of Information and Regulatory Affairs estimates that independent agencies have a $230 billion a year impact on the U.S. economy—not au iusigmificant figure. Nevertheless, Executive Order 13563, like those which preceded it, does not expressly apply to these agencies.

According to a February guidance memo sent by OIRA Administrator Cass Sunstein, the independent agencies "are encouraged to give consideration to all [of the Executive order's] provisions. . .Such agencies are encouraged to consider undertaking, on a voluutary basis, retrospective aualysis of existing rules." Shamefully, at this Subcommittee's June 3, 2011 hearing, Mr. Sunstein confirmed for us that not one of the independent agencies under this Committee's jurisdiction had voluntarily submitted to his office such a plan.

In a June 1st letter to the editor printed in the Wall Street Journal, Nancy Nord, a Commissioner of the Consumer Product Safety Commission, noted that, under the Obama administration, CPSC has "ignored the recent direction to look for and eliminate burdensome regulations. We are just too busy putting out new regulations." Two of Ms. Nord's fellow CPSC Commissioners are here today, along with several other representatives from independent agencies. I hope they can provide us with

an update on their efforts to provide regulatory relief and answer troubling questions about what appears to be inaction until now in complying with the letter and spirit of the President's Executive order.

Independent regulatory agencies contribute their fair share of burdensome regulations that affect all aspects of our economy and stifle job creation. The President's push for regulatory reform is meaningless if independent regulatory agencies are left out of this effort.

PREPARED STATEMENT OF HON. SUE WILKINS MYRICK

I appreciate the Subcommittee's examination of how independent agencies are approaching the "Improving Regulation and Regulatory Review" Executive order issued by President Obama. As we're all well aware, regulations can create unnecessary burdens that hinder economic development and job creation.

An electric utility headquartered in my home state of North Carolina is tangled up in an ongoing hydropower relicensing problem which I think exemplifies the real world detriment that can result from a lack of coordination at the federal level.

As I understand it, Duke Energy is trying to relicense a set of dams in the Catawba-Wateree river basin in South Carolina. Working with local stakeholders and the local office of the National Marine Fisheries Service (NMFS), the Federal Energy Regulatory Commission (FERC) agreed to incorporate a set of recommendations to protect the endangered short-nose sturgeon as part of the project's Final Environmental Impact Statement for the project. Unfortunately, the regional NMFS in St. Petersburg, Florida ultimately recommended a different set of recommendations that continue to delay the relicensing process.

Not only does this seem to be a case in which two federal entities cannot agree on the appropriate path forward, it highlights a case in which two offices within the same agency cannot agree. A NMFS office several hundred miles away is substituting its judgment for a local office that has been involved throughout the process.

Aside from affecting utility rates paid by consumers in North Carolina and South Carolina, the provisions sought by the regional NMFS office could potentially jeopardize a carefully-negotiated water rights apportionment settlement.

Sadly, the Catawba-Wateree relicensing issue is just oue of many situations in which federal regulatory actions harm Americans. It is my hope that today's hearing will lead to improvemeuts in the regulatory enviroument.

Mr. STEARNS. Now it is my opportunity to welcome our distinguished panel. I don't remember in my experience in Congress where I have ever seen these many agencies collected together, and I don't think there ever has been, at least in my experience. So it is a very auspicious occasion to have this distinguished group here to meet, and we appreciate you coming.

I thought for the members I would just give you a brief bio of each of the witnesses. Commissioner Robert Adler, Consumer Product Safety Commissioner, is a commissioner at the United States Consumer Product Safety Commission. He was appointed in August 2009. Prior to assuming office, he served as a professor of legal studies at the University of North Carolina at the Luther Hodges Junior Scholars in Ethics in Law at Chapel Hill's Kenan-Flagler Business School. At the University of North Carolina, he served as the Associate Dean of the MBA program as Associate Dean of the school's bachelor of science in business. Welcome.

Commissioner Anne Northup is the honorable—in fact, she serves the 3rd Congressional District of Kentucky representing Louisville district in the United States House of Representatives as a Republican from 1997 to 2006. Before her tenure in Congress, she served in the Kentucky House of Representatives for 9 years from 1987 to 1996. On July 30, 2009, President Ohama nominated her to a seat on the Consumer Product Safety Commission and was confirmed by the Senate on August 7, 2009. Welcome, Anne.

Commissioner Robert McDowell was first appointed to a seat on the Federal Communications Commission by President Bush in 2006. He was reappointed to the commission by President Barack Obama in 2009. He brings over 16 years of private sector experience in the telecommunications industry to the commission. Welcome.

Chairman Jon Wellinghoff was named chairman of the Federal Energy Regulatory Commission, FERC, the agency that oversees wholesale electric transaction and interstate electric transmission and gas transportation in the United States by President Obama on March 19, 2009, a member of the commission since 2006. The U.S. Senate confirmed him to a full 5-year FERC term in December 2009. He is an energy specialist with more than 34 years experience in the field. Welcome.

Commissioner Philip Moeller is currently serving his second term on the commission of FERC, having been nominated by President Obama and sworn in for a term expiring on June 30, 2015. He was first nominated to FERC by President Bush in 2006 and sworn into office on July 24, 2006. From 1997 through 2000, he worked in Congress, serving as an energy policy advisor to Senator Slade Gordon, where he worked on electricity policy.

And then we have Chairman Jon Leibowitz from the Federal Trade Commission. He served as chairman of this commission since February 2009. He was appointed to the FTC as commissioner in the fall of 2004. Before coming to the commission, he had a long career in the public sector, working for the U.S. Senate Judiciary Committee for almost 10 years, and prior to that, in the office of Senator Paul Simon. Welcome.

Commissioner William Kovacic served on the Federal Trade commission since January 2006 and served as chairman from March 2008 to March 2009. He was the FTC's General Counsel from 2001 through 2004 and worked for the commission from 1979 until 1983. He has been a professor of law at George Washington University Law School and has also taught law at George Mason University School of Law. Welcome.

As you know, the testimony that you are about to give is subject to Title 18, section 1001 of the United States Code. When holding an investigative hearing, this committee has the practice of taking testimony under oath. Do any of you have any objection to testifying under oath? No? OK.

The Chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today? If not, then if if you would please rise and——

Mr. BILBRAY. Mr. Chairman.

Mr. STEARNS. Yes?

Mr. BILBRAY. I hate to interrupt right now, but one thing I would ask, at least of one member here, is that pictures are not taken while they are being sworn in. I know this is done, but I just think that is unfair to the witnesses. I think it sends a message that it is not appropriate and I would ask the camera people not to take a picture of individuals with their right hand raised. I just think it is used to often to send the wrong message to the public. Everyone here is voluntarily participating and we should not be giving

a false impression to the public. That is just one member's statement but I think in the environment of fairness on both sides, I am going to raise this issue again and again, and I am doing that today, and I apologize.

Mr. STEARNS. I thank the chairman, and as you know, he and I are good friends. Unfortunately, I will have to overrule you. I think the press has a right to take pictures when they want, and I think that is probably what I have seen in my experience being involved with so many Oversight and Investigation hearings as well as others that it is customary to let the press have access, so I am sorry to have to overrule you. And if all of you would please stand up and raise your right hand?

[Witnesses sworn.]

Mr. STEARNS. Well, it is my pleasure now to start with the opening statements, and Mr. Adler, we welcome you and look forward to your statement.

TESTIMONY OF ROBERT S. ADLER, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; ANNE NORTHUP, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; ROBERT MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; JON WELLINGHOFF, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION; PHILIP D. MOELLER, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION; JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION; AND WILLIAM E. KOVACIC, COMMISSIONER, FEDERAL TRADE COMMISSION

TESTIMONY OF ROBERT S. ADLER

Mr. ADLER. Thank you very much, and good morning, Chairman Stearns, Ranking Member DeGette and the members of the Subcommittee on Oversight and Investigations. Thank you for the opportunity to testify along with my colleague, Anne Northup, on behalf of the Consumer Product Safety Commission. My name is Bob Adler and I have been a commissioner at the agency since August of 2009.

I am honored to sit in the company of so many of my fellow independent agency commissioners, and I bring you regrets from Chairman Tenenbaum, who is not able to be here today.

In order for me to respond to the subcommittee's request for the agency's response to Executive Order 13563 and similar Executive orders, I briefly need to review a few critical points about rulemaking at the CPSC. I do so to make the point that we have undertaken the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the Executive orders despite our being exempt from the orders, so I would like to make a few observations and I promise I will be brief.

First, since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act and to the other acts that it enforces to conduct an exhaustive cost-benefit analysis when we write safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any Executive order issued by the Office of the President, and I think in the case of any other agency. In fact, over the years, in

part because of the detailed and lengthy cost-benefit procedures contained in our laws, the commission has actually promulgated very few mandatory safety rules under these procedures.

Now, I did a count, so I could be off by one or two, but by my count, in 30 years we have issued a grand total of nine mandatory safety standards, or about one every 3⅓ years, which has meant we have had to turn to alternative approaches, one of which is working with the voluntary standards sector to promulgate voluntary standards and to upgrade voluntary standards. The other thing that we have done is to work through a very successful corrective action recall program, and I think that has been successful.

With respect to regulatory review, you did note the passage of the Regulatory Flexibility Act in 1980. At that time, the CPSC choose to undertake a retrospective review of every safety rule under its jurisdiction from the very beginning, not just those identified as having a significant impact on a substantial number of small economic entities. Since this review, we have continued for the past 30 years to comply with the requirements for retrospective review of our regulations under the Regulatory Flexibility Act.

In addition to conducting a retrospective review of regulations under the RFA, the CPSC has voluntarily undertaken a comprehensive review of its regulations beginning in 2004 and temporarily suspended in 2007 in a spirit consistent with Executive Order 13563. In fact, in conducting our review, we have committed the agency to using OMB's assessment tool. The only departure from our approach arises because of the enactment of the Consumer Product Safety Improvement Act in 2008. In response to its grave concerns about the need to protect the lives of young children, Congress voted overwhelmingly, and in the House it was a vote of 424 to 1, to set a number of very tight guidelines for the commission to meet. Our general counsel did a count of the number of deadlines imposed on us. There were 42 separate deadlines imposed by the Consumer Product Safety Improvement Act.

But recognizing the difficulty of meeting these guidelines, Congress streamlined our rulemaking authority when writing these children's safety rules and limited the requirements in the CPSIA for economic analysis of the impact of the rules. The streamlined procedure directed to regulate hazardous children's products such as infant bath seats, baby walkers and cribs, all of which were associated with an unacceptable number of fatalities and serious injuries has, I believe, resulted in significantly more expeditious and protective safety standards that should save numerous lives in the coming years and could not have been accomplished otherwise.

I particularly want to note the commission's new crib standards, which was unanimously approved by all of our commissioners and became effective last Tuesday, June 28. This standard sets the most stringent safety requirements for cribs in the world and ensures that the place that infants spend the most time and the most time alone will be the safest place in their homes. Having noted that, I hasten to add that even with this new authority under CPSIA, the commission remains obligated to conduct economic analyses under the Regulatory Flexibility Act assuring that our most vulnerable small business sector is safeguarded along with safeguarding our most vulnerable young consumers.

The commission is well on its way to meeting the deadlines imposed under the CPSIA. We haven't met all of them, and we are going to miss a few more, but as we wind down the bulk of our CPSIA rulemaking, it is my understanding that Chairman Tenenbaum has directed staff to develop options to restart the retrospective review process.

In closing, notwithstanding that independent agencies do not fall under the direct purview of Executive orders like 13563, we at CPSC have always tried to implement the wisdom contained in those Executive orders and to coordinate our efforts in the spirit of such orders to the best of our ability.

Finally, I note that CPSC's jurisdiction is very broad. Roughly speaking, if you walk into a department store, a sporting goods store, a hardware store, a toy store or you go to a school, that is us. Those products that are in those institutions are the things we regulate. But we are an agency that has barely above 500 people and a budget just about $118 million. In other words, I am sitting at a table with agencies that are between two and a half and three times our size. But given these limits on our resources, I think we have done a good job in advancing consumer safety, and thank you very much.

[The prepared statement of Mr. Adler follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
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Statement of
Robert S. Adler
Commissioner
United States Product Safety Commission

Before the
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

July 7, 2011
Rayburn House Office Building, Room 2322

"The Views of the Independent Agencies on Regulatory Reform"

Good morning Chairman Stearns, Ranking Member DeGette, and the members of the Subcommittee on Oversight and Investigations. Thank you for the opportunity to testify along with my colleague Anne Northup on behalf of the Consumer Product Safety Commission (CPSC). My name is Bob Adler, and I have been a Commissioner at the CPSC since August 2009. I am honored to sit in the company of so many of my fellow independent agency commissioners.

An Overview of CPSC and Regulatory Reform

In order for me to respond fully to the subcommittee's request for the agency's response to Executive Order 13563 and similar executive orders, I briefly need to review the history of the CPSC's rulemaking. I do so to make the point that we have undertaken both the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the executive orders. So, I begin with several observations:

1. Since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act (and the other acts it enforces) to conduct an extensive cost-benefit analysis when we promulgate safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any executive order issued by the Office of the President.
2. Over the years, the CPSC has promulgated extremely few mandatory safety rules requiring cost-benefit analyses, a grand total of nine in thirty years -- or about one every 3 1/3 years -- opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.

3. Under the Regulatory Flexibility Act of 1980,[1] the CPSC chose to undertake a retrospective review of <u>every</u> safety rule under its jurisdiction from its beginning, not just those identified as having a substantial impact on a number of small entities (and, therefore, requiring a mandatory review).
4. In addition to the retrospective review of agency regulations mandated by the Regulatory Flexibility Act, the CPSC voluntarily undertook a comprehensive review of its regulations beginning in 2004 in a spirit consistent with Executive Order 13563 and anticipates continuing to do so in the future.
5. The only departure from the approach I've just described arises because of the enactment of the Consumer Product Safety Improvement Act in 2008. In response to its grave concerns about the need to protect the lives of young children, Congress voted overwhelmingly to streamline the CPSC's rulemaking authority when writing children's safety rules and to limit (but not eliminate) the requirements in our laws for economic analyses of the impact of CPSC rules.

I. <u>Cost-Benefit Analysis</u>

In 1981, Congress added a broad and comprehensive set of cost-benefit requirements to the Consumer Product Safety Act (and the other acts enforced by the CPSC) for consumer product safety rules promulgated by the CPSC. These provisions easily match, if not surpass, in their stringency and scope the cost-benefit provisions of the various executive orders on cost-benefit

[1] 5 U.S.C. §§ 601-12.

analysis recommended by the Office of Management and Budget. Among other things, prior to promulgating almost every safety rule,[2] they require the CPSC to:

- Make findings with respect to the degree and nature of the risk of injury the rule is designed to eliminate or reduce; the approximate number of consumer products, or types or classes thereof, subject to such rule; the need of the public for the consumer products subject to such rule, and the probable effect of such rule on the utility, cost, or availability of such products to meet such need; and any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.[3]
- Prepare a final regulatory analysis of the rule containing the following information: a description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs; a description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen; a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.[4]

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[2] While the 1981 changes to the acts enforced by the CPSC require the agency to undertake cost-benefit analysis with respect to almost every safety rule it promulgates, some labeling requirements under § 3(b) of the FHSA do not require the same regulatory analysis.

[3] 15 U.S.C. §2058(f)(1).

[4] 15 U.S.C. § 2058(f)(2).

- Find that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the promulgation of the rule is in the public interest; in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under the CPSA would adequately protect the public from the unreasonable risk of injury associated with the product; in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard that compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard.[5]
- Find that the benefits expected from the rule bear a reasonable relation to its costs and that rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.[6]
- Give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions.[7]

Speaking from personal experience, I note that the analysis and findings contained in section 9 of the CPSA (and similar provisions in other acts the agency enforces) have resulted in rulemaking proceedings that span years of effort and cost the agency millions of dollars. I find it hard to

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[5] 15 U.S.C. § 2058(f)(3).

[6] 15 U.S.C. § 2058(f)(3).

[7] 15 U.S.C. § 2058(d)(2).

believe that OMB or Congress could expect any more analysis by a regulatory agency, especially one that is directed to protect the lives and safety of young children.

2. Alternative Approaches to Protecting the Public

Both in response to the extremely detailed, time-consuming requirements in section 9 of the CPSA[8] (and our other laws) and because of its success in working with the voluntary standards sector, the CPSC has opted, wherever possible, to look to the promulgation and strengthening of voluntary standards as an alternative to developing mandatory standards. The Commission, of course, has always retained the option to undertake mandatory rulemaking where voluntary standards have proven to be inadequate. As I noted, the burdens of mandatory rulemaking have resulted in the Commission's promulgation of only nine standards in the 30 years since the 1981 amendments. In sharp contrast, the Commission has actively participated in the development or enhancement of hundreds of voluntary standards in that same time period. As I shall mention, the Commission's infrequent promulgation of mandatory rules and reliance on voluntary standards has not gone without criticism in Congress, especially when it comes to protecting the lives and safety of young children.

The Commission has also used its recall authority to great effect over the years. Under section 15(b) of the Consumer Product Safety Act, companies are required to notify the Commission whenever they obtain information that one of the products they have placed in commerce:

- fails to comply with an applicable consumer product safety rule,

[8] Section 9 specifically requires that, before CPSC promulgates a mandatory consumer product safety rule, the agency must determine that no voluntary consumer product safety standard would adequately reduce or eliminate a risk of injury. Where an adequate voluntary standard exists and is substantially complied with, the agency must defer to the voluntary standard.

- fails to comply with a voluntary consumer product safety standard upon which the Commission has relied,
- fails to comply with any other rule enforced by the agency,
- contains a defect which could create a substantial product hazard, or
- creates an unreasonable risk of serious injury or death.[9]

These so-called "15(b) reports" have become the basis upon which the Commission has taken action to negotiate Corrective Action Plans (CAP) with companies that have led to the recall of numerous dangerous products. The Commission has participated in thousands of recalls over the years involving hundreds of millions of potentially hazardous products. Although it is impossible to quantify the number of lives saved and injuries avoided through this program, they undoubtedly number in the millions.

There are limits both on the use of voluntary standards and recalls in protecting American consumers, but they have, of necessity, become important tools in CPSC's approach to product safety.

3. CPSC and the Regulatory Flexibility Act (RFA)

Section 610 of the RFA requires agencies to periodically review rules that have a significant impact on a substantial number of small entities.[10] Each agency is required to publish a plan demonstrating its approach to its review. Accordingly, on September 14, 1981, the CPSC

[9] 15 U.S.C. § 2064

[10] 5 U.S.C. § 610.

published its plan for reviewing existing rules under the RFA, as well as subsequent rules within 10 years of their publication.[11]

The CPSC went far beyond the requirements of the RFA in its plan. In fact, the agency not only solicited and reviewed comments for rules that we determined would have a significant economic impact on a substantial number of small entities, we actually conducted a review of every safety rule under our jurisdiction. In addition to soliciting comments from the general public in the Federal Register, we directly contacted affected parties and their trade associations through appropriate trade publications. Moreover, the Commission made an effort personally to contact those persons who submitted comments during the earlier rulemaking proceedings. Based on the information received in the comments, as well as other information available to the Commission, CPSC staff then conducted an assessment of the degree of economic impact on small entities and sought to identify appropriate actions required to minimize the impact on those entities consistent with the objective of the statute under which the regulations were issued.

Under section 610(b) of the RFA, the Commission sought comments on, and reviewed its rules according to, the following factors: (1) the continued need for the rule, (2) the nature of complaints or comments received concerning the rule from the public, (3) the complexity of the rule, (4) the extent to which the rule overlapped, duplicated, or conflicted with other federal rules (and the Commission also considered, to the extent feasible, the extent to which the rule overlapped, duplicated, or conflicted with state and local government rules), and (5) the length of

[11] 46 Fed. Reg. 45621.

time since the rule had been evaluated or the degree to which technology, economic conditions, or other factors had changed in the area affected by the rule.

Since 1981 and the passage of the RFA, our agency has carefully reviewed its regulations. This effort has continued over the last 30 years. On the whole, I believe these reviews have been good both for consumers and the regulated community. Under the RFA (and other provisions of the CPSA requiring rule reviews), the Commission issued reports involving 17 rules under the CPSA, as well as nine rules promulgated under the Federal Hazardous Substances Act (FHSA),[12] eight rules under the Flammable Fabrics Act(FFA),[13] and four rules under the Poison Prevention Packaging Act (PPPA).[14]

4. Voluntary Regulatory Review Efforts

In addition to the rule reviews required by the RFA, the Commission also has recently voluntarily undertaken efforts to review its regulations in a manner consistent with the spirit of Executive Order 13563 and similar executive orders. Specifically, on January 28, 2004, the Commission published a notice in the Federal Register announcing a pilot rule review program.[15] In the notice, the agency committed itself to using OMB's Program Assessment Rating Tool

[12] 15 U.S.C. §§ 1261-1278.

[13] 15 U.S.C. §§ 1191-1204.

[14] 15 U.S.C. §§ 1471-1477.

[15] *See Pilot Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 69 Fed. Reg. 4095 (Jan. 28, 2004) (requesting comments on Commission regulations for walk-behind power mowers, electrically operated toys, standards for flammability of vinyl plastic film, and child resistant packaging for certain salicylate compounds).

(PART) to help provide a consistent approach to rating programs across the federal government.[16]

In the notice, the Commission listed four rules for review, and asked for public comment on each regulation. Specifically, the notice asked: (1) whether the regulation is consistent with CPSC program goals, (2) whether the regulation is consistent with other CPSC regulations, (3) whether the regulation is current with respect to technology, economic or market conditions, and other mandatory or voluntary standards, and (4) whether the regulation could be streamlined to minimize regulatory burdens, particularly those affecting small businesses.

Out of this pilot program, the Commission then conducted annual reviews that looked at four to six rules per year in 2005,[17] 2006,[18] and 2007.[19] Out of this review, the CPSC clarified its rules regarding standards for carpets, rugs and bicycles. In addition, the Commission also established projects to examine amendments to the electrical toy and cigarette and multi-purpose lighter rules.

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[16] A description of the PART process and associated program evaluation materials is available at http://www.whitehouse.gov/omb/budintegration/part_assessing2004.html.

[17] *See Fiscal Year 2005 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 70 Fed. Reg. 18,338 (April 11, 2005) (requesting comments on Commission regulations for cigarette lighter and multi-purpose lighter safety standards, bicycles, surface flammability of carpets and rugs, and child resistant packaging for controlled substances).

[18] *See Fiscal Year 2006 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 71 Fed. Reg. 32,882 (June 7, 2006) (requesting comments on Commission regulations for matchbooks, toy rattles, baby bouncers, walkers-jumpers, and baby walkers).

[19] *See Fiscal Year 2007 Program for Systematic Review of Commission Regulations; Request for Comments and Information*, 72 Fed. Reg. 40,265 (July 24, 2007) (requesting comments on Commission regulations banning certain unstable refuse bins and safety requirements for pacifiers).

The voluntary rule review program was temporarily suspended in 2008 with the passage of CPSIA due to limited resources, tight deadlines, and Congress' specific directions for the Commission to review and revise many of its existing regulations as part of that legislation.

As we wind down the bulk of our CPSIA rulemakings, it is my understanding that CPSC Chairman Tenenbaum has directed staff to develop options to continue the voluntary review process. As part of this review, staff will be looking at ways to maximize openness and public participation, as well as ways to most effectively to target rules that may require revision, repeal, or strengthening to protect the public against the risk of unreasonable danger from consumer products.

5. The Consumer Product Safety Improvement Act of 2008

In 2008, Congress became concerned about the large number of violative toys and other children's products recalled by the CPSC in 2006 and 2007 as well as the slow pace of agency rulemaking under existing procedures. Accordingly, Congress enacted by overwhelmingly large bipartisan majorities (424-1 in the House and 89-3 in the Senate) the Consumer Product Safety Improvement Act (CPSIA). Focusing particularly on children's hazards, Congress added several new provisions to the agency's acts: (1) Congress legislatively imposed several safety standards for children's products,[20] (2) Congress set numerous deadlines within which the CPSC was obligated to write safety standards for children's products, and (3) Congress streamlined the rulemaking process that the Commission must follow, lifting some of the burdens of section 9 of the CPSA, and similar provisions in our other laws.

[20] Because these provisions were added by act of Congress, they automatically applied without the need for CPSC rulemaking.

The rationale behind Congress' action seems to be clear. Congress wanted to protect young children – society's most vulnerable and involuntary risk takers – as fully and expeditiously as possible. Congress did not eliminate economic analyses – the agency remains obligated to conduct such analyses under the RFA – but it did remove some of the more time-consuming procedures from the laws enforced by the CPSC. The result has been more expeditious drafting of new safety standards specifically designed to protect the lives and safety of young children. Among the new standards promulgated by the agency since passage of the CPSIA have been improved safety requirements for baby walkers, bath seats, and children's toys. Perhaps the most significant new standard advancing children's safety has been the Commission's safety standard for cribs, unanimously approved by the Commissioners and effective this past Tuesday, June 28. This standard sets the most stringent safety requirements for cribs in the world and should save numerous lives in the coming years.

Even with this new authority, however, the Commission has taken steps to insure that the economic impact of new rules and regulations is considered during the rulemaking process. In fact, other than regulations where Congress, by law, made an exception every substantive safety rule the Commission has written under the CPSIA has been analyzed under the RFA to determine the impact of that requirement on small businesses -- assuring that our most vulnerable business sector is safeguarded along with protecting our most vulnerable consumers.

Speaking for myself, I applaud the streamlined authority the Congress gave the agency to write standards for children's hazards. I think we all appreciate how critical it is to protect children – who can't read safety labels and who don't realize how dangerous some consumer products can

be to the greatest extent possible. Accordingly, I think Congress struck the proper balance between minimizing unnecessary costs imposed on businesses (and, ultimately, consumers) and safeguarding our most vulnerable consumers.

Conclusion

The CPSC's jurisdiction is very broad: roughly speaking we regulate most products found in a department store, sporting goods store, hardware store, toy store, or in a school (with the exception of items regulated by other agencies, such as food, drugs, cars, boats, planes, guns, and tobacco). Yet we are an agency of barely 500 people with a budget just over $118 million. Given these limits on resources, I believe that the agency has done a good job in advancing consumer safety with minimal disruption to the marketplace.

Mr. STEARNS. I thank the gentleman.

Ms. Northup, welcome. It is particularly nice to have a former member.

TESTIMONY OF ANNE NORTHUP

Ms. NORTHUP. Thank you. Chairman Stearns and Ranking Member DeGette, thank you so much for the opportunity to testify in front of you, and I am delighted to be back on Capitol Hill with you. I have great respect and appreciation for the challenges you face every day and the decisions you make. I do appreciate the opportunity to come and give you some idea of what it looks like from the other side, from a regulatory agency.

You just heard an excellent history of review of the Consumer Product Safety Commission and the past, the way they operated, primarily through the development of voluntary guidelines, through risk assessment and intervention when there were real risks based on science and the ability to intervene when they were dangerous products. However, all of what was said about the reviews of our regulations and the reasonableness of that changed in 2008 when the Consumer Product Safety Improvement Act went into effect, and in fact, very little of that would be present today. As a matter of fact, we no longer have the option to consider risk in most of the things we do. We are required to write rules based on numbers that were given to us in the CPSIA but that hasn't stopped us in the regulatory process of casting a wider net including maybe more toys and more children's products or more products than the law requires us to do to make steps where the testing is more rigid than required by the law. And so while the law is very difficult, it has been very hard for small businesses in particular to comply with it, we have at the agency, in my opinion, gone beyond what the law has required us to do.

Let me just give you some idea. In the time since the CPSIA passed, we have been involved in about 50 rulemakings if you include the statements of policies, the notice of requirements and lab accreditations, and by the way, lab accreditations are huge because any time we do a notice of requirements for labs to be accredited, within 6 months every product under that category has to begin sending every component and every part of their product to a lab for a third-party test and certify based on those tests and label their product to reflect what those certifications are.

So in truth, while I appreciated what Representative Waxman said about big companies complaining, it is actually the opposite. Very few of our largest companies complain. Most of them make products in such large numbers that they can spread their costs around, and what we have really done is put out of competition the smaller businesses that made things primarily in this country. Those are the people that we hear from because they cannot spread their costs over so many products.

You know, I hear so often people say oh, yes, that is the law we passed to decrease the number of things coming in from China or that is the law we passed to make the big companies comply, but in fact, the effect of the cost of these regulations has been the burden that has put many, many small businesses out of business. It has caused those smaller businesses to leave the children's product

market. We have the public that has fewer choices than they have ever had in the past and we are told that if we—our four, by the way, biggest rules are still to come. They are expected to come before December 31st or to take effect by December 31st.

I thought I would share with the committee one that I anticipate that we will agree on, the majority. I expect it to be a 3–2 vote, and that is allowing the parts per million of lead in any component of a child's product to reduce to 100 parts per million as of August 15th. This is what our economic team said about this: "Economic impacts are likely to occur. They are going to have to use more expensive low-lead materials rather than the non-conforming materials used today. The cost associated with the reengineering products to make the new materials, the cost to make leaded components that are inaccessible, the increased testing costs, the increased consumer products, the reductions in the types and quantities of the children's products available to consumers, businesses that are exiting the children's product market, manufacturers going out of business, reduction in the utility of products and the reduction in the durability of products." This is all for this one rule that we are about to—or this one step-down that we are about to take effect, and it says there is no anticipated benefit in health to children because of this. And so I would just point out to you that 10 out of 40 of the small manufacturers of bicycles left the market with the original step-down. We anticipate more will exit the market. And my question, I guess, is, what sort of regulation sort of rationalization can be brought to this process. I have proposed many times ways to within the limits of the law to lessen the impact of this, and I am disappointed that we haven't done more of that at the commission. Thank you.

[The prepared statement of Ms. Northup follows:]

Testimony of Anne M. Northup
Commissioner
United States Consumer Product Safety Commission

Hearing: "The Views of the Independent Agencies on Regulatory Reform"

Before the

U.S. House of Representatives
Committee on Energy and Commerce

Subcommittee on Oversight and Investigations

July 7, 2011

Chairman Stearns and Ranking Member DeGette, thank you for the opportunity to provide testimony to this Subcommittee on the response of our independent agency, the Consumer Product Safety Commission (CPSC), to the Administration's goal of regulatory reform.

Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, said recently in an op-ed for *The Wall Street Journal*: "This insistence on pragmatic, evidence-based, cost-effective rules is what has informed our [the Administration's] regulatory approach over the past two and a half years."[1] Unfortunately, this cannot be said for the CPSC. Although the Commission is a relatively small agency (FY 2011 budget of $114.8 million), the agency's actions over the last two and one half years to implement the Consumer Product Safety Improvement Act of 2008 (CPSIA) have substantially added to the economy's woes, causing small businesses to leave the children's product market, reduce jobs, and/or close.

Since the beginning of 2009, the Commission has focused its time and resources principally on implementing the CPSIA. My testimony today will focus on the devastating impact the law and its regulations are having on American business growth and competitiveness, all with little or no offsetting improvement in product safety. I will also discuss the opportunities the Commission's Majority has failed to take to reduce the law's burdens when the statute has allowed such flexibility.

Finally, I will also propose today, as I did before a hearing of the Commerce, Manufacturing and Trade Subcommittee, specific actions that this Committee and Congress can take to ameliorate the CPSIA's effects. With regard to Mr. Sunstein's and this Committee's calls for independent agencies to voluntarily review burdensome or outdated regulations for potential reforms, I am unaware that our Chairman has responded. I know that, notwithstanding my request to contribute to the formulation of any Commission views on the subject, she has not asked for my input. Thus, without a willingness on the part of our Chairman or the Commission's Majority to proactively seek cost-benefit analyses of our rules and/or to roll back unnecessary parts of our rulemakings put forth to implement the CPSIA, only Congress will be able to stop the damage.

I. The CPSIA:

Background

As you may know, the CPSIA was passed following a number of high-profile recalls involving lead in paint found on children's toys imported from China. While the law passed with broad support in 2008, its many unintended consequences have since led both Democrat and Republican Members of Congress to introduce bills reforming the law. In January 2010, the Appropriations Committees of the House and Senate requested

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[1] Cass Sunstein, "21st Century Regulation: An Update on the President's Reforms," *The Wall Street Journal*, May 25, 2011.
http://online.wsj.com/article/SB10001424052702304066504576345230492613772.html

a Report from the five Commissioners on ways to amend the CPSIA. (*See the following link for the Report to Congress and the Commissioners' five statements: www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf*). Most recently, the Commerce, Manufacturing and Trade Subcommittee voted to approve a bill to reform the CPSIA, which may soon be marked-up by the full Energy and Commerce Committee. Thus, the law no longer enjoys the broad support it received in 2008.

Unfortunately, neither the Commission's Democrats nor the law's original Democrat supporters in Congress have shown interest in any more than minor tweaks to the statute, which will not address small businesses' concerns. Democrats at the Commission acknowledge and even sympathize with the many requests for relief that we receive from small businesses, but have missed numerous opportunities to implement the statute in a less burdensome way. They blame the statute for being too inflexible, but do not request, even when asked, more than negligible relief from Congress. At the same time, the law's strongest supporters in Congress blame the Commission for not using the flexibility in the law. Meanwhile, nothing changes and the statute and its regulations continue to undermine the economic recovery.

It's not about safety: The CPSIA's non-risk based requirements

While the Commission's budget has grown substantially since the law's passage in 2008 (by nearly 44 percent), new and old resources have been shifted away from more risk-based priorities to implement the arbitrary, non risk-based mandates of the CPSIA, including the lead-in-substrate and phthalates bans, the Public Database, and the third-party testing, certification and labeling requirements. Over the last two and one half years, the Commission has issued an estimated 3,500 pages of regulations and guidance documents as a result of the CPSIA- a large portion of which must be read and understood by every affected company in order for them to grasp the law's complex requirements.

The diversion of the Commission's resources to CPSIA implementation reduces our focus on genuine safety hazards. Our agency is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products -but we cannot fulfill this mission if our time is spent primarily enforcing the CPSIA, including its complex, non-risk-based, testing and certification requirements.

Indeed, since 2008, there has been a significant delay in progress on actions to address many genuine safety hazards, such as promulgating standards to reduce the risk of death and injuries caused by cigarette lighters, table saw blades and portable generators. These issues would be front and center on the Commission's schedule if it were not for the CPSIA.

The new Public Database also will be a substantial drain on Commission resources, without any likely safety benefit, due to the Commission's flawed database regulation.[2] While consumers have always been able to report to the CPSC experiences of harm or risk of harm involving a consumer product, such reports were not made public unless the CPSC took reasonable steps to ensure accuracy. That is why this Committee's draft CPSIA reform bill has called for changes to ensure that incident reports published in the database are at least verifiable. Potentially inaccurate and unverifiable information on a public database is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information. If this Commission is to have a public database funded by taxpayers, it should be ***different and better*** than any source of information that already exists in the public domain, such as websites like Amazon.com or Yelp.com. Many believe the Commission's ".gov" database, if left unchanged, will be useful only to trial lawyers or advocacy groups that will be able to populate it with unverifiable, second-hand information for their own purposes.

II. Economic Impact of the CPSIA

The lack of cost-benefit analyses

In March 2009, Commission staff reported that the economic costs associated with the CPSIA would be "in the billions of dollars range."[3] Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards.

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs that will result from the upcoming Public Database. **Attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and

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[2] The Commission Majority's database rule suffers from three major infirmities: 1) It interpreted the statute to allow *anyone* to report incidents to the database – even consumer advocacy groups, trial lawyers, and others with ulterior motives and who may not have firsthand knowledge of the incident; 2) the rule fails to require enough information from submitters so that reports are even verifiable; and 3) the rule requires that all reports will be made public on the 10th day following transmittal to the manufacturer, regardless of whether there's a pending, valid claim of material inaccuracy.

[3] Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell, March 20, 2009.

Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.[4]

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence snggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm lead content or the interim-banned phthalates pose a safety risk to children. It has long been established that the lead absorbed by children overwhelmingly comes from leaded paint or from lead in gasoline that got into the dirt and was tracked into homes near older gas stations. The Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.[5] Similarly, 2007 data indicates that one percent of children selected nationwide for testing, who are targeted due to their higher risk profile, showed an elevated blood lead level as established by the CDC. This number was down from nearly eight percent in 1997,[6] and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Burdensome testing and certification requirements on manufacturers

Given the tools available to manufacturers to determine compliance and our own improved enforcement methods, I do not believe the complex, third-party testing and certification requirements of the CPSIA are necessary or helpful to ensure compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom may be able to comply with the law's lead and phthalates limits but still cannot afford the mandatory third-party testing.

By requiring all manufacturers of children's products to send their products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation. The CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product is entirely unnecessary – and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a

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[4] Most of the CPSIA mandated regulations are **not required** to be promulgated under Section 9 of the CPSA, which normally would entail a cost-benefit analysis. However, the statute does not **prohibit** the agency from doing so, if the Commission recognizes a need for such analyses.

[5] http://www.epa.gov/opeedweb/children/body_burden/b1-graph.html

[6] http://www.cdc.gov/nceh/lead/data/national.htm

casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

The CPSIA also requires the creation of massive new paperwork and tracking systems, often without any safety enhancing product changes. A member of the American Home Furnishings Alliance reported that it spent $13 million dollars on tests, new systems and tracking processes, despite the fact that every single component it used on children's furniture already complied with the current lead standard. The company was therefore not required to change a single material used in its manufacture of children's furniture, and there was no corresponding benefit in the improved safety of its children's furniture to justify the costs.

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in its public comments on the Component Parts rule:

> As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.[7]

The testing and certification requirements of the law have yet to be fully implemented. Therefore, I would continue to request that Congress intervene to prevent the Commission from enforcing these requirements, at least until a full cost-benefit analysis has been performed.

III. Commission Actions Have Made the Law's Impact Worse

I no longer believe that action by the Commission to alleviate the law's unnecessary burdens is likely. Before my Senate confirmation hearing, I was asked by both Democrat and Republican Senators to "find flexibility" in the law wherever possible, because the law had resulted in many unintended or unforeseen consequences. Once confirmed as a Commissioner, I took this request seriously.

However, the flexibility that I have found in the following rules was rejected by a majority of Commissioners:

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[7] American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

- ***Absorption exclusion***: I argued that the absorption ***exclusion*** under Section 101 was actually intended to exclude certain products from the lead limits (rather than be meaningless), and therefore that the term "any lead" in that section may be interpreted to mean a *de minimis*, harmless amount of lead in a children's product. If the Commission had accepted my interpretation, lead in the substrate of ATVs, bicycles, and brass axles on toys would be legal since lead in the substrate of these products is not harmful. This interpretation would have allowed American standards to mirror European standards more closely and reduced the number of components that need to be tested. Because the Commission rejected this interpretation, it voted to reject the petition of a manufacturer of toy cars, even though the car's brass fitting contained less absorbable lead than the Food and Drug Administration deems to be acceptable in a piece of candy.[8]

- ***Civil Penalties Factors*** – In the Commission's interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, "technical" violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.[9] Unfortunately, a majority of the commissioners did not want to provide that leeway.

- ***Definition of Children's Product*** – The CPSIA applies to all "children's products", statutorily defined as products "primarily intended for a child 12 years of age or younger." The comments that the Commission received following the proposed rule made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended for ages 10-12 or for an age range falling both inside and outside the upper age limit of 12. The purpose of defining the term was to guide manufacturers in determining which of their products fall within the purview of the CPSIA. After receiving these comments, the Commission had a chance to put a much narrower "fence" around the scope of covered products---or to at least define clearer boundaries. Unfortunately, the Majority chose to leave the definition vague whenever possible, which helps neither the CPSC staff,[10] nor the regulated community.[11]

- ***"Children's product safety rules"*** – I offered a valid, alternative interpretation of the statute with regard to the requirement to impose third-party testing on all "children's product safety rules." A clear distinction can be made between "children's product safety rules" and more general "consumer product safety rules" promulgated well before the passage of the CPSIA. Unfortunately, because the Majority chose to view all consumer product safety rules of the Commission as potential "children's product

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[8] http://www.cpsc.gov/pr/northup110409.pdf
[9] http://www.cpsc.gov/pr/northup03102010.pdf
[10] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses,"*Associated Press*, December 11, 2010. http://news.yahoo.com/s/ap/20101211/ap_on_he_me/us_cadmium_lead_glassware
[11] http://www.cpsc.gov/pr/northup09292010.pdf

safety rules," it imposed an unnecessary, additional layer of testing (at third-party labs) on manufacturers of carpets and rugs, vinyl, clothing textiles and mattresses—all of which are subject to consumer product safety rules. The Commission did not have to take this step—and there is no risk associated with these products that necessitates *new* third-party testing requirements.[12]

- ***Public Database***: I proposed an alternative database rule that would have responded to a number of manufacturer concerns and made the database a more accurate source of information for consumers. The Commission's Majority instead passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys, random bystanders, and, as has actually occurred, people perusing the internet that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers--particularly small businesses.

- ***Cribs***: In December 2010, the Commission set a six-month effective date for a new mandatory, retrospective crib rule that it was required to promulgate under the CPSIA. Beginning in April 2011, the Commission received appeals from associations representing hundreds of small and medium-sized crib retailers asking for an extension of time to sell through crib inventory that did not comply with the new standard and therefore could not lawfully be sold after June 28, 2011. Data received by the Commission from a small fraction of all crib retailers indicated that as of May 2011, there were at least 117,800 noncompliant cribs, valued at approximately $32,000,000, still in retailer inventory. While I voted in favor of the new crib standard in December 2010 and the original six-month effective date for both retailers and manufacturers, I realized in hindsight that due to the chain of commerce, it was illogical to set the same effective date for both. Two weeks ago, the Commission held a public meeting to determine whether to extend by any amount of time the period during which retailers could lawfully sell new, non-drop-side cribs that satisfy the most recent voluntary standard. The Commission had previously given day care providers and the hospitality industry until December 2012 to meet the new mandatory standards, so there was no issue regarding the safety of the cribs that would have been the subject of the extended deadline. Nonetheless, the Commission decided on a 3-2 party-line vote not to extend the effective date by even 30 days, thus missing another opportunity to avoid unnecessary economic waste without sacrificing safety.

- ***Reduction to 100 ppm of Lead***: The CPSIA banned as a hazardous substance children's products containing over 300 ppm of lead. It also provides that children's products containing over 100 ppm of lead shall be treated as a banned hazardous substance beginning on August 14, 2011, "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." The Commission is scheduled to decide by majority vote on July 13,

[12] http://www.cpsc.gov/pr/northup07122010.pdf

2011, whether reducing the lead limit to 100 ppm for any product or product category is not technologically feasible. Staff has prepared a public decisional package on the issue and presented its views during a public briefing held last week. During the briefing, staff acknowledged the common sense fact that the economic impact of reducing the limit to 100 ppm is a factor in determining the technological feasibility of doing so. In addition, staff has identified significant "economic impacts that are likely to occur", including: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard. With respect to any potential counterweight to this economic harm, Commission staff concludes that the "overall contribution of" products with lead content between 100 ppm and 300 ppm "to lead exposure in children is minimal." Notwithstanding staff's acknowledgment that reducing the lead limit to 100 ppm will cause substantial economic harm with no offsetting improvement in product safety, I believe it is likely that the Commission's majority will still vote to reduce the standard.

IV. Lack of a Regulatory Review

To my knowledge, the Commission has not undertaken a retrospective review of its regulations since before passage of the CPSIA in 2008, and on-going small businesses analyses are minimal. The Commission's only evaluation of the impacts of its regulations on small businesses has been performed under the Regulatory Flexibility Act (RFA). Since I have been at the Commission, Regulatory Flexibility Analyses have been as perfunctory as one paragraph or as lengthy as a dozen pages – and the Commission seldom if ever bases its decisions on such analyses. As you know, the RFA also requires retrospective review of regulations, but only every ten years - and only if the Commission has deemed such rules to have a "significant" impact on small businesses.

Prior to the passage of the CPSIA, the Commission undertook a voluntary, annual review of certain regulations, including notice and comment to the public, in order to determine whether any should be rolled back or updated. From 2004 - 2007, the Commission reviewed 11 rules, standards and bans. I understand that those reviews resulted in modifications to only one of the rules – the flammability standard for carpets and rugs. In some cases, staff reviews of regulations produced recommendations for change, but the Commission never did the work necessary to implement them. Finally, a review of the bicycle standard done at that time also helped to inform some recent changes made to that standard, which were done principally to allow bicycle manufacturers to comply with the CPSIA's testing and certification requirements.

V. Going Forward - Recommendations to Reform the CPSIA:

Reforming the CPSIA to focus on risk would greatly relieve the strain on agency resources caused by implementing and enforcing non-risk based regulations and monitoring low risk products. It would also free the agency to redirect its limited resources toward more effectively fulfilling its safety mission. This can be accomplished in a variety of ways:

- Amend the law's Absorbability Exclusion §101(b)(1)(A) so that it is meaningful:

The CPSIA included three statutory exclusions from the lead limits. But the Commission has meaningfully interpreted only two of them. The law's third exclusion, based on the absorbability of lead in a product, has not excepted a single product from the CPSIA's scope. The CPSIA should therefore be amended to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

Drawing the line at the level of absorbable lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the CDC and the EPA. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead in dirt that is tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA standard for lead in soil is 400 ppm (http://www.epa.gov/lead/). This standard for safety is less strict even than the current 300ppm lead content standard provided in the CPSIA for children's products, including bicycle handlebars where lead is embedded in the metal substrate and cannot be absorbed.

Unlike other Commission rules, regulations promulgated under the CPSIA, as interpreted by the Majority, have led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, the CPSIA has led to a ban on children's books published before 1986, because the ink in them is likely to contain lead above the allowable level. But children are not likely to eat the pages of old books or ingest more than minuscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed in meaningful amounts. Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a bicycle handlebar, the CPSIA

treats these items in exactly the same way it treats products that truly could hurt a child by increasing her blood lead level.

If the law is amended to unambiguously exclude products with a level of absorbable lead that is not harmful to a child's health, the scope of the CPSIA will be considerably narrowed, and the Commission can focus its limited resources on real risks to children.

- Lower the age-range of products impacted by the law:

Under the CPSIA, a "children's product" is any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the same products to different age groups, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products which many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that the products are primarily inteuded for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children under age six, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose "substantial product hazard" under the Federal Hazardous Substances Act.

- Eliminate third-party testing and certification requirements:

As stated previously, the law's third-party testing, certification, tracking and labeling requirements are the most burdensome for small manufacturers. They are also unnecessary for verifying compliance, particularly given the agency's improved traditional enforcement tools. As a result, Congress could eliminate current third-party testing and certification requirements all together, allowing manufacturers to test in-house and/or in the best way they know how to determine

compliance. The Commission would retain the discretion to impose third-party testing requirements on products whose risk justifies the cost.

- Public Database - require reforms to the Database Rule to ensure that incident reports are verifiable and useful.

Finally, the Commission's Database Rule could be revised in order to ensure that incident reports going up on the new, public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information.

Several features of the Majority's rule guarantee a database populated by inaccurate information. The Majority has broadly defined the statutory categories of submitters to the Database to include groups and individuals with no direct knowledge of the incident or the person harmed. Such groups include consumer advocacy groups, trade associations and attorneys, for whom the accuracy of the incidents they report may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

The Database Rule also does not require sufficient information from the submitter to ensure that Commission staff or consumers can tell one type of product from another. Only the minimal amount of information is required, including manufacturer name and a "description of the product" which could include simply "baby stroller." But one company may have manufactured dozens of different models of baby strollers, some of which may no longer be in production. As a result, the limited product information required is insufficient to permit the Commission to investigate the claim, and of no value to a consumer seeking to identify a safe model of baby stroller.

The problems created by permitting inadequate product identification and allowing individuals and groups without firsthand knowledge to report alleged incidents of harm, are compounded by the rule's failure to require the identification of the victim or product owner who experienced the risk of harm. As a result, the Commission's staff may be unable to verify the accuracy of the report by speaking to the only party with actual knowledge of the product and incident. Moreover, because manufacturers bear the burden of proving a material inaccuracy, the Commission will publish a report that contains the minimal required information, even where inadequate product identification or the absence of victim contact information leaves the report unverified. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the

manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Inaccurate information will likely also be posted on the database - at least temporarily - even when there is sufficient information to eventually confirm the truth. That is because the Majority's rule requires the Commission to publish an incident report on the public database by the 10th day after sending notification to the manufacturer, notwithstanding that a manufacturer has adequately supported a claim that the report is materially inaccurate. Unless the Commission can conclude within 10 days that the report is materially inaccurate, it is published on the 11th day and remains on the Database while the Commission completes its investigation. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely.

Thank you, Chairman and Members of the Subcommittee for calling this hearing and for inviting me to testify today on the burden to the economy of the CPSIA's non-risk-based regulations. I look forward to your questions.

ECONOMIC IMPACT OF THE CPSIA - EXAMPLES
2009 - 2011

Costs associated with the CPSIA

1. In a letter from the CPSC to Representative Dingell in March 2009, Commission staff reported that the overall economic impact of the CPSIA would be in the "**billions of dollars range**." The Commission also acknowledged that the testing and certification costs will fall disproportionately on small-volume businesses. (*Letter from Acting Chairman Nancy Nord to Representative Dingell, March 20, 2009*)

2. **"MAJOR RULE"** - CPSC acknowledges in its FY 2011 Regulatory Agenda that its main rule pertaining to the CPSIA's testing requirements **([PDF] CPSC Docket No. CPSC-2010-0038)** is a "major rule" under the Congressional Review Act, resulting in, or likely to result in: 1) an annual effect on the economy of $100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, government agencies or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

3. In an article entitled "Makers Are Pushing Back on Toxic-Toy Law" (*Wall Street Journal*, March 5, 2009 http://online.wsj.com/article/SB123621357629835121.html), Joe Periera reported the following loss statistics:

    - Goodwill Industries to destroy **$170 million** in merchandise.
    - Salvation Army expects to lose **$100 million** in sales and disposal costs.
    - The Toy Industry Association estimates inventory losses at **$600 million**.
    - Members of the Coalition for Safe and Affordable Childrenswear lost **$500 million.**
    - The California Fashion Association estimates troubled inventory at **$200 million**.
    - The Motorcycle Industry Council expects to lose 50,000 motorized bikes and four-wheelers worth at least **$125 million**.

4. On March 11, 2009, *Playthings Magazine* reported updated data from the Toy Industry of America (see http://www.playthings.com/article/CA6643505.html), including:

- From a pool of nearly 400 manufacturers and 220 retailers, the TIA estimates **losses of $2 billion in retail value**.
- More than **$1 billion** in already shipped merchandise has been returned or is being withheld for return.
- More than **$800 million** in compliant merchandise is at risk of return.
- **40%** of all respondents plan to eliminate jobs to pay for the CPSIA, with more than 1200 jobs reported to be in jeopardy.

"TIA: Safety Act puts $2B crimp in toy biz"
3/11/2009

5. Separately, the Motorcycle Industry Council advised that total losses from disruptions in its members' businesses could total **$1 billion**. See: http://1st5ive.com/new-lead-rule-could-cost-motorcycle-industry-1-billion-annually.html

6. In May 2011, the Commission learned that there were at least 117,800 safe, but non-compliant, cribs nationwide that retailers possessed in inventory that would have to be disposed of by June 28th due to the retroactive effects of the CPSIA-mandated crib standard. The Commission could have modestly extended the effective date for retailers to avoid unnecessary, substantial economic losses from the disposal of safe, brand-new cribs; but it declined to provide such relief. The known potential losses at the time: 117,800 X $275 (estimated wholesale price/crib) = $32,395,000. http://www.cpsc.gov/pr/northup06272011.pdf

Examples of businesses closed due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Whimsical Walney, Inc. – Santa Clara, CA
2. Fish River Crafts – Fort Kent, ME
3. Kungfubambini.com – Portland, OR
4. Baby Sprout Naturals - Fair Oaks, CA http://www.babysproutnaturals.com/about/
5. Gem Valley Toys – Jenks, OK
6. Angel Dry Diapers – Michigan
7. Abracadabra Educational Craft Kits for Kids – Bend, OR
8. Hailina's Closet – Ellensburg, WA (thrift store)
9. Eleven 11 Kids
10. Perfect Circle Consignment – Bremerton, WA
11. JenLynnDesigns
12. A Kidd's Dream – Conway, AK
13. Storyblox – New Vienna, OH
14. Phebe Phillips, Inc. – Dallas, TX http://www.phebephillips.com/shopnow.htm
15. Pops Toy Shop - mountains of Tennessee, Virginia, North & South Carolinas

14. Hands and Hearts History Discovery Kits – Greenwood, SC
15. The Lucky Pebble – Kailua, HI
17. My Sister's Closet – Arizona
18. Honeysuckle Dreams
19. Sullivan Toy Co.

Businesses that have stopped production of certain children's lines due to CPSIA
Most names provided by the Handmade Toy Alliance

1. Creative Artworks – Greenwood, AK
2. Craftsbury Kids – Montepeliar, VT
3. "Pockets of Learning" *Special Needs Products Being Driven from Market By Testing Costs – Rhode Island*
4. Creative Learning Connection
5. Giverny, Inc / Mini Me Geology
6. HABA
7. Challenge & Fun, Inc. - http://online.wsj.com/article/SB10001424052748703478704574612573263963560.html
8. Hands and Hearts Far East History Discovery Kit – Greenwood, SC
9. Moon Fly Kids – Las Vegas, NV
10. Louisville Slugger ® – Louisville, KY

Businesses that closed and list the CPSIA as one of the factors
Most names provided by the Handmade Toy Alliance

1. Due Maternity – San Francisco, CA
2. Frog Kiss Designs – Fairfield, CT
3. Waddle and Swaddle – Berkley, CA
4. Lora's Closet – Berkley, CA
5. Baby and Kids Company – Danville, CA
6. Baby and Beyond – Albany, CA
7. Obabybaby – Berkley, CA
8. Bellies N Babies – Oakland, CA
9. Oopsie Dazie
10. Bears on Patrol – not a business, but program by police departments to hand out stuffed animals to scared children - http://learningresourcesinc.blogspot.com/2009/10/cpsia-cpsia-casualty-of-week-for.html
11. Simple Treasures

Other companies hurt by retroactivity of the CPSIA's lead content and phthalates bans:

1. Gymboree – "change in safety requirements related to levels of phthalates rendered about 1.7 million of its inventory obsolete"
    i. http://www.reuters.com/article/idUSBNG44760220090305

2. Constructive Playthings, Inc – "'We have millions of dollars worth of merchandise sitting in 30 40-foot-long trailers waiting to be hauled out to a landfill somewhere," says Michael Klein, president of Constructive Playthings Inc.…The banned products include beach balls, inflatable toy guitars and blow-up palm trees.' http://online.wsj.com/article/SB123621357629835121.html

3. Louisville Slugger ® – Destruction of $500,000 in safe, non-compliant inventory (baseball bats) due to the retroactive effects of the law

Businesses no longer exporting to the U.S. due to the CPSIA
Most names provided by the Handmade Toy Alliance

1. Hess – Germany
2. Selecta – Germany http://www.zrecommends.com/detail/breaking-news-selecta-to-cease-us-distribution-due-to-cspia/
3. Finkbeiner – Germany
4. Saling – Germany
5. Simba – Germany
6. Bartl GmbH dba Wooden Ideas – Germany
7. Woodland Magic Imports – France
8. Brio
9. Helga Kreft – Germany
10. Eichorn – Germany
11. Kapla
12. Kallisto Stuffed Animals

EuroToyShop – On this company's homepage, you will find links at the bottom with a list of "endangered toys" or "extinct toys" that are still sold to children in Europe but which the company will no longer be able to sell in the U.S. due to the CPSIA.

> *Endangered Toys The CPSIA (Consumer Product Safety Improvement Act) has unintended consequences. Now, some European toys are no longer available in the USA.*
>
> http://www.eurotoyshop.com/

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Associations that have voiced concerns to the Commission regarding CPSIA's costs (list is not exhaustive):

> Association of Home Appliance Manufacturers

International Sleep Products Association
Retail Industry Leaders Association
Specialty Graphic Image Association
American Coatings Association
The Carpet and Rug Institute
National Retail Federation
Association of American Publishers
Consumer Healthcare Products Association
Toy Industry Association
Glass Association of North America
American Honda Motor Company, Inc.
Society of the Plastics Industry, Inc
American Home Furnishings Alliance
Sporting Goods Manufacturers Association
Handmade Toy Alliance
Consumer Specialty Products Association
Footwear Distributors and Retailers
Fashion Jewelry Association
Craft and Hobby Association
National Association of Manufacturers
Halloween Industry Association
American Apparel and Footwear Association
Juvenile Products Manufacturers Association
National School Supply and Equipment Association
National Federation of Independent Business
Promotional Products Association International
Bicycle Product Suppliers Association

Killing Small Businesses:
CPSIA in the News, Letters and Public Comments

A MESS OF A LAW:
March 11, 2011

"President Obama has been on a campaign to shake his antibusiness reputation, so a good place to start would be to revisit the Consumer Product Safety Improvement Act, a mess of a law that has put new burdens on small businesses..."

http://online.wsj.com/article/SB10001424052748703408604576164510202890494.html "Get the Lead Out, Sir," *The Wall Street Journal*, March 11, 2011. Editorial.

HIGHER COSTS FOR SCHOOLS:
January 11, 2010

"NSSEA members sell educational supplies, equipment and instructional materials to schools, parents, and teachers...

... the costs to schools, municipalities, libraries, and others of identifying and replacing such books would be extremely high and there is no reason to impose such costs given the lack of identifiable risk.

...While we applaud the efforts the CPSC has made to find solutions for small businesses...we believe the CPSC could do more if given more discretion by Congress. The alternative is the elimination of many valuable educational toys and products, some manufactured in low volume for niche markets (such as the deaf, blind, or otherwise differently-abled children) and typically not supplied by the huge multi-national toy manufacturers."

Letter from the NSSEA (National School Supply and Equipment Association) to Commissioner Northup, January 11, 2010

HIGHER COSTS FOR PRODUCTS WITH NO LEAD RISK:
October 13, 2010.

"The government wants to regulate Hannah Montana CDs and DVDs. The bureaucrats at the Consumer Product Safety Commission (CPSC) insist that the discs marketed to children be tested for lead, but when the same young starlet churns out raunchier material under her real name, Miley Cyrus, they will escape scrutiny. Never mind that the same 10-year-olds will likely end up buying both products.

"…Never mind that Hannah Montana's fans aren't likely to eat their DVDs, the latest red tape makes no distinction between products where lead is likely to be consumed and those where it isn't."

http://www.washingtontimes.com/news/2010/oct/13/bureaucrats-way-out-of-tune/ "Bureaucrats way out of tune," *Washington Times*, October 13, 2010.

PUNISHING SMALL BUSINESSES, WHILE MATTEL AND THE BIG GUYS SQUEEZE OUT THE COMPETITION:

June 17, 2010

"Now Mattel is testing and making toys without any trouble at all, and those of us who were never the problem are in danger of losing our businesses," says Hertzler, who runs EuroSource, based in Lancaster, Pa., with his wife and two sons…

"Nearly two years after the safety law was enacted, Congress and the Consumer Product Safety Commission are still struggling to reduce its burden on small businesses while eliminating the risk of lead and phthalates in children's products."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

BORDERING ON RIDICULOUS:

June 17, 2010

…"What the law should be about is ensuring safe products," says Edward Krenik, a spokesman for the children's product alliance. "We've crossed over into ridiculousness."

http://www.usatoday.com/money/industries/retail/2010-06-17-productsafety17_ST_N.htm "Lead testing can be costly for mom and pop toy shops," *USA Today*, June 17, 2010

REGULATION FOR REGULATIONS' SAKE

November 8, 2010

"Regulation for regulations' sake, where there is no inherent change to a bill of materials, a process or a product indicated after extensive, statistically significant testing across multiple points of input and verification, is simply wasteful."

American Home Furnishings Alliance
November 8, 2010 – Letter to Commissioners

MATTEL FINDS CPSIA A CHALLENGE – HOW MUCH MORE FOR SMALL BUSINESSES?

November 9, 2009

"Officials of the toy manufacturer, Mattel, met separately with two CPSC commissioners November 3 to talk about how challenging it was for Mattel to comply with the CPSIA…

Peter Biersteker, a lawyer for Mattel with the law firm Jones Day in Washington D.C., said his client is finding the CPSIA difficult to decipher... "It's a lot of work. I don't know how smaller companies do it," Biersteker told Commissioner Robert Adler.

Despite Mattel's large team of in-house lawyers, he said, the company needed to hire outside lawyers to help understand the CPSIA. He said Mattel holds weekly conference calls on the issue, discussing how to comply with the act while remaining "cost competitive."

"Mattel Finds CPSIA to be a Challenge," *Product Safety Letter*. November 9, 2009.

COMMISSION ACTION ADDS TO CPSIA'S PROBLEMS:

August 16, 2010

"The latest dictates from the Consumer Product Safety Commission (CPSC) will drive up the cost of manufacturing products intended for children. The agency adopted a pair of new rules in July and August implementing the Consumer Product Safety Improvement Act of 2008, but as drafted, these regulations will force companies to waste time and money on redundant testing programs solely for the entertainment of bureaucratic busybodies.

… The redundant examinations, mostly checking flammability, can be prohibitively expensive. For instance, the regulations could require a manufacturer to build a queen-sized-bed prototype of a baby's crib just so it can be tested in an independent lab. Yet each of the component parts - the crib-sized mattresses, blankets and all other component parts - already are individually tested for the same hazards when manufactured."

Editorial: "The Red Tape Stimulus," *Washington Times*, August 16, 2010
http://www.washingtontimes.com/news/2010/aug/16/the-red-tape-stimulus/

EVEN THE NEW YORK TIMES SPOTLIGHTS THE UNINTENDED CONSEQUENCES OF THE CPSIA:

September 28, 2010

"… a new federal crackdown on dangerous toys has left some in the industry crying foul and not wanting to play."

"…Critics point to provisions in the law that they deem ludicrous. For instance, a paper clip that is included in a science kit for schoolchildren would have to be tested for lead. But a teacher can walk into any drug store and buy a box of paper clips that would not be subject to the same testing.

Similarly, a lamp that is festooned with cartoon characters would have to be tested, but a lamp without the characters would not."

http://www.nytimes.com/2010/09/29/business/29toys.html "Toy Makers Fight for Exemption From Rules," *New York Times*, September 28, 2010

SCIENCE KITS ARE "NOT BANNED" – BUT THE TOOLS USED INSIDE THEM ARE!

October 1, 2010

"The science kit makers had asked for a testing exemption for the paper clips and some other materials. On Wednesday, in a close 3-2 vote, the commission declined to give them the waiver they sought."

"…After the science kit vote, CPSC Chairman Inez Tenenbaum sought to reassure people that, "There is nothing in this rule that bans science kits."

Right. But while the commission vote doesn't ban the kits, manufacturers say it may crimp the supply of kits for elementary school children."

http://www.lvrj.com/opinion/goodbye-to-chemistry-sets-104139059.html "Goodbye to chemistry sets," *Las Vegas Review Journal*, October 1, 2010. Editorial.

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, ZERO SAFETY BENEFIT TO CHILDREN:

November 8, 2010

"…there has not been a corresponding benefit in the improved safety of children's furniture for children. All the representatives told you that their respective companies have not had to change a single material they use in the manufacturing of their children's product lines since they began testing to CPSIA in 2008.…The testing is simply being done to attempt to prove a negative."

American Home Furnishings Alliance

FURNITURE MANUFACTURERS FACED WITH ADDED COSTS, FORCED TO CUT JOBS:
November 8, 2010

"The majority of the annual costs will be in the record keeping requirements because none of the companies have the requisite IT infrastructure to handle the tracking of test reports per batch…Hooker estimates that it will cost them from $350,000 to $400,000 per year. Furniture Brands International said this will cost them over $4.5 million per year which is more than the profits from their best quarter in the last 2.5 years. In addition, this company must invest an additional $2 million in start up costs for setting up the production testing, programming computer systems to work with existing systems, and hiring and training employees for the administration of the CPSIA."

To offset these new costs, the company is forced to consider these choices: 1) shut down a small domestic plant which will mean the loss of 64 full time and 30 temporary US jobs; 2) shut down a larger domestic plant which will mean the loss of 384 US jobs; 3) significantly increase prices to offset the loss in revenue making them less competitive; 4) offer a lower quality product… or 5) shut down all domestic production which incorporates any finishing processes, which will mean the loss of approximately 460 US jobs."

American Home Furnishings Alliance
November 8, 2010 Letter to Commissioners

NO MORE MOM AND POP TOY SALES:
July 7, 2010

"The second program involves making wooden toys that are given to the church and other charitable organizations in the county for distribution to needy children throughout the year especially at Christmas. Last year we created over 700 toys. The idea that we now are required to have these handcrafted toys certified will bring the program to a halt."

Dupage Woodworkers, Downers Grove, IL (July 7, 2010, Public Comment, Testing rule)

Mr. STEARNS. Commissioner McDowell.

TESTIMONY OF ROBERT MCDOWELL

Mr. MCDOWELL. Thank you, Mr. Chairman and Ranking Member DeGette and all members of the committee for having me here today.

During my 5 years at the FCC, I have supported policies that promote consumer choice through abundance and competition in lieu of regulation whenever possible. I therefore welcome today's dialog on regulatory reform.

Fifty years ago, there were only 463 pages in the FCC's portion of the Code of Federal Regulations, the C.F.R. During this period, Americans only had a choice of three TV networks and one phone company. Today, over-the-air TV, cable TV, satellite TV and radio, and the millions of content suppliers of the Internet offer consumers with an abundance of choices. In other words, the American communications economy was far less competitive in 1961 than it is today yet it operated under fewer rules.

In contrast, by late 1995, the FCC's portion of the C.F.R. had grown to 2,933 pages, up from 463 34 years earlier. As of the most recent printing of the C.F.R. last October, it contained a mind-numbing 3,695 pages of rules. Even after Congress codified deregulatory mandates with the landmark Telecommunications Act of 1996, the FCC still managed to add hundreds more pages of rules.

To put it another way, the FCC's rules measured in pages have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth, America's GDP grew by a substantially smaller number, 357 percent. In short, this is one metric illustrating government growth outpacing economic growth.

To be fair, some of those rules were written due to various congressional mandates and sometimes the FCC does remove regulations on its own accord or forbear from applying various mandates in response to forbearance petitions. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend. At the same time, Congress has given the FCC ample authority to deregulate. The legislative intent of key parts of the 1996 act such as sections 10, 11, 202H and 706, just to name a few, was to reduce the amount of regulation in telecommunications, broadcasting and information services. For instance, Congress ordered the FCC through section 10 of the 1996 act to forbear from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and not necessary for the protection of consumers. Similarly, section 11 requires the FCC to conduct reviews of telecom rules every 2 years to determine whether any such regulation is no longer in the public interest as a result of meaningful economic competition and to repeal or modify any regulation it determines to be no longer necessary in the public interest.

Removing unneeded rules can liberate capital currently spent on lawyers and filing fees, capital that would be better spent on powerful innovations. Accordingly, it is my hope that the FCC stays faithful to Congress's intent as embodied in section 11 by promptly

initiating a full and thorough review of every FCC rule, not just those that apply to telecom companies but all rules that apply to any entity regulated by the commission. The presumption of the FCC's review should be that a rule is not necessary unless we find compelling evidence to the contrary.

The first set of rules I would discard of course would be the recently issued Internet network management regulatory regime, also known as net neutrality. As I have stated many times before, those rules are unnecessary at best and will deter investment in badly needed next-generation infrastructure at worst. No evidence of systemic market failure exists to justify these overly burdensome regulations.

Furthermore, the FCC has too many forms. To give you some examples, there is form 603, form 611T, form 175, form 601, form 492, form 477, form 323 and forms 396, 396C—I am not sure what happened to 396A and B—form 397 and 398, among many, many others. While a few forms may be necessary, many could be eliminated or simplified. Similar repeal initiatives should be on our plate soon. For example, as I noted in a speech in May, the so-called fairness doctrine is literally still codified in the C.F.R. The doctrine regulated political speech. Political speech is core protected speech under the First Amendment and the doctrine is patently unconstitutional, as the FCC found in 1987.

Chairman Genachowski recently informed your committee that he supports removing references to the doctrine and its corollaries from the C.F.R. and intends to move forward on this effort in August. I look forward to helping him fulfill that promise.

In the same spirit, it is time to eliminate the outdated newspaper-broadcast cross-ownership rule in the upcoming review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices, especially newspapers in scores of American communities. Overall, however, what is needed is a comprehensive and sustained effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. All future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner.

In the absence of market failure, unnecessary regulations in the name of serving the public interest can have the perverse effect of harming consumers by inhibiting the constructive risk-taking that produces investment, innovation, competition, lower prices and jobs. In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers.

I look forward to working with all of you in pursuit of these goals. Thank you, Mr. Chairman.

[The prepared statement of Mr. McDowell follows:]

SUMMARY OF TESTIMONY
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

JULY 7, 2011

My testimony will focus on four points: (1) FCC authority; (2) examples of ongoing proceedings that propose streamlining various regulations; (3) examples of regulations that are ripe for repeal; and (4) where we should go from here.

Congress envisioned that the 1996 Telecom Act would allow potential rivals, such as cable and phone companies and new entrants, to compete against each other. Added competition, lawmakers thought, would obviate the need for more rules. Unfortunately, over time, it does not appear that a net reduction of regulation has been the end result.

Chairman Genachowski has already initiated some proceedings in the past couple years that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. For instance, in May, the Commission adopted a Notice of Proposed Rulemaking (NPRM) that proposed to eliminate certain reporting requirements for international telephone service. I look forward to continuing to work with my colleagues on this proceeding and others that the Chairman has initiated.

Much more work remains to be done, however. For example, I would discard the recently issued Internet network management regulatory regime, also known as "net neutrality." Also, while not as controversial, the "equal access" scripting requirements are still on the books. These rules require various phone companies to read aloud to new customers a list of independent long distance companies. Ironically, these rules no longer apply to the Baby Bells or their successors; they only apply to *smaller* phone companies. Additionally, as I noted in a speech in May, the Fairness Doctrine is literally still codified in the CFR. To his credit, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him fulfill that promise. Similarly, it is time to eliminate the outdated newspaper/broadcast cross-ownership rule in our upcoming quadrennial review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices – especially newspapers -- in scores of American communities.

Going forward, instead of an ad hoc approach, it would be more constructive to initiate a *comprehensive and sustained* effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. In addition to a review of current regulations, the agency should approach the adoption of any new rule with caution and humility. First, all future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner. Second, the FCC should view its statutory mission through a *de*regulatory lens, as Congress intended. The trend in recent years has been the opposite, unfortunately. One stark example is the FCC's regulatory use of Section 706 of the 1996 Telecom Act, which had previously been widely viewed as a deregulatory section.

In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers. I look forward to working with all of you as we find ways to scale back unnecessary and harmful regulations. Thank you again for the opportunity to appear before you today.

STATEMENT
OF
COMMISSIONER ROBERT M. MCDOWELL
FEDERAL COMMUNICATIONS COMMISSION

"THE VIEWS OF THE INDEPENDENT AGENCIES ON REGULATORY REFORM"

BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 7, 2011

Thank you, Chairman Stearns and Ranking Member DeGette, for inviting me to join you today. As a commissioner, serving both in the majority and now the minority, I have supported policies that promote consumer choice offered through abundance and competition in lieu of regulation whenever possible. I therefore welcome today's dialogue on regulatory reform.

Removing unnecessary or harmful rules is by no means a partisan concept. As many of you have noted, on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."[1] Additionally, Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs, sent a memorandum to agency heads regarding the executive order in which he noted that it "does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority."[2] Sunstein further wrote that, "[i]n particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules."[3] Moreover, Chairman Genachowski recently indicated that he would follow the spirit of this executive order and review outmoded FCC regulations. I look forward to working with him on this important endeavor.

Two months ago our office compiled some compelling Code of Federal Regulations ("CFR") statistics which now turn out to be relevant to today's hearing. We discovered that over 50 years ago, there were only 463 pages in the FCC's portion of the Code of Federal Regulations ("CFR"). During this period, Americans only had a choice of three TV networks and one phone company. Today, over-the-air TV, cable TV, satellite TV and radio, and the millions of content

[1] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

[2] Cass R. Sunstein, *Memorandum Regarding Executive Order 13563, "Improving Regulation and Regulatory Review,"* Feb. 2, 2011.

[3] *Id.* at 6.

suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

In contrast, by late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. In fact, the 1996 Telecom Act states that the FCC should "promote competition and reduce regulation."[4] Just the opposite occurred, however. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. So, even after a landmark *de*regulatory act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth, America's GDP grew by a substantially smaller number: 357 percent.[5] In short, this is one metric illustrating government growth outpacing economic growth.

To be fair, some of those rules were written due to various congressional mandates. And sometimes the FCC does remove rules on its own accord or forbear from applying various rules in response to forbearance petitions. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

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[4] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Telecom Act").

[5] The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," http://www.bea.gov/national/index.htm#gdp; *see also id.*, "Current and Real Gross Domestic Product," http://www.bea.gov/national/xls/gdplev.xls.

My testimony will focus on four points:

(1) The FCC's authority;

(2) Examples of ongoing proceedings that propose streamlining various regulations;

(3) Examples of regulations that are ripe for repeal; and

(4) Where we should go from here.

THE FCC HAS AMPLE AUTHORITY FROM CONGRESS TO DEREGULATE.

The 1996 Telecom Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete against each other. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grows, deregulation in this economic sector should take place. The legislative intent of key parts of the legislation, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, broadcasting and information services. Unfortunately, over time, it does not appear that a net reduction of regulation has been the end result.

Congress has already provided the Commission with the legal tools it needs to reverse the pro-regulation trend of the past 50 years. Congress ordered the FCC through Section 10 of the 1996 Telecom Act to "forbear" from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and "not necessary for the protection of consumers."[6] Similarly, Section 11 requires the FCC to conduct reviews of

[6] 47 U.S.C. §160(a)(2); *see* Harold Furchtgott-Roth, *FCC ignores law while blindly increasing its regulations*, THE WASHINGTON EXAMINER, (May 1, 2011), http://washingtonexaminer.com/opinion/op-eds/2011/05/fcc-ignores-law-while-blindly-increasing-its-regulations#ixzz1RFsckE4k; *see also* Randolph J. May, *Rolling Back Regulation at the FCC*, NATIONAL REVIEW ONLINE, (Apr. 11, 2011), http://www.nationalreview.com/articles/print/264898.

telecom rules every two years to determine "whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition,"[7] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[8] Removing unneeded rules can liberate capital currently spent on lawyers and filing fees -- capital that would be better spent on powerful innovations. Accordingly, it is my hope that the FCC stays faithful to Congress's intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of the FCC's review should be that a rule is not necessary unless we find compelling evidence to the contrary.

RECENT FCC PROCEEDINGS PROPOSE SOME REGULATORY STREAMLINING.

Chairman Genachowski has already initiated some proceedings in the past couple years that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. For instance, in May, the Commission adopted a Notice of Proposed Rulemaking (NPRM) that proposed to eliminate certain reporting requirements for international telephone service. Also, in January of 2010, the FCC issued an NPRM that proposes to streamline the application process for satellite and earth stations. In addition, the agency issued an NPRM this past February which seeks comment on ways the FCC can reform and modernize its Form 477 data collection processes. I look forward to continuing to work with my colleagues on these pending proceedings.

MANY MORE FCC RULES SHOULD BE REPEALED.

Much more work remains to be done. The first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as "net neutrality."

[7] 47 U.S.C. §161(a)(2).

[8] 47 U.S.C. §161(b).

As I have stated several times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. There has been no evidence of systemic market failure that justifies these overly burdensome regulations. Moreover, language in the net neutrality order itself concedes that the Commission did not conduct a market power analysis or make a market power finding.[9] Notably, even though the FCC adopted the net neutrality rules last December, they have yet to become effective. In the interim, America's Internet remains open and freedom-enhancing, as it *always* has been. Now, before the new rules go into effect and cause uncertainty and unintended consequences in the marketplace, is the perfect time to repeal them.

While perhaps not as controversial as net neutrality, there are many other unnecessary rules still on the books. For instance, a good number of phone companies are still required to read aloud to new customers a list of independent long-distance companies. This so-called "equal access" scripting requirement is a dusty old vestige from the break-up of the AT&T long-distance monopoly. Ma Bell's long-distance arm was declared "non-dominant" way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on. Ironically, these rules no longer apply to the Baby Bells or their successors. It is *smaller* phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies – are always paid for, ultimately, by consumers.

Furthermore, the FCC has too many forms. As I mentioned, the Chairman has launched an initiative which seeks to reform the FCC's data collection processes. I support these efforts and hope that this exercise results in comprehensive reform of the FCC's burdensome data

[9] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, n. 49 (2010) ("Open Internet Order").

collection procedures as opposed to simply shaving them around the edges. To give you an example of the current processes, there is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. While a few forms may be necessary, many could be eliminated or simplified. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take, for example, my "favorite" form, the Enhanced Disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Also, unless I'm missing something, TV stations don't aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV.

There is some good news on this front, however. First, the Office of Management and Budget under both Presidents Bush and Obama have prevented the Enhanced Disclosure form from going into effect because of concerns that the mandate violates Paperwork Reduction Act prohibitions. Second, a recent FCC staff report analyzing the "Information Needs of Communities"[10] recommends that the Commission scrap the form -- a recommendation I heartily endorse – and replace it with a more streamlined online disclosure system. I am skeptical of any potential replacement because of the risk that it might simply resurrect the Enhanced Disclosure form's pointless and burdensome mandates in a new electronic guise. Nevertheless, I hope the FCC moves forward on a rulemaking effort to eliminate the form quickly.

[10] Steve Waldman and the FCC Working Group, *The Information Needs of Communities: The changing media landscape in a broadband age* (June 2011).

Similar repeal initiatives should be on our plates soon. For example, as I noted in a speech in May, the Fairness Doctrine is literally still codified in the CFR.[11 12] The Fairness Doctrine was a rule that thrust the government's coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Political speech is core protected speech under the First Amendment, and the Fairness Doctrine is patently unconstitutional. In fact, the FCC decided as much in 1987, when everyone assumed the agency had killed it. Instead, it appears that the Commission merely opted not to enforce the rule. To his credit, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him fulfill that promise.

Similarly, it is time to eliminate the outdated newspaper/broadcast cross-ownership rule in our upcoming quadrennial review of our media ownership regulations. Evidence suggests that the old cross-ownership ban may have caused the unintended effect of reducing the number of media voices – especially newspapers – in scores of American communities. The FCC staff's *Information Needs of Communities* report is replete with data documenting the declining state of American newspapers, including the fact that more than 230 papers have closed their doors since 2007.[13] Although it is impossible to attribute the deaths of all those papers to the FCC restriction, I note that many knowledgeable observers for years have attributed the hobbling and

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[11] 47 C.F.R. § 73.1910 ("broadcasting"); 47 C.F.R. § 76.209 ("origination cablecasting"). *See also* 47 C.F.R. §§ 76.1612-13 (Fairness Doctrine corollaries applied to origination cablecasting).

[12] Attached as Exhibit A for the Subcommittee's convenience are copies of the speech on regulatory reform that I gave on May 19 to the Telecommunications Industry Association as well as letters I sent to Acting Chairman Copps and Chairman Genachowski in 2009 on FCC reform in general.

[13] Steve Waldman and the FCC Working Group, *The Information Needs of Communities: The changing media landscape in a broadband age* (June 2011) at 41, http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0609/DOC-307406A1.pdf (providing list of developments concerning shuttered papers between 2007 and 2010). Another 18 newspapers moved to online-only editions. *Id.*

eventual disappearance of the old *Washington Star*, once the city's premier daily, to the cross-ownership ban which forced the paper to separate from its radio and TV operations.[14] But how many modern-day *Washington Stars* could have survived the Internet's effect on traditional business models if they already had been part of a stronger, multi-platform news operation?

WHERE THE FCC SHOULD GO FROM HERE.

Although I have appreciated the FCC's review of various rules on an ad hoc basis, a more constructive approach would be to initiate a *comprehensive and sustained* effort to repeal or, where appropriate, streamline unnecessary, outdated or harmful FCC rules. The FCC should review every rule and should adopt the presumption that a rule is not necessary unless it finds compelling evidence to the contrary. A large-scale and aggressive review would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate.

In addition to a review of current regulations, the agency should approach the adoption of any new rule with caution and humility. First, all future regulatory proceedings should start with a thorough market analysis that assesses the state of competition in a sober and clear-eyed manner. Furthermore, if the FCC opts not to include a market analysis, it should explain why. It has been my philosophy that in the absence of market failure, unnecessary regulations in the name of serving the public interest can have the perverse effect of harming consumers by inhibiting the constructive risk-taking that produces investment, innovation, competition, lower prices and jobs.

Second, the FCC should view its statutory mission through a *de*regulatory lens, as Congress intended. The trend in recent years has been the opposite, unfortunately. One stark

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[14] *See* James Gattuso, *The FCC's Cross-Ownership Rule: Turning the Page on Media*, Heritage Foundation Backgrounder on Internet and Technology (May 6, 2008), http://www.heritage.org/research/reports/2008/05/the-fccs-crossownership-rule-turning-the-page-on-media (citing, *e.g.*, Testimony of Jerald N. Fritz, Allbritton Communications Company, before Committee on Energy and Commerce, U.S. House of Representatives, Dec. 5, 2007, available at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.120507.Fritz-testimony.pdf).

example is the FCC's use of Section 706 of the 1996 Telecom Act, which had previously been widely viewed as a deregulatory section.[15] Section 706 requires the FCC to determine whether "advanced telecommunications capability [broadband] is being deployed to all Americans in a reasonable and timely fashion."[16] In all of the reports starting with the first in 1999, the FCC has answered "yes" to that question. In 2010, however, the Commission dramatically reversed course and answered "no."[17] This year, the FCC made the same flawed finding.[18] I dissented from both of those Section 706 reports. The reports were unsettling, considering that America has made impressive improvements in developing and deploying broadband infrastructure and services. In addition to my concern that the reports were outcome driven, I also warned that the conclusions could be used as a pretext to impose unnecessary new rules. Unfortunately, my fears were realized only five months after the issuance of the 2010 Section 706 Report. The Commission then, in a 3-2 vote, relied heavily on the findings in that report in an attempt to

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[15] Congress stated that "[i]f the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by *removing barriers* to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b) (emphasis added) (Section 706 of the Telecommunications Act of 1996 has since been codified in Title 47, Chapter 12 of the United States Code but is commonly referred to as "Section 706"). Clearly, Congress envisioned the Commission "removing barriers" if it determined that broadband was not being deployed in a timely manner. Adding new rules, such as those regulating Internet network management, erects new barriers contrary to the directive to remove them.

[16] 47 U.S.C. § 1302(b).

[17] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 09-137, A National Broadband Plan for Our Future*, GN Docket No. 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 (2010) ("2010 *Section 706 Report*"). In fact, the 2010 Section 706 Report explicitly included in its caption and referenced findings from the National Broadband Plan that "95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps."

[18] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, FCC 11-78 (May 20, 2011) ("2011 Section 706 Report").

manufacture a legal foundation for the net neutrality order.[19] Given this history, it is reasonable to be concerned that reiteration of the negative Section 706 finding two years in a row may be used to bolster additional FCC regulatory efforts in other areas where Congress has not given the FCC legal authority to do so.

In sum, decreasing the burdens of onerous or unnecessary regulations increases investment, spurs innovation, accelerates competition, lowers prices, creates jobs and serves consumers. I look forward to working with all of you as we find ways to scale back unnecessary and harmful regulations.

Thank you again for the opportunity to appear before you today.

[19] *See* ¶ 6 of 2011 Section 706 Report. *See also Open Internet Order*, 25 FCC Rcd 17905 (2010).

Exhibit A

Remarks of FCC Commissioner Robert M. McDowell delivered to Telecommunications Industry Association (May 19, 2011).

Letter from FCC Commissioner Robert M. McDowell to FCC Chairman Julius Genachowski (July 20, 2009).

Letter from FCC Commissioner Robert M. McDowell to FCC Acting Chairman Michael Copps (January 27, 2009).

Remarks of FCC Commissioner Robert M. McDowell
Telecommunications Industry Association
TIA 2011: Inside the Network

Thursday, May 19, 2011
The Gaylord Texan
Dallas, Texas

As prepared for delivery

Thank you, Grant. You and your team have put together another impressive show.

It's great to be back in Texas. My family has deep roots in the Lone Star State – more than five generations worth, in fact. My great-great grandfather, James Knox McDowell, was an abolitionist who moved here before the Civil War. As a fan of Abe Lincoln's, he helped found a fledgling new political party, known as the Republican Party. That started a long line of Republicans in the McDowell family. Of course, back in those days, you could ride across the dusty plains of Texas for days and never see any sign of another Republican. There were so few Republicans here that James cast the only vote in his county against secession – the *only* vote.

After enduring a great deal of hardship during and after the War, including surviving a failed lynching at the hands of the Klan, James and his wife, Victoria, went on to raise five sons. One of them, C.K. McDowell, my great grandfather, went from working as a ranch hand and cowboy living in a frontier dugout, to reading the law and becoming an attorney. After the turn of the century, somehow he was elected chief judge of Val Verde County. Upon his election, a riot broke out in the town of Del Rio because he was … well, a Republican. The Texas Rangers had to be called in to quell the violence. (Not the baseball team, the horsemen with guns.) But his picture still hangs on a wall in the old courthouse in Del Rio. For decades, he was the *only* Republican on that wall.

In his later years, he went on to run for governor of Texas and won the Republican nomination in 1942. Keep in mind that back then the Republican Party of Texas could have held its convention in a phone booth. For all I know, he was nominated by default because no one else wanted the "honor." But while writing this speech, I thought I would look up the election results from his race. Ready? It ends up that the incumbent governor, Coke R. Stevenson, garnered 280,735 votes. Judge Caswell Kelliston McDowell hauled in 9,204 votes. That translated into a whopping 3.17 percent. Some would call that a "rounding error."

So what does any of this have to do with the FCC? Well … it seems that we McDowells have a knack for picking places where we end up being the *only* Republican. And while there are a lot more Republicans in Texas these days, there are no more Texas Republicans on the FCC. I had no idea that my family history was preparing me for such loneliness and being on the short end of votes – the shortest of short ends, in fact. But it all makes sense to me now.

3.17 percent. That's quite a number. So let's change the subject and take a look at another number: 463. That was the total number of pages in the FCC's portion of the Code of Federal Regulations – the "CFR" – 50 years ago. The CFR is the book that contains most of the federal government's regulations affecting our country's economy. And at the time of then-FCC Chairman Newt Minow's famous "TV is a vast wasteland" speech, in 1961, all of the FCC's rules governing radio, television, telegraphs, telephones and such could fit neatly into 463 pages Keep in mind, in 1961 Americans only had a choice of three TV networks and one phone company. Today, over-the-air and cable TV, satellite TV and radio, and the millions of content suppliers on the Internet are overwhelming consumers with choices. In other words, the American communications economy was far less competitive in 1961 than it is today, yet it operated under fewer rules.

By late 1995, right before the Telecommunications Act of 1996 became law, the FCC's portion of the CFR had grown to 2,933 pages – up from 463 pages 34 years earlier. With the '96 Act, Congress envisioned allowing potential rivals, such as cable and phone companies and new entrants, to compete. Added competition, lawmakers thought, would obviate the need for more rules. The plain language of the statute, plus its legislative history, tell us that as competition grew, deregulation – *DE*regulation – in this economic sector should take place. The legislative intent of key parts of the '96 Act, such as Sections 10, 11, 202(h) and 706 – just to name a few – was to *reduce* the amount of regulation in telecommunications, information services and broadcasting. In fact, the Act states that the FCC should "promote competition and reduce regulation."[1] But, as it ends up, just the opposite occurred. As of the most recent printing of the CFR last October, it contained a mind-numbing 3,695 pages of rules. That's right, after a landmark *de*regulatory act of Congress, the FCC *added* hundreds more pages of government mandates.

To put it another way, the FCC's rules, measured in pages, have grown by almost 800 percent over the course of 50 years, all while the communications marketplace has enjoyed more competition. During this same period of regulatory growth of 800 percent, America's GDP grew by a substantially smaller number: 357 percent.[2] In short, this is one imperfect but relevant metric illustrating growth in government outpacing economic growth.

To be fair to the Commission, some of those thousands of pages of rules were written due to congressional mandates. And sometimes the FCC does remove rules from its books as the

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[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

[2] The growth rate was calculated based on historical figures reported by the Commerce Department's Bureau of Economic Analysis. *See generally* Bureau of Economic Analysis, U.S. Dep't of Commerce, "National Economic Accounts," http://www.bea.gov/national/index.htm#gdp; *see also id.*, "Current and Real Gross Domestic Product," http://www.bea.gov/national/xls/gdplev.xls.

result of forbearance petitions, or by its own accord, just as we did last week with some international reporting requirements. But all in all, the FCC's regulatory reach has grown despite congressional attempts to reverse that trend.

Now at this point I need to issue a warning. For the next couple of minutes, I'm going to sound like a lawyer.

As both former FCC Commissioner Harold Furtchgott-Roth and the Free State Foundation's Randy May have written recently, Congress ordered the FCC through Section 10 of the '96 Act to "forbear" from applying a regulation or statutory provision that is not needed to ensure that telecom carriers' market behavior is reasonable and "not necessary for the protection of consumers."[3] Similarly, Section 11, the less famous sibling of Section 10, requires the FCC to conduct reviews of telecom rules every two years to determine "whether any such regulation is no longer in the public interest as the result of meaningful economic competition,"[4] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[5]

Please keep in mind that removing unnecessary or harmful rules is by no means a partisan concept. The '96 Act passed both houses of a Republican Congress with a large bipartisan vote and was signed into law by a Democratic president. And on January 18 of this year, President Obama issued an executive order directing agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome."[6] As he wrote in the *Wall Street Journal*, he is seeking to "remove outdated regulations that stifle job creation and make our economy less competitive."[7]

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[3] 47 U.S.C. §160(a)(2).
[4] 47 U.S.C. §161(a)(2).
[5] 47 U.S.C. §161(b).
[6] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).
[7] President Barack Obama, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011.

So, having established that we have strong bipartisan support to deregulate, let's get to work. Removing unneeded rules can liberate capital currently spent on lawyers and filing fees -- capital that would be better spent on powerful new communications equipment. Accordingly, I call on the Chairman and my fellow commissioners to stay faithful to Congress's intent, as embodied in Section 11, by promptly initiating a full and thorough review of *every* FCC rule, not just those that apply to telecom companies, but all rules that apply to any entity regulated by the Commission. The presumption of our review should be that a rule is not necessary unless we find compelling evidence to the contrary.

Of course, the first set of rules I would discard would be the recently issued Internet network management regulatory regime, also known as "net neutrality." As I have stated numerous times, those rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. But to be realistic, reversal of them will have to be at the hands of the courts or Congress.

Similarly, it would take congressional action to start to erase the regulatory stovepipes created by Titles I, II, III and VI. Products and services are converging across platforms. So should the statute.

But here are a few other rules the FCC could get rid of itself.

Did you know that many phone companies are still required to read aloud to new customers a list of available independent long distance companies? This so-called "equal access" scripting requirement is a dusty old vestige from the break-up of the AT&T long distance monopoly. Ma Bell's long distance arm was declared "non-dominant" way back in 1995. In other words, the long distance market has been competitive for almost 16 years, yet our antiquated rules live on like a slumbering Rip Van Winkle who fell asleep in the 1980s.

Ironically, these rules no longer apply to the Baby Bells or their successors, and have never applied to wireless carriers. It is smaller phone companies that must bear the burden of living under them. Such costs – be they regulations or taxes on companies -- are always paid for, ultimately, by consumers. It took the Commission about a year to put out for public comment a 2008 petition to eliminate these dinosaurs, and we are several years overdue to repeal them.

Similarly, it is smaller non-Bell companies that must live under cost allocation requirements and ARMIS (Automatic Reporting Management Information System) reporting mandates. For carriers living under flexible price cap rules in an environment that is more competitive than a few years ago, these cumbersome and costly requirements make no sense.

Then there are the forms – lots of forms. Government bureaucracies *love* to require people to fill out forms. There is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others. Several forms require companies to submit data that is no longer needed or is supplied elsewhere. Take for example, my "favorite" form, the enhanced disclosure form. Back in late 2007, over my dissent, the Commission voted to require TV licensees to fill out a form describing to the government what kind of programming they were airing to the public and when they were airing it. Broadcasters estimated that it would cost them up to two full-time jobs to hire people to do nothing all day but fill out the form and send it to Washington bureaucrats. Proponents of this rule may have meant well. In fact, at the time of its adoption I overheard one advocate exclaim joyfully, "Two full-time jobs? That's terrific. That's job creation!" Of course, they didn't realize that the new requirement would result in the *elimination* of two jobs elsewhere at the station, such as the newsroom, to pay for the new mandate.

Also, unless I'm missing something, TV stations don't aim to keep their work product a secret from anyone. If the government wants to know what is being aired, it can turn on the TV – all Big Brother and First Amendment concerns aside.

The good news is that the enhanced disclosure form has been held up by the Office of Management and Budget (OMB) since 2008 because it raises Paperwork Reduction Act problems, among other things. And, yes, that's the same office that has temporarily held up the effectiveness of the net neutrality rules. Given that both the Bush and Obama White Houses have kept it from going into effect, why don't we just put it out of its – and our – misery and repeal it?

I'm not saying that all forms are unnecessary. But multiple forms sometimes collect the same data, such as Form 477 collecting the same ownership information required by Form 602. Do we really need to kill America's information economy with a thousand paper cuts?

And now, if you have fallen asleep, this last part should wake you up. In fact, the likely headline coming out of this speech will have nothing to do with telecom equipment. Sorry about that. Are you ready? It is rare that the English language can come up with two words that, when put together, generate so much controversy. This is potent stuff, so you'd better brace yourself. The … Fairness Doctrine. It still exists! No, it doesn't still exist the way Elvis "still exists." The Fairness Doctrine is literally still codified in the CFR.[8] We stumbled on this forgotten fact while researching material for this speech.

For those of you who have no idea what I am talking about, the Fairness Doctrine was a rule … well, still IS a rule, apparently … that thrust the government's coercive reach into editorial decisions of broadcasters. In short, the Doctrine regulated political speech. Suffice it to say that political speech is core protected speech under the First Amendment, and the Fairness

[8] 47 C.F.R. § 73.1910 (broadcasting); 47 C.F.R. § 76.209 ("origination cablecasting").

Doctrine is patently unconstitutional. The FCC decided as much in 1987 when everyone assumed the FCC killed it. We thought that this monster's dead and stinking corpse was left to rot in a government graveyard. Instead, it appears that the Commission merely opted not to enforce the rule. Its words still defile the pages of the CFR, and we should erase it with a repeal order immediately.

In closing, a comprehensive and sustained effort to repeal and streamline unnecessary, outdated or harmful FCC rules would signal to investors that the Commission takes seriously Congress's and the President's calls to deregulate. With the certainty that the Commission will not only refrain from issuing new unneeded rules, but weed out old ones as well, investment capital is more likely to start flowing again.

Congress could do its part as well. Adoption of tax policies that accelerate depreciation schedules for tech equipment and classify some capital investments as expenses have a history of stimulating economic activity and job creation. By some estimates, every one dollar in accelerated depreciation tax incentives generates nine dollars in GDP growth.[9] One study estimated that the tech tax incentives of 2002 and 2003 may have increased GDP by $20 billion and affected the creation and retention of up to 200,000 jobs.[10]

The bottom line is the bottom line. History teaches us over and over again: Decreasing the burdens of onerous regulatory and taxation policies increases investment (which means more purchases of telecom equipment), spurs innovation, accelerates competition, lowers prices, creates jobs and pleases consumers. So what is there not to like? Let's get on with such a program right away.

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[9] Robbins, Aldona and Gary, *What's the Most Potent Way to Stimulate the Economy?*, INSTITUTE FOR POLICY INNOVATION (Oct. 10, 2001).

[10] House, Christopher L. and Shapiro, Matthew D., *Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation*, Am. Economic Rev. (2008).

Thank you for having me here today, and I look forward to your questions.

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

July 20, 2009

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Mr. Chairman:

Once again, congratulations on your nomination and confirmation as Chairman. I am greatly encouraged and energized to know that you, Commissioner Copps and I will be working together on a plethora of communications policy challenges facing the economy and American consumers. Although you have only been here for three weeks, I applaud the steps you have already taken to reform the agency. Your recent statements regarding boosting employee morale, promoting greater transparency, and creating a more informed, collaborative and considerate decision-making process are heartening. Anything we could do to advance the timely and orderly resolution of Commission business would be constructive. I am confident that you will agree that the preliminary steps Mike took during his interim chairmanship have provided a sound footing upon which to build.

Accordingly, in the collaborative and transparent spirit of my January 29, 2009, letter to Mike, I offer below a number of suggestions on achieving the important public interest objectives of reforming this agency. As you and I have already discussed, these thoughts are intended as a starting point for a more public discussion that should examine a larger constellation of ideas for moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Many of these ideas have been discussed by many people for a long period of time, and if we don't care who gets the credit we can accomplish a great deal.

Operational, financial and ethics audit.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company, the National Exchange Carrier Association and the federal advisory committees. Just as you recently articulated in your June 30 request for information on the Commission's safety preparedness, I would envision this audit as an examination akin to a due diligence review of a company as part of a proposed merger or acquisition, or after a change in top management. I would not envision the process taking a lot of time; yet, upon completion, we would be better positioned to identify and assess the current condition of the FCC and its related entities, as well as how they operate.

This undertaking would be a meaningful first step on the road to improving the agency. As with all FCC reform endeavors, I hope that all of the commissioners would be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with additional opportunities to submit comments anonymously. I also propose that we hold a series of "town hall" meetings at the FCC's Washington headquarters, at a few field offices, as well as in a few locations around the country to allow our fellow citizens to attend and voice their opinions directly to us.

As part of a financial review, it is crucially important that we examine the Commission's contracting process, as well as the processes relating to the collection and distribution of administrative and regulatory fees currently conducted exclusively by the Office of Managing Director. For instance, we should consider whether the full Commission should receive notice prior to the finalization of significant contracts or other large transactions.

In the same vein, it is time to examine the Commission's assessment of fees. Regulatory fees are the primary means by which the Commission funds its operations. You may be aware that the FCC actually makes money for the tax payers. As Mike has also noted, our methodology for collecting these fees may be imperfect. At first blush, it appears that we may have over-collected by more than $10 million for each of the last two years. Some have raised questions regarding how the fee burden is allocated. Our recent further notice of proposed rulemaking could lead to a methodology that lowers regulatory fees and levies them in a more nondiscriminatory and competitively neutral manner.

We should also work with Congress to examine Section 8 of the Act and the Commission's duty to collect administrative fees. I am hopeful that we will examine why we continue to levy a tax of sorts of allegedly $25 million or so per year on industry, after the Commission has fully funded its operations through regulatory fees. As you may know, that money goes straight to the Treasury and is not used to fund the agency. Every year, we increase those fees to stay current with the Consumer Price Index. At the same time, our regulatees pass along those costs to consumers and they are the ones who ultimately pay higher prices for telecommunications services.

Further, given the significant concerns raised about the numbers and the way the audits have been conducted, I recommend that we examine the financial management of the universal service fund. You may know that the Commission's Inspector General reported last year that the estimated erroneous payment rate for the High Cost program between July 2006 and June 2007 was 23.3 percent, with total estimated erroneous payments of $971.2 million. While I am pleased that the OIG identified this error, it is time that we get to the bottom of this matter and remedy it.

In the same spirit, an ethics audit should ensure that all of our protocols, rules and conduct are up to the highest standards of government best practices. Faith in the ethics of government officials has, in some cases, eroded over the years and we should make sure that we are doing all that we can to maintain the public's trust.

Update and republish the FCC strategic plan.

Also in connection with this review, I hope that we can work together to update and republish the Commission's strategic plan. Like me, you may find that, as we toil on day-to-day tasks, it can be easy to lose sight of our strategic direction. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

Potential restructuring of the agency.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. As you know, the Commission has been reorganized over the years – for instance, the creation of the Enforcement Bureau under Chairman Kennard and the Public Safety and Homeland Security Bureau under Chairman Martin. Close coordination among the staff in pursuit of functional commonality historically has improved the Commission's effectiveness. Nonetheless, the time is coming again to reconsider this option.

I am not suggesting that we make change for the sake of change. After all, we would agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, additional improvements we can make to increase our efficiency. As Mike emphasized, the Commission's most precious resource, really our *only* resource, are its people. Many of our most valued team members are nearing retirement age. We need to do more to recruit and retain highly-qualified professionals to fill their large shoes. I hope our next budget will give us adequate resources to address this growing challenge.

Next, I would encourage consideration of filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals. For example, there is no reason why we cannot use engineers to help investigate complaints and petitions that involve technical and engineering questions. This would be especially useful as we continue to consider matters pertaining to network management. Similarly, our economists could be better used to help assess the economic effects of our proposed actions.

Improve external communication.

As you and I have also discussed, we need to improve our external communications regarding FCC processes and actions. I greatly appreciate Mike's promptness in posting the Open Meeting dates covering his tenure. I am hopeful that we will swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

As part of these communications improvements, I look forward providing input as to updating the Commission's IT and web systems. I applaud your commitment to this endeavor and Mike's success in securing additional funding toward this end. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable. I also recommend that we update the General Counsel's part of the website to include litigation calendars, as well as access to pleadings filed by all the parties. Additionally, I suspect that our customers would prefer that licenses of all stripes be housed in one database, rather than separate databases spread across the stovepipes of our several bureaus. We should seek comment on this, and other similar administrative reform matters.

In addition, I propose that we create, publish on the website and update regularly an easy-to-read matrix setting forth a listing of all pending proceedings and the status of each. This matrix would include those matters being addressed on delegated authority. The taxpayers should know what they are paying for.

Similarly, I suggest that we establish and release a schedule for the production of all statistical reports and analyses regularly conducted by the Commission, and publish annual updates of that schedule. This would include, for example: the *Wireless Competition Report*, which has traditionally been released each September; the *Video Competition Report*, which until recently, was released at the end of each year; and the *High-Speed Services Report*, which, at one point, was released biannually. Similarly, quite some time before your arrival, I went on record calling for giving the American public the opportunity to view and comment on at least a draft or outline of the National Broadband Plan. I look forward to working with you to increase public awareness regarding the status and substance of our work on this plan. The goal here would be not only to ensure that the public is fully aware of what we are working on and when, but also to give these valuable analyses to their owners – the American people – with regularity.

In the same vein, Congress, the American public and consumers, among other stakeholders – not to mention your fellow commissioners – would greatly appreciate it if notices of proposed rulemakings actually contained *proposed rules*.

Improve internal communication.

Also, we need to overhaul our internal information flow, collaboration and processes. I am eager to work with you, Mike, and our future colleagues, to identify and implement additional measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process. The bottom line is simple: No commissioner should learn of official actions through the trade press.

An effective FCC would be one where, for instance, Commissioner offices would receive options memoranda and briefing materials long before votes need to be cast. For example, for all rulemakings, within 30 days of a comment period closing, perhaps all commissioners could

receive identical comment summaries. Also, within a fixed timeframe after receiving comment summaries, say 60 to 90 days, all commissioners could receive options memos complete with policy, legal, technical and economic analyses. In preparation for legislative hearings, it would be helpful if all commissioners received briefing materials, including witness lists, at least five business days prior to the hearing date. For FCC *en banc* hearings or meetings, we should aim to distribute briefing materials to all commissioners at least one week prior to the event date. The details here are less important than the upshot: all commissioners should have unfettered access to the agency's experts, and receive the benefit of their work. Again, I am grateful to Mike for his preliminary efforts in this regard.

Also along these lines, I hope that your team will reestablish the practice of regular meetings among the senior legal advisors for the purpose of discussing "big picture" policy matters, administrative issues, as well as to plan events and meetings that involve all of the offices. Given the numerous tasks we have before us, I trust you will agree that regular meetings among this group will improve our efficiencies, and go a long way toward lessening, if not eliminating, unpleasant surprises.

Just as important would be to hold regular meetings among the substantive advisors and relevant staff, including the Office of General Counsel. Having ample opportunity to review and discuss pending proceedings and the various options at the early stages of, and throughout the drafting process would allow us to capitalize on our in-house expertise early and often. Taking such precautions might also bolster the Commission's track record on appeal. Indeed, this type of close collaboration might lead to more logical, clear and concise policy outcomes that better serve the public interest.

Another idea is to update and rewrite our guide to the Commission's internal procedures, currently entitled *Commissioner's Guide to the Agenda Process*. For instance, just as Mike has done with respect to the distribution of our daily press clips, I propose that we undertake a thorough review of the physical circulation process, including identifying and making changes to reduce the amount of paper unnecessarily distributed throughout the agency. Current procedures require that each office receive about eight copies of every document on circulation when one or two would suffice. I also wonder why our procedures mandate delivery of 30 paper copies of released Commission documents to our press office. The overwhelming majority of reporters who cover our agency pull the materials they need from our website. Perhaps this is another area where we could save money and help the environment all at the same time.

Coordinate with other facets of government.

Finally, on a more "macro" level, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, I again extend my warmest congratulations on your new position as Chairman. You are to be commended for the steps you have taken thus far toward rebuilding this agency. I look forward to working together with you, Mike and our new colleagues upon their confirmation to do even more.

Sincerely,

Robert M. McDowell

cc: The Honorable Michael J. Copps

Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

January 27, 2009

The Honorable Michael J. Copps
Acting Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Mike:

Once again, congratulations on being named Acting Chairman. Additionally, thank you for your dedication and commitment to public service and the Commission. It goes without saying that I am looking forward to continuing to work with you.

I am greatly encouraged and energized to know that you, Commissioner Adelstein and I will be working together toward the goals of boosting employee morale, promoting greater transparency, as well as creating a more informed, collaborative and considerate decision-making process, all aimed toward advancing the timely and orderly resolution of Commission business. Thank you for addressing these and many other issues within minutes of becoming Acting Chairman. I certainly appreciate the new atmosphere you are creating at the Commission, and I know that the FCC's talented and dedicated career employees appreciate your efforts as well. Accordingly, with the utmost respect for you, the Commission staff and the new Obama Administration, I offer below several preliminary suggestions on achieving the important public interest objectives of reforming this agency. My letter is intended to continue a thoughtful dialogue on moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Our collaborative efforts to rebuild the agency should not be limited to the thoughts outlined in this brief letter. As you and I have discussed many of these ideas already, let this merely serve as a starting point for a more public discussion that should examine a larger constellation of ideas.

I would first recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company and the Federal Advisory Committees. As with all FCC reform endeavors, I hope that all of the commissioners will be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with an opportunity to submit comments anonymously.

I would also suggest that we work to update and republish the Commission's strategic plan. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. I am not suggesting that we make change for the sake of change. After all, we agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, steps we likely would want to implement to increase our efficiency. For example, as you have already stated, delegating some authority back to upper and mid-level management, filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals come to mind.

As we have also discussed previously, we need to improve our external communications regarding FCC processes and actions. As an immediate first step, I suggest that we swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

Also, we agree that we need to overhaul our internal information flow, collaboration and processes. I am eager to continue to work with you and Commissioner Adelstein to identify and implement measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process.

As part of these communications improvements, I share your desire to update the Commission's IT and web systems. They are in dire need of an overhaul. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable.

Finally, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the consumer protection, homeland security, and technology areas. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, Mike, I again extend my warmest congratulations on your designation as Acting Chairman. I look forward to working together with you and Commissioner Adelstein to improve our agency during the coming days and weeks.

Sincerely,

Robert M. McDowell

cc: The Honorable Jonathan S. Adelstein

Mr. STEARNS. I thank the gentleman.

Welcome, Chairman Wellinghoff, for your opening statement.

TESTIMONY OF JON WELLINGHOFF

Mr. WELLINGHOFF. Thank you, Chairman Stearns, Ranking Member DeGette and members of the subcommittee. I want to thank you all for having us here today, and my colleague, Commissioner Moeller, to discuss our views on regulatory reform in independent agencies. We have submitted full testimony here that I would like to have entered into the record, and I will summarize my testimony.

The commission continually seeks to streamline its regulations in order to foster competitive markets and facilitate enhanced competition to minimize consumer costs. Implementing the statutory authority provided by Congress, I am committed to assisting consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost for appropriate regulatory and market means. Fulfilling this mission involves pursuing two primary goals: ensuring that rates, terms and conditions are just and reasonable and not unduly discriminatory or preferential, and promoting the development of safe, reliable and efficient infrastructure that serves the public interest. The commission has taken and continues to take a number of steps to make certain that its regulations meet the fundamental objectives set forth by Congress without imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers.

For example, the commission has taken several steps to remove barriers to entry of new businesses and technologies which facilitate competitive markets and can lower consumer costs. The commission also seeks out ways to help entities, particularly small ones, navigate the federal regulatory process. The commission has also recently reduced burdens on applicants, speeding up processes of filings and improved public access to documents.

In sum, I support the goals of Executive Order 13563. I have directed the commission staff to conduct review of the commission's regulations with the goals of the Executive order in mind. This direction is consistent with the commission's practice of engaging in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry and its consumers.

Thank you, and I look forward to answering any questions.

[The prepared statement of Mr. Wellinghoff follows:]

One Page Summary: Testimony of Chairman Jon Wellinghoff

The Commission continually seeks to streamline its regulations in order to foster competitive markets and facilitate enhanced competition to minimize consumer costs. In implementing the statutory authority provided by Congress, I am committed to assisting consumers in obtaining reliable, efficient, and sustainable energy services at a reasonable cost through appropriate regulatory and market means. Fulfilling this mission involves pursuing two primary goals: ensuring that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential, and promoting the development of safe, reliable and efficient infrastructure that serves the public interest. The Commission has taken, and continues to take, a number of steps to make certain that its regulations meet the fundamental objectives set by Congress without imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers.

For example, the Commission has taken several recent steps to remove barriers to entry of new business and technologies, which facilitates competitive markets and can lower consumer costs. The Commission also seeks out ways to help entities, particularly small ones, navigate the federal regulatory process. The Commission has also recently reduced burden on applicants, sped up processing of filings and improved public access to documents.

In sum, I support the goals of Executive Order 13563. I have directed the Commission's staff to conduct a review of the Commission's regulations with the goals of the executive order in mind. This direction is consistent with the Commission's practice of engaging in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry and consumers.

Testimony of Chairman Jon Wellinghoff

Federal Energy Regulatory Commission

Before the House Subcommittee on Oversight and Investigations

Of the Committee on Energy and Commerce

United States House of Representatives

July 7, 2011

Mr. Chairman and members of the Subcommittee:

My name is Jon Wellinghoff, and I am the Chairman of the Federal Energy Regulatory Commission (FERC or Commission). Thank you for the opportunity to appear before you today to discuss my views on regulatory reform and independent agencies. It is my belief that the Commission continually seeks to streamline its regulations in order to foster competitive markets and facilitate enhanced competition to minimize consumer costs.

In implementing the statutory authority provided by Congress, the Commission is committed to assisting consumers in obtaining reliable, efficient, and sustainable energy services at a reasonable cost through appropriate regulatory and market means. Fulfilling this mission involves pursuing two primary goals: ensuring that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential, and promoting the development of safe, reliable and efficient infrastructure that serves the public interest. While independent agencies such as the Commission are not subject to Executive Order 13563, consistent with the goals of the executive order, the Commission

has taken, and continues to take, a number of steps to make certain that its regulations meet the fundamental objectives set by Congress without imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers. I describe below some of the Commission's recent efforts toward these important goals.

Reducing Regulatory Burdens

The Commission regularly reviews its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers. For example, in the Energy Policy Act of 2005, Congress directed FERC to establish new rules under which the Commission would provide incentive rates to encourage development of electric transmission infrastructure. In July 2006, the Commission implemented that directive by issuing Order No. 679. Since then, the Commission has received more than 75 applications for transmission incentives. Given the significant changes in the electric industry and the Commission's experience in applying Order No. 679, the Commission issued a Notice of Inquiry in May of this year regarding the scope and implementation of its transmission incentives program. Through this Notice of Inquiry, the Commission is seeking public comment on whether its incentive regulations are encouraging the development of transmission infrastructure in a manner consistent with the intent of Congress. The development of transmission infrastructure will facilitate competition in regional electricity markets, which helps ensure just and reasonable rates without burdensome regulatory oversight.

The Commission also is responsive to industry requests to reevaluate its regulations. With respect to the natural gas industry, for example, the Commission

responded to requests to reduce the burden of certain annual natural gas reporting requirements. In Order No. 704-C, the Commission clarified the requirements for natural gas market participants to annually report information regarding physical natural gas transactions that use an index or contribute to the formation of a gas index. The Commission exempted certain transactions from natural gas index reporting requirements, particularly with reference to blanket sales certificates, finding that those transactions were burdensome to report and provided little market information. The Commission also exempted small entities that were obligated to report solely by virtue of possessing a blanket sales certificate. Thus, the Commission removed regulatory burdens on regulated entities, including small businesses.

Moreover, in 2007, the Commission undertook a ten-year review of its electric transmission open access regulations, including its landmark Order No. 888, which prohibited public utilities from using their monopoly power over transmission to restrain or prevent competition. In reviewing these regulations, the Commission conducted significant outreach to the regulated industry and other stakeholders. This effort culminated in the issuance of Order No. 890, which revisited the Commission's open access policies and amended its *pro forma* Open Access Transmission Tariff to further improve competition in wholesale markets by, among other things, increasing the ability of customers to access new generating resources and promoting efficient utilization of transmission by requiring an open, transparent, and coordinated transmission planning process.

Simplifying the Regulatory Process

The Commission also seeks out ways to help entities, particularly small ones, navigate the federal regulatory process. One example of these efforts is the Commission's encouragement of small hydropower development. In response to rising public interest in small hydropower and low-impact hydropower projects, the Commission has developed a publicly available website that provides detailed information on how to navigate the small hydropower regulatory process. Commission staff also has been hosting and will continue to host public tutorials and webinars tailored to the needs of entities intending to file applications to develop small hydropower projects. In addition, Commission staff conducted a study last year in coordination with the hydropower industry, government agencies, Native American tribes, non-governmental organizations, and the general public to evaluate the effectiveness of the Commission's integrated licensing process for hydroelectric facilities. Reflecting similar outreach, the Commission has entered into a number of memoranda of understanding with other federal agencies and state governments to reduce regulatory conflict and overlap.

The Commission and its staff also have coordinated seminars around the country on environmental review and compliance for natural gas facilities. In the past two years, over 1,000 people have attended these seminars. I believe that these seminars increase transparency, help stakeholders better understand the natural gas regulatory process, improve inter-agency coordination, and allow faster processing of applications.

The Commission recently revisited certain regulations to reduce burden on the applicants, speed up processing of the filings and improve public access to documents.

For example, in March of last year, the Commission issued a final rule to revise its Form 556, through which cogeneration and small power production facilities either self-certify qualifying facility (QF) status or apply for Commission certification of QF status. Among other changes, the final rule reduces the burden on small entities by exempting generating facilities that are 1 MW and smaller from the need to file a Form 556 in order to be certified as a QF. This change will facilitate the development of small generating facilities. The final rule also removed the contents of Form 556 from the Commission's regulations and, in their place, provided that an applicant seeking to certify QF status of a small power production or cogeneration facility must complete, and electronically file, the Form 556 that is in effect at the time of filing. The Commission stated that this change takes advantage of newer technologies that will reduce both the filing burden for applicants and the processing burden for the Commission.

The Commission also has taken various steps to simplify the regulatory process by moving from paper to electronic formats in a number of areas. Most notably, the Commission has developed and implemented a standard electronic tariff filing system known as eTariff. Electronic filing reduces the burden on those who make filings at the Commission -- and on those who use such filings, such as regulated entities, the public, and Commission staff -- by providing faster and easier access to tariffs. The eTariff filing process has greatly improved public access to tariff filing documents by posting such filings in near real-time into the public record, and increased ten-fold the number of FERC regulated tariffs that are now available through the Commission's web site.

Similarly, the Commission is moving to automate various forms to simplify the

regulatory process. For example, section 205(f) of the Federal Power Act requires respondents to submit certain information in Form 580 to ensure the economical purchase and use of fuel and electric energy, among other purposes. In 2010, the Commission established Form 580 in an electronic pdf-fillable form and streamlined the information required by the Form.

Removing Barriers to Entry for New Business and Technologies

In addition to reviewing its regulations to reduce undue burdens, the Commission has taken several recent steps to remove barriers for entry of new business and technologies, which in turn facilitates competitive markets and can lower consumer costs. In recent years, improvements in technology have led to an increasing variety of resources being capable of contributing to reliable, efficient, and sustainable energy services. The Commission has initiated a number of recent rulemaking proceedings to ensure that regulations it developed prior to those improvements do not prevent the use of emerging technologies to provide services subject to the Commission's jurisdiction. In general, increased competition among providers of these services will tend to place downward pressure on rates for those services. I also would note that in each of these rulemakings, the Commission seeks public comment to ensure that any changes the Commission proposes are appropriately tailored to their intended purpose.

One example of this effort is that the Commission also has taken steps to remove barriers to the use of emerging technologies that are capable of responding to certain transmission system needs more quickly than the generators that have traditionally provided those services. These types of emerging technologies include batteries,

flywheels and other electric storage devices. In February of this year, the Commission proposed to revise its regulations with respect to provision in organized wholesale electric markets of regulation service. Regulation is an ancillary transmission service that protects the grid by correcting deviations in grid frequency and imbalances on transmission lines with neighboring systems. The Commission's proposed changes are intended to ensure that resources that provide faster and more accurate regulation service are compensated appropriately for their performance. Again, this proposed rule has the potential to lower costs to consumers, as increased use of fast and accurate resources should allow system operators to purchase less regulating capacity.

A variety of resources are capable of providing regulation and other aocillary transmission services but may be discouraged from doing so by certain aspects of the Commission's market-based rate policies. They may also lack of access to the information necessarily to supply those services. Therefore, the Commission is now exploring whether changes are needed to allow more resources to provide ancillary services. Just last month, the Commission issued a Notice of Inquiry that sought public comment on ways in which the Commission can facilitate competition in the provision of ancillary services from all resource types, including electric storage. The Commission also sought comment in that Notice of Inquiry on whether the Commission's accounting requirements present a barrier to development of electric storage.

The Commission also has taken a number of recent steps to remove barriers to demand response participation in organized wholesale electric markets. Pursuant to a Congressional directive, Commission staff in 2009 developed a National Assessment of

Demand Response Potential, which found that the potential for peak electricity demand reductions across the country is between 38 gigawatts and 188 gigawatts, up to 20 percent of national peak demand, depending on the penetration of advanced metering and the applicable regulatory policies. Also pursuant to a Congressional directive, Commission staff in 2010 developed a National Action Plan on Demand Response. In addition, the Commission has amended its regulations to facilitate demand response participation in organized markets. In Order No. 719, for example, the Commission amended its regulations to facilitate provision of ancillary transmission services by demand response resources that are technically capable of providing those services.

Conclusion

In sum, I support the goals of Executive Order 13563. I have directed the Commission's staff to conduct a review of the Commission's regulations with the goals of the executive order in mind. This direction is consistent with the Commission's practice, which I have described, of engaging in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry. I look forward to working with you to ensure that this remains the case.

I appreciate this opportunity to share my thoughts on regulatory reform and independent agencies and would be happy to answer any questions you might have.

Mr. STEARNS. I thank the gentleman.
Commissioner Moeller, welcome.

TESTIMONY OF PHILIP D. MOELLER

Mr. MOELLER. Thank you, Mr. Chairman, Ranking Member DeGette, members of the committee. I appreciate the chance to be before you today to talk about these important issues. I welcome your oversight, and I will summarize my written comments with a brief history, I guess, of how our regulations have evolved at the commission and then give you three examples of where I think we kind of struggle with balancing the need to ensure that our services are provided safely at fair and just rates but also making sure that we are protecting and not unduly burdening the entities that we regulate.

The Federal Power Commission, our predecessor, really came into its own after the passage of the 1935 Federal Power Act and the 1938 Natural Gas Act, and as regulators then, the commission was highly relating these entities because they were monopoly providers of services that were deemed essential but over the decades and particularly in the last 25 years, regulation has evolved so that more competitive forces can provide consumers with frankly lower prices at better service. These came through two landmark orders on the natural gas side, 436 and 636, which restructured the pipelines, and then on the electric side, orders 888 and 2000 that set up regional markets and allowed for open access of the transmission systems. Again, these have had great benefits for consumers but our responsibilities as regulators in monitoring these markets have increased substantially since then.

Three areas where we particularly spend time, the first of which I will say is the reliability area of assuring the reliability of the bulk power system. Now, the origins of this issue came from the 1965 Northeast blackout a voluntary set of regulations came about after that, but as time went on, particularly in the late 1990s, it was clear that a mandatory system was going to be necessary, some kind of a cop on the interstate electric highway, and although there was legislation in the late 1990s, eventually it took the 2003 blackout and the 2005 Energy Policy Act before you as Congress directed us to create a national electric reliability organization with eight regional entities, and in the meantime, we have adopted 101 national standards, 11 regional standards, and we have had a very active enforcement process on those standards. In fact, we have had 7,000 violations to date since they became mandatory in June of 2007. And frankly, we are struggling with our role, the role of NERC, the role of the regional entities because we have a bit of a backlog on these violations. They are about to about 3,200.

I think the good news, though, is that through NERC, or through our direction to NERC, they are working to make sure that it is a better streamlined process so that we can eliminate the backlog and essentially share the best practices amongst the entities we regulate on the bulk power system.

A second area is related to that and that is with our new powers of enforcement that you gave us in the 2005 Energy Policy Act, partly emanating from the Western crisis in 2000 and 2001. You gave us the kind of major league enforcement authority that few

agencies have. We can fine entities up to $1 million per day per violation. And initially when we put out some of our rulings with some significant fines, there was some criticism from the industry that we lacked transparency in the process and lacked priorities, and I am happy to say that our office of enforcement under the urging of several of us on the commission has opened up that system so that we are a much more transparent system now. We adopted annual priorities in terms of enforcement, adopted guidelines based on the U.S. Sentencing Commission, and essentially have processes and policies in place that allow anyone under investigation to know at certain times that they are and give them the certain rights that other agencies give them. So we are making progress there.

The third area I would note, because I come from the Pacific Northwest, is the hydropower system. We regulate 2,500 hydropower dams throughout the Nation and some have complained that that processing of licensing or, more often, re-licensing, is both costly and time consuming, and that much is true, but I don't think much of that can be put on FERC. I think actually the laws itself that govern the process of re-licensing are worth looking at if this is something that inspires you because we actually I think do a good job under the current system of setting timetables but often the resource agencies don't have any consequence to missing the timetables involved.

In the meantime, though, I think we have tried as an agency to develop small hydropower systems through MOUs with various states that are interested. We have tried to open up the process to stakeholders and developers that are interested in small hydropower development and we have come up with a pilot licensing process for the new hydrokinetic technologies of in-stream power, ocean power and tidal power, again in a way through our regulations to try and encourage an industry to move forward.

And finally, I will send a compliment to our colleagues at the Federal Trade Commission. They have been active in some of our rulemakings, and their perspectives are always very valuable.

Thank you for the opportunity again to testify, and I look forward to answering any questions.

[The prepared statement of Mr. Moeller follows:]

Summary of Testimony of Commissioner Philip D. Moeller
Before the U.S. House of Representatives
Committee on Energy and Commerce,
Subcommittee on Oversight and Investigations

July 7, 2011

Highlighted are three areas where the Commission has specific regulatory challenges. In these three areas we have a difficult role in balancing the need to assure that the services provided are done safely and at just and reasonable rates --- while not imposing undue burdens on the entities we regulate.

In 2005, Congress gave the Commission significant new responsibilities including a new regulatory directive to increase the reliability of the Bulk Electric System through the creation of mandatory and enforceable reliability standards and certifying a new Electric Reliability Organization. It has truly been a paradigm shift for an entire industry to go from a set of voluntary standards to mandatory and enforceable standards with significant potential of financial penalties.

The Commission, through our Office of Enforcement, has established new measures to provide our regulated industry with a better understanding of our enforcement processes. Ultimately, our intent is not to assess penalties, but instead, to increase compliance with our regulations.

The licensing process of hydropower projects (and the re-licensing of existing projects) is an expensive and multi-year process. Most of the cost and time involved in this process can be traced to the requirements of the federal hydropower licensing law. An examination of related laws and specifically the roles and responsibilities of resource agencies could help streamline the licensing process and provide more certainty for those seeking to develop this abundant renewable resource.

Testimony of Commissioner Philip D. Moeller
Before the U.S. House of Representatives
Committee on Energy and Commerce,
Subcommittee on Oversight and Investigations

July 7, 2011

Chairman Stearns, Ranking Member DeGette, and members of the Subcommittee, thank you for the invitation to testify before you on the subject of streamlining regulation in an effort to increase the effectiveness of the federal government. This is a vital issue for the Congress to consider and I welcome yoor oversight of our agency and our efforts. Throughout my career in botb the public sector and the private sector, my personal philosophy has always been to work toward increasing the effectiveness of regulation and legislation, with an emphasis on defining specific problems that need fixing and working toward specific solutions to those problems. I am a strong believer in effective oversight that periodically reviews government action to make surc that the solutions that are proposed and enacted through legislation or regulations were and continue to be effective, necessary and not counterproductive.

With enactment of the Federal Power Act and the Natural Gas Act in 1935 and 1938, respectively, the Federal Power Commission was required to regulate both the sales of electricity at wholesale and the transportation of natural gas along interstate pipelines, products that were often sold by monopolies. Given the monopoly power of numerous utilities, the Commission engaged in a comprehensive regulation of the costs and revenoes of jurisdictional transactions. Of the many achievements of the Commission, we developed the Uniform System of Accounts, a comprehensive manner of ensuring consistency in the books and records of regulated utilities. Yet with technological improvements in the means of generating electric power and transporting natural gas, the

Commission recognized that competition among utilities could result in prices that were lower for consumers than traditional cost-based regulation.

In light of the emerging prospects for competition, the Commission began a series of initiatives, including several groundbreaking orders, which opened up wholesale markets to certain forms of competition. Thus, despite issuing more regulations comprising of more words on paper, this Commission was actually allowing the public more freedom to engage in transactions that would result in better outcomes than under traditional regulation.

Throughout the 1980s and 1990s, the Commission issued landmark rulings (*i.e.*, Order Nos. 436 and 636) which restructured natural gas pipeline services by unbundling sales of the commodity from transportation services, thereby transforming pipelines into solely transportation providers. Meanwhile, in the electric industry, the issuance of Order No. 2000 established the creation of regional markets administered by Regional Transmission Organizations and Independent System Operators, and Order No. 888 initiated changes to promote open-access transmission service that has allowed competitive forces to discipline the wholesale electric markets. Our responsibilities to monitor these markets have vastly increased after these regulations took effect.

Our economic regulation of the wholesale electric markets consumes most of the agency's time and resources, but that does not diminish our other regulatory duties: safety and environmental regulation of non-federal hydropower dams, limited safety and economic regulation of natural gas pipelines and onshore liquefied natural gas terminals, and economic regulation of interstate oil pipelines.

In my testimony today I highlight three areas where the Commission has specific regulatory challenges. In these three areas we have a difficult role in balancing the need to assure that the services provided are done safely and at just and reasonable rates --- while not imposing undue burdens on the entities we regulate. We have made a lot of progress but admittedly still have a lot of work to do on each of them.

In 2005, Congress enacted the Energy Policy Act. This wide-ranging legislation gave the Commission significant new responsibilities including a new regulatory directive to increase the reliability of the Bulk Electric System through the creation of mandatory and enforceable reliability standards and certifying a new Electric Reliability Organization (now known as the North American Electric Reliability Corporation or NERC.) Congress also tasked us with another major regulatory responsibility by enhancing our enforcement powers by requiring additional market oversight and giving us the ability to fine entities up to $1 million per day per violation for violations of our rules. Our regulatory responsibility for Bulk Electric System reliability provides an appropriate example of the tradeoffs involved in our role as regulators. The Commission has spent considerable time and effort since 2005 implementing this regulatory responsibility.

It has truly been a paradigm shift for an entire industry to go from a set of voluntary standards to mandatory and enforceable standards with significant potential of financial penalties as noted above. This has been a difficult transition for everyone involved, as we to date have adopted 101 national and 11 regional reliability standards that apply to the owners and operators of our Bulk Electric System. More than 7,000 possible violations both large and small have been reported since the first group of

standards approved by the Commission became mandatory on June 18, 2007. These violations are first reviewed by one of eight Regional Entities, are then reviewed by NERC, and then by the entire Commission. All of these violations are relevant to our efforts to prevent small or widespread outages in the Bulk Electric System. However, the entire system (consisting of the regional entities, NERC and FERC) currently has more than 3200 possible violations that are pending dismissal or filing with the Commission.

While some of these possible violations represent new cases, there is a significant backlog in processing these violations before NERC files them with the Commission. We have endeavored to create a more streamlined system of reviewing violations and at our direction NERC is working to develop a more efficient way to address minor violations and to develop a "lessons learned/best practices" informational resource for regulated entities. But clearly we have a lot of work ahead of us to reduce the backlog at the Regional Entities and at NERC in order to improve the effectiveness of this area of regulation.

Regarding our relatively new authority related to enforcement, I have made it a personal priority to increase the effectiveness and transparency of our Office of Enforcement. When the federal government wields the power of its sword, it should be firm and fair. In the first years of this new authority, many regulated entities contended that we lacked transparency in both our enforcement priorities and the results, with wide-ranging penalties that at times did not seem proportional to the violations that occurred. I wish to highlight that the Commission, through our Office of Enforcement, has established new measures to provide our regulated industry with a better understanding of our enforcement processes. Ultimately, our intent is not to assess penalties, but instead,

to increase compliance with our regulations. Maintaining a transparent enforcement process will provide jurisdictional utilities with a greater level of certainty that their actions will be evaluated fairly and objectively by us, their regulators.

Among the new measures that have been established since last year, the Commission is now announcing its annual enforcement priorities; we have enacted objective penalty guidelines based on the U.S. Sentencing Guidelines model; and we have formalized a process to disclose exculpatory material during the course of an investigation, similar to the due process afforded by some other Federal agencies. Moreover, to provide transparency to our investigative process, the Commission has begun issuing public notices that announce the initiation of an enforcement investigation. While the specific details of the matter remain confidential, we now make public basic facts surrounding the investigation. This information will help to inform the regulated community about the views of the Office of Enforcement and will likely contribute to a better understanding of the Commission's compliance obligations.

As someone who hails from the Pacific Northwest, I have always had a keen interest in promoting cost-effective and environmentally-friendly hydropower resources. It is a fact that the licensing process of hydropower projects (and the re-licensing of existing projects) is an expensive and multi-year process. However, most of the cost and time involved in this process can be traced to the requirements of the federal hydropower licensing law. This existing law emphasizes both extensive environmental reviews of a project's impacts and a role for federal and state resource agencies. There are no consequences to these agencies if they miss deadlines that are part of the Commission's licensing process or of the laws and regulations they must comply with before the

Commission can issue a license, such as the Endangered Species Act and the Clean Water Act. For those members interested in promoting hydropower development, an examination of this and related laws and specifically the roles and responsibilities of resource agencies could help streamline the licensing process and allow greater certainty for those seeking to develop this abundant renewable resource.

In the meantime, the Commission has worked to promote the development of both smaller hydropower resources and the newer hydrokinetic technologies that include harnessing in-stream power, tidal power, and ocean power. Specifically, the Commission has developed a pilot license process for hydrokinetic resources and focused on removing barriers to developing smaller hydropower resources by creating a small hydro initiative. This initiative includes adding new web-based resources to make it easier for applicants to understand and complete the licensing process, updating or creating Memoranda of Understanding (MOUs) with other agencies to improve coordination, and a new education and outreach program for developers and interested stakeholders.

Thank you again for the opportunity to testify before you today. I look forward to working with you in the future and to answering any questions.

Mr. STEARNS. I thank the gentleman.
Chairman Leibowitz, welcome.

TESTIMONY OF JON LEIBOWITZ AND WILLIAM E. KOVACIC

Mr. LEIBOWITZ. Thank you, Chairman Stearns, Ranking Member DeGette, Mr. Barton, Dr. Burgess, Mr. Terry, members of the subcommittee. Let me thank you for the opportunity to appear here today with my friend and my colleague, Bill Kovacic, to discuss the FTC's longstanding regulatory review program. It has been and it is a bipartisan priority for us as well as our plans for ensuring that this program continues to protect American consumers while minimizing burdens on American businesses.

Today, the FTC is announcing additional measures to strengthen our regulatory review process including an expedited schedule for reviewing rules and guides to meet the demands of the marketplace, a new streamlined form for pre-merger filings, a new page on our Web site to provide greater transparency and public participation in reviews and a sort of review of the reviews, that is, we are asking stakeholders how we can make our review process even better. In that same spirit, we are also seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the commission.

So let me give you a brief overview of the FTC before Commissioner Kovacic describes the history and nature of FTC regulatory reviews. After he is finished, I will tell you a little more about what the commission is doing today to enhance and improve our approach to regulations.

Simply put, we are building on our longstanding regulatory housecleaning efforts over the years under which we have eliminated outdated rules from the Mad Men era including those addressing extension ladders, fiberglass curtains and frosted cocktail glasses. That is true.

As you know, the Federal Trade Commission is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy, and our work touches the lives of virtually every American. We are primarily a law enforcement agency but we perform our mission using other tools as well including rulemakings from time to time, either when Congress asks us or when additional clarity is needed in the marketplace. Most of our rules, by the way, are a result of directives from Congress because you have recognized that they would be valuable to consumers and businesses alike by protecting all of us from unfair and deceptive acts or practices and by leveling the playing field so that legitimate businesses aren't at a competitive disadvantage from the bottom feeders who don't always play fair, and with that, I would like to turn it over to Commissioner Kovacic.

Mr. STEARNS. Mr. Kovacic, go ahead. Just for members' information, the two gentlemen from the Federal Trade Commission are going to split their 10 minutes so they will be going back and forth, as I understand. Welcome.

Mr. KOVACIC. Thank you, Mr. Chairman, Madam Ranking Member and your colleagues for the opportunity to speak here today. Although the Executive order that we have been focusing on doesn't bind independent agencies, the FTC does endorse its goals, and in

particular, we endorse the intuition that changing market conditions dictate ongoing efforts to determine whether existing rules have become outdated, unduly burdensome or simply ineffective.

To ensure that our work meets this objective, since 1992 we have had a voluntary program to review our rules and guides. We examine each regulation and rule in a 10-year cycle. Each year we publish a schedule of review and we begin the examination of each rule or guide by publishing a Federal Register notice, and this notice seeks comment on the continuing need for the regulation or the guide and an examination of its costs and benefits to consumers and businesses. We also ask whether consequent economic developments call for changes in the rule or its outright abolition. We also consider whether the measure conflicts with other intervening State, local or national legal commends.

We use these comments and we use the results of workshops that we conduct from time to time to decide whether there is a continuing need for the regulatory command or guideline and how needless burdens could be avoided, and if adjustments are warranted, we start proceedings to modify or appeal the rule or guide. As John mentioned, through this process, we have repealed 37 rules and guides. We haven't repealed one outright since 2004. I think we did look at the most serious cases first but we have undertaken modifications with respect to others since that time. We now have 12 reviews in place. In one proceeding, we are considering amendments to the labeling requirements for the alternative fuels and alternative-fueled vehicles, and here we are assessing how to eliminate the need for firms to apply redundant labels that are mandated by different agencies. In another instance, we have accelerated the review of our Hart-Scott-Rodino mechanism for mandating the notification and reporting of mergers, and we intend to initiate reviews of 11 more rules or guides by the year's end.

Comments provided in this process I think overwhelmingly show business support for not only the mechanism we have used but for the rules and guides themselves, and our guidelines in particular stand out as means to reduce business burdens by clarifying what we regard to be the line that separates appropriate from inappropriate behavior, and in doing so, we think we have significantly reduced the cost of complying with what you know to be the exceedingly broad general mandates that appear in our statutes.

My colleague will now explain recent measures that we have taken to enhance this review process, and I look forward to your questions and comments later. Thank you.

Mr. LEIBOWITZ. As Commissioner Kovacic has explained, we have long had a program for reviewing our guides and our regulations. You noted, Chairman Stearns, in your opening statement the importance of taking costs and benefits into account and we do do that. It is critically important to us. All of our work including the guides is done publicly with input from stakeholders.

But earlier this year, we began examining what more we could do to improve these rules and really relieve undue burdens on industry, so as part of this effort and very much in the spirit of the President's Executive order, here is what we are doing. First, as Commissioner Kovacic noted, we are undertaking a review of 23 rules and guides. That is more than a third of all the rules we ad-

minister, rules and guides we administer. As announced in our Federal Register notice today, six of the rules under review have been accelerated to take into account for rapid changes in the marketplace. Congresswoman DeGette, you mentioned the Do Not Call Rule, and we recently strengthened the Do Not Call Rule, the Telemarketing Sales Rule, which Do Not Call is part of. It has 200 million, actually now more than 200 million registered phone numbers, and Dave Barry has called it the most effective government program since the Elvis stamp.

Second, our Federal Register notice asked for the public to comment on the FTC's 20-year program of reviewing its rules. Businesses have generally been, as Commissioner Kovacic noted, supportive of our regulatory reviews but we nevertheless asked a number of questions. For example, how often should the commission review rules and guides, how can we modify programs to make them even more responsive to the needs of consumers of businesses.

Third, the FTC's new regulatory reform Web site just went live today because not everyone reads the Federal Register, although I know many of you do. It serves to provide—and many of us do. It serves to provide greater transparency for members of the public to understand our regulatory review efforts. It allows them to more easily comment on our ongoing rule reviews as well as on the FTC's process to review its rules. It also contains links to the 37 rules the commission has eliminated over the years as well as easy links to other resources like the new 10-year review schedule and the streamlined HSR, Hart-Scott-Rodino, pre-merger form.

Fourth, commission staff are seeking to identify statutes that might impose undue burdens on businesses or on the commission. Although a law's goals may be laudable, some statutes passed by Congress, as we know, can detract from other beneficial work, and I think Commissioner Moeller sort of alluded to this with respect to licensing issues. So one example is the FACT Act, which was passed in 2003, Fair and Accurate Credit Transactions Act, and it came out of the Financial Services Committee, and it required the FTC to conduct 30 separate rulemakings, studies and reports, 30. Some of those obligations of course make sense, but at one point around 2005, and this was shortly after I came to the commission, about a third to half of our financial practices staff, and these are the folks who go after mortgage fraud, were actually spending time writing reports because they were obligated, and we do what Congress tells us to do. Now, we have been writing reports since 1914, we are very good at it, but in fact our staff should have been spending more time going after the bad guys who were preying on American homeowners. So consistent with the goal of reducing unnecessary burdens, commission staff is now working to identify reports required by statute, and I think statutes themselves that divert businesses or commission resources from more pressing work, and the staff has identified sort nf two such reports at least preliminarily. So year after year, the mandated ethanol industry report has shown that there is almost no concentration in the ethanol fuel market. The report doesn't appear to provide significant value to the public but it does impose burdens on small businesses because they have to respond to inquiries from the FTC, and so our staff

is proposing that the report be eliminated or at the very least that the frequency be reduced to every 3 years.

Additionally, while the FTC, the DOJ, the Department of Education are very involved in fighting scholarship scams, and for the FTC's part, we compile complaints, the annual report about scholarship scams, the annual report that the three agencies must jointly produce each year on the topic which is required by statute, doesn't appear to FTC staff to advance any real or significant goals.

So Mr. Chairman, through these four initiatives, we are working to improve the FTC's review program. We will do our best going forward and working with this committee to ensure that all of our regulations protect American consumers while minimizing burdens on businesses. Thank you. Of course, we are happy to answer questions.

[The prepared statement of Mr. Leibowitz and Mr. Kovacic follows:]

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

The FTC's Regulatory Reform Program:

Twenty Years of Systematic Retrospective Rule Reviews
&
New Prospective Initiatives to Increase Public Participation and Reduce Burdens on Business

Before the

House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

Washington, D.C.
July 7, 2011

I. Introduction

Chairman Stearns, Ranking Member DeGette, and Members of the Subcommittee, we are Chairman Jon Leibowitz and Commissioner William Kovacic of the Federal Trade Commission ("FTC" or "Commission").[1] As the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy, the FTC's work touches the economic life of every American. We appreciate the opportunity to appear before you today to testify about the FTC's ongoing and comprehensive regulatory review program. Since 1992, we systematically and rigorously have reviewed our rules to ensure that they enhance consumer welfare without imposing undue burdens on business. Going forward, the FTC will continue an aggressive schedule of regulatory reviews and is seeking public comment to improve our regulatory review program.

Through Executive Order 13563, the President recently directed all Executive Branch agencies to engage in a regulatory review process. While the FTC, as an independent agency, is not bound by this Order, it fully supports the Order's goals. In a rapidly changing marketplace, effective regulations and industry guidance can become outdated, ineffectual, and unduly burdensome. To ensure that the Commission's regulations and compliance advice remain cost-effective, the FTC has engaged in a systematic review program for the last two decades, scheduling all rules and industry guides for review on a ten-year cycle. Pursuant to that

[1] This written statement represents the views of the Commission. Our oral presentations and responses to questions are our own and do not necessarily reflect the views of the Commission or any other Commissioner.

program, the Commission has rescinded 37 rules and guides and updated dozens of others since the early 1990s.[2]

After 20 years, the Commission is taking a fresh look at our regulatory review program. The FTC currently is seeking public comments on ways it can improve its regulatory review process to better serve consumers and businesses. In addition, the FTC just announced an updated schedule of rule and guide reviews for the next decade, which included accelerating two rule reviews. To enhance these efforts, the Commission is launching a new web page on FTC.gov dedicated to our regulatory review program to increase transparency, foster public participation, and make it easier for the public to comment on ongoing reviews.[3]

The Commission currently has a robust regulatory review docket, with 13 rules and guides under review and 10 additional reviews scheduled to start this year. In other words, more than a third of the Commission's 66 rules and guides will be under review, or will have just been reviewed, by the end of 2011.[4]

As part of its commitment to regulatory review, the Commission does not wait ten years to review a rule or guide if there is reason to believe that changes may be appropriate. The

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[2] The Commission has rescinded 24 guides and 13 trade rules that had been promulgated under the FTC's general authority. The Commission began using a ten-year calendar in 1992, but rescinded two rules using a similar process in 1990. Although it has been many years since a rule has been fully rescinded using this review process (the Commission rescinded its Smokeless Tobacco Rule, 16 C.F.R. Part 307, pursuant to statute in 2010), the Commission has made significant updates and improvements to its rules and guides in recent years.

[3] Federal Trade Commission, Regulatory Review, http://www.ftc.gov/regreview.

[4] An additional nine rules that had previously been scheduled for review are being transferred to the Consumer Financial Protection Bureau ("CFPB") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, Sec. 1061(b)(5), 124 Stat. 2004 (July 21, 2010) ("Dodd-Frank Act").

Commission has recently accelerated the scheduled review of six rules and guides that require attention. For example, the Commission just completed review of its Hart-Scott-Rodino Transmittal Rule and promulgated a revised rule that reduces the filing burden on companies seeking to merge and streamlines the premerger notification form from 15 to 10 pages. Another example of the Commission's proactive approach to regulatory review is its accelerated review of its Alternative Fuels and Alternative Fueled Vehicles Rule, where it is working with a sister agency to harmonize our rules and ensure that automobile manufacturers need not apply redundant labels.

II. FTC Rules and Guides Protect Consumers and Level the Playing Field for Businesses

The Commission works to protect consumers from deceptive and unfair commercial practices, and to ensure a vibrant and competitive marketplace. The FTC performs these dual missions through a variety of tools, including law enforcement, research, studies of marketplace trends and legal developments, consumer and business education, as well as rules and guides.

Congress often delegates rulemaking authority to the Commission to use its expertise to implement statutes, and most of the FTC's rules have been promulgated pursuant to such specific delegations. The Commission's regulations and guides serve an important public interest, protecting consumers from deceptive and unfair business practices, and creating a level playing field for legitimate businesses.

The agency administers and enforces 15 "trade regulation rules" authorized by the FTC Act and 35 rules authorized by other statutes.[5] Further, the Commission currently publishes 16

[5] This excludes nine statutory rules that are being transferred to the CFPB pursuant to the Dodd-Frank Act. The FTC has not issued an entirely new trade regulation under its FTC Act Section 5 authority (using Magnuson-Moss procedures) since 1984.

industry guides. These guides set forth the Commission's interpretation of the prohibition on deceptive practices in Section 5 of the FTC Act.[2] In this way, they help clarify the line between deceptive and legitimate conduct, thereby giving marketers greater certainty when seeking to avoid running afoul of the law. The Commission understands the importance of avoiding undue burden on business, and seeks to promulgate rules and guides that improve the ability of legitimate businesses to compete in a marketplace free from deceptive and unfair practices.

To provide just two examples, the Children's Online Privacy Protection Rule ("COPPA Rule"),[3] which was promulgated pursuant to the Children's Online Privacy Protection Act of 1998, helps protect the privacy of children online. It requires operators of websites and online services directed to children under the age of 13, as well as operators of general audience sites and services having knowledge that they collect information from children, to provide notice to parents and obtain their consent before collecting, using, or disclosing children's personal information. In the past ten years, the Commission has brought 16 law enforcement actions alleging COPPA rule violations and has collected more than $6.2 million in civil penalties. The comments submitted during the Commission's ongoing regulatory review of the COPPA rule[4]

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[2] 15 U.S.C. § 45(a).

[3] 16 C.F.R. Part 312.

[4] Although the Commission generally reviews its rules approximately every ten years, the agency accelerated its COPPA review by five years (from 2015 to 2010) due to the rapid pace of technological developments, including a dramatic increase in children's use of mobile devices and changes in the way they use and access the internet.

indicate widespread agreement, including among industry members, that the regulation is an important part of an effective government program to address children's online privacy."

Similarly, the Telemarketing Sales Rule ("TSR")[10] has been widely hailed both for its effective anti-fraud provisions and the important privacy protections provided by the Do Not Call provisions. Our 1999 regulatory review of the TSR revealed a broad consensus among consumers that the original Rule's provisions designed to decrease intrusive and unwanted telemarketing calls were ineffective in reducing those calls.[11] As a result, the Commission adopted a revised and strengthened TSR in January 2003 by establishing the National Do Not Call Registry. The amended Rule is widely-recognized as an important bulwark against fraud and an important privacy protection, empowering consumers, not telemarketers or government, to decide whether they want to receive telemarketing calls. Over 208 million numbers are on the Registry.

III. The Commission's Regulatory Review Program

This section discusses the FTC's program for scheduling periodic reviews of its rules and guides, the method the Commission uses to review rules and guides, and steps it is taking to improve this process.

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[9] *See* Prepared Statement of the Federal Trade Commission on Consumer Privacy and Protection in the Mobile Marketplace Before the Committee on Commerce, Science, and Transportation, 112th Cong. (May 19, 2011), *available at* http://www.ftc.gov/os/testimony/110429mobilemarketplace.pdf.

[10] 16 C.F.R. Part 310.

[11] Under the earlier rule, consumers had to ask each business that made a telemarketing call not to call again, and those businesses then had to put that consumer's telephone number on an internal do not call list.

A. Scheduling Regulatory Reviews

The Commission currently schedules its rules and guides for review on a ten-year cycle; *i.e.*, all rules and guides are scheduled to be reviewed ten years after implementation and ten years after completion of a regulatory review. The Commission publishes this schedule annually, with adjustments in response to public input, changes in the marketplace, and resource demands. As a result of this process, the Commission accelerated four reviews in recent years and just announced that it would accelerate the review of two others.

Because of recent increases in the use of environmental marketing claims, in 2007, the Commission accelerated its review of its Guides for the Use of Environmental Marketing Claims, also known as the Green Guides.[12] The Commission accelerated in 2010 its review of the Children's Online Privacy Protection Rule[13] to address rapid changes in technology and children's use of online media. The Commission accelerated from 2014 to 2010 possible amendments to the Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles[14] that would harmonize FTC rules with EPA rules and eliminate the need for automobile manufacturers to apply redundant labels from different agencies. The Commission also just completed review of the Hart-Scott-Rodino Antitrust Improvements Act ("HSR") Transmittal Rule to streamline the premerger notification form,[15] and is accelerating its review of

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[12] 16 C.F.R. Part 260.

[13] 16 C.F.R. Part 312.

[14] 16 C.F.R. Part 309.

[15] 16 C.F.R. Part 803.

the HSR Coverage Rule[16] from 2013 to 2011, to more rapidly alleviate any unnecessary burden on merger filers. Finally, the Commission is accelerating review of the Appliance Labeling Rule,[17] previously scheduled for 2018, to 2012 to address rapid changes in appliance technology and help ensure that consumers have the information about the energy efficiency and operating costs of appliances and electronic devices in the marketplace.

B. Current Regulatory Reviews

As part of its ongoing regulatory review program, the Commission has pending reviews relating to 13 of its rules and guides.[18] Of the 13 additional rules and guides originally scheduled to be reviewed in 2011, the Commission is postponing review of four of them due to resource constraints resulting from the acceleration of the reviews noted above, and because staff has determined that there is no pressing need for review this year.[19] As noted above, the

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[16] 16 C.F.R. Part 801.

[17] 16 C.F.R. Part 305.

[18] Guides for Private Vocational and Distance Education Schools, 16 C.F.R. Part 254; Guide Concerning Fuel Economy Advertising for New Automobiles, 16 C.F.R. Part 259; Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260; Automotive Fuel Ratings, Certification and Posting Rule, 16 C.F.R. Part 306; Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 [Pay Per Call Rule], 16 C.F.R. Part 308; Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles Rule, 16 C.F.R. Part 309; Children's Online Privacy Protection Rule, 16 C.F.R. Part 312; Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended Rule, 16 C.F.R. Part 423; Use of Prenotification Negative Option Plans Rule, 16 C.F.R. Part 425; Rule Concerning the Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429; Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435; Disclosure Requirements and Prohibitions Concerning Business Opportunities Rule, 16 C.F.R. Part 437; and Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.

[19] Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements, 16 C.F.R. Part 14; Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. Part 23 (recently amended to keep pace with developments in the platinum market); Preservation of Consumers' Claims and Defenses Rule ("Holder in Due Course Rule"), 16

Commission is accelerating one rule review to 2011.[30] Thus, the Commission intends to initiate a review of, and solicit public comments on, 10 additional rules and guides during 2011, for a total of 23 rule reviews this calendar year.[31]

C. Process for Reviewing Rules and Guides

When the Commission reviews a rule or guide, it publishes a notice in the Federal Register seeking public comment.[32] This notice asks all interested parties to comment on the continuing need for the regulation or guide as well as its costs and benefits, both to consumers and businesses. Additionally, the Commission asks whether current or impending technological or economic changes affect the need for, or require modification of, the regulation or guide and whether the regulation or guide conflicts with state, local, or other federal law. The Commission

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C.F.R. Part 433; and Credit Practices Rule, 16 C.F.R. Part 444.

[30] HSR Coverage Rule, 16 C.F.R. Part 801.

[31] Guides for the Advertising of Warranties and Guaranties, 16 C.F.R. Part 239; Rules and Regulations under the Wool Products Labeling Act of 1939, 16 C.F.R. Part 300; Rules and Regulations under Fur Products Labeling Act, 16 C.F.R. Part 301; Rules and Regulations under the Textile Fiber Products Identification Act, 16 C.F.R. Part 303; Retail Food Store Advertising and Marketing Practices Rule, 16 C.F.R. Part 424; Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. Part 700; Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 C.F.R. Part 701; Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702; Informal Dispute Settlement Procedures, 16 C.F.R. Part 703; and HSR Coverage Rule, 16 C.F.R. Part 801.

[32] Rules and guides serve very different purposes; review of each is important for different reasons. The Commission periodically reviews rules to ensure they remain relevant in a changing marketplace and continue to serve their intended purpose without unduly burdening commerce. Guides, on the other hand, help clarify the line between deceptive and non-deceptive marketing in a particular context. As such, they help companies avoid incurring the risks and cost of determining how their claims may be interpreted. Because the meaning of advertising terms is established by what reasonable consumers understand in the real world, and not what the Commission believes they should mean, it is important to periodically update the Commission's guides to ensure they reflect evolving consumer understanding.

also asks specific questions about how the rule or guide can be improved and for data, studies, or other evidence to support the commenter's recommendation.[23] Typically, the Commission receives substantive comments from businesses, trade associations, consumer and other public interest groups, state law enforcement, individual consumers, and other interested stakeholders. It also often holds workshops at which interested parties can express their views to the Commission staff and respond to the views of others.

Using this feedback, the Commission determines whether there is continuing need for the rule or guide, and, if so, whether it still serves its intended purpose without unduly burdening commerce. After analyzing the comments, the Commission either initiates a proceeding to modify or repeal the regulation or guide in question, or determines no changes are warranted.[24]

If the Commission determines that a rule should be modified, it issues either an Advance Notice of Proposed Rulemaking or a Notice of Proposed Rulemaking, in which it summarizes the public comments, sets forth the proposed modifications, explains the costs and benefits of the proposed modifications and why they are justified, and seeks additional public comment.[25] At

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[23] *See, e.g.*, Review of Regulations under the Fur Product Labeling Act, 76 Fed. Reg. 13550 (Mar. 14, 2011); Review of Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods as Amended, *available at* http://www.ftc.gov/os/fedreg/2011/03/110314carelabelingfrn.pdf.

[24] As noted above, in the last two decades, the Commission has rescinded 37 rules and guides whose costs exceeded their benefits.

[25] The procedures the Commission follows when amending a rule depend on whether the regulation in question is a trade regulation rule. After the Commission gets to the stage of a Notice of Proposed Rulemaking, it will either follow the relatively streamlined notice-and-comment processes under the Administrative Procedure Act, 5 U.S.C. § 553, available for Commission rulemakings with respect to unfair methods of competition, 15 U.S.C. § 46(g), or when Congress directs the Commission to promulgate rules for a particular statute pursuant to APA notice-and-comment procedures, or it will take further steps to comply with the provisions for trade regulation rulemaking under Section 18 of the FTC Act, 15 U.S.C. § 57a.

the same time, it also publishes a burden estimate under the Paperwork Reduction Act and seeks comment on that estimate. The Commission actively looks for means to reduce burden while preserving the effectiveness of a rule. For example, as part of its ongoing review of the Business Opportunity Rule,[25] the Commission approved issuance of a Staff Report recommending changes designed to significantly decrease the disclosure burdens on covered sellers of business opportunities, reducing the categories of information they must provide from 23 to five.[27]

D. Improvements to Regulatory Review Process

As part of the Commission's commitment to robust and effective regulatory review, it recently asked for public comment on how the FTC can improve its regulatory review program to better serve consumers and businesses.[28] The Commission asked ten distinct questions, including questions about how often it should review rules and guides; how it can modify its regulatory review program to make it more responsive to the needs of consumers and businesses; how it should identify those rules and guides that can, and should, be modified, streamlined, expanded, or repealed; whether it should consider other federal or state models for regulatory review; and whether there are specific rules or guides that are ripe for review. By working to improve this long-standing, successful program, the Commission will ensure that all of its

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[25] 16 C.F.R. Part 437.

[27] *See* Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule, Disclosure Requirements and Prohibitions Concerning Business Opportunities, *available at* http://www.ftc.gov/os/fedreg/2010/october/101021businessopprulefrn.pdf.

[28] Regulatory Review Schedule, Notice of Intent to Request Public Comments, and Request for Information and Comment, *available at* http://www.ftc.gov/os/fedreg/2011/01/110107regreview.pdf; *see also* Federal Trade Commission, Regulatory Review, http://www.ftc.gov/ftc/regreview.shtm.

regulations continue to protect American consumers while minimizing the burden on businesses that provide the products and services consumers want.

The FTC has also created a new web page on FTC.gov to help consumers, businesses, lawmakers, and other interested parties learn more about the FTC's regulatory review program and allow interested parties to comment on ongoing reviews and on the review process itself.[2] On the FTC Regulatory Review page, the public can find the ten-year schedule of regulatory reviews, links to comment on rules that are under review, a link to provide direct feedback on the FTC's regulatory review program, and a list of rules and guides that have been eliminated over the years. The web page will also provide direct and easy access to the new streamlined form for merger filings, which resulted from the FTC's recent review of the HSR rules.

Furthermore, consistent with the goal of reducing unnecessary burdens, within and outside the government, Commission staff are in the process of identifying reports required by statute as well as statutes themselves that appear to be of limited value, but that divert business or Commission resources from more pressing work. Thus far, staff preliminarily have identified two reports that do not appear to be useful. The first is a report, required annually, on concentration in the ethanol market. The Commission has found each year that the market is extremely unconcentrated, and that entry is easy and ongoing. Therefore, this report seems to provide little useful information.[3] The second report is prepared by the Commission together

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[2] Federal Trade Commission, Regulatory Review, http://www.ftc.gov/ftc/regreview.

[3] Under the FTC and DOJ Horizontal Merger Guidelines, market concentration is calculated using the Herfindahl-Hirschman Index ("HHI"). The HHI measures concentration by summing the squares of each participant in a market. An HHI can be no higher than 10,000, which is reached when a market is a monopoly. The Merger Guidelines regard an HHI below 1500 as unconcentrated. Mergers resulting in an HHI of up to 1500 are unlikely to have anticompetitive effects and generally require no additional analysis. See U.S. Department of Justice and the

with the Department of Justice and the Department of Education, and simply describes actions taken to address scholarship scams. Though stopping scholarship scams is an important priority, the report appears to provide little valuable information. Accordingly, the Commission will make appropriate recommendations to Congress at the conclusion of this review.

IV. Conclusion

Thank you for providing the Commission an opportunity to appear before the Committee to discuss our ongoing regulatory review program and new initiatives to help maximize effectiveness for American consumers while minimizing the burden for U.S. businesses.

Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, at 24-26, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf. The HHI in the ethanol industry is less than 700, which represents a highly unconcentrated market.

Mr. STEARNS. Mr. Kovacic, do you have anything briefly you would want to add since Chairman Leibowitz had most of the time?

Mr. KOVACIC. No, I don't. Thank you.

Mr. STEARNS. All right. With that, I will start with opening questions. I think before I start, I would like to put on the record Mr. Cass Sunstein's memorandum of February 2, 2011. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. And I understand the ranking gentlelady has a document, "Evaluation of Consumer Product Safety Database," that she would like to put in.

Ms. DEGETTE. That is correct.

Mr. STEARNS. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. Chairman Leibowitz, before I start my questions, I think myself and staff are a little struck that you have voluntarily stepped up to the plate and sort of followed the spirit of this Cass Sunstein letter right there, and I think it is interesting when you look at the letter I just put in the record, he said in particular such agencies, talking about the independent agencies, are encouraged to consider undertaking retrospective analysis of the existing rules. You have stepped up to the plate to do it. Not all the independent agencies have done it. You have actually identified some areas that you think you have to do where you don't think you should be doing it, so I guess the question from Members of Congress is, what would you like us to do to help you?

Mr. LEIBOWITZ. Well, I think having oversight hearings like this is useful. It sort of shines a public light on regulations that do work because of course regulations are very important and ones that need to be modified. You know, look, we are a very bipartisan consensus-driven agency. We work together. We try to do regulatory reviews because we know they are really, really——

Mr. STEARNS. Well, you have identified some things that I think you would like some legislation to——

Mr. LEIBOWITZ. And yes, and we have identified——

Mr. STEARNS. We will follow up on that.

Mr. LEIBOWITZ. That would be terrific, Mr. Chairman.

Mr. STEARNS. Commissioner McDowell, I couldn't help but take your comments "sober and clear manner" when you talked about over 50 years regulations have gone up 800 percent. Is that true? That is 16 percent a year in the law of 72. That means every 4½ years these regulations are doubling. That is really staggering to think that that is occurring. Is that an accurate explanation of what you said, that regulations could possibly be doubling every 4½ years based upon 800 percent increase for 50 years?

Mr. MCDOWELL. That would appear to be the case, yes.

Mr. STEARNS. Let me move, based upon what—I just put a letter in from Cass Sunstein where he said these independent agencies should step up and voluntarily—that is the spirit of what he is talking about. Obviously, President Obama has indicated he wants that done, and he didn't include the independent agencies but I would like, if you would, just to answer some questions yes or no just for the limited amount of time. So Commissioners Adler and

Northup, yes or no, did the CPSC submit a regulatory review plan to OMB? Just yes or no.

Mr. ADLER. No.

Mr. STEARNS. OK.

Ms. NORTHUP. No, it didn't.

Mr. STEARNS. Yes or no, has the CPSC publicly committed to conduct a review of all existing regulations in accordance with the Executive order? Yes or no.

Mr. ADLER. As far as I am concerned, yes.

Ms. NORTHUP. No, I have not been informed that we are having any review.

Mr. STEARNS. OK. Mr. Adler, if you answer yes, as you did, why hasn't there been a notice so that Commissioner Northup would know about it if you answered yes?

Mr. ADLER. Well, first of all, with respect to submitting a formal plan to Cass Sunstein, he is actually a hero of mine as a former academic, but in order to preserve independence——

Mr. STEARNS. You said you have issued a public notice?

Mr. ADLER. What I said was, we had begun a retrospective review beginning——

Mr. STEARNS. But you haven't issued a public notice?

Mr. ADLER [continuing]. In 2004 that was temporarily suspended in 2007, and as soon as Chairman Tenenbaum gets back, I anticipate we will resume that process.

Mr. STEARNS. So you personally believe the CPSC should conduct a review?

Mr. ADLER. Oh, yes, sir.

Mr. STEARNS. OK. CPSC used to conduct regulatory reviews but has stopped in recent years. Is that a fair statement?

Mr. ADLER. They stopped in 2007 under then-Acting Chairman Nord, and I believe it was because of passage of the Consumer Product Safety Improvement Act, and just competition for resources within a very tiny agency.

Mr. STEARNS. OK. Commissioner McDowell, do you believe the reviews the FCC conducts under the Telecommunications Act take the place of the kind of look-back the President and this committee has asked for?

Mr. MCDOWELL. No.

Mr. STEARNS. You also state in your testimony that net neutrality is the first rule you would discard upon the agency review of its regulation. Is that true?

Mr. MCDOWELL. Yes.

Mr. STEARNS. I agree with you. Chairman Genachowski hails the net neutrality rulemaking proceedings as a test case for openness. However, I believe there were some bad precedents set in this proceeding. Commissioner McDowell, do you believe you were able to review the record in the net neutrality docket or were there items placed late into the docket that made it very difficult to review before the vote?

Mr. MCDOWELL. There are about 3,000 pages of documentation placed into the record in the final 2 or 3 days or 4 days.

Mr. STEARNS. And you had no opportunity to review those?

Mr. MCDOWELL. Well, there was opportunity but there wasn't enough time.

Mr. STEARNS. As a commissioner, when was the first time you saw the net neutrality order that you voted against on December 21, 2010, and was it the same rules proposed in October 2009?

Mr. MCDOWELL. There were several drafts, of course, the first in October of 2009, but we got the final draft about quarter to midnight the night before the vote.

Mr. STEARNS. I understand although the agency passed its net neutrality rules in December, the docket to reclassify broadband services under Title II remains open. I think this is surprising, as Chairman Genachowski has made efforts to close other dockets opened at the FCC. Do you believe this docket should be closed?

Mr. MCDOWELL. Yes.

Mr. STEARNS. Are you aware of any reason why this docket remains open?

Mr. MCDOWELL. Only speculation. I have no firsthand knowledge.

Mr. STEARNS. Chairman Wellinghoff, in your testimony you say you support the goals of the Executive order and have directed commission staff to conduct a review of existing regulations with the goals of the Executive order in mind. Why didn't you submit a regulatory review plan to OMB?

Mr. WELLINGHOFF. Because I believe that we weren't subject to the Executive order under OMB.

Mr. STEARNS. Notwithstanding what Cass Sunstein had sort of directly, the spirit of the law was for you to comply?

Mr. WELLINGHOFF. I believe in fact we are complying with the spirit of the law by directing the regulatory review that I have directed staff to do.

Mr. STEARNS. Have you submitted a notice for public comment on this review?

Mr. WELLINGHOFF. My general counsel has indicated that is not necessary to staff review.

Mr. STEARNS. Well, let me ask you personally. Do you believe FERC should conduct a retrospective review in the spirit of the Executive order?

Mr. WELLINGHOFF. Yes, we are doing that. I have directed my staff to do that.

Mr. STEARNS. OK. My time is expired.

Ms. DEGETTE. Thank you, Mr. Chairman.

Mr. Chairman, my recollection of what Cass Sunstein said is that the independent agencies should comply with the spirit of the law, not the specific legal requirements, and I guess I will ask you, Chairman Leibowitz, since your agency is supposed to be the paragon of virtue today, have you submitted a plan to OMB? Has your agency submitted a plan to OMB?

Mr. LEIBOWITZ. We have not submitted a plan to OMB.

Ms. DEGETTE. And that is because you are not legally required to, right?

Mr. LEIBOWITZ. And that is because we are not legally required to, although as you know——

Ms. DEGETTE. But that doesn't mean you are not doing regulatory reform, correct?

Mr. LEIBOWITZ. No, no, no. I think as everyone knows, we are doing a lot of regulatory reform.

Ms. DEGETTE. And Commissioner Adler, also your agency, although it hasn't submitted a plan to OMB, you are doing regulatory reform too?

Mr. ADLER. That is correct.

Ms. DEGETTE. Thank you.

Now, Chairman Leibowitz, something you said was very interesting to me. You talked about how a lot of the regulations that you do is a result of statutes passed by Congress directing you to do regulations, correct?

Mr. LEIBOWITZ. That is correct.

Ms. DEGETTE. And you gave several examples of that, right?

Mr. LEIBOWITZ. Yes.

Ms. DEGETTE. Now, Commissioner Northup, you talked about a lot of the regulations that the CPSC is promulgating as a result of the statute that Congress passed, correct? Like the lead standards and other regulations.

Ms. NORTHUP. That is correct.

Ms. DEGETTE. So Mr. Chairman, one thing I am concerned about, you can't really talk about regulatory reform in a vacuum without looking at the statutes that Congress has passed but ask these agencies, and so I think there are two levels here. There is the regulations themselves, which may be overly burdensome, but there is also statutes that I think we should look at, and I know, Chairman Leibowitz, you had actually come up with a list of some statutes that you think could be streamlined so that the agencies, whether they are the independent agencies or not, could also streamline their regulations, correct?

Mr. LEIBOWITZ. That is correct.

Ms. DEGETTE. Would you be willing to submit a copy of those statutes to this committee so that we could then look at those statutes within the purview of this committee and think about ways to fix them so that we can reduce the burden of regulations?

Mr. LEIBOWITZ. It sounds like very much a bipartisan effort on this subcommittee, and we would be glad to do that.

Ms. DEGETTE. OK. For the rest of the commissioners who are here, I would just ask for a yes or no answer. Would you be willing to also submit a similar list of statutes that your agency deals with that you think could be streamlined so the regulatory process could be streamlined? Commissioner Adler?

Mr. ADLER. Yes.

Ms. DEGETTE. Commissioner Northup?

Ms. NORTHUP. I have.

Ms. DEGETTE. Oh, you have? Great. I would love to get a copy of that.

Mr. McDowell?

Mr. MCDOWELL. Yes.

Ms. DEGETTE. Chairman?

Mr. WELLINGHOFF. Yes.

Ms. DEGETTE. Commissioner?

Mr. MOELLER. Yes.

Ms. DEGETTE. Chairman?

Mr. LEIBOWITZ. Yes.

Ms. DEGETTE. And Commissioner Kovacic?

Mr. KOVACIC. My list is the same as Jon's.

Ms. DEGETTE. OK. Great. This is a good effort down here at the end of this table.

And I wanted to ask you, Commissioner McDowell, because you had listed off numbers of regulations. I don't think that you think that—first of all, are all those regulations that you listed—I don't know them by heart—are they all duplicative or unnecessary regulations, the ones you listed?

Mr. MCDOWELL. Are you talking about the number of pages I cited?

Ms. DEGETTE. Well, you listed some different sections. You just threw out a whole bunch of regulations.

Mr. MCDOWELL. The sections I cited were statutory sections that gave us the power to deregulate on our own, and I also listed——

Ms. DEGETTE. No, no, but——

Mr. MCDOWELL [continuing]. The forms——

Ms. DEGETTE [continuing]. You said there—oh, the forms. Just because there is a form, doesn't mean that it is per se unnecessary, correct?

Mr. MCDOWELL. No, and I didn't imply that.

Ms. DEGETTE. So the numbers of the forms that you listed, are those particular forms unnecessary in your view?

Mr. MCDOWELL. Not all of them necessarily.

Ms. DEGETTE. OK. So you were——

Mr. MCDOWELL. That is what I said in my testimony.

Ms. DEGETTE. That was kind of a figure of speech that you were talking about a lot of forms, right?

Mr. MCDOWELL. I think that my testimony speaks for itself. It is a lot of forms.

Ms. DEGETTE. Well, here is my question to you. Have you compiled a list of regulations for your agency that you think are duplicative or overly burdensome?

Mr. MCDOWELL. Yes, ma'am, it is in my testimony.

Ms. DEGETTE. OK. That is the comprehensive list. And has everybody else——

Mr. MCDOWELL. It is not the complete list but there is——

Ms. DEGETTE. Could you get us your complete list? That would be really helpful.

Mr. MCDOWELL. Sure.

Ms. DEGETTE. You know, along with our brand-new member from Colorado, Mr. Gardner, my neighbor to the north and others, we are trying to develop bipartisan legislation, and to be honest, as you see from these folks down here, regulatory reform is not a partisan issue. I mean, nobody wants to have overly burdensome regulations, and so I guess what I would ask everybody here from all of these agencies, as well as a list of statutes that you think lead to overly burdensome regulations, if you can give us a list of regulations that you think are overly burdensome, that would be helpful too.

Commissioner Adler, would you be willing to do that?

Mr. ADLER. I am speaking only for myself, but for myself, yes.

Ms. DEGETTE. OK. Commissioner Northup, I believe you have probably already done that.

Ms. NORTHUP. I have. It is part of my testimony but I have also previously sent to the Hill a list of——

Ms. DEGETTE. If you could get that to our staff too, that would be great.

And Commissioner McDowell?

Mr. MCDOWELL. Absolutely.

Ms. DEGETTE. Mr. Chairman?

Mr. WELLINGHOFF. Yes.

Ms. DEGETTE. And Commissioner Moeller?

Mr. MOELLER. Yes.

Ms. DEGETTE. And then——

Mr. LEIBOWITZ. We certainly will, although we have eliminated a lot of regulations. We do ongoing regulatory reviews pretty rigorously.

Ms. DEGETTE. OK. Thank you very much.

Mr. STEARNS. The gentleman from Texas, Mr. Barton, is recognized for 5 minutes.

Mr. BARTON. Well, thank you. I would stipulate that all the individuals before us are paragons of virtue today because they are subject to the Energy and Commerce Committee and that recognition makes you a paragon.

I think we need to repeat, this is kind of a hearing that is unusual in that this Executive order that we are asking you folks to comment on explicitly excludes you, and as we all know in Washington, not too many commissioners and chairmen voluntarily comply with things that they don't have to. Those of us that have been around a little bit understand that.

So my first question is, what should this committee do in the absence of statutory language that would force compliance with something similar to the Executive order? Should we pass some sort of a statutory requirement that you all do similar things that the President says in his Executive order or should we let the sleeping dog lie? Let us try Chairman Wellinghoff. He doesn't come before us too often.

Mr. WELLINGHOFF. Thank you, Mr. Barton. I don't have any specific recommendation for you, sir. I think in fact, as I have indicated in my testimony, we are going to comply with the spirit of it and in fact have a staff review, and I think our agency certainly as an economic regulatory agency, each and every regulation that we institute do in fact take into account whether rates are just and reasonable and services are, and we also provide the industry with an opportunity to fully comment on those regulations and determine ultimately whether the regulations are burdensome based upon those comments and information that we gather. So I don't have any specific recommendation for you.

Mr. BARTON. Mr. Leibowitz?

Mr. LEIBOWITZ. I would say this. You know, we comply with the spirit of the Executive order. I think it is a terrific Executive order. We go beyond it because I think only four of our rules would be sort of within reg flex, and we do reg reviews of all of rules and all of our guides, but I also think it is important to preserve the independence of agencies too, and as you can see, you know, agencies provide—by having members not of the President's party, agencies as a sort of institutionalized matter provide checks and balances, and they are independent voices. And so I understand

what you are saying because I think you believe that the Executive order has a lot of good things in it, and we agree.

Mr. BARTON. The Republicans think what the President says he is doing, we are not sure he is doing it, but what he says he wants to do, we think is a good thing. And so you folks say the right words, you are comply with the spirit and you agree in general, but the truth is, you are not going to do anything unless you absolutely have to. The question is, should I get with Ms. DeGette and Mr. Stearns and put together a bipartisan bill that would make it a requirement?

Mr. LEIBOWITZ. Let me defer to Commissioner Kovacic because I know he wants to add something here.

Mr. KOVACIC. Congressman Barton, I would like to quarrel with your suggestion that we only do what the gun at the head compels us to do. I was a junior case handler at the FTC for the first time in 1979, and I think it has been in the DNA of the agency internally, partly because of our structure, partly because we have a large team of economists to do this kind of introspective work as long as I have known the agency, and I would emphasize, I think that would be very constructive would be two things. First is for us to have perhaps a more frequent conversation in settings like this with your staff about we do. In 2008, 2009, we did a comprehensive self-study of our agency. We benchmarked ourselves with 40 of our counterparts overseas. We talked extensively with our counterparts at Federal, State government, and we did a substantial publicly available assessment of how we are doing. I think it would be helpful on one front to have a more extensive continuing conversation with the committee about the measures we do take that aren't obliged, and the second is, to go back to something that several of you have mentioned——

Mr. BARTON. You are going to have to be quick, because I have got 20 seconds and I have got one more question.

Mr. KOVACIC. The other thing is to think more in the design of legislation itself about what burdens it will impose.

Mr. BARTON. I want to ask Commissioner McDowell—I can't let him sit here and not ask him some question. The pending regulation regulating the Internet under Title II is still pending at the FCC. Do you have any information for us what Chairman Genachowski intends to do with that? Is he going to withdraw it or push forward with it? What is your view on that?

Mr. MCDOWELL. Sir, just to be clear, the open proceeding to regulate the Internet under Title II, I don't have any information as to whether or not he is going to withdraw it or what the reasoning might be for keeping it open.

Mr. BARTON. Don't you think he should withdraw it?

Mr. MCDOWELL. I do.

Mr. BARTON. That is the right answer. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

I think the next speaker on this side is Mr. Green. You are recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

First, I want to take the opportunity to thank all our commissioners for being here. Those of us who have been on this com-

mittee a number of years welcome back our colleague from Kentucky. What you do every day is very important in ensuring the health and safety of our citizens, particularly consumer protection, but everything. FERC, obviously from Texas, FERC is very important to what we do, and the FCC and of course FTC.

Mr. Leibowitz, in your testimony you discuss the children's online privacy protection rule or regulation your agency promulgated that helps protect privacy of children online. Can you please tell us more about this rule and does it ensure that children are protected while using the Internet?

Mr. LEIBOWITZ. Well, it was a bipartisan piece of legislation passed out of this committee, but we also understand that the Internet has changed and technology has changed the way children use the Internet dramatically in the last few years, and that is why we actually moved up our regulatory review of COPPA by 5 years, and so we are working with stakeholders. We put out a sort of notice of inquiry and we will have proposed COPPA improvements, draft legislation. We always put out—I am sorry, draft rule. We put that out. We take comments again, hopefully within the next few weeks by the end of the summer.

Mr. GREEN. And I know for all the agencies, and this is just an example, there is a lot of concern about agency regulation, but so much of what you do is in response to legislation, whether it is new legislation or previous legislation or may have been amended, and this is a good example of a rule that frankly as a father, or a grandfather now, I can't possibly monitor what my grandchildren may be doing on the Internet but we do need to have protection from an entity other than just the family.

Mr. LEIBOWITZ. Right, and the whole notion of COPPA, which is that if you are 12 years old or younger, you shouldn't be able to give consent to have your personal information go to companies on the Internet, you need to have parental consent, is a really good one, and that is the bedrock of COPPA, the law you passed.

Mr. GREEN. Some of us might move that age a little higher, but I appreciate it.

Mr. LEIBOWITZ. Some of us might encourage you to do that.

Mr. GREEN. And beyond issuing standards that require safety such as that, you have done children's cribs. Consumer protection safety works on manufacturers to organize recalls and remove dangerous products from the market.

Mr. Adler, a recall authority has the potential to save lives, doesn't it?

Mr. ADLER. It certainly does, sir, and I believe we have saved many lives.

Mr. GREEN. And other agencies have tools to help consumers too. For example, the FCC has taken steps against consumer fraud and deceptive practices through its enforcement powers.

Mr. ADLER. All the time.

Mr. GREEN. Mr. Leibowitz, in your understanding, in fiscal year 2010 your agency initiated 66 court cases to protect the rights of consumers. How valuable is that enforcement action?

Mr. LEIBOWITZ. Well, we think they are critically—we are principally an enforcement agency. We do rules, mostly when you tell us to, but what we really do on both the antitrust and the con-

sumer protection side is go to court to stop unfair or deceptive acts or practices and to stop people who engage in unfair methods of competition, and we have brought a variety of cases protecting privacy, stopping mortgage scams. That is what we do.

Mr. GREEN. The lawsuits you file can have real impact on individual lives. Is that correct?

Mr. LEIBOWITZ. Yes, I mean, often getting redress if we win a case or if we settle one for injured victims, yes.

Mr. GREEN. So there is a positive byproduct of agencies issuing regulations and enforcing regulations that are based on what Congress passes and the President signs?

Mr. LEIBOWITZ. Absolutely.

Mr. GREEN. Mr. McDowell, I was pleased that the chairman of the FCC announced that the commission would comply with the President's Executive order on regulatory review. It is important that that review is as comprehensive as possible, and I am looking forward to seeing the streamlining of the FCC, which I am sure as commissioners you would love to have. Given the constant change and the growing competition in the communications market, do you agree that the FCC should be diligent in reviewing and potentially eliminating regulations that no longer protect the public interest?

Mr. MCDOWELL. Absolutely, in a comprehensive way.

Mr. GREEN. The biannual review requirement is the commissioner's major tool to accomplish this. Is this correct?

Mr. MCDOWELL. It is, but only for telecom companies, not for media companies or information service providers, etc.

Mr. GREEN. Over the past 10 years, the commission has complied with its statutory duty to prepare and submit a biannual review?

Mr. MCDOWELL. Yes, sir.

Mr. GREEN. Do you believe the biannual review requirement should be amended to include other entities?

Mr. MCDOWELL. I do.

Mr. GREEN. And would you submit your recommendations for the record?

Mr. MCDOWELL. Yes, sir, and it is my testimony but I will reiterate it too.

Mr. GREEN. OK. I appreciate it.

Mr. Chairman, I will yield back my time.

Mr. STEARNS. The gentleman yields back his time, and the gentleman from Nebraska is recognized for 5 minutes.

Mr. TERRY. Thank you, Mr. Chairman. Let me first start by thanking Jon Leibowitz. First of all, I like the little play between the two of you because it kind of signals that you work with both sides and work together, and Mr. Kovacic, the way that you have answered questions, you are telegraphing or telling us that you two actually work together, and I really appreciate that. I think that is the way America expects our agencies to work. So I want to thank you for that. And Jon, you are doing a good job. I like that you are actually——

Mr. LEIBOWITZ. Is this a setup? Because——

Mr. TERRY. No, there is no "comma but" coming here. I like that you are already attacking the issue of finding the regulations that are not very useful anymore and don't serve the purpose. So good job. That is exactly what my bill that is in a different committee

wants every agency, independent agency to do, and it is to provide the flexibility.

Commissioner Northup, we can sit here and say good job on cribs but it is amazing to me that we are sitting here talking about bicycles and ATVs and large cars and trucks that, you know, 6- and 7-year-olds play with but don't eat but yet we are regulating them.

So you have to admit, Mr. Adler, there is some absurdity to the law. Do you agree with the rules and regulations——

Mr. ADLER. I think that Congress basically got the law right, and by the way, what you are talking about is a mandate that Congress imposed, not that the commission imposed, but there are always some portions of the law that need to be reexamined, and the issue you raised with bicycles and ATVs is one of those that we are actually taking a look at.

Mr. TERRY. And in regard to the absurdity of Congress's mandate—and by the way, I list this as one of those votes that I thought if I had to take back, we should have really fought harder on this one to make it a better law.

So Anne, do you have specific requests for us of where we should change the Consumer Product Safety Improvement Act?

Ms. NORTHUP. Well, let me just said if I had been there, I wasn't, but I can imagine that I would have voted for the law. I certainly would expect I would have. When I was being confirmed by the Senate, I read the law. It seemed like such a good law. I was supportive. So many of the Senators at the confirmation hearing said we want you to use all the flexibility we gave you to rationalize this law; we believe that bicycles and ATVs and scooters—I mean, it goes way beyond those two—carving them out may be some people happy, but like you say, trucks kids play with, the axles in those trucks, if they bend, what good are they, but the problem is, when you try to—when we have tried to find flexibility, there just hasn't heen three out of five votes for that. So it is going to take a change in the law. The discouraging part is that even the commissioners can't seem to agree how sweeping a change they would support but we desperately need——

Mr. TERRY. Well, do you have flexibility on, for example, third-party testing? I think there was an incident when this bill was being developed by a toy manufacturer that manufactured in China that perhaps there was accusations that their data in-house was not correct, so if you are a large international company, mandating third-party testing when you found out your in-house testing was inaccurate, but do it on a 10-person company in Omaha, Nebraska, on tee shirts where on every size and every color doesn't make sense to me. Do you have the flexibility to——

Ms. NORTHUP. No, we don't have that flexibility.

Mr. TERRY. Is that an area that we should look at?

Ms. NORTHUP. It is an area. In fact, today there are vast new ways to enforce the law. We track things coming in from overseas, tools that we didn't have in 2008. And I would give the commission the ability, the flexibility to require third-party testing where they think there is risk and they think it will be effective to enforce it. It is one of the proposals I have made. It would make a huge difference in the cost of this because as you say, every small business

is telling us when they have to third-party test every single component individually for lead, when they have to then do random——

Mr. TERRY. Or phthalates.

Ms. NORTHUP [continuing]. When they have to do phthalates, when they have to do it to the toy standard, it is extremely expensive.

Mr. TERRY. Well, and one quick point on that. Do you guys try and obtain data, for example, when the third-party testers are telling a small company that prints motorcycles on tee shirts that asking that they test the cumulative effects of 10 tee shirts of the same color and size, do you ask, produce one piece of evidence that a child has eaten ten tee shirts?

Ms. NORTHUP. The problem here is that if there is, say, a dot of blue paint on that, they need enough blue paint to test to have a quantity of blue paint. I will tell you, I have pushed for a component part testing allowing somebody to—and I think we are going to pass this, and this is the flexibility that I think would be—is probably the most flexible regulation we have where you can take your blue paint and test it and then you can put it on every tee shirt and you don't have to tear up the tee shirt.

But when you talk about bikes, for example, that have 141 parts to them and every part, every time you change the shipment of spokes, the shipment of pedals, you have to have a new test for that, then you have to change the label so it reflects the component test that was used, it is very complicated.

Mr. STEARNS. The gentleman's time has expired, and Ms. Schakowsky, the gentlelady, is recognized for 5 minutes.

Ms. SCHAKOWSKY. Thank you.

You know, I think we all here agree that it is important for regulatory agencies to be efficient and mindful of the impact of regulations on businesses, and I think we all agree. I helped negotiate this bill. I am very proud of the legislation. But Henry Waxman introduced legislation that would deal with some of the unintended consequences. I think maybe we as a committee ought to take another look at that legislation, and I know that the commission would be willing, as I understand it. Is that not true, Mr. Adler, on behalf of Mr. Tenenbaum and Ms. Northup? I think we ought to look at that.

But let me just say, to go back to risk-based assessment, that is what we had before, and I think that what we have found is that why we regulate and that is because time and time again industry has shown that they aren't going to police themselves, and that we need to do it, and one of the issues is the industry standard for cribs, and we had a press conference with the attorney general in Illinois on June 28th when the crib standard went into effect, and I congratulate all of you on that, although I have to say, I was disappointed to see the press release that went out that, you know, we didn't give people enough time when of course you had said earlier that you wished it had gone into effect the next day so that parents could be sure when we put our kids to bed alone or grandchildren that they are going to be safe.

So let me ask you, Mr. Adler, do you consider the crib standard to be an example of a victory for the Consumer Product Safety Improvement Act?

Mr. ADLER. I think it is one of the finest things that has been done under the Consumer Product Safety Improvement Act. It is taking children who are our most vulnerable involuntary risk takers who are put in cribs that have to be the safest place in the home because they are there for long periods of time with no supervision, and it is saying that we have the most stringent safety standard in the world. I think it is really a magnificent achievement and I commend the Congress for directing us to——

Ms. SCHAKOWSKY. And in fact, in the regulation, you did give some places that might have cribs some time to comply. Is that not true?

Mr. ADLER. We did, and I am delighted to respond to the issue that Commissioner Northup and I disagree on with respect to the independent retailers. I think that we had a group that said we need more time but we had another group that said please, please, please do not give more time, we have compliant cribs and we are prepared to sell them right now.

Ms. SCHAKOWSKY. I ant to mention on the database, I have an op-ed from a gentleman in New Jersey whose daughter was injured by a crib in 2007. He called the manufacturer and asked if they had any other complaints about the crib and was told no, there weren't any, but actually found out that there were 84 reports to similar problems. Fortunately, his daughter was not hurt very bad.

So Mr. Adler, the public information database was created by the CPSIA because previously, manufacturers would not, and the CPSC could not share lifesaving information with consumers. Is that correct?

Mr. ADLER. That is correct. I think the database is one of the finest pieces of the Consumer Product Safety Improvement Act.

Ms. SCHAKOWSKY. So do you think that it actually is serving the function of making consumers more aware?

Mr. ADLER. It is, and I might just quickly point out that it is modeled after a similar database at the National Highway Traffic Safety Administration. Ours actually has more due-process rights for manufacturers than they do at NHTSA, and I think it is a very balanced piece that provides the proper attention to disclosure to protect consumers with the rights of manufacturers to make sure that the information is correct.

Ms. SCHAKOWSKY. Do you think that Congress should force the Consumer Product Safety Commission to do a full cost-benefit analysis every time it takes steps to protect children from harmful products no matter how dangerous those products are?

Mr. ADLER. I actually think Congress got it right. Congress didn't say regulate with no attention to the economic impact. Congress said that when we regulate with respect to children, that we need to follow the dictates of the Regulatory Flexibility Act, and one of the things I like about that is, it is focused on vulnerable small business. That is the group that we are supposed to make specific economic findings with respect to when we are trying to protect our most vulnerable consumers.

Ms. SCHAKOWSKY. I think I will yield back the 2 seconds I have. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentlelady. The gentleman from Texas, Dr. Burgess, is recognized for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman, and Commissioner Northup, it is good to see you here.

Ms. NORTHUP. Thank you.

Mr. BURGESS. It is amazing you got confirmed by the Senate, so congratulations on that. What an accomplishment.

And I apologize for being late. We had a Health Subcommittee hearing going on simultaneously. Can you give us an idea of the scope of the effect on the retail industry on this crib ban that has now gone into effect? I mean, I realize that the other commissioner said a cost-benefit analysis is not necessary but still, there has got to have been an impact.

Ms. NORTHUP. Let me just say, first of all, the regulatory flex analysis that we do is only—it is like checking a box. Sometimes it is a paragraph, sometimes it is a page. It says that small businesses are going to be affected, we are going to put some out of business, but we go right ahead and regulate. There is nothing, there is no requirement that it be cost-effective.

What happened with the crib standard was, is that we issued it and we considered at the request of manufacturers how long it would take for them to get the new qualifying cribs tested, third-party tested, and into the market. Six months was decided. We didn't really think about retailers. There was one sentence in our rule that said we think 3 to 6 months is enough for retailers too. Unfortunately, it took longer to get them developed, it took longer to get them tested, and by the time they got them to the retail stores, the retail stores, some of the orders they had placed last November arrived a week before the new standard took effect. They were not third-party tested, and so they were junk to them. How many? Well, we know that one group of retailers that did a survey had 17,000 of them. We know that we called five, not our biggest stores but five major retailers; they had 100,000 as of the 1st of June. That comes to about $32 million worth of materials that will have to be thrown away if they are not—and these are not drop-side cribs. These are not even cribs that are almost identical to the standard. They haven't been third-party tested or certified. But the new crib standard that went in in 2009 was the basis of our crib standard. And let me just say, if these are unsafe, then why we would have allowed daycare centers, the motel-hotel industry, leasers 2 years before they had to place them? It is because we did not believe they were unsafe.

Mr. BURGESS. That is a valid question.

In the winter of 2008, it was kind of a bleak time up here on the Hill, and with no thought to my personal safety, I took a trip to the CPSC and looked at the testing facility. It is remarkable in that it is very Spartan. There are certainly no——

Ms. NORTHUP. We have a new one now.

Mr. BURGESS. Oh, you do have a new one?

Ms. NORTHUP. Yes. We just moved 3 weeks ago.

Mr. BURGESS. This was an old missile base, as I recall, when I went out there, and I was struck that the folks there were working diligently and they were quite inventive and innovative, and I actually took a great deal of confidence away from that, but at the same time, I will never forget sitting in that press conference that the people on the youth motorcycle thing put together a couple of

years ago, a beautiful little blond-haired boy about 10 years old in full motocross regalia standing at the microphone and said Mr. Congressman, if you will let me ride my bike, I promise I won't eat the battery when I am finished. And you know, that is the level of absurdity to which we have sunk.

Ms. NORTHUP. This testimony today has been fascinating, hearing the agency talking about the DNA, the DNA of the CPSC is really fabulous, but that has all changed because of the Consumer Product Safety Improvement Act and the rulemaking that we have done in compliance with levels and requirements that are unrelated to risk. For years this agency was risk-based, it worked with the Voluntary Standards Committee, which is very important because products emerge, they evolve, and these voluntary standards keep up with these evolutions. Any time we didn't think they were strong enough, we had the right to intervene, and we did, as my colleague pointed out.

Mr. BURGESS. Let me just briefly, I do need to ask our friend from the Federal Trade Commission a question on the—familiar with the ACO—if you read the Federal Register, you may be aware that there was a health care law signed last year that has caused some of us some grief, and when this new accountable care organization reg came through, did you guys participate in the writing of that regulation?

Mr. LEIBOWITZ. Well, we participated. It is principally from CMS, as you know, and we participated——

Mr. BURGESS. Well, what I know is, when we had the briefing, they had one guy from CMS and two guys from the Federal Trade Commission.

Mr. LEIBOWITZ. One from the Federal Trade Commission and one from the Department of Justice because we wrote it with the Department of Justice, or maybe two from the Federal Trade Commission and one from the Department of Justice. So we did the antitrust component, and their draft guys were taking comments, we did a workshop. And can I just say one other thing? And I will turn it back over to you.

We believe that competition is critically important to health care, not regulation, and so what we are trying to do with the ACO implementation—you know, ACOs are a brave new world and very uncertain, but what we are trying to do is make sure that competition principles remain.

Mr. BURGESS. Look, you give the antitrust exemption to Major League Baseball, the National Football League, but here is the deal. The 21st century health care model, and this was started in the previous Administration with Secretary Leavitt, has been continued with Don Berwick at CMS, and now we have got an ACO rule that doesn't work in actuality. The rule is—you put something that was working in practice and rendered in invaluable in theory, and that is the problem that I see with what you have done.

Mr. LEIBOWITZ. Well, look, we have certainly—one of the reasons we put out draft guidance—and again, we have a small component of it. It is only the competition portion. One of the reasons why we put out draft guidance and why we are meeting feverishly with all stakeholders is, we want to make sure that, you know, to the extent that there is an uptake on ACOs, the notion, you pick up

vertical efficiencies by putting together, as you know, different doctor practices, lab testing facilities and a hospital, is not a bad one. We want to make sure that you don't have one dominant provider so that it soaks up all the efficiencies, and we also——

Mr. BURGESS. What about the Karen Ferguson? I mean, you give a dominant provider status to insurance companies.

Mr. STEARNS. The gentleman's time has expired.

Mr. LEIBOWITZ. We will just point out, we cannot review the insurance industry. We are exempted from that. But yes, I hear what you are saying. I don't think we are in disagreement. We are going to try and make it work better.

Mr. STEARNS. The gentlelady, Ms. Christensen, is recognized for 5 minutes.

Mr. CHRISTENSEN Thank you, Mr. Chairman, and I want to also add my thanks to all of the commissioners for being here, and as I listen to the testimony, it seems that all of the independent agencies that you represent have been undergoing some regulatory reform and even though you are not under the Executive order, that you have really gone beyond what you had been doing to keep in spirit with the Executive order, and I commend you for that.

I sat on the Small Business Committee for about 10 years, and each of you is governed by the Regulatory Flexibility Act, and so you are required to look at how the impact of your regulations on small business reviewed. I was going to ask Commissioner Northup, my classmate——

Ms. NORTHUP. Yes.

Mr. CHRISTENSEN [continuing]. About the effectiveness, but you have already kind of said that it is not effective. Is it the experience of the other commissioners that the Regulatory Flexibility Act does not do enough to protect small businesses?

Mr. ADLER. I don't agree with my colleague about that. I think that especially with respect to the impact of the Regulatory Flexibility Act on our agency, I think it has been a very good provision. I was just reviewing section 604 of the Regulatory Flexibility Act, and to me, it is a smaller but focused cost-benefit analysis and it is something I think the commission has done very conscientiously.

Mr. CHRISTENSEN Did I misinterpret what you said?

Ms. NORTHUP. No. It is often just a paragraph in a long rule, and even if we find that it will impact small businesses, it is not even—it doesn't require us to decide it is still worth going forward to make any changes to our rules. It has no impact on the rules that I—one or two maybe but very few that I can remember ever.

Mr. CHRISTENSEN Does anyone else have that experience that RFA——

Mr. MCDOWELL. I find it to be toothless, and if you look at it from an appellate perspective, the appellate courts agree, there is really nothing the courts can do to make agencies change their rules based on the RFA.

Mr. CHRISTENSEN That would be very disappointing, but it seems as though most agencies have had—most of the commissions have had good experience with the act.

Mr. KOVACIC. I think, Madam, that it has some limited effect in focusing our attention on things that are important but I think there are a number of other things we have done that have tended

to be more significant and have come from within, and we would be glad to share those with you at your pleasure.

Mr. CHRISTENSEN Thank you. And what I have been hearing is that most of the commissions have gone beyond what really has been required, and I appreciate that.

Commissioner McDowell, on June 20th, you wrote a letter to Chairman Genachowski offering several recommendations on how the FCC should be reformed. You suggested reforming it to be more transparent, efficient, accountable and fiscally responsible, and from prior testimony to date, we have learned that Chairman Genachowski has proactively implemented some of those changes to facilitate your suggested reforms. Through these reforms, the FCC has improved external communications by creating a more user-friendly Web site which includes providing live streams of all public workshops and meetings. Do you think this new Web site has enhanced public participation and access to FCC activities?

Mr. MCDOWELL. Well, the FCC's Web site right now is a bit controversial. It depends on which segment of the audience that uses it you ask.

Mr. CHRISTENSEN You don't think that it has enhanced public participation?

Mr. MCDOWELL. Certainly in general, I think, Chairman Genachowski has taken some discreet steps on an ad hoc basis but I would like to see more comprehensive reform done.

Mr. CHRISTENSEN But the FCC has also made effort to collect broader input from the public and industry, which included having more than 85 staff-led public forums and reinvigorating external advisory committees. Do you think these efforts have allowed for an increase in public participation?

Mr. MCDOWELL. Absolutely.

Mr. CHRISTENSEN In fact, you have had several workshops on the national broadband plan to discuss potential reforms to the Universal Service Fund. Do you think that those workshops have been helpful?

Mr. MCDOWELL. They have, certainly.

Mr. CHRISTENSEN OK. And although the FCC is not subject to President Obama's Executive order on regnlatory reform, the FCC initiated their own look-back process which also is included in the statute. According to a letter Chairman Genachowski sent to Chairman Upton and Chairman Walden, this effort has resulted in the agency's eliminating and/or revising 49 regulations and identifying more than 20 sets of unnecessary data collection requirements for possible elimination. Is that correct?

Mr. MCDOWELL. I don't know. I haven't seen the list of the 49 or the 20, so I am not quite sure.

Mr. CHRISTENSEN Does it sound reasonable?

Mr. MCDOWELL. And I don't know if some are mainly data collection. I think the proceeding, as I understand, under section 11 that was initiated really was focused primarily on data collection, although it has general language in there, but the thrust of it was data collection and not just a comprehensive review of all of our rules that apply to all the entities regulated by the commissioner.

Mr. CHRISTENSEN Well, our information is that 49 regulations and identifying maybe 20 sets of unnecessary data. So it seems to

me that the FCC's current leadership has been really successful in implementing new ideas on how to improve current regulations, and I look forward to hearing more from the commission and their continued focus on ensuring public participation and open exchange of ideas that improve the work of our government.

My time is up. I yield back.

Mr. STEARNS. I thank the gentlelady, and the gentleman from California, Mr. Bilbray, is recognized for 5 minutes.

Mr. BILBRAY. Thank you.

Mr. Adler, you were bringing up this issue of trying to make sure that we have the safest cribs in the world, as we say. What percentage of the cribs that are on the market in the United States have elevated platforms or are made of a hard material—wood, plastic, steel?

Mr. ADLER. I don't know the answer to that. I would be delighted to——

Mr. BILBRAY. Would it be fair to say the overwhelming majority of them have elevated platforms or are made of hard material?

Mr. ADLER. I think that makes sense.

Mr. BILBRAY. And wouldn't you agree that any elevated platform or material when you have a child, you have a potential for injury because of dropping off of an elevated platform or injury because some activity that may end up meaning impact with the hard material, so there is a risk in both of those design features?

Mr. ADLER. That is an excellent point, and the commission standard is addressed to what we consider the unreasonable risks, but I don't think we could make that a fatality-free zone under all circumstances.

Mr. BILBRAY. OK, and that is the point, is what is a reasonable level. You know, you could sit there and say that because we do not require all cribs to be on the ground, we do not require all cribs to be made of inflated material or soft material, it is not the safest it could be. It is reasonableness, and I think that is a determining factor. Wouldn't you agree?

Mr. ADLER. I would absolutely agree with that, but what we have done is make the cribs that are produced in the United States the safest within the types of fatalities that we think that——

Mr. BILBRAY. I just think that—and I appreciate that, making sure that, you know, we make these claims and these statements and elected officials or as public officials but it is reasonableness that really is the determining fact, and that is where the judgment issue has to come down.

Let us talk reasonableness, Mr. McDowell. You recently discovered that the so-called Fairness Doctrine was still on your books, almost a quarter of a century after it was abandoned. Do you think it is reasonable that a federal agency has basically misinformation, if not, some people may say the lingering lie of the Fairness Doctrine on your books? Do you think it is reasonable that almost a quarter of a century after a regulation isn't there, it still is being stated as being part of the process?

Mr. MCDOWELL. I don't think it is reasonable that the language remains on the books, if that is your question.

Mr. BILBRAY. And what are we doing to make sure that this mistake isn't throughout your regulatory guidelines so the public and

the business community can read something and find out is it the gospel or isn't it?

Mr. MCDOWELL. Exactly. If the commission has opted not to enforce the rule, the rule should disappear from the books.

Mr. BILBRAY. OK. Let us get down to the fact that the FCC has taken nearly 12 months—and I will say this. I spent decades in regulatory agencies so I understand how tough it is when you are in a regulatory agency of trying to take the theory of legislation and make it a practical application. But when you have got decisionmaking that is delayed for over 12 months, you know, and there is nothing on the books that requires you to make a decision in what is a reasonable time period, don't you think—is there anything to make you make a decision in less than 12 months?

Mr. MCDOWELL. Certainly, statutory language helps. There is nothing like the force and effect of law. But even that sometimes is not observed. For instance, the video competition report we are required to produce every year, the last time I think I voted on one was in 2007.

Mr. BILBRAY. OK. So in other words, we need to basically tighten it up but also have some enforcement on that tightening. I will just tell you, somebody that built the light rail system in San Diego, we abandoned any federal funding just so we could avoid the regulatory oversight, and we built that system under budget and on time because we didn't take federal funding, and I think that is one of the things we don't talk enough about. People want transit, they want this, they want that. Sometimes the most important component to get the public the services that you claim you care about is getting the federal regulatory agencies out of the way so you can get the job done, and that is why I would just like to state down the line.

Mr. Moeller, you were talking about hydroelectric. When you are reviewing the hydroelectric and the relicensing, are you required to consider the no-project option and the environmental damage done if you don't approve it? Things like climate change, emissions, pollution, and that kind of thing, are you required to basically take a look at this and understand that if you do not approve it, it will have an adverse impact because the alternative-energy capabilities or generation is going to cause pollution where the hydroelectric is not.

Mr. MOELLER. Well, typically, I think of the no-action alternative as truly no action as opposed to perhaps modifying or taking out a dam and then the consequence being that it would be a result of more generation that would be less environmentally friendly than hydro. But typically I think it essentially doesn't get to that. It is a long settlement process where——

Mr. BILBRAY. But you don't have a specific requirement that you have to consider offsets for shutting down a plant?

Mr. MOELLER. Not that I am aware of.

Mr. BILBRAY. Well, that is one of those things that I think we need to talk about, Mr. Chairman, more, is that, you know, when you don't improve a road improvement, you should have to offset the pollution caused by the congestion rather than always we look at all of the emissions that happen for construction. But the no-project option and the environmental and economic and social im-

pact of that need to be considered but the environmental impact is one that if individual a real hypocrisy that you want to have offsets for the emissions caused for building the project but nobody who is stopping the project has to account for the environmental pollution by not finishing the project, and I yield back, Mr. Chairman.

Mr. STEARNS. I thank the gentleman, and the gentleman from Louisiana, Mr. Scalise, is recognized for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate you holding this hearing. I appreciate all of the commissioners who have come here to participate and talk about the costs of regulations, especially how it impacts people, and when you look at lot of the intent and what is usually said about regulations that come out, they all sound really good and, usually the name of a bill, you can tell how bad it is by how good the name sounds. It is usually an inverse proportion.

And so as I talk to people, our economy is still very sluggish right now, and of course, in many cases, when you talk to small business owners, when you talk to American job creators, as many of us do, the first thing they will tell you that is the biggest impediment to job creation in America are federal regulations. You know, all of the other things that get in their way, they can manage. It seems like the federal regulations have become the biggest burden to creating jobs in America today, and so when you look at some of these regulations, you definitely want to look and see what is the real impact, are they even achieving some of the results that they were intended to, and in many cases you find out they are not, and then you look at some of these agencies, and we have had a number of hearings and I appreciate the chairman having the hearings that we have had going through various agencies, even looking at the President's Executive order, and we have seen and it has been pointed out even by some of the people implementing it the shortcomings of the President's Executive order, how it doesn't really get at the cost of regulation, and I read, there was a report that was recently done by the Small Business Administration that is titled the Impact of Regulatory Costs on Small Firms, and this really looked at how it impacts our small businesses, the people that actually create the bulks of the jobs in our economy and, you know, I guess it is not surprising for those of us that have been in some of these hearings but they talk about the cost of federal regulations to small businesses is over $1.7 trillion, and how does that break down? I broke it down per family. Over $15,000 per family is the cost to small businesses of these regulations. And so when you look at the regulations and when you look at the impact and how it is not only affecting jobs, it is a major impacter that is costing us jobs but it also costs every American family over $15,000. You say where is the bang for the buck.

And I want to ask Commissioner Northup, you touched on this in your opening testimony. You talked about some of the things you have seen, and you have seen businesses go under, actually go bankrupt because of some of these regulations, and in many cases had actually no health impact, you know, bills that were sold and regulations that were sold as helping the health of children had actually nothing to do with health and it just had to do with some kind of radical policy somebody had that didn't help anybody's

health, it just made a company go bankrupt. Can you expand on some of the things you have seen in terms of how these regulations not only impact the businesses that you have talked about but also how in many cases there is not even a relationship between health and——

Ms. NORTHUP. Well, I will give you two quickly. One of them is the—in the bill that you passed, you had exclusions with the lead limit for electrical products, and we have a whole cutout for that. You had exclusion for inaccessible parts, and we have addressed that. You also had an exclusion for lead where not any lead could be absorbed. I assume you meant for some things to be included in that, perhaps screws, nuts and bolts that are holding a crib together, maybe the handlebars of a bike because lead in the handlebars, if you suck on it, unlike paint, it is trapped in that metal. You can't suck out the lead. But our agency, even though I proposed a de minimis standard where if you rub the handlebars and less than a molecule could be gotten off that, it couldn't possibly change your blood lead content, that absorbability exclusion that you wrote in the bill, I intended you meant for it to apply to something. And the rest of the commissioners decided no, and so basically they have found that even though you wrote in the non-absorbability exclusion, that it applies to nothing, that there is not one material that it applies to.

If we had nuts, screws, bolts, things that can't be swallowed, things that have small amounts in them that are in lead, trapped in—excuse me—trapped in steel, that those things would have been excluded from this law. It would have made a huge difference.

Mr. SCALISE. Let me ask, and I am running out of time. I want to ask just by a show of hands how many people have actually read this report that came out just a few months ago on the impact to small businesses of the regulations? Can I get a show of hands? Not one person on the panel read this. I think it should be required reading for all regulators. But if I can ask unanimous consent to submit this into the record?

A final question, if I can ask——

Mr. STEARNS. Before we put it in the record, the minority would like to look at it.

Mr. SCALISE. Sure. I will be happy to hand that over. It is a report that was published in September of 2010. It cites a number of sources but goes into very good detail on sector of breakdowns, also differential between large businesses and small, how they differentially fall higher even on our small businesses.

Commissioner McDowell, you gave an assessment on the things that the FCC did to take into consideration. It was looking at both net neutrality and data roaming rules. Did they look into and do proper market analysis, in your opinion, to look at the impact how that would be on our job creators?

Mr. MCDOWELL. There was no proper market analysis, no finding of market power. In fact, the order, the net neutrality order says as much, that there was no market analysis conducted.

Mr. SCALISE. See, that is the problem with a lot of these regulations that come down. They have dramatic impacts on job creators and they cost us jobs, run jobs to other countries, and yet it just seems like the regulators kind of go into their own shell and are

oblivious to the actual impact on our economy, so hopefully we can shift that course, and I appreciate the chairman for having this hearing and more like it to get our economy back on track.

Thanks. I yield back.

Mr. STEARNS. And the minority has looked at this, so by unanimous consent, this will be made part of the record, so I thank you for bringing this.

[The information appears at the conclusion of the hearing.]

Mr. STEARNS. The gentlelady from Tennessee, Ms. Blackburn, is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you all for your patience in being here.

Commissioner McDowell, I want to stay with you. On that net neutrality order, no market analysis done, no look-ahead at what the cost-benefit analysis was going to be. If there had been that analysis done, do you believe the commission would have gone ahead and issued that order?

Mr. MCDOWELL. I think so. I think that whole proceeding was outcome based, outcome driven.

Mrs. BLACKBURN. Chairman Leibowitz, I want to come to you. I am concerned about the FTC's food guidelines, food marketing guidelines. I have two grandchildren. They are age 3 and age 2. And so things of this nature really I pay a lot of attention to. You know, you think about the unintended consequences that are going to come forward with this, and I think that you may see is that an unintended consequence could be seen as hampering free speech, harming our economy and not having a significant reduction in childhood obesity, and one of the things that I have found recently is that the food currently sold through the WIC program, which is designed by USDA experts to provide a healthy diet for young children, could no longer be marketed under this proposal. So you claim these proposed food marketing restrictions are voluntary but aren't these government standards going to form the basis for NGO attacks? And then also talk about what you think—I think that you could see there should be consider about shareholder actions, so if you will address that quickly, please?

Mr. LEIBOWITZ. Thank you, Congresswoman. Well, first, as you know, this was an obligated requirement. We are not the only agency. We do the marketing side. We don't do the science side. That is the agriculture department, the CDC and the FDA. But it was a Sam Brownback, Tom Harkin obligation in our appropriations bill. We are obligated to do what Congress tells us to do. It is voluntary. So in that sense, there is no enforcement mechanism. We are taking comments from stakeholders. And let me just say, and you recognize, as we all do, there is an obesity crisis and there are twice as many obese children as there were a generation ago, but speaking only for myself, you know, I try to take a sort of pragmatic approach here. If my kids eat Special K with yogurt in the morning, which actually wouldn't quite meet the nutrition guidelines, I am pretty happy, because you know what? I think that is better than what else they might eat or better than not eating anything at all. So my understanding is that within the next week—first of all, we will be getting comments and we will be reviewing those comments very seriously from stakeholders, but within the next week, my understanding is that the food marketing companies

are going to come up with some proposed standardized or uniform guidelines. If they come up with guidelines that are good, and I think they will, then we ought to take that into account going forward member of the working group, and we will.

Mrs. BLACKBURN. Let me shift gears with you. I want to go to the privacy issues that are out there, and we know that the Internet online advertising is really an economic engine in this country and the industry is beginning to voluntarily enter into some self-regulatory structures when it comes to privacy. Do you believe the FTC should impose a top-down technology mandate on the Internet governing the privacy issue?

Mr. LEIBOWITZ. It is the last thing we want to do, no.

Mrs. BLACKBURN. OK. Thank you for that. I appreciate that. I think that just as I said with Chairman McDowell, if you were to look at the net neutrality issue, if there had been a robust review of cost-benefit analysis, I think that it would have been determined that the net neutrality order, especially paragraph 84, was going to be detrimental to our economy, and I think that a heavy hand on the privacy issue would likewise.

I have got less than a minute. I want to ask each of you, just a show of hands, how many of you have read the Executive order that we are discussing and have been through the process of reviewing that? OK. So all of you have. All right. How many of you disagree with any part of that order? Is there any part of that order that you have disagreement with? Yes, sir, go ahead.

Mr. KOVACIC. I don't think—I think a number of the provisions aren't very well specified. I think it could have benefited from a much fuller discussion about how it intended specific tradeoffs that are implicit in the order were to be made. There has been subsequent guidance, subsequent commentary. It is a nice start.

Mrs. BLACKBURN. OK. Anyone else? Commissioner?

Mr. MCDOWELL. I would agree. I think it could be broader and more comprehensive and more aggressive.

Mrs. BLACKBURN. OK. Any other addition to that? Thank you all for your patience. Yield back.

Mr. STEARNS. The gentlelady's time is expired. The gentleman from Virginia, Mr. Griffith, is recognized for 5 minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman.

Commissioner McDowell, it is nice for me to be able to say that in a formal setting in my new role. When I look at the FCC's merger review process under Republican and Democrat Administrations, I see a process that appears to be broken. The XM and Sirius merger took way too long. The Comcast-NBC merger took way too long. There is simply too much discretion for the commission to halt the timeline for the review of the transfer of control of licenses in an expeditious manner. Is there something we can to provide applicants with certainty regarding the timing of the FCC review process?

Mr. MCDOWELL. And Congressman Griffith, it feels good to say that as well, my first time saying that publicly, so congratulations. Yes, the FCC has an 180-day shot clock that is honored more in the breach that in the rule to get mergers done. I read yesterday also that the Assistant Attorney General for Antitrust, Christine Varney, is stepping down and there is a big merger, the AT&T and

T-Mobile merger, that needs a fair, thorough and expeditious review, and I would hope that her stepping down doesn't delay that. I think we could get that done by the end of the year in a fair, thorough manner.

But I have been in a dialog with Chairman Genachowski about making sure that we move as quickly as we can on our merger review process. I think there are a lot of problems with how the commission under both Republicans and Democrats have conducted themselves in terms of taking too long or imposing conditions that have absolutely nothing to do with the substance of the merger itself. So Congress could look at that. There could be a statutory provision certainly, but the best thing to do would be for the FCC to honor its own 180-day shot clock.

Mr. LEIBOWITZ. So Congressman, may I just add something?

Mr. GRIFFITH. Yes, please.

Mr. LEIBOWITZ. We do from time to time work with the FCC on merger reviews, and I think from our perspective, you don't deserve a particular outcome but you do deserve sort of a speedy resolution. Sometimes it takes a little longer with documents, but that is what you deserve, so I think that is a reasonable point.

Mr. MCDOWELL. And I agree.

Mr. GRIFFITH. And I think most of us would agree with that as well.

Commissioner Northup, do you think Congressman Waxman's proposed legislation will actually ease any burdens under the Consumer Product Safety Improvement Act?

Ms. NORTHUP. No, I don't think it goes nearly far enough, and in fact, he has proposed previously a functional purpose exemption which I have to say is like picking winners and losers. If you think a part—first of all, it says it can't be harmful to children and then it says if it serves a function, for example, on a bicycle and is necessary, then we can exempt it. Well, if it doesn't harm a child, why do we have to then exempt it in part by part? It means that big companies that have lots of product or big expensive products can afford to get a functional exemption because it is a very complicated petition you would have to file with us. They can afford to file the petition and all the supporting work and everything and then we can exempt them but for small needs for these same exact materials that do not harm a child, I don't think that, you know, they probably would be able to afford either the wait for us to act on it or the cost to put the petition together. So that in particular to me is, you know, not a good way to go about easing this. Making the absorbability a useful exception would make a huge difference.

Mr. GRIFFITH. Did you want to add onto that?

Mr. ADLER. Well, I wanted to disagree.

Mr. GRIFFITH. Somebody else may give you time to do that but let me—I have got one more thing I want to say and if I could take back my time because I am running out of time. I did hear from several of you as I was listening to the testimony that you all, at least a couple of you, made mention that perhaps the legislation created more of the problem than the agency created and that we should be careful when we craft legislation that that may be costing jobs as well as the regulations costing jobs that are ultimately awarded, and while in some cases it may be an agency that is

pushing the envelope and some cases it is just the agency following exactly what Congress told them to do, and I do appreciate that. I yield back my time.

Mr. STEARNS. The gentleman yields back the balance of his time. The gentleman from Colorado, Mr. Gardner, is recognized for 5 minutes.

Mr. GARDNER. Thank you, Mr. Chairman, and thank you for your time and testimony today.

Chairman Wellinghoff, in developing energy policies such as policies to support the integration of renewables, demand response or the deployment of smart grid technologies, does FERC evaluate the impact that increased energy price, evaluate the impact that increased energy prices resulting from the implementation of these policies will have on jobs?

Mr. WELLINGHOFF. The policies that we implement aren't directed to specific technologies but rather directed to the integration of all technologies into competitive marketplace. We believe, and I think my colleague, Commissioner Moeller, I think would agree, we believe that competition is good for consumers and so to the extent that we can maximize competition, we can increase the types of resources that are available in the market, whether they be coal or nuclear or natural gas or solar, geothermal, hydroelectric or any of these resources, and also to the extent that we can do things like incorporate in demand response and energy efficiency which usually at the lowest cost resources, the whole mix of those resources in a competitive environment allowed to compete fairly in that competitive environment will in fact produce the lowest cost for consumers.

Mr. GARDNER. So do you do an analysis that these policies, the impact they will have on jobs?

Mr. WELLINGHOFF. We don't a specific impact on——

Mr. GARDNER. So you don't do an analysis then?

Mr. WELLINGHOFF. We don't do a specific analysis.

Mr. GARDNER. A specific analysis on jobs? You do not do a specific analysis on jobs?

Mr. WELLINGHOFF. We don't, but we do believe that——

Mr. GARDNER. So in terms of——

Mr. WELLINGHOFF. Excuse me, if I could finish. We do believe——

Mr. GARDNER. Actually, reclaiming my time. In terms of the Executive order, so you do not believe that the Executive order, which I think you said you believe in the spirit of, you do not believe that it requires you to look at jobs? I understand that you are exempted from it but you believe, you said you want to follow the spirit of it. Do you think you ought to be concerned about jobs and looking at the job impact?

Mr. WELLINGHOFF. I think we are always concerned about jobs to the extent that we can drive down prices in a competitive atmosphere and allow for the economy to have access to low-cost power. To the extent that we can provide low-cost competitive power within the economy, we are going to create jobs and we are going to maintain jobs.

Mr. GARDNER. But you don't do an analysis to know that or not?

Mr. WELLINGHOFF. My basic economics, what I know if basic economics, tells me that if we can lower costs for electricity, we are going to have the ability to increase jobs.

Mr. GARDNER. Would you commit today to start beginning a jobs analysis when you make decisions?

Mr. WELLINGHOFF. I certainly have no problem looking at jobs. I believe, for example——

Mr. GARDNER. But shouldn't that be our——

Mr. WELLINGHOFF [continuing]. Your colleague from Louisiana, for example, was talking about this issue with respect to jobs and regarding that, Entergy, which is one of the utilities in Louisiana, has chosen to join a competitive market, Myso. An analysis was done that showed by joining that competitive market, something over $700 million could be saved. I think there is a lot of money if you can take that money and save it for Louisiana consumers and others throughout the region. It wasn't just Louisiana but spread out the region. That additional money in the pockets of consumers is going to help them create jobs and invest back in the economy in ways that more jobs will be created. So I think that is a very valid example of the types of things that FERC is doing to the regulations and the competitive structures that we are putting in place to ensure that in fact we can create more jobs.

Mr. GARDNER. Well, and then so what you are telling the committee then, and I believe what you just said, though, when it comes to developing energy policies like integration of renewables, demand response or the deployment or smart grid technologies, then you are saying today that you will do a jobs analysis on these decisions?

Mr. WELLINGHOFF. I am saying that to the extent that it is possible to do so, we certainly will in fact look at the impact on jobs.

Mr. GARDNER. I think we ought to be looking at the impact on jobs no matter what we do so that we have an idea of——

Mr. WELLINGHOFF. I absolutely agree.

Mr. GARDNER. And so Commissioner Moeller, do you care to comment on this?

Mr. MOELLER. I generally want to associate my remarks with the chairman because we are believers in competitive wholesale markets and those ultimately are what benefit consumers the most and allow more resources. I think we should always be cognizant of the employment impact we have on rising energy prices because it can be substantial.

Mr. GARDNER. Thank you, Commissioner Moeller.

I see my time is expired and I yield back.

Mr. STEARNS. I thank the gentleman for his questions. I think we are completed with our first round. I think the ranking member and I have talked that we are going to ask a few more questions and then wrap up.

I don't think there has ever in my experience been such a distinguished group of people that could make an impact on deregulation in America as you folks today so we are here with a certain humility in asking you what is the best way for us to move forward. As Mr. Scalise pointed out with that Small Business Administration report, had every U.S. household paid an equal share of the federal regulatory burden, each household would pay $15,586. That was in

2008. And when you compare that with what we spent for health care costs in 2008, the federal regulatory burden exceeded by 50 percent the private spending on health care, which equaled $10,500. So it is within your power to deregulate and to get rid of burdensome regulations, which would spur the economy. So we are not talking about something insignificant.

So I guess the larger question is, we passed in 1980 the Regulatory Flexibility Act. Obviously that is not applicable today and it is not working, so the question is for you is sort of a wrap-up understanding, the President reached out with his Executive order that did not apply to the independent agencies in some of your opinions. We think Cass Sunstein's letter did imply but we don't seem to have you jumping to the forefront to try to deregulate. Should Congress should either statutes or legislation provide, one, either more flexibility to you or should we update the Regulatory Flexibility Act of 1980? So we are reaching out for you to tell us, one, should we do some of the things I mentioned, and secondly, would you be willing to help us in terms of providing us documentation on what we should do? I will start with Commissioner Adler.

Mr. ADLER. Mr. Chairman, the devil is always in the details. I would be delighted to look at anything you drafted and to respond to it.

Mr. STEARNS. So you think that we should take the Regulatory Flexibility Act of 1980 and update it in Congress?

Mr. ADLER. Actually, I am probably a bigger fan of the Regulatory Flexibility Act than some folks here. As I read it, I think it is a fairly useful tool, especially in terms of what we do when we are trying to regulate and we are looking particularly at the impact on small business. That is actually something that both Commissioner Northup and I agree on is that we do have to worry about the impact on small business.

Mr. STEARNS. Commissioner Northup?

Ms. NORTHUP. Yes, but unfortunately, it has no teeth in it. No matter what the regulatory analysis is, if you decide in our agency that you should go ahead and regulate, it almost has no impact on what we do. So unless we are required to justify the cost with the benefit, adding that to it, I think that would be an important improvement, but other than that, it is a box we check and it doesn't have an effect.

Mr. STEARNS. Just for your information, I checked the Consumer Product Safety Improvement Act. Everybody in Congress voted for it under the Bush Administration except one, and that was Ron Paul. So you probably would have been like most——

Ms. NORTHUP. I am sure I would have, and, like I said, when I first read it before my confirmation, I was really very excited about it.

Mr. STEARNS. Commissioner McDowell?

Mr. MCDOWELL. I think statutory action is the best way to sort of cut through this Gordian knot of regulation and statutory provisions that have built up over the years and so I would be happy to work with you on something like that.

Mr. STEARNS. Mr. Wellinghoff, Commissioner, Chairman?

Mr. WELLINGHOFF. Yes, Chairman Stearns. As I indicated to Congressman Barton, I don't have any specific recommendation for you. However, certainly anything that the committee decided to draft, we would be happy to work with you in any way.

Mr. STEARNS. Commissioner Moeller?

Mr. MOELLER. Mr. Chairman, I generally think a government of both legislative and regulatory bodies should periodically review legislation and regulations, so if that is in order, I would certainly endorse that. And as our chairman said, I had a specific example about hydropower re-licensing that I would be happy to provide to you. It would be quite complicated, given the number of federal laws involved, but any help that we can provide, we would be happy to do so.

Mr. STEARNS. Chairman Leibowitz?

Mr. LEIBOWITZ. I am also happy to work with you, although as my colleague, Commissioner Kovacic, pointed out, I think only four rules that we have actually are within reg flex but we do do, you know, reg reviews and rule reviews. In fact, we are in the middle of 23 of them now, so I will defer to my colleague, Mr. Kovacic.

Mr. KOVACIC. Mr. Chairman, if I could just underscore a couple of themes that have come up already today. One, the enormous value of having committees and the Congress all assess before the fact the likely impact in regulation writing of legislation adopted. Second, the custom you are developing in this hearing of making a regular question for all of us how much are you spending in each budget cycle to look at evaluation and the assessment of effects, not just to measure accomplishment by activity itself but looking at actual impacts and ask us how much are you setting aside in each budget cycle to do this. And last, we do an enormous amount of work as advocates for competition and better consumer protection techniques before the government agencies, before our State governments, and this perhaps provides specific suggestions that we would be happy to share with you about how adjustments in national and State legislation could improve productivity and improve economic performance.

Mr. STEARNS. I am going to yield to the ranking member, but I think each of you have indicated you will help us. You are saying something should be done. So I am going to presuppose that all of you will submit to us some specifics that we could incorporate and still working as the Energy and Commerce Committee towards this.

The gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman, and I agree. I had asked them for that information earlier, and I really look forward to working with all of you because as we all said—no, actually it was one of you who said the devil is in the details of these regulations. You can say we are all for regulatory reform. We also probably need to streamline some of the statutes because a lot of the regulations flow from the statutes and so I think we need to look at all of those.

I have been sitting up here thinking about this lead standard with the CPSIA. I was on the conference committee with Chairman Barton and others, and Mr. Chairman, you are exactly right. There was only one no vote on that bill in the House, and Chairman Bar-

ton and Ranking Member Waxman and a bunch of us, and even the other body sat around for a long time trying to figure out what to do with this lead standard. I remember it so clearly, and when we drafted the new lead standards, what we decided was, was that determining total lead content was preferable to risk assessment because what happened with risk assessment is, it was dependent on a product-by-product determination which you couldn't do because of the large number of children's products in the marketplace, and so in addition, although with most chemicals a traditional risk-based model can work, if you have persistent bioaccumulative toxins like lead, science has demonstrated that traditional models are inappropriate and exposures inevitable, and we spent a lot of time in that conference committee talking about what we do about bikes and ATVs and things like that. So it is not like Congress never talked about these things.

I think what we need to do now that we have passed this—and it wasn't one of these provisions slipped in in the middle of the night either. We really, really hammered this out on a bipartisan, bicameral basis. So now I think what we need to do, given the experience that the CPSC has had in trying to draft the regulations, is sit down and figure out what about that new lead standard might work, what might not work, and this is what led to this effort by then-Chairman Waxman last year to develop this legislation everybody has been talking about. The staff undertook a consultative shareholder process with small business and others to try to figure out what we do about the ATVs, the bicycles, the tee shirts with the blue ink and things like that. He did release a consensus discussion draft of a document to try to figure out how to address these concerns because we need to do it but unfortunately your side of the aisle, Mr. Chairman, rejected that.

And so we can sit down and talk about it. We did do that. We did that when the Republicans were in the majority in the Congress and when we had President Bush in the White House, but we can't devolve to the stage where we say oK, we are the majority, we are just going to do it our way and to heck with you, and vice versa. We really need to work together on how to make this work for small businesses and most importantly for consumers. So as someone who has fortunately or unfortunately been in those trenches, sometimes these regulations actually came from scientific basis and it is going to take some really hard work to fix it. I think every witness here would agree with that on some of these harder regulations that might be more burdensome.

And just one last thing, Mr. Chairman. Ms. Christensen was asking a question about Chairman Genachowski's efforts to eliminate outdated and unnecessary regulations at the FCC, and he had sent a letter to the subcommittee, to you and to me, outlining the efforts which noted that they eliminated 50 outdated regulations and identified 25 sets of data collection that are no longer necessary. So Mr. Chairman, I would like to ask unanimous consent to put that letter into the record.

Mr. STEARNS. Will the gentlelady let us take a few moments to review it?

Ms. DEGETTE. Yes.

Mr. STEARNS. What is the date of this? I don't see the date on this.

Ms. DEGETTE. Today.

Mr. STEARNS. Oh, it is today's date? OK. I would say at this point there is some concern that is really perhaps some of it is applicable but there is others that is concern on this committee we talked about earlier, the fact that Chairman Genachowski was invited as chairman to come up. He said he could not come, and so it is customary if he doesn't come, we do not respectfully take his statement and make it part of the record since he didn't show, and we are a little concerned that this might in fact be part and parcel of his opening statement. So I think at this——

Ms. DEGETTE. Mr. Chairman, I would just point out, it is not an opening statement, it is a letter to us, and we generally——

Mr. STEARNS. I think the staff is interpreting it as an opening statement and so I am just saying at this point we are not able to rule in favor of that and so I think we are just going to hold off and not put it part of the record.

At any rate, I will close by saying that civilizations rise and fall because of burdensome regulation. It is in your hands, you people, to do as much as you can to make the small businessperson succeed so that we can have innovation in this country.

I thank you for your time, and the subcommittee is adjourned.

[Whereupon, at 1:07 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 2, 2011

M-11-10

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND OF INDEPENDENT REGULATORY AGENCIES

FROM: Cass R. Sunstein
Administrator

SUBJECT: Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Order 13563 states that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It sets out certain principles and requirements designed to promote public participation, improve integration and innovation, increase flexibility, ensure scientific integrity, and increase retrospective analysis of existing rules. The purpose of this Memorandum is to offer guidance on these principles and requirements.

Relationship between Executive Order 13563 and Executive Order 12866

Executive Order 13563 is designed to affirm and to supplement Executive Order 12866; it adds to and amplifies the provisions of Executive Order 12866, rather than displacing or qualifying them. After the issuance of Executive Order 13563, agencies should continue to follow the principles and requirements contained in Executive Order 12866.

Section 1 of Executive Order 13563 specifically reiterates five principles from Executive Order 12866. These principles generally involve consideration of benefits, costs, and burdens. Section 1 also asks agencies "to use the best available techniques to quantify anticipated present and future costs as accurately as possible," such as identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. The goal of this provision is to promote careful and accurate quantification. At the same time, Section 1 recognizes that agencies may consider and discuss certain values that "are difficult or impossible to quantify"; such values include "equity, human dignity, fairness, and distributive impacts."

Public Participation

Section 2 of Executive Order 13563 emphasizes the importance of public participation. It requires agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than

60 days." This section complements a corresponding provision in Executive Order 12866,[1] while also emphasizing the importance of public comment through the Internet. Section 2 aims to promote agencies' continuing efforts to use online technologies to facilitate greater participation in the rulemaking process, thus making that process simpler and more accessible - - and less burdensome and costly—for all stakeholders.

Section 2 also requires an "open exchange" of information among government officials, experts, stakeholders, and the public. In this context, "open exchange" refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made. Section 2 thus seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself. In this way, Section 2 is designed to foster better and more informed agency decisions.

This provision is not satisfied simply through the acceptance of electronic submission of rulemaking comments by interested parties who lack information about the arguments and information provided by other parties. A central goal of public participation is to improve the content of rules, and open exchanges of information by interested parties can be helpful in that endeavor.

Section 2 also directs agencies (to the extent feasible and permitted by law) to give the public timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings. For proposed rules, agencies are required to include an opportunity for public comment on the rulemaking docket, including comment on relevant scientific and technical findings.[2]

Finally, Section 2 directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking. This provision emphasizes the importance of prior consultation with "those who are likely to benefit from and those who are potentially subject to such rulemaking." One goal is to solicit ideas about alternatives, relevant costs and benefits (both quantitative and qualitative), and potential flexibilities.

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[1] "Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Executive Order 12866, Section 6(a)(1).

[2] This requirement is consistent with Office of Information and Regulatory Affairs, Memorandum for the President's Management Council, *Increasing Openness in the Rulemaking Process - Improving Electronic Dockets* (May 28, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf, which states, "To the extent feasible, and consistent with applicable laws, regulations, and policies, agencies should make their electronic regulatory dockets on Regulations.gov consistent with their paper-based dockets. Both dockets should provide the public with access to all relevant materials. To the extent that they are part of a rulemaking, supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket."

Integration and Innovation

Section 3 of Executive Order 13563 calls for "[g]reater coordination across agencies" to produce simplification and harmonization of rules. This provision complements related provisions of Executive Order 12866, such as the provision asking each agency to "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."[1]

Section 3 of Executive Order 13563 instructs agencies (1) to consider the combined effects of their regulations (together with those of other agencies) on particular sectors and industries and (2) to promote coordination across agencies and harmonization of regulatory requirements. Section 3 thus emphasizes the crucial importance of simplifying and harmonizing regulations and acknowledges that, at times, regulated entities might be subject to requirements that, even if individually justified, may have cumulative effects imposing undue, unduly complex, or inconsistent burdens. Section 3 is designed to reduce burdens, redundancy, and conflict, and at the same time to promote predictability, certainty, and innovation.

Efforts at harmonization might occur within agencies, as efforts are made to coordinate various rules. Such efforts may also occur across agencies, as agencies work together to produce greater simplicity and predictability. Such interagency efforts may be promoted or assisted by OIRA.

Flexible Regulatory Tools

Section 4 of Executive Order 13563 states that ". . . each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." Such approaches include "warnings, appropriate default rules, and disclosure requirements, including provision of information to the public about risks in a form that is clear and intelligible." This provision complements, and does not displace, related provisions in Executive Order 12866 (such as the provision in Section 1(b)(3), asking each agency to "identify and assess available alternatives to direct regulation, including...providing information upon which choices can be made by the public").

Section 4 acknowledges the importance of considering flexible approaches and alternatives to mandates, prohibitions, and command-and-control regulation. It emphasizes the potential value of approaches that maintain freedom of choice and improve the operation of free markets (for example, by promoting informed decisions). It directs agencies to consider the use of tools that can promote regulatory goals through actions that are often less expensive and more effective than mandates and outright prohibitions. When properly used, these tools may also encourage innovation and growth as well as competition among regulated entities.

[1] Executive Order 12866, Section 1(b)(11).

Science

Section 5 of Executive Order 13563 refers to the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and implementing guidance. It emphasizes that each agency shall "ensure the objectivity of any scientific and technological information used to support the agency's regulatory actions."

In implementing guidance, the President's Science Adviser stated, "Science, and public trust in science, thrives in an environment that shields scientific data and analyses from inappropriate political influence; political officials should not suppress or alter scientific or technological findings."[4] Section 5 of Executive Order 13563 extends the President's Memorandum and implementing guidance to the context of regulatory actions.

Retrospective Analysis of Existing Rules

Section 6 of Executive Order 13563 emphasizes the importance of retrospective analysis of rules and contains a "look back" requirement: "Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles set forth in Sections 1 through 5 remain fully applicable, and should help to orient agency thinking.

Agency plans should not, of course, call into question the value of longstanding agency rules simply because they are longstanding. Many important rules have been in place for some time. The aim is instead to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Agencies should explore how best to evaluate regulations in order to expand on those that work (and thus to fill possible gaps) and to modify, improve, or repeal those that do not. Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken. Agency review processes should facilitate the identification of rules that warrant repeal or modification.

While systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking. Retrospective review may reveal that an existing rule is needed but has not operated

[4] John Holdren, Memorandum for the Heads of Agencies and Departments, *Scientific Integrity* (December 17, 2010), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

as well as expected, and that a stronger, expanded, or somewhat different approach is justified. In formulating its preliminary plan for retrospective review, each agency should exercise its discretion to develop a plan tailored to its specific mission, resources, organizational structure, and rulemaking history and volume.

While each agency should set its own priorities, all plans are expected to address the following topics:

- **Public participation**. Consistent with the general commitment to public participation, agencies should solicit the views of the public on how best to promote retrospective analysis of rules. Even before preliminary plans are written, for example, the public might be asked to provide comments on how such plans might be devised and to help identify those rules that might be modified, streamlined, expanded, or repealed. Consistent with existing guidance on the Paperwork Reduction Act (PRA), agencies may consider general efforts to obtain public feedback, including town hall meetings and online equivalents, to be exempt from PRA requirements.[3] Agencies are encouraged to consider providing a period of public comment after drafts of preliminary plans are written and/or after such plans have been submitted to OIRA. Agencies may want to reach out to stakeholders with an interest in the rules mentioned in the preliminary plans to ensure that diverse views are considered. Because knowledge of the effects of rules is widely dispersed in society, and because members of the public are likely to have useful information and perspectives, agencies should consider developing mechanisms to promote public consultation about existing rules on a continuing basis.

- **Prioritization**. The preliminary plan should specify factors that the agency will consider and the process that the agency will use in setting priorities and in selecting rules for review. To the extent feasible, the preliminary plan should also include an initial list of candidate rules for review over the next two years.

- **Analysis of costs and benefits**. Agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments, which can be used to enhance the agency's analytic capability.

- **Structure and staffing**. Responsibility for retrospective review should be vested with a high-level agency official who can secure cooperation across the agency. The preliminary plan should also consider how best to maintain sufficient independence from

[3] For further explanation of the applicability of the Paperwork Reduction Act, please see Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Information Collection under the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf and Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

the offices responsible for writing and implementing regulations. Finally, the plan should identify possible actions to strengthen internal review expertise (if necessary).

- **Coordination with other forms of retrospective analysis and review.** Under existing requirements and authorities, many agencies are already engaged in retrospective analysis and review. For example, the Regulatory Flexibility Act, 5 U.S.C. §610, requires agencies to "publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities." The same provision calls for review of all such agency rules every ten years. It is appropriate to use existing processes, and information now at hand, as significant inputs into preliminary plans.

Within 100 days, agencies should submit initial drafts of their preliminary plans to the appropriate desk officer at the Office of Information and Regulatory Affairs (OIRA). OIRA desk officers will review the plans and may provide suggestions to the agencies on possible improvements. OIRA desk officers are also prepared to work with agencies as they finalize their preliminary plans.

Independent Agencies

Executive Order 13563 does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority. In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules.

July 2011

Evaluation of the Consumer Product Safety Database

Committee on Energy and Commerce, Democratic Staff

In August 2008, Congress passed and President Bush signed into law the Consumer Product Safety Improvement Act, strengthening the ability of the Consumer Product Safety Commission (CSPC) to identify product hazards and remove dangerous products from the marketplace. The law required that the CPSC create an online database for consumers, health care professionals, and public safety officials to report safety hazards and incidents involving consumer products.

The CPSC SaferProducts.gov database went live on March 11, 2011. For the first time, reports about dangerous products are now publicly available to parents and other concerned consumers. The database is also improving the commission's ability to identify trends in product hazards quickly and efficiently.

The Republican-controlled House of Representatives is expected to soon vote on the FY 2012 Financial Services and General Government Appropriations bill. This bill contains a provision that would shut down the new database by barring CPSC from using any funds "to carry out any of the activities" related to the database. Consumer organizations have described the possible elimination of the database as "a giant step backwards for consumer safety protections."[1]

To assess the new consumer safety database, Democratic Committee staff analyzed the most recent data available online, the consumer product incidents reported to the CPSC over a three-month period from the database's launch on March 11, 2011, to June 7, 2011. This report, the first analysis of the database since its creation, summarizes the staff's key findings.

The database contains more than 1,600 incident reports. During its first three months of operation, consumers, health care professionals, public safety officials, and others reported 1,624 incidents that CPSC then published in the online database. Almost one-third of these incidents involved reports of death or injury.

The database contains 31 reports of incidents that resulted in fatalities. These fatality reports include accounts of infants who died in cribs and playpens and teenagers and adults who were killed while riding ATVs. One report describes a death caused by carbon monoxide poisoning from a faulty furnace.

The database contains an additional 483 reports of incidents that resulted in an injury. The reports include incidents in which children suffered amputations or injuries to their fingers when their hands became trapped in the hinges of strollers. Numerous people reported ATV accidents resulting in serious injuries and hospitalization. Other consumers reported ankle and knee injuries from footwear. Most of these incidents required some level of medical attention.

Many other incident reports describe product defects that could cause injury. One consumer reported that the hinges on a safety gate broke, causing the gate to fall down the stairs. A mother reported that a hair dryer started sparking while she was using it to dry her daughter's hair. Another consumer reported that her front-loading washing machine had burned her clothes. Many consumers reported light fixtures, small appliances, and electronics that began over-heating and smoking with normal use.

Kitchen products account for one-third of the incident reports. Other product categories receiving the most reports include home maintenance, nursery equipment, furniture and furnishings, and toys. See Table 1.

Table 1. Incidents Reported in the SaferProducts.gov Database: By Category

Product Category	No. of Incident Reports
Kitchen	545
Home Maintenance and Structures	204
Baby - Nursery Equipment and Supplies	161
Furniture, Furnishings, and Decorations	143
Toys and Children	119
Clothing and Accessories	112
Yard and Garden	101
Sports and Recreation	75
Electronics	73
Drywall	27
Personal Care	26
Containers and Packaging	15
Hobby	13
Fuel, Lighters, and Fireworks	11
Products at Public Facilities	1

Consumers, public safety officials, and others have filed incident reports. Consumers reported the vast majority of product safety incidents to this database, accounting for 1,574 (97%) of the incident reports. State and local agencies (18 reports), public safety officials (15 reports), health care professionals (12 reports), medical examiners (4 reports), and even child service providers (4 reports) also have reported incidents to the database.

The information in the incident reports is accurate. Opponents of the CPSC database have claimed that the database allows "companies and their brands to be unfairly characterized"[2] and that "the database could be filled with bogus reports."[3] But this is not occurring. Product manufacturers are given the opportunity to review and dispute information in incident reports before the reports are published online in the database. They have challenged the accuracy of only 202 reports. The CPSC has accepted in whole or part 154 of the manufacturers' claims (over 75%) and took action by removing inaccurate information or not publishing the incident report in the database.

The information in the incident reports is detailed. Opponents of the database also have claimed that the database would be filled with reports by anonymous individuals that do not identify the specific products involved. This is also not occurring. More than 80% of the incident reports in the database include the product's model or serial number. In addition, 82% of the persons filing reports have given the CPSC permission to release their contact information to the manufacturers.

Hundreds of thousands of consumers are using the database to obtain important information about product safety. According to CPSC officials, there have been more than 305,000 visits to the new website. The individuals visiting the website have conducted almost 1.8 million product searches. More than half of all site visits and almost half of all searches occurred in June 2011, indicating that the database is rapidly becoming more popular among consumers and others searching for critical product safety information.

The new CPSC consumer safety database has been available to the public for only a few months. During this short time period, consumers, public health officials, and others have already reported more than 1,600 product safety incidents – including hundreds that caused death or serious injury – and almost 300,000 consumers have searched the database for important public safety information. Efforts by House Republicans to eliminate this database would deprive the public and government officials of critical information needed to improve consumer safety.

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[1] Consumer Federation of America and Consumers Union, Press Release, *House Appropriations Committee Votes to Gut Safety Database* (June 23, 2011).

[2] House Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, Testimony of Wayne Morris, Association of Home Appliance Manufacturers, *A Review of CPSIA and CPSC Resources* (Feb. 17, 2011).

[3] Letter from Rosario Palmieri, Vice President, National Association of Manufacturers, to Members of Congress (Feb. 17, 2011).

The Impact of Regulatory Costs on Small Firms

by

Nicole V. Crain and W. Mark Crain
Lafayette College
Easton, PA

for

under contract number SBAHQ-08-M-0466

Release Date: September 2010

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Executive Summary

The annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008. Had every U.S. household paid an equal share of the federal regulatory burden, each would have owed $15,586 in 2008. By comparison, the federal regulatory burden exceeds by 50 percent private spending on health care, which equaled $10,500 per household in 2008. While all citizens and businesses pay some portion of these costs, the distribution of the burden of regulations is quite uneven. The portion of regulatory costs that falls initially on businesses was $8,086 per employee in 2008. Small businesses, defined as firms employing fewer than 20 employees, bear the largest burden of federal regulations. As of 2008, small businesses face an annual regulatory cost of $10,585 per employee, which is 36 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees).

The regulatory landscape highlighted above and detailed in this report emerges from an updated analysis of the regulatory record explored in three previous studies for the Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (Hopkins, 1995; Crain and Hopkins, 2001; and Crain, 2005). Direct comparisons to the results in these prior studies should be made with caution, however. The present study introduces some new methodological techniques, which may account for some of the differences in the cost estimates for 2008 versus those for prior years.

I. Purpose and Highlights

Government regulations pervade modern life in America and other nations with few exceptions. Regulations are needed to provide the rules and structure for societies to properly function. This research, while mindful of this fact, does not consider the benefits of federal regulations, but looks at the overall costs imposed by them. Little stock is taken of the cumulative effects.

Unlike most fiscal actions taken by government, the costs of regulatory actions are relatively hidden. For example, consider the activities, products, and services consumed by a typical household on a typical day. The costs of government regulations get stirred into the indistinct mixture of countless economic forces that determine prices, costs, designs, locations, profits, losses, wages, dividends, and so forth. Isolating the contribution of regulations to one's daily routine requires more than simply looking at the sales receipts, for example, as in the case of government sales taxes. A comprehensive list of regulatory influences that affect one's daily existence is indeed extensive and overwhelming to track or sum up. Yet, knowledge of the cumulative consequences of regulatory actions, and how these are changing, provides important information to assess and evaluate the performance of a political-economic social system.

This report seeks to fill some of these gaps in our knowledge by providing estimates of the costs of federal government regulations in the United States. An awareness of regulatory costs reveals much about the balance in public versus private sector responsibilities for and control over resources. Transparency about compliance costs can inform critical judgments about what society gives up in exchange for government responsibility exercised through the machinery of the regulatory process.

Policymakers long ago recognized the importance of information about U.S. taxing and spending programs; such fiscal information has been provided systematically

for nearly a century and is in fact mandated by the Constitution (Article 1, Section 9). The annual federal budget process and the *Budget of the United States* provide considerable detail regarding where the money comes from and how it is spent. The quest for transparency in the nation's fiscal affairs has increased through the online availability of and public access to detailed budget information.

Unfortunately, comparable information about the impact of federal regulatory programs is largely absent. Federal regulations escaped any rigorous scrutiny until limited tracking was mandated by Executive Order 11821 in 1974. The federal Regulatory Right-to-Know Act, enacted in 2000, was a major attempt to make information about the costs and benefits of regulations far more transparent and widely available than before. This act requires the U.S. Office of Management and Budget (OMB) to submit an accounting statement and report that includes an estimate of the total annual costs and benefits of federal rules and paperwork "to the extent feasible."[1]

In the 2009 Report from OMB, the estimated annual cost of major federal regulations ranges between $51 billion and $60 billion in 2001 dollars. Denominated in 2009 dollars (that is, adjusting for inflation), this annual cost is between $62 billion and $73 billion. The estimated cost range provided in OMB's report differs markedly from estimates in three prior studies commissioned by the Office of Advocacy of the U.S. Small Business Administration (hereafter referred to as "Advocacy").[2] Thomas Hopkins

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[1] Section 624 of the Treasury and General Government Appropriations Act of 2001, Pub. L. 106-554, 31 U.S.C. § 1105 note.

[2] Thomas D. Hopkins, *Profiles of Regulatory Costs, Report to the U.S. Small Business Administration*, U.S. Department of Commerce, National Technical Information Service #PB96 128038, November 1995 (http://www.sba.gov/advo/). W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms*, U.S. Small Business Administration, 2001 (http://www.sba.gov/advo/). Hopkins (1995) began to fill the information vacuum regarding the federal regulatory burden, presenting a profile of the level and distribution of federal regulatory compliance costs using data through 1992, and made cost projections through 2000. The Hopkins study was updated and extended in Crain and Hopkins (2001); that study examined the actual, as distinct from projected, regulatory burden in 2000. Crain (2005) updated and provided methodological revisions to the 2001 study and estimated compliance costs for 2004.

(1995) estimated annual federal regulatory costs to be $777 billion. Mark Crain and Thomas Hopkins (2001) estimated the annual costs to be $876 billion (both numbers are converted here to 2001 dollars, the base year normally used by OMB in its reports). More recently, Crain (2005) estimated the annual costs to be in excess of $1 trillion (again in 2001 dollars). According to these three studies for Advocacy, the costs of federal regulations are larger than the costs reported by OMB by a factor of 13 to 17. What accounts for this large discrepancy?

OMB discusses this issue openly and candidly, stating in its 2009 *Report*: "because these estimates exclude non major rules and rules adopted more than ten years ago, the total benefits and costs of all Federal rules now in effect are likely to be significantly larger than the sum of the benefits and costs reported."[3]

It is worth emphasizing at the beginning of this report the main factors that cause OMB's estimates to differ so greatly from those in the studies for Advocacy, including the new estimates presented here for 2008. If OMB or other government-provided estimates were complete and comprehensive, further study would add little value. First, in compiling its accounting statement, OMB includes only those regulations that it cleared during the previous 10 years, which in the 2009 report included October 1, 1998, to September 30, 2008. Limiting the analysis to this time period omits some of the most costly federal regulations, such as the regulations stemming from the parts of the Clean Air Act and its amendments that were enacted before 1998.

Second, the annual OMB accounting statements are based solely on cost-benefit analyses that were performed by the separate federal agencies.[4] In other words, the

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[3] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs (2005), *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, p. 9.

[4] In some cases, the cost estimates are based on OMB's transparent modifications of agency-provided cost-benefit estimates. Agencies are not required to perform cost-benefit analyses on

sources for the cost and benefit estimates that OMB uses to compile its accounting statement are the federal agencies that promulgate and enforce regulations, and those agencies frequently declare many costs to be "inestimable." This means that while the annual OMB accounting statements offer a trove of relevant information, the coverage in these annual statements is limited; federal agencies have not assessed the costs (or the benefits) for a host of regulatory activities — past and present. This is particularly problematic in the case of economic regulations, which have not been analyzed by federal agencies and therefore have not been included in OMB's annual accounting total. Burdensome economic regulations such as import restrictions, antitrust policies, telecommunications policies, product safety laws, and many other restraints on business activities are implemented outside of the OMB regulatory review process.[5] None of these regulatory costs are therefore included in OMB's annual estimates of total costs.

Third, the OMB annual reports to Congress include "major" regulations reviewed by OMB. This methodological decision is understandable given the massive volume of "non major" regulations. Nonetheless, thousands of non major regulations in the aggregate may amount to substantial costs. Fourth, and finally, a host of regulations are issued by independent regulatory agencies — federal government entities that fall outside the executive branch — and, therefore, are not subject to the reporting

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regulations that are expected to have an economic impact of less than $100 million, and thus these are omitted from OMB's cost estimate.

[5] For example, regulations implemented directly through the legislative process are outside the OMB review process. Furthermore, the totality of rules, both existing and new, with anticipated impacts below $100 million, and not subject to the Paperwork Reduction Act, are also outside the OMB review process.

requirements in Executive Order 12866.[6] The costs and benefits of such regulations are not included in the aggregate costs and benefits reported by OMB.[7]

These and other differences between OMB's cost calculations and those used in this study will be described in further detail in the sections that follow. This preliminary discussion anticipates the natural question about the large difference between OMB's cost estimates and the cost estimates in Hopkins (1995), Crain and Hopkins (2001), Crain (2005), and those presented in this study. An appreciation of the limitations of OMB's regulatory accounting procedures also motivates one of the purposes of this study, which is an inclusive accounting of all federal regulations and their estimated cost. The cost estimates provided by OMB — in general, calculated by the specific executive branch agency that promulgated the regulation — are used whenever possible in this report, in particular for environmental regulations, occupational safety and health, and homeland security regulations. In the case of regulatory activities for which OMB does not offer cost estimates, the report performs independent analysis to approximate the costs and relies on other secondary sources. For example, the report specifies and estimates an econometric model and then uses the parameters to estimate the cost of economic regulations.

This report seeks to update and improve the 1995, 2001, and 2005 studies for Advocacy and advance the understanding of who bears what burdens from regulation. In particular, the report seeks to identify the federal regulatory burden on small U.S. firms, and to assess whether and to what extent this burden disadvantages small businesses

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[6] Exec. Order No. 12,866 §1(a), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[7] On this subject, OMB (2009, p. 23) states that "...it would be highly desirable to obtain better information on the costs and benefits of these rules." The OMB reports provide in tabular form information that is available from the Government Accountability Office (GAO) about the costs and benefits of regulations issued by independent regulatory agencies. As OMB (2009) notes, monetized costs were reported for only two rules issued by independent regulatory agencies for the period 2007-2008.

relative to their larger competitors. Underlying the significance of this assessment for the U.S. economy is the fact that 89 percent of all firms in the United States employ fewer than 20 workers. By comparison, large firms (defined as those with 500 or more employees) account for only 0.3 percent of all U.S. firms.[8] If federal regulations place a differentially large cost on small business, this potentially causes inefficiencies in the structure of American enterprises, and the relocation of production facilities to less regulated countries, and adversely affects the international competitiveness of domestically produced American products and services. All of these effects, of course, would have negative consequences for the U.S. labor market and national income.

Some Key Findings: The Cost of Federal Regulations in 2008

The findings in this report indicate that in 2008, U.S. federal government regulations cost an estimated $1.75 trillion, an amount equal to 14 percent of U.S. national income. When combined with U.S. federal tax receipts, which equaled 21 percent of national income in 2008, these two costs of federal government programs in 2008 consumed 35 percent of national income. This obviously represents a substantial burden on U.S. citizens and businesses.

It is important to stress that direct comparisons between 2008 and prior years must be made cautiously because new estimation methodologies introduced in this study were not possible previously. This means that some of the cost differences are attributable to different estimation techniques. Given this cautionary caveat, the

[8] Tables 7 and 8 provide snapshots of the size distribution of American businesses. It should be pointed out that large firms employ 50 percent of all workers, whereas small firms employ 18 percent of all workers in the United States. These snapshots are computed from data compiled by the U.S. Census Bureau for Advocacy (source: U.S. Small Business Administration website, http://www.sba.gov/advo/research/data.html). For general information about the relevance of small business to the US economy, see Frequently Asked Questions on the U.S. SBA website, http://web.sba.gov/faqs/faqindex.cfm?areaID=24.

comparable cost in 2004 was an estimated $1.26 trillion (in 2009 dollars), or 11 percent of national income (Crain, 2005).[9] If regulatory costs in 2004 are recomputed using the methodologies introduced in this study, those costs rise by $445 billion to an estimated $1.7 trillion (again, converted into 2009 dollars). This apples-to-apples comparison — that is, using the same estimation methods —suggests that the cost of federal regulations increased by $43 billion (or three percent) between 2004 and 2008 after adjusting for inflation.

What is the distribution of federal regulatory costs among firms of different sizes? The findings in this report indicate that compliance costs fall disproportionately on small businesses. Table 1 summarizes the incidence of costs by firm size based on aggregate data for all sectors of the U.S. economy.

Table 1. Distribution of Regulatory Compliance Costs by Firm Size in 2008 *

	Cost per Employee			
Type of Regulation	**All Firms**	**Firms with <20 Employees**	**Firms with 20-499 Employees**	**Firms with 500+ Employees**
All Federal Regulations	$8,086	$10,585	$7,454	$7,755
Economic	$5,153	$4,120	$4,750	$5,835
Environmental	$1,523	$4,101	$1,294	$883
Tax Compliance	$800	$1,584	$760	$517
Occupational Safety and Health, and Homeland Security	$610	$781	$650	$520

*** Notes to Table 1:**

[9] Milton Friedman put the estimated burden of government mandates and regulations at roughly 10 percent of U.S. national income in 2003. See Milton Friedman, "What Every American Wants," *Wall Street Journal*, January 15, 2003, p. A10.

Costs are denominated in 2009 dollars. The cost per employee for each firm size category uses employment shares for the respective business sectors to compute the weighted averages.

Considering all federal regulations, all sectors of the U.S. economy, and all firm sizes, federal regulations cost $8,086 per employee per year in 2008. For firms with fewer than 20 employees, the cost is $10,585 per employee per year. The cost is $7,454 in medium-sized firms, and $7,755 in large firms. Costs per employee thus appear to be at least 36 percent higher in small firms than in medium-sized and large firms. These results are roughly consistent with the findings in Hopkins (1995), Crain and Hopkins (2001), Crain (2005), as well as other studies completed during the past 25 years.[10]

The underlying force driving this differential cost burden is easy to understand. Many of the costs associated with regulatory compliance are "fixed costs," that is, a firm with five employees incurs roughly the same expense as a firm with 500 employees. In large firms, these fixed costs of compliance are spread over a large revenue, output, and employee base, which results in lower costs per unit of output as firm size increases. This is the familiar empirical phenomenon known as economies of scale, and its impact is to provide a comparative cost advantage to large firms over small firms.

[10] Studies on the incidence of regulatory costs among firms of different sizes include Henry B. R. Beale and King Lin, *Impacts of Federal Regulations, Paperwork, and Tax Requirements on Small Business*, SBAHQ-95-C-0023; Microeconomic Applications, Inc., prepared for the Office of Advocacy, U.S. Small Business Administration, September 1998; Roland J. Cole and Paul Sommers, *Costs of Compliance in Small and Moderate-sized Businesses*, SBA-79-2668, Battelle Human Affairs Research Centers, Seattle, WA, February 1980; *Improving Economic Analysis of Government Regulations on Small Business*, SBA-2648-OA-79, JACA Corporation, Fort Washington, PA, January 1981; Robert J. Gaston and Sidney L. Carroll, *State and Local Regulatory Restrictions as Fixed Cost Barriers to Small Business Enterprise*, SBA-7167-AER-83, Applied Economics Group, Inc., Knoxville, TN, April 1984; and, *Economies of Scale in Regulatory Compliance: Evidence of the Differential Impacts of Regulation by Firm Size*, SBA-7188-OA-83, Jack Faucett Associates, Chevy Chase, MD, December 1984. For a theoretical discussion, see William A. Brock and David S. Evans, *The Economics of Small Businesses: Their Role and Regulation in the U.S. Economy*, Holmes & Meier, New York, NY, 1986, especially chapters 4 and 5. A recent survey and extension of this literature is provided by Steven C. Bradford, "Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation," *The Journal of Small and Emerging Business Law*, 8 (1), 2004, pp. 1-37.

The findings in Table 1 illustrate that the compliance cost disadvantage faced by small businesses is driven by environmental regulations, tax compliance, occupational safety and health, and homeland security regulations. The cost per employee of environmental regulations is more than four times higher in small firms than in large firms. With respect to tax compliance, the cost per employee is three times higher in small firms than in large firms. The particular drivers of the distribution of compliance costs among firm sizes differ across sectors of the U.S. economy. Later sections of the report lay out these patterns in further detail. It is worth highlighting the finding that not all regulations fall more heavily on small businesses than on larger firms. For example, the cost per employee of economic regulations falls most heavily on large firms. In part, this likely reflects the fact some industrial structures do not lend themselves to small firm participation (*e.g.*, utilities, telecoms, or mining) because large scale operations are a precondition to remain competitive. This simply reduces the number of small enterprises that would be affected. Another factor impacting the distribution of economic regulations is the Regulatory Flexibility Act (RFA). Under the RFA agencies are required to assess the effect of regulations on small businesses, and to mitigate undue burdens, including exemptions and relaxed phase-in schedules.[11]

This report details the distribution of regulatory costs for five major sectors of the U.S. economy: manufacturing, trade (wholesale and retail), services, health care (including social assistance), and "other" (a residual category containing all businesses not included in the other four).[12] This is the same five-sector grouping that was used in

[11] This may be especially relevant in the cost of complying with Saction 404 of the Sarbanes-Oxley Act of 2002. The impact of the exemption of small business entities has resulted in cost savings in the billions. See U.S. Small Business Administration, Office of Advocacy (annual editions), *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272,*

[12] The "other" category includes the following industries: forestry, fishing, hunting & agriculture; mining; utilities; construction; and transportation and warehousing.

the prior report for SBA. The sector-specific findings reveal that the disproportionate cost burden on small firms is most dramatic in the manufacturing sector; the compliance cost per employee for small manufacturers is more than double the compliance cost for medium-sized and large firms. In the health care sector and the "other" sector categories, the compliance costs also appear starkly higher in small firms compared with medium-sized and large firms. In the service and trade sectors, the distribution of regulatory costs among firm sizes is much more even overall, yet varies depending on the type of regulation.

The remainder of the report is organized into three sections and four appendices. Section II gives an overview of the regulatory accounting methodology and describes the primary sources for the cost estimates used in the report. Section III begins with a snapshot of American enterprise, showing the distribution of firms, employees, and payroll expenditures for the major sectors of the U.S. economy. It then presents the underlying assumptions and maps the methods used to allocate: (i) the regulatory burden that falls on business, (ii) the regulatory costs across business sectors, and (iii) the regulatory costs by firm size within each business sector. Section IV provides the detailed findings for the distribution of the costs across the sectors and firm sizes, and by type of regulation. The appendices contain details for the various analytical procedures used in the report, and supplemental information about the "on-budget" expenditures on federal regulatory agencies.

This report does not address the benefits of regulation, an important challenge that would be a logical next step toward achieving a rational regulatory system. The annual accounting statements compiled by OMB move toward such a system by presenting partial estimates of benefits as well as costs. This report, thus, should be seen as a building block toward a broader understanding of the costs of regulation, much of which creates important and substantial benefits. Like data on federal budgetary

outcomes, the regulatory cost estimates inform the discussion about the balance between public and private sector control over resources.

II. Scope of Regulatory Costs

Perspective on Regulatory Accounting

The imbalance between what is known about the costs and benefits of government regulations versus government fiscal programs is hardly surprising. Regulatory accounting requires the discovery of relevant costs and benefits not reflected in any governmental cash flow, which is inherently a difficult task. Fiscal accounting is simpler in two respects: it has the luxury of using well documented monetary flows tied to tax receipts and agency expenditures, and it tracks costs but not the associated benefits. Notwithstanding the practical difficulties associated with regulatory accounting, the impact of government regulations on business and citizen activities is no less real than the impact of fiscal programs.

The total direct cost of federal regulations consists of resources employed by government agencies to promulgate, monitor, and enforce regulations, as well as the compliance activities by citizens and enterprises. This report follows the practice in the three predecessor studies for Advocacy by focusing on the latter: the resource costs over and above those that show up in the federal budget and agency personnel charts. The report provides an accounting of the nonbudgeted costs imposed on individuals and businesses to comply with regulations. A simple example illustrates this perspective on regulatory accounting. The total direct cost to the nation of, say, a pollution control regulation consists of spending by the U.S. Environmental Protection Agency for monitoring and enforcement activities, plus spending by businesses to install abatement equipment, hire environmental engineers, attorneys, accountants, and so on to comply with the regulatory rules. EPA spending shows up in the federal budget, and therefore would not be included in this report's cost accounting. Rather, this report includes estimates of the impact on those who are regulated: the spending by businesses to

install abatement equipment, hire engineers, and so forth. In this sense, the estimates presented understate the full cost of federal regulations.

Regulatory agency spending — the cost component this report excludes — amounts to less than 3 percent of the nonbudgeted regulatory compliance costs on which this report focuses. Nonetheless, spending by federal regulatory agencies on regulatory activity reached $47 billion in fiscal year 2008, so it is not trivial. Appendix 4 provides the on-budget costs of federal regulations, and shows how these budgets have grown over time. Between 1990 and 2008 regulatory agency budgets grew by 129 percent in inflation-adjusted dollars, an average annual rate of about 7 percent.[13] Total staffing of federal regulatory activity in fiscal year 2008 equaled 249,471 full-time equivalent employees. These staffing levels grew by 63 percent between 1990 and 2008, or 4 percent on an annualized basis. While these on-budget indicators of federal regulatory costs are large and growing, they represent only a tiny fraction of the nonbudgeted compliance costs on which this report focuses. To reiterate, on-budget spending on federal regulatory activity equals only 2.7 percent of the estimated compliance costs borne by U.S. citizens and businesses.

Other important regulatory costs are not captured in this report's estimates, most notably activities by state and local governments, indirect burdens, and general equilibrium effects. Regulatory agencies in the 50 American states have promulgated hundreds of thousands of regulations that are superimposed on federal regulations. Consider state-level environmental regulations as just one example. The sections of the

[13] These data are from Veronique de Rugy and Melinda Warren (2009), *Expansion of Regulatory' Budgets and Staffing Continues to Rise: An Analysis of the U.S. Budget for Fiscal Years 2009 and 2010,* Regulatory Report 31, Arlington, VA: Mercatus Center, George Mason University. Appendix 4 in this report presents additional data from their study of regulatory budgets and staffing.

State Administrative Codes that regulate the environment consist of 18 million words.[14] The costs of complying with hundreds of thousands of state regulations are not explicitly considered here, but clearly add to the nation's total regulatory compliance burden.[15]

The report uses various methods to determine how the costs of regulations are distributed: between businesses and individuals, among sectors of the U.S. economy, and among businesses of different sizes. These tend to reflect the initial or statutory burden of the regulations, that is, based on who bears the initial compliance costs. It needs to be acknowledged that this initial compliance burden can be shifted, and the final incidence of regulations may differ from this initial or statutory assignment of the regulatory costs. The difference between the initial incidence and how costs are ultimately divided depends on the demand and supply elasticities in the respective product and input markets. The final incidence of the federal regulatory burden is likely to differ from the initial incidence of costs. Of course, this is exactly analogous to the distinction between how a government collects a tax versus who ultimately pays for the tax. Collecting 100 percent of gasoline taxes from the service station owner does not necessarily mean that the owner bears the full burden of the gas tax. Rather, the gas tax is passed on to consumers to the extent they are willing to pay a higher price at the pump. While acknowledging that shifting in the cost burdens will occur, this report does

[14] See W.M. Crain, "18 Millions Words Can Hurt You: The Cost of State Environmental Regulations," Policy Studies Working Paper, Lafayette College, 2010.

[15] A recent study of California state regulations estimated the costs of that state's regulation to be $493 billion in 2007; see Sanjay B. Varshney, and Daniel H. Tootelian, *Cost of State Regulations on California Small Businesses Study*, California State University, Sacramento, September 2009. Other researchers have ranked states in terms of their relative regulatory burden, for examples: John D. Byars, Robert E. McCormick, and T. Bruce Yandle, *Economic Freedom in America's 50 States: A 1999 Analysis*, State Policy Network, 1999; Ying Huang, Robert E. McCormick, and Lawrence McQuillen, *U.S. Economic Freedom Index: 2004 Report*, Pacific Research Institute, 2004; and Lawrence J. McQuillan, Michael T. Maloney, Eric Daniels, and Brent M. Eastwood, *U.S. Economic Freedom Index: 2008 Report*, Pacific Research Institute, 2008. A different methodology is used by Amela Karabegovic and Fred McMahon (with Christy G. Black) to rank American States and Canadian Provinces. See *Economic Freedom of North* America, The Fraser Institute, annual editions since 2002. No estimates seem to be available for the aggregate costs of state regulations for the 50 states.

not attempt to model these changes because the estimates of the relevant supply and demand elasticities for different sectors of the U.S. economy are not sufficiently consistent or reliable. This methodological issue is addressed again in Section III.

Similarly, the report does not account for a number of indirect or second-order costs of regulations. For example, environmental regulations directly affect the cost of producing electricity, and these show up as a direct cost for electric utilities. The report's cost estimates include these types of direct costs. Yet increases in the cost of electricity have ripple effects throughout the American economy in the form of higher energy costs, thus indirectly raising costs in virtually every sector. Some of these costs will be shifted even further onto consumers in the form of higher prices (directly for energy consumption, and, indirectly, for the other products purchased that now cost more because of higher energy costs). For another example, regulations that raise costs on health care providers will be shifted forward, at least partially depending on market elasticities, in the form of higher rates businesses must pay for health insurance premiums and other health care-related outlays. In turn, businesses will attempt to shift the burden of these higher health care-related outlays by increasing consumer prices or requiring employees to pay a larger share of health care costs. Some attempt is made to examine the more general impact of economic regulations, yet the distribution of these costs among sectors necessarily relies on the initial incidence.

Other general equilibrium effects include a reduction in dynamic efficiency, such as slowing innovations that would lead to productivity gains and therefore general economic expansions over time.[16] Again, the study does not measure the dynamic

[16] The effect of regulations on dynamic efficiency is not without opposing viewpoints. Perhaps the most famous is Professor Porter's theory that environmental progress and economic competitiveness are not inconsistent but complementary. See Michael Porter, "America's Green Strategy," *Scientific American* (1991). For a critique of the Porter theory, see for examples, Oats, Wallace, "Environmental Federalism." Washington, DC: Resources for the Future, Sept. 21, 2009;

effects; omission of the indirect and general equilibrium effects means that the estimates in the report probably understate the full burden of federal regulations.[17]

As a rule, the approach used in this report to approximate the costs of regulations follows the methods used by Hopkins (1995), OMB annual reports (2000 through 2009), Crain and Hopkins (2001), and Crain (2005). This consistency helps to make the results comparable over time. As in past studies, new estimation techniques are adopted when these offer obvious improvements in the reliability and quality of the cost estimates. The introduction of new methodologies obviously means that comparisons to regulatory costs in prior years must be qualified.

Major Categories of Federal Regulations: Sources and Methods

The report divides federal regulations into four categories: economic; environmental; tax compliance; and occupational safety and health, and homeland security.[18] A description of each category follows, along with an explanation of the primary sources and methods used to derive the compliance cost estimates.

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and John List and Mitch Kunce, "Environmental Protection and Economic Growth: What Do the Residuals Tell Us?, *Land Economics*, 2000, 76(2), pp. 267-82.

[17] The effects of regulations on economic growth are recognized and discussed by OMB in its annual reports to Congress, but are not included in its cost estimates. The study by Hazilla and Kopp estimates of the indirect effects of environmental regulations as well as the dynamic consequences. Their evidence suggests that both of these costs are substantial. See Michael Hazilla and Raymond Kopp, "The Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis," *Journal of Political Economy*, Vol. 98 (4), 1990. It is important to emphasize that the benefits of regulations might also be greater in a general equilibrium analysis than in partial equilibrium, and thus social welfare (benefits net of costs) might be higher in a general equilibrium than in a partial equilibrium analysis.

[18] These four categories differ slightly from those used in Crain (2005) and Crain and Hopkins (2001). They continue to conform reasonably well with the categories used by the U.S. Office of Management and Budget in its annual reports to Congress. Hopkins (1995) used slightly different categories: environmental, other social, economic, and process. Occupational health and safety regulations and homeland security regulations are combined on the rationale that both deal broadly with public safety issues.

1. Economic Regulations

Economic regulations include a wide range of restrictions and incentives that affect the way businesses operate — what products and services they produce, how and where they produce them, and how products and services are priced and marketed to consumers. Economic regulations affect both domestic and international business operations. For example, laws that impose quotas and tariffs on foreign imports limit competition from outside the United States, restrict production and employment, raise prices, and generally curtail U.S. economic activity.

One of the major differences between the cost estimates in this study and the estimates reported by OMB in its Annual Reports to Congress is that OMB does not include regulations issued by agencies not subject to Executive Order 12866 — the independent regulatory agencies.[19] In its 2009 report, OMB discusses and recognizes the potentially large impact of such regulatory activity (OMB, 2009, pp. 29-34). Nonetheless, OMB has not implemented estimates for a host of economic regulations, beyond those for which it has reviewed regulatory impact statements submitted by federal agencies during the past 10 years. As noted in the introduction to this report, OMB recognizes the potentially large costs associated with regulatory activities not included in its annual estimates of total regulatory costs.

A methodology was introduced in the prior report for Advocacy (Crain 2005) to expand the coverage by providing a method to assess the costs of broad-based economic regulations. Obviously, the goal is to incorporate into the analysis the impact

[19] Under Executive Order 12866, OMB requires and reviews regulations issued by executive branch agencies. This means, for example, that the costs are not included for rules issued by such agencies as: the Securities and Exchange Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Trade Commission, and the Nuclear Regulatory Commission. The U.S. Government Accountability Office (GAO) is required by statute to report to Congress on major regulatory rules, including those issued by agencies not subject to Executive Order 12866. This GAO report, however, still does not include cost estimates for most federal regulations.

of the widest possible range of economic regulations, including those that are promulgated by independent regulatory agencies. The method employs cross-country regression analysis to examine the impact of a broad index of economic regulations on the national economic output (GDP).[20] The 2005 study used an index of economic regulations developed by the Organization for Economic Cooperation and Development (OECD). The cost estimate derived from this approach was referred to as the "baseline" estimate in the 2005 study, simply because the regression procedure accounted for most of the costs of economic regulations. That baseline estimate was then supplemented in two ways: (i) by a separate estimate of the cost of international trade regulations using data from the International Trade Commission, and (ii) with estimates for specific domestic economic regulations that were either not covered by the OECD index, or were promulgated in years after that index was computed. In other words, several different approeches were used in the 2005 study to compile an inclusive measure of the cost of economic regulations.

This study again uses the comparative, cross-country regression approach, in this case adopting an alternative index of economic regulations that is more comprehensive than the OECD index. This new index of economic regulations, labeled the Regulatory Quality Index, is computed by researchers at the World Bank as part of its Worldwide Governance Indicators (WGI) research project. The WGI project has estimated various measures of governance and institutional quality, including the

[20] It is interesting to note that in its 2000 Report to Congress, OMB used a comparable methodology and OECD data to include a more expansive estimate of the costs of economic regulations than it used in subsequent Reports to Congress. A similar regression methodology is employed by Varshney and Tootelian, *op. cit.*, to estimate the cost of state-level regulations in California. They use indices that gauge the extent of state government regulations and analyze the impact on gross state product, controlling for various factors that influence state economic performance.

Regulatory Quality Index used in this report. These indices are available from 1996 through 2008.

The Regulatory Quality Index measures perceptions of the ability of governments to formulate and implement sound policies and regulations that permit and promote private sector development. For example, the index values for 2008 are derived from 1,751 data points, representing four types of data: commercial business information providers (46 percent); public sector organizations (24 percent); nongovernmental organizations (17 percent); and surveys of firms or households (13 percent). The data from these four sources are aggregated using a statistical procedure known as the unobserved components model.[21] The elements included in the Regulatory Quality Index are listed in Appendix 1.

Three important aspects of the WGI Regulatory Quality Index — how it differs from the OECD economic regulation index used in Crain (2005) and why it enhances the accuracy of the estimated costs of economic regulation — should be described. First, a larger data series is available for the Regulatory Quality Index, covering a longer time period and more countries, and this helps to overcome the small sample size used to

[21] A detailed description of the methodology used in its construction is provided in Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, "Governance Matters VIII: Aggregate and Individual Governance Indicators 1996--2008," World Bank Development Research Group, Macroeconomics and Growth Team, Policy Research Working Paper 4978, June 2009. See especially Appendix D. For further discussion of applications of the governance metrics see Kaufmann, Daniel and Aart Kraay (2008). "Governance Indicators: Where Are We and Where Should We Be Going?" *World Bank Research Observer*, Spring 2008. As noted in the text, the prior study (Crain, 2005) introduced this methodological approach as a baseline estimate for economic regulations, except that it used an index of regulations compiled by researchers at the Organization for Economic Cooperation and Development. (See G. Nicoletti, Scarpetta and O. Boylaud (2000), "Summary Indicators of Product Market Regulation and Employment Protection Legislation for the Purpose of International Comparisons," *OECD Economics Department Working Paper*, No. 226.) It is noteworthy that the OECD and WGI indices are correlated over the time periods for which both indices are available. The WGI index is employed in this report because it is available annually for a longer and more recent time period, while the OECD index is only available at five-year intervals: 1998, 2003, and 2008. Prior studies by Crain and Hopkins (2001) and OMB (2000) used an estimate based on the OECD findings in *Regulatory Reform in the United States*, OECD Reviews of Regulatory Reform, Paris, 1999. One criticism of the earlier method is that it fails to account adequately for major deregulation activities in various industries in the 1980s and 1990s.

estimate the parameters in the Crain (2005) study.[22] Second, the Regulatory Quality Index covers international as well as domestic economic regulations. This means that unlike the 2005 study, a separate estimate of the international economic regulation component is unnecessary. Third, the WGI Regulatory Quality Index includes rules and mandates that affect factors markets — which obviously include the labor market — as well as product markets. This means that the impact of economic regulations that affect the workplace is encompassed in this measure. For this reason the four categories of regulations are redefined from the 2005 study. In that report, "workplace regulations" were a separate category and estimated using a different methodology. In this report, the estimated costs of workplace regulations, such as laws affecting collective bargaining, employee drug-testing, and the American with Disabilities Act, are now included in the Regulatory Quality Index and merged into the general economic regulation category. Fifth, the OECD index used in the Crain (2005) estimate of economic regulations did not cover all business sectors.

In summary, the methodology for estimating the cost of economic regulations is the main difference between this report and prior reports. This improvement is made possible because of new research at the World Bank to measure economic regulations. This Regulatory Quality Index is available for a larger number of countries and for a longer sample period than anything available for prior studies. More important, the Regulatory Quality Index embodies extensive stakeholder knowledge about the countries' regulatory practices that affect domestic and international practices that are related to product markets and labor markets.

[22] The OECD Index used in Crain (2005) was based on the OECD Survey for 1998. Criticism of the short time period is raised in Winston Harrington, "Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews," RFF Discussion Paper 06-39, Washington, DC: Resources for the Future. September 2006. See especially pages 14-16. Of course, a larger sample size generally improves the reliability of statistical estimation.

Cross-Country Regression Model. The cost of economic regulations is derived from regression analysis using a panel of OECD member countries, which includes the United States. The basic idea is to estimate empirically the impact of regulations on aggregate economic output, or GDP. The approach uses the Regulatory Quality Index as the main variable of interest, while controlling for other variables that affect national economic performance. The form of the regression model is specified in Equation 1.

(Eq. 1) GDP per Capita $_{it} = \beta$ (World Bank Index of Regulatory Quality) $_{it} + \phi$ (X) $_{it} + \alpha_i + \varepsilon_{it}$

The sample used to estimate Equation (1) consists of 25 OECD countries for which data on all of the relevant variables are available. The variable subscript *i* in Equation (1) denotes an observation in a particular country *i* (= 1, ..,25). The variable subscript *t* denotes an observation in a particular year, where *t* = 2002 through 2008.[23]

The dependent variable, GDP per capita, is real GDP divided by population, denominated in constant U.S. dollars (source: World Bank, 2010). The main explanatory variable of interest in Equation (1) is the *World Bank Regulatory Quality Index* (source: World Bank, 2009). This *Regulatory Quality Index* is scaled to have values that range from -2.5 to 2.5. Note that increases correspond to improvements in regulatory quality — that is, reductions in the regulatory burden imposed on the operation of product and factor markets.

The model also includes several economic and demographic control variables, represented by the vector X in Equation (1). These control variables are drawn from the empirical literature that examines differences in economic levels across countries and

[23] Values for the Regulatory Quality Index are available for many OECD countries starting in 1996. The sample in the regression model includes seven years, 2002 through 2008. This is because data for some of the control variables used to estimate Equation (1) are missing for various countries before 2002. Thus, the sample of countries that may be used in the analysis increases to 25 by beginning the sample in 2002.

over time. (For useful surveys of this literature, see Hall and Jones, 1997, Barro and Sala-i-Martin, 1995, and Barro, 1997.) The set of controls included in X are: foreign trade as a share of GDP, country population, primary school enrollment as a share of the eligible population, and fixed broadband subscribers per 100 people (data source: World Bank, World Development Indicators, online database). The variables are entered into the regression model as natural logarithmic transformations.

Because the dataset is organized as a panel — that is, it includes observations over time for the same set of countries — the model also includes country fixed-effects variables. Fixed-effects variables are simply country-specific indicator variables that control for time-invariant factors that affect economic performance. For example, a landlocked country may be disadvantaged relative to a country with ocean access. Geographic location obviously does not change over time, and including the fixed-effects variables helps to control for the impact of such factors. Appendix Table A-2 provides summary statistics for the variables used in the analysis.

The results of estimating Equation 1 are shown in Table 2, and these parameters are used to calibrate the cost of economic regulations.

Table 2. Impact of Economic Regulations on GDP in OECD Countries, 2002 through 2008

Independent Variable	ln (GDP per Capita) [a]
World Bank Regulatory Quality Index	0.094
	(2.77)**
ln (Country Population)	0.089
	(0.39)
ln (Foreign Trade as a Share of GDP)	0.242
	(4.95)**
ln (Primary Education as a Share of the Eligible Population)	-0.243
	(-2.37)*
ln (Fixed broadband subscribers per 100 people)	0.032
	(8.89)**
Constant	8.31
	(2.19)*
Observations	118
Number of Countries	25
R-square Within	0.85
R-square Between	0.03
F-stat (6,87)	85.4**

Notes to Table 2:

t-statistics in parentheses where:
* indicates significance at the 5 percent confidence level.
** indicates significance at the 1 percent confidence level.
The variables are denominated in 2009 U.S. dollars. The model includes fixed-country effects and fixed-year effects when significant.

As reported in Table 2, the coefficient on the World Bank *Regulatory Quality Index* is positive and significant at the one-percent confidence level. This indicates that less stringent restrictions systematically enhance a country's aggregate economic activity, as reflected by the level of its GDP per capita. The estimated coefficient is 0.094. This means that a one-unit change in the *Regulatory Quality Index* corresponds to a 9.4 percent change in real GDP per capita (recall that the dependent variable is entered into the regression model as a logarithmic transformation and thus percentage changes).[24] The Regulatory Quality Index value for the United States is equal to 1.579 in 2008, and, as noted, the index is calibrated to range between -2.5 and 2.5. The difference between 1.579 and 2.5 (the minimal amount of regulation) would require a change equal to 0.92, which would correspond to an increase in U.S. GDP per capita of 8.7 percent (=0.094 x 0.92). The estimated cost of economic regulations as reflected in lost GDP in 2008 is thus $1.236 trillion (denominated in 2009 dollars).

This estimated cost represents a very large increase over the estimated cost of economic regulations in 2004, which equaled $671 billion after converting the estimate in Crain (2005) into 2009 dollars. As noted, some of this difference is attributable to the change in the cost accounting methodology, one that is more complete than methodologies used in the prior studies for SBA. The 2008 estimate includes labor market economic regulations that were included under the "workplace regulations" category in the 2004 estimate. The approximate value of the "economic" component of the workplace regulations category in 2004 is $56 billion (again adjusting for inflation). This means that the comparable economic regulations cost (one that includes product and labor market regulations) in 2004 is $727 billion (=$671+$56). Even after

[24] For comparison, when Equation (1) is estimated without the country fixed-effects variables, the estimated coefficient on the *World Bank Regulatory Quality Index* equals 0.142, which is significant at the 1 percent confidence level. In other words, the parameter estimate used in the report for the cost of economic regulations is on the low end of the range of estimates using this regression analysis.

readjustment to account for the redefined categories, this still suggests that economic regulations increased by 70 percent from 2004 to 2008, or roughly $500 billion.

How much of this large increase comes from "real" regulatory changes and how much comes from methodological changes? If the cost of economic regulations in 2004 is re-estimated using the new methodology, that value rises by $445 billion to $1.172 trillion. This recalibration of the 2004 estimate suggests that the "real" cost of economic regulations increased by $63 billion between 2004 and 2008, after adjusting for inflation and estimation methods.

2. Environmental Regulations

Cost estimates for environmental regulations are derived from two sources: OMB's annual reports to Congress and Hahn and Hird (1991). The report assumes that OMB's coverage of environmental regulations has been relatively complete. OMB has reviewed the regulatory impact analyses for the most costly regulations promulgated by the Environmental Protection Agency back through the late 1980s. In its reports, OMB has relied on the cost estimates in Hahn and Hird (1991) to gauge the costs of environmental regulations prior to 1988, and this study follows that procedure.[25]

Table 3 lists the sources and estimated annual costs for environmental regulations that were enacted during various time periods. It is important to stress that the costs of environmental regulations shown in Table 3 are denominated in 2001 dollars, the same base year used in the original OMB sources of these estimates. This facilitates comparisons to the OMB reports, and these costs are converted into 2009 dollars in Section IV below.

[25] It is worth reiterating that OMB includes only the costs of "economically significant" regulations subject to E.O. 12866 review. These are less than 1 percent of EPA's rulemaking. Moreover, as noted earlier, the OMB annual reports now encompass only regulations issued in the prior 10 years. This was not always the case, and data on the earlier environmental regulations are summarized in OMB's past annual reports.

Table 3. Sources and Estimated Annual Costs of Environmental Regulations

Years Regulations Were Issued *	Cost Estimates (Millions of 2001 $)		Source for Estimate
	Low	High	
Through 2000, Q1	108,359	191,887	OMB 2001, Table 2
Apr 1999 to Sep 2001	11,380	12,812	OMB 2002, Table 7
Oct 2001 to Sep 2002	192	192	OMB 2003, Table 1
Oct 2002 to Sep 2003	335	335	OMB 2004, Table 1
Oct 2003 to Oct 2004	3,840	4,073	OMB 2005, Table 1-1
Oct 2004 to Sep 2005	2,609	3,373	OMB 2006, Table 1-3
Oct 2005 to Sep 2006	2,720	2,965	OMB 2007, Table 1-3
Oct 2006 to Sep 2007	7,475	7,584	OMB 2008, Table 1-3
Oct 2007 to Sep 2008	7,591	8,780	OMB 2009, Table 1-3
Total	144,501	232,001	

Note to Table 3:

These dates follow OMB's practice by reporting the costs by fiscal years, which begin October 1 and end September 30.

OMB discusses the shortcomings in these estimates, including the basic fact that cost estimates do not exist for all environmental regulations, and the inherent difficulties in performing the regulatory impact analyses (RIAs). For example, OMB does not include an estimate for the cost of the Superfund program, which is likely to be quite large. To account for some of these shortcomings, OMB provides a range of cost estimates for most regulations, and these are reported in Table 3.

Beginning in its 2003 report, OMB began the practice of limiting its cost summaries to regulations promulgated over the preceding 10 years, which in that report covered 1992 through mid-2002.[26] For this reason, this report begins with the OMB report for 2001, which includes its earliest cost accounting and takes Hahn and Hird

[26] U.S. Office of Management and Budget, Office of Information and Regulatory Affairs (2003), *Informing Regulatory Decisions: Report to Congress on the Costs and Benefits of Federal Regulations*, Table 2. OMB's cost estimates rely on regulatory impact analyses (RIAs) issued mainly by the U.S. Environmental Protection Agency.

(1991) as its beginning estimate of the costs prior to 1988. To account for environmental regulations promulgated since then, the costs of newly reviewed regulations are taken from OMB's annual reports for 2002 through 2009.

As shown in Table 3, this puts the cost of environmental regulations in a range between $144 billion and $232 billion (in 2001 dollars) or between $175 billion and $280 billion when converted into 2009 dollars. This report uses the high end of the cost range provided in the OMB reports and Hahn and Hird (1991). This reflects a judgment that cost estimates are absent for important environmental regulations and that government agencies tend to be conservative in estimating regulatory costs.[27] For comparison, if the midpoint of the high and low estimates were used, the cost of environmental regulations in this report would decline by roughly $50 billion, or 19 percent.

3. Tax Compliance

Prior studies of federal regulations stress the substantial burden of paperwork costs on the American public and businesses. In the modern era in which electronic

[27] Several regulatory experts draw a similar conclusion about the OMB environmental cost estimates, but considerable debate continues. For example, Johnson concludes that "the costs of water quality regulation totaled $93.1 billion in 2001. While this figure is based on conservative estimates of regulatory costs, it is significantly larger than the cost and benefit estimates produced by EPA." (Joseph Johnson, *The Cost of Regulations Implementing the Clean Water Act*, Arlington, VA: Mercatus Center, Regulatory Studies Program Working Paper, April 2004.) In contrast, in 1999, EPA estimated the costs of the 1972 Clean Water Act at $15.8 billion per year. ("A Retrospective Assessment of the Costs of the Clean Water Act: 1972 to 1997," U.S. Environmental Protection Agency, October 2000.) The discussion in Robert W. Hahn, "Regulatory Reform: What Do the Government's Numbers Tell Us?" in Robert W. Hahn (ed.) *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, New York: Oxford University Press and AEI Press, 1996, pp. 208-253, is also informative. Hahn makes a strong case that government agencies overestimate benefits and underestimate costs systematically. In addition, the review article by Jaffe, *et al.*, "Environmental Regulation and the Competitiveness of U.S. Manufacturing," *Journal of Economic Literature*, Vol. 33 (1), 1995, suggests that environmental costs in the long run have exceeded compliance cost estimates. Finelly, the study by Winston Harrington, *et al.* "On the Accuracy of Regulatory Cost Estimates," *Journal of Policy Analysis and Management*, vol. 19 (2), 2000, examines the estimates for 28 particular rules promulgated by EPA and OSHA and finds, in contrast, that overestimation of unit costs occurs about as often as underestimation.

submissions are displacing paper, the term *"paperwork burden"* has become merely a metaphor for the time and resources required for monitoring, recordkeeping, reporting, and compliance with statutes and regulations. Of this burden, the time required to comply with the federal tax code accounts for the lion's share. Of course, the federal government requires a host of additional forms that also impose recordkeeping and reporting burdens. However, these non-tax-related reporting and compliance requirements are largely tied to specific economic, environmental, or occupational safety and health and homeland security regulations. This means that the cost estimates for the other regulations will account for most of the non-tax-related compliance and reporting burden. In that sense, a separate estimate would be double-counting recordkeeping and form filing costs.

The estimates of the cost of federal tax compliance in prior studies for Advocacy relied mostly on annual studies of tax compliance produced by the Tax Foundation. These studies provided extensive details about the time required to file federal income tax forms and the number of specific forms filed. The estimates in this report rely mostly on data directly available from the U.S. Internal Revenue Service, simply because the Tax Foundation's latest report was for 2005. For certain forms, the Tax Foundation's estimates of the time required to file in 2005 are used.

The estimate of tax compliance costs in 2008 is consistent with past reports for Advocacy and is easy to describe. The first step compiles data from the Internal Revenue Service and in some cases from the Tax Foundation on the amount of time required to complete each type of tax form, and the number of filings for each type of form. The number of compliance hours is shown in the first row of Table 4 broken down by businesses and by individual and nonprofits, with a total for these two categories. The total number of hours required for compliance is nearly 4.3 billion per year, with

businesses devoting about 2.3 billion hours and individuals and nonprofits devoting about 2.0 billion hours.

Table 4. Sources and Estimated Costs of Compliance with the Federal Tax Code

	Businesses	Individuals & Nonprofits	Total
# Hours Required to Comply	2,280,966,382	2,018,119,637	4,299,086,018
Compliance Cost per Hour (in 2009 $)	$ 49.77	$ 31.53	
Total Compliance Cost (in 2009 $)	$95,984,291,402	$ 63,635,262,186	$ 159,619,553,588
Share of Total Compliance Cost	60%	40%	

The second step is to multiply the hours spent on compliance by an hourly wage rate that reflects either the value of the preparer's time (the average hourly wage rate for accountant and auditors in the case of individuals and nonprofits) or the hourly compensation rate for Human Resources professionals (in the case of businesses).[28] The estimated cost of federal tax compliance is nearly $160 billion (in 2009 dollars). To be clear, this $160 billion estimate includes the combined costs on individual filers, nonprofit organizations, and business filers. The estimated cost of compliance for businesses is about $96 billion, accounting for 60 percent of the total cost.

4. Occupational Safety and Health and Homeland Security Regulations

Prior studies for Advocacy used "workplace regulations" as one of the four categories for analysis. This category covered a wide array of regulations dealing with

[28] The source of the hourly rate data is the U.S. Bureau of Labor Statistics website.

wages, benefits, safety and health, and civil rights, among other things.[29] Because the economic cost component of workplace regulations is now reclassified and scored under the "economic" regulations category, this report modifies the workplace category to include only workplace regulations that deal with safety and health. These are primarily issued by the Occupational Safety and Health Administration, a division of the U.S. Department of Labor. It is noteworthy that occupational safety and health regulations alone accounted for 53 percent of the compliance costs of all workplace regulations in the 2005 study (Crain 2005). These were by far the largest element within the workplace regulations category.

This report relies on three sources to estimate the costs of occupational safety and health and homeland security regulations. These costs and sources are summarized in Table 5.

Table 5. Sources and Estimated Costs of Occupational Safety and Health and Homeland Security Regulations

Type of Workplace Regulation	Cost Estimate (Millions of 2009 $)	Source
Occupational Safety and Health (for those issued pre-2001)	64,313	Johnson (2005)
Occupational Safety and Health (for those issued 2001-2008)	471	OMB (2009), Table 1-2
Homeland Security (all through 2008)	10,416	OMB (2009), p. 18
Total	75,200	

[29] The source for the cost estimate for workplace regulations is the 2005 study by Joseph Johnson. The Johnson study offers a synthesis and evaluation of available estimates of the cost of regulations directed at the workplace, and from these different studies, generates an estimate of the total cost of workplace regulation. It provides the most comprehensive analysis to date, covering the 25 statutory acts and executive orders that encompass all significant workplace regulations promulgated by the federal government through 2001. Joseph M. Johnson, "A Review and Synthesis of the Cost of Workplace Regulations," in *Cross-Border Human Resources, Labor and Employment Issues*. Andrew P. Morriss and Samuel Estreicher (eds.), Kluwer Law International: Netherlands, 2005, pp. 433-67.

The cost calculations from the Johnson (2005) study are used where possible, that is, until 2001, and adjusted for inflation as shown in Table 5. The costs provided by OMB on OSHA regulations are used for those regulations issued subsequent to the Johnson study. All 17 of the homeland security regulations included in this report have been implemented since the 2005 report for Advocacy, and these cost estimates are all taken from OMB (2009). As examples, these are regulations concerned with transportation facilities security, chemical plant security, electronic availability of passenger manifest lists, cargo security, notice of imported food and registration of food facilities that might be vulnerable to bioterrorism, and air cargo security. The cost of these 17 homeland security regulations is $10.4 billion, and the total cost for this category — Occupational Safety and Health plus Homeland Security — is $75.2 billion.

Summary of Total Regulatory Costs

Table 6 summarizes the cost estimates described in this section by regulatory category, and notes the basic sources and procedures behind the estimates.

Table 6. Summary of Regulatory Compliance Costs in 2008
(Billions of 2009 dollars)

Type of Regulation	Cost Estimate	Sources
All Federal Regulations	1,752	Summation of Costs by Type
Economic	1,236	Original regression analysis using World Bank Regulatory Quality Index
Environmental	281	Hahn and Hird (1991); Crain (2005); OMB (2004, 2005, 2006, 2007, 2008, 2009)
Tax Compliance	160	IRS website, Bureau of Labor Statistics; Tax Foundation (2005)
Occupational Safety and Health, and Homeland Security	75	Johnson (2005); OMB (2009)

III. Incidence of Regulatory Costs

This section describes how the burden of federal regulations is distributed among major business sectors of the American economy, and, within sectors, how this burden is distributed among firms of different sizes. It begins with a brief quantitative summary of the composition of American enterprise: how the number of firms and the work force are distributed among firms of different sizes and among the major categories of business activities. This underlying composition of economic activity in America is a key element in the study, because it provides the basis for determining the incidence of regulatory costs.

A Snapshot of American Enterprise

The report uses a three-part firm size classification, relying on data available from Advocacy on employees per firm:

- Small firms — fewer than 20 employees
- Medium-sized firms — 20 to 499 employees
- Large firms — 500 or more employees.

The North American Industry Classification System (NAICS) devised by the U.S. Census Bureau divides American businesses into 2,000 distinct industry types. In order to make the results tractable, this report distills these classifications down to five broad categories:

- Manufacturing,
- Trade (wholesale and retail trade),
- Services,
- Health care, and
- Other (e residual containing almost all other nonfarm employers).[33]

[33] The U.S. Census Bureau provides Advocacy with these data. The Statistics of U.S. Business covers almost all nonfarm employer businesses. It omits farms, railroads, and most government-owned establishments, the U.S. Postal Service, and large pension, health, and welfare funds

Four of these five categories are adopted from the original Hopkins (1995) study for Advocacy. The health care category was added in the Crain (2005) study for Advocacy to reflect the growing scale and importance of this sector within the U.S. economy. The rationale for a small number of large categories, here and in previous reports for Advocacy, is to gain insight into the distribution of the regulatory burden across various types of economic activity — "manufacturing" versus "services" provides an obvious and distinct boundary. The "other" category includes: forestry, fishing, hunting & agriculture, mining, utilities, construction, and transportation and warehousing. To be sure, "other" bundles a diverse set of economic activities into a single category. However, in creating additional sector categories the analysis becomes less tractable.

Table 7 shows the distribution of American industry by sector and firm size using the most recently available data (for 2006) from Advocacy.[31] Table 7 presents three relevant size indicators: the number of firms, the number of employees, and payroll expenditures.[32] For example, the data indicate some six million firms in the United States and roughly 5.4 million of these are small businesses (less than 20 employees).

(100 + employees) and nonincorporated firms with no paid employees. According to the Census Bureau, nonemployers account for roughly 3 percent of all business activity (see U.S. Census Bureau, "Nonemployer Statistics," http://www.census.gov/epcd/nonemployer).

[31] American industry is obviously not static and these 2006 data on the distribution of business activity do not match up exactly with the years for the regulatory cost data. However, changes in the basic structure of American industry generally occur only incrementally. These data provide a reasonable approximation for the relevant years of the proportions of firms, employees, and payroll across the three firm size categories and the five sector classifications.

[32] The Office of Advocacy of the U.S. Small Business Administration contracts with the U.S. Census Bureau to collect the employer firm size data (see http://www.sba.gov/advo/stats/data.html). When the Census Bureau compiles its *Statistics of U.S. Businesses*, it relies on survey questionnaires filled out by firms. Occasionally, firms classify themselves under more than one industry type (or NAICS classification). This means that when summed by sector, the number of firms is greater than the actual number of firms. The data used in this report are corrected for this over count using a technique explained in Appendix 4. In brief, the correction relies on the fact that the number of employees in each industry is accurately reported to the Census Bureau, and the share of employees by sector is used to eliminate the redundancy and scale back over counts of firms.

Table 7. Size Distribution of American Business in 2006*

Sector	Size Measure	All Firms [a]	Firm Size:		
			<20 Employees	20-499 Employees	500+ Employees
All Sectors [a]	Firms	6,022,127	5,377,631	626,425	18,071
	Employment	119,917,165	21,609,520	38,614,220	59,693,425
	Payroll ($000)	5,099,088,373	772,519,440	1,492,491,072	2,834,077,860
Manufacturing	Firms	278,703	210,220	66,890	1,593
	Employment	13,631,683	1,180,832	4,875,389	7,575,462
	Payroll ($000)	659,910,538	44,023,629	205,977,710	409,909,200
Trade	Firms	1,048,443	941,506	105,527	1,410
	Employment	21,798,513	4,060,460	5,939,480	11,798,573
	Payroll ($000)	35,798,406	128,105,755	238,874,376	368,818,276
Services	Firms	3,064,433	2,755,361	296,335	12,738
	Employment	55,026,464	10,386,251	17,413,803	27,346,941
	Payroll ($000)	2,420,355,343	354,457,788	627,515,860	1,427,510,876
Health Care	Firms	596,992	526,261	69,895	835
	Employment	16,451,361	2,544,976	5,401,418	8,504,967
	Payroll ($000)	666,681,058	112,830,630	186,810,745	367,039,682
Other	Firms	1,033,556	944,284	87,778	1,494
	Employment	13,009,144	3,430,737	4,982,216	4,634,181
	Payroll ($000)	616,343,027	132,247,939	231,835,480	250,237,452

Notes to Table 7:

* Source: U.S. Small Business Administration, Office of Advocacy, "Statistics of U.S. Businesses: Firm Size Data," website: http://www.sba.gov/advo/stats/data.html. Payroll data are converted into 2009 dollars. The Office of Advocacy contracts with the U.S. Census Bureau to provide employer firm size data. These data for 2006 are the most recently available from the SBA.

[a] These Statistics of U.S. Businesses data cover almost all nonfarm employer businesses. Omitted are farms, railroads, and most government-owned establishments, the U.S. Postal Service, and large pension, health, and welfare funds (100 + employees) and nonincorporated firms with no paid employees.

Table 8 reports these business size indicators in a slightly different format, as shares of all U.S. industry, which are used to allocate compliance costs. Table 8 simply converts the raw data shown in Table 7 into percentage terms. For example, consider

the data in Table 8 that describe the manufacturing sector. Manufacturing accounts for 5 percent of all U.S. firms, 11 percent of all U.S. employment, and 13 percent of all U.S business payroll expenditures. Within the manufacturing sector, 75 percent of the firms are classified as small businesses (fewer than 20 employees), 24 percent have between 20 and 499 employees, and only one percent has 500 or more employees. Nine percent of manufacturing employees work in small firms, 36 percent in mid-sized firms, and 56 percent in large firms. Finally, regarding the distribution of payroll expenditures, small firms account for 7 percent, mid-sized firms account for 31 percent, and large firms account for 62 percent.

Table 8. Size Distribution of American Business (As a Percentage of Private Industry Employment)

	Sector Share of All U.S. Industry					
Size Measure	Manufacturing	Trade	Services	Health Care	Other	
No. of Firms	5	17	51	10	17	
Employees	11	18	46	14	11	
Annual Payroll	13	14	47	13	12	
	Percent of Firms, by Sector					
	Manufacturing	Trade	Services	Health Care	Other	All Sectors
<20 employees	75	90	90	88	91	89
20-499 employees	24	10	10	12	9	10
500+ employees	1	0.1	0.4	0.1	0.1	0.3
	Percent of Employees, by Sector					
	Manufacturing	Trade	Services	Health Care	Other	All Sectors
<20 employees	9	19	19	15	26	18
20-499 employees	36	27	32	33	38	32
500+ employees	56	54	50	52	36	50
	Percent of Payroll, by Sector					
	Manufacturing	Trade	Services	Health Care	Other	All Sectors
<20 employees	7	17	15	17	21	15
20-499 employees	31	32	26	28	38	29
500+ employees	62	50	59	55	41	56

Source: See Table 7.

The percentages displayed in Table 8 provide a snapshot of the distribution of productive activity and resources among broad sectors of American industry. It is against this descriptive backdrop that the report charts the incidence of regulatory compliance costs. These costs are allocated across the sectors and firm sizes shown in Table 8 using the procedures described in the remainder of this section.

Assumptions and Procedures Underlying the Cost Allocations

Business Portion of the Regulatory Burden

Before costs can be allocated across these five business sectors, a more general cost allocation is necessary, specifically how much of the regulatory burden falls in the aggregate on businesses. This task requires a delineation of the regulatory burden that falls initially on business from the burden that falls initially on individuals and state and local governments. As discussed in Section II, the report does not attempt to map out the subsequent shifting of this burden from businessas to individuals (*e.g.*, in the form of higher retail prices) or from one business sector to another (*e.g.*, in the form of higher energy prices or health insurance premiums). It is worth emphasizing that all regulatory costs are — and can only be — borne by individuals, as consumers, as workers, as stockholders, as owners, or as taxpayers. In other words, the distinction between "business" and "individual" is one that focuses on the compliance responsibility, fully recognizing that ultimately all costs must fall on individuals. Moreover, the degree to which businesses are able to shift compliance costs forward onto consumers can only be determined with highly specific information about the market elasticities. For example, without the price elasticity of demand, we cannot determine with any level of certainty

what percentage of the regulatory cost will be shifted forward beyond the statutory incidence.

A second rationale for attempting to apportion costs between businesses and individuals is that the incidence of costs across different sectors of the economy is potentially quite important from a policy perspective, and the consumer costs cannot be allocated to the different classes of businesses. As a final introductory comment, some of the costs of federal regulations fall on state and local governments. Homeland security regulations are a good example of such costs. These costs borne by state and local governments are bundled with those borne by individuals to keep a relatively tractable division in business versus non business costs.

The cost allocations for each type of regulation are shown in Table 9.

Table 9. Allocation of Compliance Cost Incidence to Business

Type of Regulation	Business Incidence (% of Category Costs)	Other Incidence (% of Category Costs)
Economic	50	50
Environmental	65	35
Tax Compliance	60	40
Occupational Safety and Health, and Homeland Security	97	3

The allocations shown in Table 9 generally employ the same methodology used in Hopkins (1995), and Crain and Hopkins (2001), and Crain (2005). The allocation of environmental regulations is based on the compliance data reported by the

Environmental Protection Agency.[33] In the absence of allocation data for economic regulation, a default judgment of 50-50 is applied. The allocation for federal tax compliance uses the apportionment data from the IRS as shown in Table 4. Occupational Safety and Health, and Homeland Security are allocated 97 percent to businesses and 3 percent to other. This assumption is consistent with the empirical evidence that the labor supply function is relatively inelastic, and therefore safety and health costs are not immediately shifted onto consumers.[34] The assumption is that a small share (3 percent) of estimated homeland security costs is borne by state and local governments and individuals.

Allocation of Regulatory Costs Across Business Sectors

The second task is to allocate the business portion of regulatory costs among the five major sectors. These five sectors generally follow those in Hopkins (1995), Crain and Hopkins (2001), and Crain (2005) to facilitate comparisons over time. The sectors are based on the Census Bureau's North American Industry Classification System (NAICS), in some cases aggregating categories.[35] For example, the NAICS separates wholesale trade and retail trade, and these are combined in this report. Table 10 lists these allocations by sector and the sources and methods used. A more complete description of the allocation basis for each type of regulation is described in turn.

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[33] Environmental Protection Agency, "Environmental Investments: The Cost of a Clean Environment," EPA 230-11-90-083, November 1990, pp. 2-5.

[34] Moreover, this assumption is similar to that used by the Congressional Budget Office that payroll taxes are borne fully by workers (and therefore not shifted forward onto consumers through price increases). See the discussion in Jonathon Gruber, *Public Finance and Public Policy*. New York: Worth Publishers, 2004, pp. 539-540.

[35] The NAICS data are from the U.S. Census Bureau website: http://www.census.gov/epcd/naics02/naicod02.htm

Table 10. Allocation of Business Regulatory Costs to Sectors (Percentages)

Type of Regulation	Sectoral Allocations					Sources and Summary of Methods
	Manufacturing	Trade	Services	Health Care	Other	
Economic	12	18	46	13	11	BEA (Value added share of private GDP); SBA (Employment share of private workforce)
Environmental	54	0	0.3	1	45	Hazilla and Kopp, 1991 (Compliance Costs by Sector)
Tax Compliance	3	14	58	7	17	IRS, Statistics of Income (Sector share of total returns filed, weighted by cost of filings)
Occupational Safety and Health, and Homeland Security	14	18	49	12	8	SBA (Employment share of private workforce); BEA (Value added share of private GDP)

Economic Regulations. Regarding economic regulations, the cost allocations are based on a weighted average of two components: (i) the sector's value added to GDP divided by total private sector GDP, and (ii) the number of employees on the sector divided by total private sector employment. [36] The average for each sector is weighted by

[36] The source of the value added to GDP by sector and the private sector GDP data is the Industry Economics Division, Bureau of Economic Analysis (BEA), U.S. Department of Commerce. The data used were released on April 28, 2009. The source for the employment data is U.S. Small Business Administration, Office of Advocacy, "Statistics of U.S. Businesses: Firm Size Data," website: http://www.sba.gov/advo/stats/data.html.

the share of non-OSHA workplace regulations on the sector. That is, a sector's employment share gets a slightly higher weight where regulations such as "labor standards" or "labor management relations" are likely to have a larger impact.

Environmental Regulations. The sector allocations for environmental regulations are taken from Hazilla and Kopp.[37] Almost all of these costs fall on the manufacturing sector (54 percent) and the "other" sector (45 percent). The "other" sector includes such businesses as coal mining, ore mining, oil and gas extraction, coal gasification, and electric utilities, all of which are heavily affected by regulations promulgated under the Clean Air Act and the Clean Water Act. The remaining one percent of environmental costs falls on the health care and service sectors.

Federal Tax Compliance. The allocation of federal tax compliance costs is derived from IRS Statistics of Income data that indicate the number of returns and forms filed by each type of business by sector, sole proprietorships, partnerships, and corporations. These data are summarized in Table 11.

[37] Michael Hazilla and Raymond Kopp (1990), "The Social Cost of Environmental Quality Regulations: A General Equilibrium Analysis," *Journal of Political Economy*, Vol. 98 (4), p. 858.

Table 11. Cost Allocation for Federal Tax Compliance

	Sole Proprietorships	Partnerships	Corporations	All Businesses	
Total Number of Returns / Forms Filed	39,503,733	3,445,433	6,922,433	49,871,600	
Share of Forms:					
Manufacturing	2%	2%	5%		
Trade	12%	8%	18%		
Services	56%	80%	52%		
Health Care	9%	2%	8%		
Other	22%	9%	18%		
Compliance Costs (in Millions of 2009 $):					**Cost Share**
Manufacturing	475	289	2,417	3,181	3%
Trade	3,642	1,335	8,451	13,429	14%
Services	16,943	13,991	24,871	55,805	58%
Health Care	2,645	409	3,819	6,874	7%
Other	6,626	1,520	8,549	16,695	17%

Occupational Safety and Health, and Homeland Security Regulations. The costs of homeland security regulations are allocated based on each sector's share of value added to private sector GDP. The costs of occupational safety and health regulations are allocated based on each sector's share of private sector employment. The sum of these two sector costs then determines the overall sector share.

Allocation of Regulatory Costs by Firm Size

The third task of this study involves allocating the costs of regulations by firm size. As noted above, this study adopts a three-division scheme: firms with fewer than 20 employees ("small"), firms with 20 to 499 employees ("medium," or "mid-sized"), and firms with 500 or more employees ("large"). The specific allocation procedure differs for each type of regulation, and the procedures are described below.

Starting with economic regulations, the cost allocation among the three firm size groups uses a two-step procedure. Step one seeks to separate the total regulatory costs for the sector into two components, those that apply to all firms and those that explicitly exempt small firms (those with fewer than 20 employees). In step two, for the nonexempt regulations, the procedure follows Crain and Hopkins (2001) and Crain (2005) and allocates these costs based on the share of payroll expenditure within each firm size category (shown in Table 8 above). For example, in the manufacturing sector, small firms generate 7 percent of payroll within the sector, medium-sized firms generate 31 percent, and large firms generate 62 percent. This procedure is used because payroll expenditures are the best available proxy for the economic activity by firm size. The portion of economic regulations from which small firms are exempt is approximated using the share of costs that were exempt in the Johnson 2005 study. This historical share is then multiplied by the currently estimated cost of economic regulations to estimate exempted costs. These exempted costs are then reallocated to the medium-sized and large firms based on their respective employment shares. In other words, the aggregate costs of economic regulations include some regulations that exempt small firms and these exempted costs are reapportioned to mid-sized and large firms. The costs reapportioned to mid-sized and large firms are sector-specific, and based on the relative employment shares by firm size in each sector.

The methodology used to allocate the cost of environmental regulations by firm size is described in detail in Appendix 5 and is relatively easy to summarize. The procedure uses multiple regression analysis to estimate the relationship between pollution abatement costs (PAC) per employee and firm size, measured by the number of employees per firm. The model regresses firm compliance costs per employee against the number of employees, controlling for other factors. The regression results indicate that a 1 percent increase in firm size (measured in terms of the number of employees) corresponds to a 0.43 percent decrease in pollution abatement costs per employee. In essence, this parameter estimates the degree of economies of scale in compliance costs.

This "economies of scale" parameter value is used to solve for the median cost per employee within each firm size category for each business sector. To state the problem differently, given the economies of scale parameter and the share of employees within each size class, what per-employee cost for the three firm size classes would yield the overall sector average cost? Other studies are consistent with this finding of economies of scale in environmental regulatory compliance, although Becker (2005) finds that economies of scale differ depending on the type of pollutant.[38]

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[38] See, for examples, Thomas J. Dean, Pollution Regulations as a Barrier to the Formation of Small Manufacturing Establishments: A Longitudinal Analysis, Office of Advocacy, U.S. Small Business Administration: Washington, D.C., 1994; and Thomas J. Dean, *et al.*, "Environmental Regulation as a Barrier to the Formation of Small Manufacturing Establishments: A Longitudinal Analysis," *Journal of Environmental Economics and Management* 40, 2000, pp. 56-75. These two studies suggest that regulatory costs lower the startup rate for new firms, especially in the manufacturing sector, because of its higher capital requirements from environmental and other types of regulations. They also indicate that environmental regulations increase the minimum efficient scale of production. See also the related study by Samuel Staley, *et al.*, *Giving A Leg Up to Bootstrap Entrepreneurship: Expanding Economic Opportunity in America's Urban Centers*, Los Angeles: Reason Public Policy Institute, 2001. As noted in the text, a recent student finds that relative costs of pollution abatement by firm size vary depending on the type of regulated pollutant. See Randy A. Becker, "Air Pollution Abatement Costs under the Clean Air Act: Evidence from the PACE Survey," *Journal of Environmental Economics and Management*, (5) 2005, pp. 144-169.

The allocation of tax compliance costs across the firm sizes starts with the information reported in Table 11, the compliance costs by sector and by type on business (sole proprietorships, partnerships, and corporations). Within each sector, the following apportionment strategy is used. All of the costs for sole proprietorships are allocated to small businesses. The costs for partnerships are distributed between small and mid-sized businesses based on their shares of payroll expenditures. For example, consider the manufacturing sector. Of total payroll spending by small firms and mid-sized firms, small firms account for 17 percent and mid-sized firms account for 83 percent. Thus, 17 percent of the compliance costs for manufacturing partnerships are allocated to small businesses and 83 percent to mid-sized businesses. Similarly, the compliance costs for corporations are distributed between mid-sized and large businesses based on their shares of payroll expenditures. Again using the example of the manufacturing sector, of total payroll spending by mid-sized firms and large firms, mid-sized firms account for 31 percent and large firms account for 69 percent. Thus, 31 percent of the compliance costs for manufacturing corporations are allocated to mid-sized businesses and 69 percent to large businesses.

The costs of occupational safety and health, and homeland security regulations are distributed among the three firm size categories such that the cost per employee in small firms is 20 percent higher than in medium-sized firms, and the cost per employee in large firms is 20 percent lower than in medium-sized firms. For the regulations that exempt small firms, the costs are allocated solely between the medium-sized and large firms using the same ratio as above (20 percent lower per employee in large firms than in medium-sized firms). The final allocation then sums the nonexempt and exempt cost components for each firm size category.[39]

[39] The category of workplace regulations is the one area that applies this judgmental cost allocation used in Hopkins (1995), Crain and Hopkins (2001), and Crain (2005). That is, the 20

IV. Principal Findings

This section presents the report's principal findings regarding the total cost of federal regulations and the distribution of this cost across major sectors of the economy, and across firms of different sizes.

A Preliminary Benchmark: Total Federal Regulatory Costs per Household

One way to illustrate the magnitude of the total cost of federal regulations is in relation to the number of U.S. households. Table 12 presents this cost per household data as a benchmark for comparing how the regulatory burden has changed over time based on the previous studies for Advocacy. However, it is important to caution the reader that this particular benchmark includes the total cost of regulations and makes no effort to distinguish between how much of this cost falls on individuals compared with businesses. It simply assumes that households (as consumers, workers, small business owners, shareholders, and so on) ultimately bear the entire burden of regulations. Further, as noted throughout this report, the estimation methodologies have evolved since the initial study in 1995, and, obviously, this accounts for some of the differences in costs. Table 12 also shows the total federal government burden, encompassing federal tax receipts, and how this total burden per household changed during this time period. The data in Table 12 are adjusted for inflation and expressed in 2009 dollars.

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percent assumption is applied solely to a relatively small segment of all regulations, and therefore the overall results are not very sensitive to this assumption.

Table 12. Federal Regulatory Costs and Federal Receipts per Household (HH), Compared to Prior Studies for the Office of Advocacy [a]

Year	Households (Millions)	Total Regulatory Costs per HH	Federal Receipts per HH [b]	Combined Federal Burden per HH
2008	112	$ 15,586	$ 22,375	$ 37,962
2004	109	$ 11,550 [c]	$ 19,516	$ 27,359
2000	106	$ 10,362 [d]	$ 23,903	$ 30,176
1995	98	$ 9,580 [e]	$ 19,309	$ 25,441
Avg. Annual Growth Rate: 1995 to 2008	1.1%	4.8%	1.2%	2.4%

Notes to Table 12:

[a] All dollar amounts are adjusted for inflation and denominated in 2009 dollars.

[b] Federal receipts by fiscal years, including Social Security. Source: CBO Web Site: http://www.cbo.gov/showdoc.cfm?index=1821&sequence=0

[c] Source: Crain (2005).

[d] Source: Crain and Hopkins (2001). As described in Crain (2005) this estimate for 2000 adjusts the cost originally reported in Crain and Hopkins (2001) upward by $37 billion to be consistent and comparable with the calculation methods and sources introduced in the Crain (2005) report.

[e] Source: Hopkins (1995)

As shown in Table 12, the total cost of federal regulations per household reached $15,586 in 2008, an increase of more than $4,000 per household since 2004 after adjusting for inflation. (A substantial portion of the 2004-2008 increase shown in Table 12 is the result of the change in methodology in the calculation of the costs estimate for economic regulation). The combined federal burden — federal receipts plus regulatory costs — reached $37,962 per household in 2008, an increase since 2004 of nearly $6,900 per household. The combined federal burden is growing at a real annual rate of 5.5 percent. An interesting observation in Table 12 is the sharp increase in growth rates

in comparison to the 2000 to 2004 period. In that four-year period, the combined federal burden per household fell at annual rate of 2.3 percent.

Distribution of Federal Regulatory Costs: Businesses and Others

Table 13 shows the estimated costs of all federal regulations, broken down by type, and the distribution of the burden between businesses and others (*i.e.*, individuals and state and local governments).

Table 13. Total Cost of Federal Regulations in 2008 by Type and Business Share (Billions of 2009 Dollars)

		Business Portion		Others	
	Total Costs (Billions of $)	Share (Percent)	Amount (Billions of $)	Share (Percent)	Amount (Billions of $)
All Federal Regulations	1,752	55%	970	45%	782
Economic	1,236	50%	618	50%	618
Environmental	281	65%	183	35%	98
Tax Compliance	160	60%	96	40%	64
Occupational Safety and Health, and Homeland Security	75	97%	73	3%	2

These estimates in Table 13 indicate that the annual total cost of all federal regulations in 2008 was $1.752 trillion. Of this amount, the annual direct burden on business is $970 billion. Economic regulations represent the most costly category, with a total cost of $1.236 trillion, and with $618 billion falling initially on business. Environmental regulations represent the second most costly category in terms of total cost ($281 billion), and the cost apportioned to business is $183 billion. Compliance with the federal tax code is the third most costly category ($160 billion), and the cost of occupational safety and health, and homeland security regulations ranks last ($75 billion).

Distribution of the Regulatory Burden across Business Sectors: Three Metrics

Table 14 further deconstructs the business portion of regulatory costs by sector and by the four categories of regulations. Three measures of the regulatory burden are

employed to assess the cost distribution among business sectors: cost per firm, cost per employee, and cost as a share of payroll expenses.

Table 14. Average Sectoral Regulatory Costs, 2008 (In 2009 Dollars)

	Total Costs (Billions of Dollars)	Cost per Firm (Dollars)	Cost per Employee (Dollars)	Cost as a Share of Payroll (Percent)
		Manufacturing		
Total	193	688,194	14,070	29
Economic	82	293,660	6,004	12
Environmental	98	352,689	7,211	15
Tax Compliance	3	11,415	233	0.5
OSHHS *	8	30,431	622	2
		Trade		
Total	115	109,970	5,289	16
Economic	89	84,811	4,079	12
Environmental	-	-	-	-
Tax Compliance	13	12,808	616	2
OSHHS *	13	12,351	594	2
		Services		
Total	400	129,912	7,235	15
Economic	308	100,460	5,595	13
Environmental	1	177	10	0
Tax Compliance	56	18,211	1,014	2
OSHHS *	35	11,065	616	1
		Health Care		
Total	69	116,326	4,221	10
Economic	52	86,760	3,148	8
Environmental	1	2,056	75	0.2
Tax Compliance	7	11,514	418	1
OSHHS *	9	15,995	580	1
		Other		
Total	191	188,704	14,992	31
Economic	88	84,687	6,728	14
Environmental	83	79,900	6,348	13
Tax Compliance	17	16,153	1,283	3
OSHHS *	6	7,964	633	1
		U.S. Totals (All U.S. Businesses)		
Total	907	161,021	8,086	19
Economic	618	102,612	5,153	12
Environmental	183	30,329	1,523	4
Tax Compliance	96	15,939	800	2
OSHHS *	73	12,141	610	1

Note to Table 14:

* OSHHS stands for Occupational Safety and Health, and Homeland Security Regulations

As shown in Table 14, considering all U.S. businesses and all federal regulations, the cost burden on the typical U.S. firm is about $161,000. The cost per employee for the typical U.S. firm tops $8,000. This cost of federal regulation in the typical U.S. firm equals 19 percent of payroll expenditures. To place this amount in perspective, it exceeds the employer contribution to the payroll tax for Social Security (OASDHI) and Medicare, which is 7.65 percent of wages. Indeed, 19 percent of payroll expenditures exceeds the combined payroll taxes for OASHDI and Medicare paid by employers and employees, or self-employed individuals, which equals 15.3 percent.

The three cost metrics described and shown in Table 14 reveal several noteworthy patterns in how the cost burden of regulations is distributed among the business sectors. Table 15 shows these patterns a bit more clearly by ranking the five sectors in terms of the relative cost burden.

Table 15. Sector Rankings Based on Three Metrics of the Regulatory Burden (In 2009 Dollars. 1=highest burden; 5=lowest burden)

Business Sector	Cost Per Firm (Dollars)	Cost Per Firm (Rank)	Cost Per Employee (Dollars)	Cost Per Employee (Rank)	Cost / Payroll (Percent)	Cost / Payroll (Rank)
Manufacturing	688,944	1	14,070	2	29	2
Other	188,704	2	14,992	1	31	1
Services	129,912	3	7,235	3	15	4
Health Care	116,326	4	4,221	5	10	5
Trade	109,970	5	5,289	4	16	3

As illustrated by the rankings in Table 15, the manufacturing sector and the "other" sector bear the largest regulatory burden by all three metrics. For example, using the "cost per firm" metric as a gauge, the distribution of the regulatory burden is heavily skewed toward these two sectors. The manufacturing sector in particular bears the

highest total regulatory burden in terms of the average cost per firm. The burden on the manufacturing sector ($688,944 per manufacturing firm) exceeds the burden on the second most costly sector (the "other" category at $188,704 per firm) by a factor of 3.6. However, by the other two metrics — cost per employee and cost as a percent of payroll — the "other" category bears the highest burden. The cost per employee for firms in the "other" category is $14,992 as compared with the second highest sector (manufacturing), where the cost per employee is $14,070.

The difference between the rankings based on "cost per firm" versus "cost per employee" is likely explained by the fact that enterprises within these two sectors operate with different mixes of capital and labor. For example, predominant among the "other" category are utilities, mining (including coal and oil and gas extraction), and transportation and warehousing concerns, all of which require huge capital investments relative to the number of employees. This means that the regulatory cost per worker rises in this sector relative to manufacturing establishments that typically have more employees per unit of capital investment than establishments such as public utilities, airlines, and railroads. It is worth emphasis, however, that costs per employee in both of these sectors are double the cost per employee in the next highest-cost sector, services, where costs equal $7,235 per employee.

The second conclusion from the metrics in Table 15 is that regulatory costs are distributed much more evenly among the three remaining sectors: health care, services, and trade. For example, in terms of the cost per firm, the burden on the services sector is 12 percent higher than the health care sector and 18 percent higher than the trade sector. As a final observation, when the regulatory burden is gauged by "cost as a percent of payroll," the health care sector fares far better than any of the other sectors (equal to 10 percent). For example, the difference is large even compared to the second

lowest cost industry, services, which equals 15 percent of payroll expenditures. Health care compliance costs as a share of payroll is one-third the level in the "other" sector.

In summary, some conclusions about the distribution of the regulatory burden among sectors depend on which metric one favors. However, the metrics uniformly indicate that the manufacturing sector and the "other" sector bear substantially higher regulatory costs compared with the services, health care, and trade sectors of the economy.

The Distribution of Regulatory Costs by Firm Size

The distribution of regulatory costs among different firm size categories is presented in Table 16.

Table 16. Regulatory Costs in Small, Medium-sized and Large Firms, 2008 (Cost per Employee in 2009 Dollars)

Type of Regulation	All Firms	Firm Size <20	20-499	500+
Manufacturing				
Total	14,070	28,316	13,504	12,586
Economic	6,004	4,454	5,481	6,952
Environmental	7,211	22,594	7,131	4,865
Tax Compliance	233	444	205	219
OSHHS *	622	824	687	550
Trade				
Total	5,289	5,453	6,242	4,753
Economic	4,079	3,673	4,866	3,823
Environmental	-	-	-	-
Tax Compliance	616	1,013	737	418
OSHHS *	594	767	639	511
Services				
Total	7,235	7,106	6,274	7,815
Economic	5,595	4,181	4,668	6,648
Environmental	10	25	8	5
Tax Compliance	1,014	2,113	944	637
OSHHS *	616	786	655	524
Health Care				
Total	4,221	5,375	3,707	4,204
Economic	3,148	3,318	2,725	3,366
Environmental	75	203	64	44
Tax Compliance	418	1,103	292	293
OSHHS *	633	772	643	514
Other				
Total	14,992	21,906	12,878	11,964
Economic	6,728	5,273	6,700	7,721
Environmental	6,348	13,760	4,343	2,963
Tax Compliance	1,283	2,101	1,192	765
OSHHS *	633	772	643	514
Total, All U.S. Businesses **				
Total	8,086	10,585	7,454	7,755
Economic	5,153	4,120	4,750	5,835
Environmental	1,523	4,101	1,294	883
Tax Compliance	800	1,584	760	517
OSHHS *	610	781	650	520

Notes for Table 16:

* OSHHS stands for Occupational Safety and Health, and Homeland Security Regulations

** The costs per employee for all U.S. Businesses are computed using the employment shares to weight the costs in each of the five respective sectors.

Considering first the aggregate costs for all federal regulations and all business sectors (displayed as the last category in Table 16), regulations cost small firms an estimated $10,585 per employee.[40] Regulations cost medium-sized firms $7,454 per employee, and large firms $7,755 per employee. Overall, the cost per employee is 42 percent higher in small compared with mid-sized firms, and 36 percent higher in small firms than in large firms. It is noteworthy that the distribution of costs across the three categories of firms in 2008 is similar to the findings in the prior study for Advocacy (Crain, 2005). In 2004 the cost differential between small and mid-sized firms was 41 percent; thus, the cost disadvantage to small businesses has remained nearly constant. In 2004 the cost differential between small and large firms was 45 percent, which is even greater than the gap estimated in 2008. This suggests that since 2004, costs per employee have increased for large businesses relative to small and mid-sized businesses.[41] Indeed, considering the costs of all regulations and all business sectors, mid-sized firms appear to have a slight advantage over large firms, and a wide advantage over small firm.

This pattern, however, is not uniform across sectors or types of regulations. As the results in Table 16 reveal, the distribution of compliance costs with respect to firm size classes differs across the five major business sectors. Indeed, even within sectors, the distribution of the burden varies with the type of regulation. Table 17 reports the percentage difference in the cost per employee in small firms versus larger firms by

[40] The U.S. total figures are based on a weighted average of the costs in the five business categories. The weights for each average use the share for the respective category. For example, for the "cost per firm" value, the cost per firm in each sector is weighted by the share of all U.S. firms in that sector. For the "cost as a percent of payroll" value, the sector values are weighted by the share of all U.S. payroll expenditures in that sector, and so on.

[41] The caution about comparing the 2008 estimates with prior years again should be noted because of the newly introduced methodology for estimating economic regulations.

sector. That is, Table 17 restates the numbers in Table 16 in terms of the cost burden on small firms relative to mid-sized and large firms.

Table 17. Regulatory Costs in Small Firms Relative to Medium-sized and Large Firms in 2008 *

Business Sector	Small Firms Relative to Medium-Sized Firms	Small Firms Relative to Large Firms
Manufacturing	110	125
Trade	-13	15
Services	13	-9
Health Care	45	28
Other	70	83
All Sectors	42	36

*** Note to Table 17:**

The numbers reflect the percentage difference between regulatory costs per employee in a small firm versus a medium-sized firm or large firm using the data reported in Table 16.

The disproportionate cost burden on small firms is dramatic for the manufacturing sector. In that sector the estimated cost per employee for small firms is 110 percent higher than in medium-sized firms ($28,316 versus $13,504), and 125 percent higher than in large firms ($28,316 versus $12,586). To drive home the importance of this result, in the U.S. manufacturing sector, small firms face a regulation burden that is more than double the burden faced by their larger rivals. This cost disadvantage faced by small manufacturing firms appears in three of the four types of regulations (see the detailed breakdown by type of regulation in Table 16). The burden falls disproportionately on large manufacturing firms only in the case of economic

regulations.[42] However, while some types of regulations disadvantage large firms relative to small, the combined impact of all regulations in the manufacturing sector puts small firms at a substantial competitive disadvantage.

The distribution of the regulatory burden among firms of different sizes in the "other" category is similar to that in the manufacturing sector, although the overall cost differentials are less extreme than in the manufacturing sector. The cost per employee is 70 percent higher in small firms than in medium-sized firms, and 83 percent higher in small firms than in large firms. The health care sector exhibits a similar disproportionate distribution. In that sector, the cost per employee is 45 percent higher in small firms than in medium-sized firms, and 28 percent higher in small firms than in large firms.

The regulatory burden is distributed most evenly with respect to firm size in the services sector, as summarized in Table 17 and displayed in detail in Table 16. In the services sector the total cost per employee for small firms is only 13 percent larger than the cost in medium-sized firms, and 9 percent less than the cost in large firms. In the trade sector, small firms face a 15 percent heavier cost burden than large firms, but have a 13 percent cost advantage over medium-sized firms. In other words, within the trade sector, the heaviest cost burden falls on mid-sized firms.

Summary Comments

Overall and on almost every regulatory frontier, compliance costs place small businesses at a competitive disadvantage. The cost disadvantage confronting small business is driven by environmental regulations, tax compliance, and occupational safety and health and homeland security regulations. The particular cost drivers differ

[42] The relatively large impact of economic regulations on large firms has been noted by a number of scholars. See the literature review in Steven C. Bradford, "Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation," *The Journal of Small and Emerging Business Law*, 8 (1), 2004, pp. 1-37.

somewhat across the five business sectors, as the details of this report point out. Moreover, not all regulations fall more heavily on small firms than on their larger counterparts. For example, the cost of economic regulations falls most heavily on large firms in every sector except health care. The most disadvantaged of all by federal regulations are small manufacturing firms.

This study provides a broad sense of the costs of federal government regulations in the United States and how they affect the balance in public versus private sector responsibilities. In 2008 federal regulatory compliance absorbed about 14 percent of U.S. national income, a clear indication of what citizens give up in exchange for this government function.

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Appendix 1. Elements Included in the World Bank Index of Regulatory Quality and Data Summary for Estimating the Costs of Domestic Economic Regulations

Table A-1: List of Concepts Included in the Regulatory Quality Index

Export and Import Regulations
Restrictions on ownership of business by non-residents
Restrictions on ownership of equity by non-residents
Unfair competitive practices
Price controls
Discriminatory tariffs
Excessive protections
Stock Exchange / Capital Markets
Foreign investment restrictions
Administrative regulations
Tax system is distortionary
Competition in local market is limited
Anti-monopoly policy is lax and ineffective
Complexity of tax system
Easy to start a company
Banking / finance restrictions
Wage and prices controls
Administrative business start-up formalities
Ease of market entry for new firms
Tax Effectiveness (How efficient the country's tax collection system is.)
An assessment of whether the necessary business laws are in place.
Labor Market Policies
Enabling Environment for Private Sector Development
How problematic are labor regulations for the growth of your business?
How problematic are tax regulations for the growth of your business?
How problematic are custom and trade regulations for the growth of your business?
Trade & foreign exchange system
Enabling conditions for rural financial services development
Investment climate for rural businesses
Access to agricultural input and produce markets
Banking regulation does not hinder competitiveness
Competition legislation in your country does not prevent unfair competition
Customs' authorities do not facilitate the efficient transit of goods
Financial institutions' transparency is not widely developed in your country
Labor regulations hinder business activities
Subsidies impair economic development

Source for Table A-1: Kaufmann, Daniel, Aart Kraay, and Massimo Mastruzzi (2009), Table B-4

Table A-2. Summary Statistics for OECD Cross-Country Data Set

	mean	median	sd
GDP per Capita (in 2009 US $)	22,654	24,306	12,201
World Bank Index of Regulatory Quality	1.317	1.441	0.441
Population (in 1000s)	38,900	10,800	57,900
Fixed Broadband Subscribers per 100 people	14.2	13.3	10.1
Primary Education as a Share of the Eligible Population (times 100)	98	99	5
Foreign Trade as a Share of GDP (times 100)	98	81	57

Appendix 2. Methodology Used to Correct Overcount of Firms in the SBA Data

When the Census Bureau compiles its Statistics of U.S. Businesses, it relies on survey questionnaires filled out by firms. Occasionally the firms classify themselves under more than one industry. Because some firms are redundantly classified, the sum of the firms within each category is actually greater than the entire number of firms.

To correct for this over count, the number of redundantly counted firms is calculated by summing the number of firms by industry and subtracting the total number of firms from this across-industry sum.

The next task is to assign a certain fraction of over counted firms to each industry to be used as a reduction factor. This is accomplished using the fact that the number of employees within each industry is accurately measured. Each industry's share of the total work force is calculated; these shares are then used to allocate the over counted firms to each industry. From there, it is a simple matter of subtracting the over count within each industry from the reported count in each industry. This ensures that the total number of firms is equal to the number of firms summed across the five industry categories.

Appendix 3. Methodology for Estimating Economies of Scale in Environmental Compliance Costs

Introduction

In 2008, environmental regulations cost an estimated $281 billion (16 percent of total federal regulatory costs), and the cost falling on businesses was an estimated $183 billion (19 percent of total business regulatory costs). This appendix describes the methodology used to estimate the relationship between firm size and compliance costs for environmental regulations. This methodology is adopted from Crain and Hopkins (2001) and Crain (2005), and the objective is to provide a basis for allocating the cost of environmental regulations among the three firm size categories.

The relationship between compliance costs and firm size is estimated using pollution abatement expenditures by manufacturing firms. For reasons described below the data used in the analysis are for 1992. Among environmental regulations, pollution abatement expenditures account for about one-fourth of the costs. Thus, a reliable estimate of scale economies in pollution abatement provides a reasonable approximation for the general distribution of all environmental regulatory costs.

Estimation Procedure and Results

The general approach is to estimate the relationship between pollution abatement cost (PAC) per employee and firm size, here measured by the number of employees per firm. Equation (2) specifies the estimation equation, which is estimated in log form:

$$\text{(Eq. 2)}\quad \ln(\text{PAC / employee})_{i,s} = \beta \ln(\text{Firm Size}_{i,s}) + \phi \ln(\text{Value of Sales}_{i,s}) + \gamma_i + \varepsilon_{i,s},$$

where subscript *i* stands for a specific industry type and subscript *s* stands for a specific American state. Industry types are defined by two-digit SIC codes covering all industries in the manufacturing sector; see Table A-8 below for a description of the 20 industries included. Each continuous variable is entered into Equation (2) as a natural logarithmic transformation (ln).

In Equation (2) the dependent variable, (PAC / employee) $_{i,s}$, measures the average pollution abatement expenditure per employee in industry *i* in state *s* in 1994 (source: Bureau of the Census, 1996). These are the most recently available data, as Census no longer collects this series. These expenditure data include capital expenses and operating expenditures. The main independent variable of interest, firm size $_{i,s}$, measures the average number of employees per firm in industry *i* in state *s* (source: Bureau of the Census, *1992 Economic Census*). The estimated coefficient on firm size, β, thus provides the measure of economies of scale. Specifically, how does pollution abatement expenditure per employee respond to changes in firm size? Equation (2) also includes a control variable for the average value of sales, and a fixed-effects variable, γ_i, which seeks to control for other factors that cause pollution abatement costs to differ among the 20 industries. For example, the chemical industry may simply be subject to different environmental standards than, say, the leather products industry. Including the fixed-effects dummy variables in the model allows the cost function to shift for each specific industry. $\varepsilon_{i,s}$ is the regression error term, which is assumed to be normally distributed.

Equation (2) is estimated across states using data for 1992. While the Census Bureau continued to survey pollution abatement expenditures through 1994, 1992 is used because the Census of Manufacturing (the source of the state-level data on firm

sizes, employment, and sales) also occurred in that year (the Census of Manufacturing is conducted only every five years).

Results

Table A-3 presents the regression results. Overall, the regression model demonstrates considerable explanatory power. The F-statistic is significant at the one-percent confidence level, and the model explains 83 percent of the variation in pollution abatement expenditures per employee. The estimate of β, –0.431, is significant at the 0.07 confidence level. This parameter value indicates that a 1 percent increase in firm size (the number of employees) corresponds to a 0.431 percent decrease in abatement costs per employee. (Recall that the variables are entered as log transformations, so the estimated coefficient indicates the elasticity.) The control variable for the value of sales is significant at the 0.01 level. Finally, the F-statistic allows us to reject the hypothesis that the coefficients on the industry-specific dummy variables are jointly equal to zero. In other words, not surprisingly, the fixed-effects variables pick up significant differences in costs among the various industries.

Table A-3. Regression Results: Economies of Scale in Compliance Costs: Environmental Regulations

Dependent variable: Pollution Abatement Expenditure per Employee

Independent Variable	Coefficient	Std. Err.	t-stat	P>|t|
ln (Number of Employees)	-0.431	0.243	-1.78	0.07
ln (Value of Shipments)	0.698	0.186	3.75	0.00
Constant	-2.494	2.28	-1.10	0.28

Notes to Table A-3:

Number of observations = 208
Adjusted R-squared = 0.83
Regression F-stat (2, 188) = 10.84
Fixed Industry Effects, F-stat (17, 188) = 18.43

Following the firm classification scheme used throughout this study, the predicted costs per employee are computed for three broad categories of firm sizes: firms with fewer than 20 employees ("small firms"), firms with 20 to 499 employees ("medium-sized firms"), and firms with 500 or more employees ("large firms"). These costs are also shown in Table A-4, converted into 2009 dollars. The relative costs across these three firm size categories for the earlier time period establish the basis for allocating the cost of environmental regulations in 2008.

Table A-4. Results on Environmental Compliance Costs by Firm Size
(2009 Dollars)

	Cost per Employee, Manufacturing Sector Firms with:		
	<20 Employees	20 to 499 Employees	500+ Employees
Values Using Eq. 2	22,594	7,131	4,865

Concluding Comments

The earliest studies for Advocacy (Hopkins, 1995) provided the most comprehensive assessment to date on the incidence of regulatory costs by sector and firm size. However, Hopkins pointed out, he was forced to rely on a judgmental approach to the cost allocations across firm sizes in the absence of specific empirical estimates. This appendix provides the basis used in this report (and two prior reports for Advocacy) to allocate the costs of environmental regulations among the different firm size classes.

Table A-5. Sectors Included in the Regression Analysis of Environmental Compliance Costs

SIC Code	Industry Description
20	Food and kindred products
21	Tobacco products
22	Textile mill products
23	Apparel and other textile products
24	Lumber and wood Products
25	Furniture and fixtures
26	Paper and allied products
27	Printing and publishing
28	Chemicals and allied products
29	Petroleum and coal products
30	Rubber and miscellaneous plastic products
31	Leather and leather products
32	Stone, clay and glass products
33	Primary metal industries
34	Fabricated metal products
35	Industrial machinery and equipment
36	Electronic and other electric equipment
37	Transportation equipment
38	Instruments and related products
39	Miscellaneous manufacturing industries

Appendix 4. Spending and Staffing by Federal Regulatory Agencies

Table A-6. Total Spending by Federal Regulatory Agencies on Regulatory Activity, Fiscal Years (Millions of 2009 Dollars)

Fiscal Year	Social Regulations	Economic Regulations	Total
1990	17,020	3,883	20,903
1991	18,588	3,736	22,323
1992	20,320	4,098	24,418
1993	20,442	4,687	25,130
1994	20,745	4,366	25,111
1995	21,243	5,076	26,319
1996	21,041	4,685	25,726
1997	22,103	5,057	27,160
1998	24,123	4,948	29,071
1999	25,034	5,197	30,231
2000	26,247	5,460	31,707
2001	27,305	5,588	32,892
2002	32,296	6,002	38,297
2003	41,683	5,926	47,609
2004	36,658	6,418	43,076
2005	36,778	6,508	43,286
2006	37,888	6,751	44,639
2007	38,267	6,988	45,256
2008	40,518	7,352	47,870

Notes to Table A-6:

Source: de Rugy and Warren (2009), Table A-5, p. 28. Their figures were derived from the *Budget of the United States Government* and related documents, various fiscal years.

Table A-7. Total Staffing of Federal Regulatory Activity, Fiscal Years, Full-Time Equivalent Employment

Fiscal Year	Social Regulations	Economic Regulations	Total
1990	119,459	33,155	152,614
1991	123,247	34,284	157,531
1992	130,747	36,971	167,718
1993	135,804	37,957	173,761
1994	133,487	37,499	170,986
1995	136,016	37,594	173,610
1996	136,926	33,611	170,537
1997	133,153	32,313	165,466
1998	139,794	31,848	171,642
1999	139,799	32,384	172,183
2000	143,052	32,548	175,600
2001	140,523	32,270	172,793
2002	152,585	32,436	185,021
2003	210,316	31,981	242,297
2004	202,195	32,559	234,754
2005	203,417	32,312	235,729
2006	201,961	32,567	234,528
2007	204,893	33,440	238,333
2008	215,147	34,324	249,471

Notes to Table A-7:

Source: de Rugy and Warren (2009), Table A-6, p. 29. Their figures were derived from the *Budget of the United States Government* and related documents, various fiscal years.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

August 15, 2011

The Honorable Cliff Stearns
Chairman
House Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Stearns:

Attached please find responses to the written questions for the record submitted by you in connection with the Thursday, July 7, 2011, hearing entitled: "The Views of the Independent Agencies on Regulatory Reform."

Thank you again for the opportunity to testify before the Subcommittee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director, Office of Legislative Affairs, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Sincerely,

Robert Adler

Robert S. Adler

cc: The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

Attachment

The Honorable Cliff Stearns

1. In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all of the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at CPSC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.

Response: The U.S. Consumer Product Safety Commission (CPSC) enforces seven laws: (1) Consumer Product Safety Act, as amended (15 U.S.C. §§ 2051-2089); (2) Federal Hazardous Substances Act (15 U.S.C. §§ 1261-1278); (3) Flammable Fabrics Act (15 U.S.C. §§ 1191-1204); (4) Poison Prevention Packaging Act (15 U.S.C. §§ 1471-1477); (5) Children's Gasoline Burn Prevention Act (P.L. 110- 278); (6) Virginia Graeme Baker Pool and Spa Safety Act (P.L. 110-140); and (7) Refrigerator Safety Act (15 U.S.C. §§ 1211-1214). Over time, various provisions of these laws have been amended. The most recent example of this is the passage of H.R. 2715 (now P.L. 112-28), which, among other things, clarifies application of the lead limits in section 101 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) to certain products, and provides additional flexibility and relief to small manufacturers from the third party testing and certification requirements in section 102 of the CPSIA.

In the wake of H.R. 2715's enactment, which cleared the House 421-2 and unanimously in the Senate, I believe there is now broad, bipartisan agreement that our laws are well balanced. Taken collectively, the CPSC's enabling statutes do not, in my opinion, impose burdensome requirements because they generally give the agency the authority to act against dangerous products through multiple avenues including standards setting, bans, recalls and education campaigns. The CPSC is required to determine whether products are sufficiently dangerous to warrant agency action, so it is within the agency's discretion to decide when action is appropriate. I believe these laws have allowed the agency to do so in a measured and reasonable manner.

Speaking as one Commissioner, I believe the most burdensome features of our laws are the elaborate cost-benefit analyses required when promulgating mandatory safety standards or regulations. The cost-benefit analysis provisions in section 9 of the CPSA, (15 U.S.C. 2058(f)(2)), section 3 in the Federal Hazardous Substances Act (15 U.S.C. 1262(h) and (i)(1)), and section 4 in the Flammable Fabrics Act (15 U.S.C. 1193(i) and (j)(1)) are prescribed in such a way that unreasonable delay is inevitable. As I mentioned in my testimony before the Committee, because of this burdensome requirement, by my count, the agency has only promulgated nine rules in thirty years – or about one rule every three and a third years.

I believe that such rigidity in the law is what led Congress to enact the CPSIA, which allowed the agency to use more streamlined procedures. These procedures were untouched by H.R. 2715, which I believe represents a clear indication that they are working – and ensures that the Commission is able to effectively carry out its mandate in the areas touched by the CPSIA.

Accordingly, I would recommend removing the cost-benefit requirements from section 9 of the CPSA, section 3 in the Federal Hazardous Substances Act, and section 4 in the Flammable Fabrics Act and replacing them with language consistent with the CPSIA and the President's executive orders regarding cost-benefit analyses.

2. Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

Response: Speaking as one Commissioner, I have not conducted a review of CPSC regulations to identify those which are unnecessarily burdensome or duplicative. Before I could give a meaningful response, I would feel it necessary to consult with my fellow Commissioners, CPSC staff, the industries we regulate and consumers who benefit from our regulations. As stated in my testimony before the Committee, it is my understanding that the agency is in the process of undertaking such a review, and I look forward to reviewing the results of this process in the near future.

Commissioner Anne M. Northup
Consumer Product Safety Commission

Questions for the Record
House Energy and Commerce – Subcommittee on Oversight and Investigations
"The Views of the Independent Agencies on Regulatory Reform"

The Honorable Cliff Stearns

1) **In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at CPSC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

Since 2009, the Consumer Product Safety Commission has focused its time and resources principally on implementing the Consumer Product Safety Improvement Act of 2008 (CPSIA). Of our governing statutes, the CPSIA is by far the most burdensome on Commission resources and on thousands of consumer product manufacturers (both large and small)—and its requirements are largely not based on risk. Traditionally, the CPSC had been a risk-based agency, as seen through our other governing statutes – the Federal Hazardous Substances Act, Consumer Product Safety Act (prior to being amended by CPSIA), Flammable Fabrics Act, and Poison Prevention Packaging Act. However, with the passage of the CPSIA, the agency's expertise and resources have been diverted to implementing and enforcing mandates on all manufacturers that do not make products safer and burden American manufacturers disproportionately.

On August 1st, both the House and Senate passed HR 2715, a bill to amend the CPSIA. I am pleased that bipartisan agreement could be reached to ameliorate at least some of the unnecessary harm the CPSIA has and will continue to inflict on businesses, consumers, the economy, and individuals employed in the children's product industry. For instance, I support exempting ATVs and most used products from the lead limits of CPSIA § 101(a); capping the lead limit for the metal parts of bicycles at 300 ppm; and exempting from third-party testing most children's books and printed materials, and the metal components of bicycles. I am also pleased that the CPSIA's .01% lead limit, due to go into effect August 14, 2011, will no longer be applied retrospectively. While the lead limit of newly manufactured products will still be reduced below the level supported by scientific evidence, at least retailers will avoid the needless economic waste of throwing out noncompliant products already in inventory. Other provisions of HR 2715 appear to fall short of providing adequate relief, and will require the expenditure of significant private and public resources for businesses to obtain the modest relief it provides. I have proposed more straightforward and effective alternatives. Below, I discuss my

recommendations to further amend the CPSIA in order to permit the lawful and economically viable manufacture and sale of **all** safe children's products.

Additionally, in response to Ranking Member DeGette's request at the July 7 hearing, I will offer general recommendations for regulatory reform, including suggested amendments to statutes that govern the regulatory activities of both Executive and Independent Federal Agencies. I hope that these solutions will address the common obstacles all federal agencies face to achieving balanced, economically sound, risk-based regulation.

Recommended Changes to the CPSIA:

Adopt a Solubility Based Standard for Lead

The CPSIA contained a provision that permitted the Commission to exclude from the lead limits any specific product or material whose lead content did not "result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children's activities, and the aging of the product." CPSIA § 101(b)(1)(A). The Commission did not except a single material or product under this exclusion, and HR 2715 removes it and replaces it with a "Functional Purpose Exception."

The sticking point for the Commission was the inclusion of the phrase "the absorption of *any* lead." The Commission was unable to conclude that there was any product for which the absorption of *no* lead could be deemed a certainty. My view that Congress must have intended for this exception to apply to something, and that, therefore, a *de minimis* standard rather than an absolute standard should have been adopted, was overruled by the Majority.

Clearly, Congress attempted through both the CPSIA and HR 2715 to provide an exclusion that incorporates the concept that a product containing lead is only harmful if the lead it contains can be absorbed by a child in harmful amounts. The Functional Purpose Exception of HR 2715 includes this idea in part. It grants an exception to products that cannot practicably be manufactured at the lead limit, but only upon the condition that the exception will result in no measurable increase in blood lead levels or otherwise have a measurable adverse impact on health.

However, this provision of the Functional Purpose Exception is a classic case of the tail wagging the dog. A product that will result in no measurable adverse impact on health should not be subject to expensive reengineering, third part testing and certification costs, irrespective of whether the lead it contains *could* practicably be removed. Therefore, I support a lead standard based on the quantity of absorbable lead, rather than on an absolute measure of the total quantity of lead. Alternatively, there should at least be an exception for **any** product whose lead content does not have a

measurable adverse impact on health, and such an exception should be included as a standalone provision.

Focusing on whether a product can result in a measurable increase in blood lead levels is one proxy for measuring adverse health impacts generally. But it may lead to unnecessarily over-inclusive regulation, if this Commission chooses to interpret the term "measurable" to mean that a one part per billion increase in blood lead level is sufficient. The science of measuring lead in blood can detect lead at a level below amounts that are considered harmful. A better methodology would take into account the solubility and bioavailability of lead contained in a product. Other jurisdictions follow this approach. For instance, the European Union bases its laws limiting the lead content of certain toys on the amount of *soluble* lead (lead migration/leachable lead) a product contains.

Drawing the line at the level of soluble lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the CDC and the EPA. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (http://www.cdc.gov/nceh/lead/). In other words, the *risk of absorbability* from lead in dirt that is tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA standard for lead in soil is 400 ppm (http://www.epa.gov/lead/). This standard for safety is less strict even than the former 300ppm lead content standard (which was reduced to 100 ppm as of August 14, 2011) provided in the CPSIA for children's products, including furniture or bicycle handlebars where lead is embedded in the metal substrate and cannot be absorbed.

Regulations promulgated under the CPSIA, as interpreted by the Majority, have led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, everyday products such as school lockers, child-sized brass musical instruments, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed, due to the brass found on the tip, if they have a toy or game attached to them and are marketed to children. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a ball point pen or a child's dresser, the CPSIA treats these items in exactly the same way it treats products that truly could hurt a child by increasing her blood lead level.

HR 2715 will exempt a few products from the CPSIA's overreach. Most used children's products and children's ATV's are excluded from the statutory lead limits. The metal components of children's bicycles are permitted to contain 300 ppm, rather than the 100 ppm standard applicable to other children's products. These changes signal Congress's recognition that the lead in most children's products does not present an absorbability risk, but the bill fails to provide this relief to all products that are just as harmless. A standard or exclusion based on the bioavailability of harmful amounts of lead, such as the

EU solubility standard, would go a long way toward rationalizing the country's approach to protecting children from lead, while not unnecessarily destroying businesses and jobs.

Define "Children's Product" as Intended for Children Age Six or Younger

Under the CPSIA, a "children's product" is any product designed or intended primarily for children twelve years old or younger. The CPSIA thus treats the same all products intended primarily for use by children under thirteen, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented to different age groups by the same products, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products that many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that certain products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced when applied to products for older children, who no longer mouth objects or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children age six and under, while giving the agency discretion to raise that age limit for particular materials or categories of products that it determines pose a risk to older children. In any event, the CPSC always retains the authority to issue a stop-sale order or to recall any product determined to pose "substantial product hazard" under the Federal Hazardous Substances Act.

Eliminate Third-Party Testing and Certification Requirements

Given the tools available to manufacturers to determine compliance, and our own improved enforcement methods, the complex, third-party testing and certification requirements of the CPSIA are unnecessary and/or unhelpful in ensuring compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom are able to comply with the law's lead, phthalates and toy standards but still cannot afford the mandatory third-party testing and the subsequent certification and tracking label requirements of the law that are a paperwork nightmare.

By requiring all children's products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation, but who nonetheless must pay the most for third-party testing. The CPSIA's micromanagement of a company's testing,

certification and tracking of each and every component of a product is entirely unnecessary – and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

There are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. For example, the American Apparel and Footwear Association wrote in its public comments on the Commission's Notice of Proposed Rulemaking on Component Parts:

> As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.[1]

Today, the Commission also has enforcement tools vastly improved over those available even a few years ago. I believe these are a more effective use of taxpayer dollars to ensure compliance with safety standards than is policing all children's product manufacturers for certifications to mandatory third-party tests. Since the advent of our agency's Import Surveillance Division in 2008, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with Customs and Border Patrol to maximize the number of products screened at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts, application of x-ray technology (currently used to identify heavy metals) and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance by authorizing the CPSC to confiscate and destroy at the border products that violate federal safety standards, to impose higher penalties of up to fifteen million dollars, and to more easily seek criminal penalties.

Testing and certification to the law's widest reaching mandates -- lead and phthalates limits and the toy standard -- are stayed until December 31, 2011. Thereafter, the full weight of these costly requirements will fall on children's product manufacturers. Congress could eliminate these third-party testing and certification requirements before next year, allowing manufacturers to ensure compliance through less costly in-house tests and other manufacturing programs and processes. The Commission would retain the

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[1] American Apparel and Footwear Association, Request for Comments, Docket No. CPSC-2010-0037 & CPSC-2010-0038, August 3, 2010.

discretion to impose third-party testing requirements on products whose risk justifies the cost.

HR 2715 opens the door to potential third-party testing reforms, by calling for public comment and possible rulemaking to reduce the costs of third-party testing. I am hopeful the Commission's Majority will embrace this opportunity in the spirit in which Congress provided it. That is, with the intent of meaningfully reducing the number and scope of third-party tests mandated by the CPSIA, in order to permit businesses to focus their limited resources on growth and job creation. And I will work with my colleagues on the Commission to encourage the broadest possible relief consistent with the statutory language. But it is also clear that the provision falls far short of eliminating all third-party testing for any product or material, and in that regard, further Congressional action is necessary. And to be frank, I am fearful that any possible rulemaking to implement cost saving measures will be too little, too late, because the Majority is likely to push ahead to finalize the Commission's proposed rule on third-party testing in the near future, rather than reproposing to permit public comment consistent with the Congressional intent underlying HR 2715.

HR 2715 also provides a mechanism for excluding from the third party testing requirement very low production products (7,500 units), provided they are manufactured by a business meeting a very narrow definition of "small" ($1,000,000 annual revenue). Relatively few businesses are likely to obtain relief under this provision, perhaps including only those who fashion by hand unique or very small batches of products. It also appears that no businesses will be excluded under the provision until the Commission has promulgated guidelines under which businesses may register their status. I hope that the Commission's Majority recognizes the importance of prioritizing the drafting of guidelines, so that small businesses can register before the crushing costs of third-party testing drive them out of business, when the stays are lifted on January 1, 2012. In this respect, to paraphrase our Chairman, relief delayed is relief denied.

Require Reforms to the Database Rule to Ensure That Incident Reports are Verifiable and Useful

The Commission's Database Rule should be revised to ensure that incident reports posted to the public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information. The revisions contained in HR 2715 do not come close to addressing this problem.

Several features of the database and the Commission's policies governing the posting of reports make it likely that inaccurate information will be published on the database.

First Hand Information Is Not Required

The database requires that submitters of reports include their own contact information, but does not require that a report submitter have any firsthand knowledge of the product,

harm or risk of harm. Nor does it require submitters to provide the contact information of an individual with firsthand knowledge, such as the product owner or the person who used the product. As a result, requiring the contact information of only the submitter is not much different from permitting the submission of an anonymous report. In fact, the Commission is receiving incidents from people who are merely repeating information they find while surfing the internet. In these cases, the Commission has no means to verify the alleged circumstances of the incident or to obtain supplemental information relevant to determining the existence and scope of an alleged product hazard. Without access to a direct witness to an alleged incident, the Commission may also be unable to determine whether a report contains a material inaccuracy. Where a lack of information and inability to contact the product owner or a witness prevents the Commission from determining the existence of a material inaccuracy, a dubious report will remain on the database.

Moreover, these concerns are not diminished by the requirement that submitters of reports verify "to the best of their knowledge" the accuracy of the report submitted. The honest, best knowledge of someone with no personal connection to an incident or product is of little value.

This problem is not addressed by HR 2715. It could be solved by requiring that reports to the database include the identity and contact information of someone with firsthand knowledge of the product or incident.

The Rules Governing Material Inaccuracy Claims Do Not Prevent the Posting of Inaccurate Information

The rules governing the posting of reports that are subject to a manufacturer's claim of material inaccuracy also make it likely that inaccurate reports will be posted. Under the CPSIA as amended by HR 2715, manufacturers have ten business days after a report of harm is sent to them to claim that the report contains a material inaccuracy. If they fail to do so, the report is posted on the 11th day. If a material inaccuracy claim is made within the ten day period, the posting of the report is stayed for *no more than* an additional five days. The initial ten-day window to make a claim of material inaccuracy was not changed by HR 2715, and it remains insufficient time in many cases for a manufacturer to determine whether a report identifying its product contains a material inaccuracy.

This is partly because the rule passed by the majority did not require reports to contain sufficient detail about the product and incident to guide a manufacturer's investigation. Information essential to this purpose that is not required to be contained in the report, includes: the model number of the product; the date it was purchased; the UPC code; and/or, any other unique identifying information that would distinguish one product of a particular type from the potentially dozens of others that are of the same general type but are materially different. For example, a recent search of Amazon.com for high chairs manufactured by one particular company produced a list of 137 different high chairs ranging in price from $54 - $148. Given the broad range of identically named, yet distinctive products available from the same company at a single snap shot in time, a

report of harm relating to a particular manufacturer's high chair, with no reference to the model, date of purchase or other more specific identifying information, would not permit the manufacturer even to identify the specific product, let alone to gauge the accuracy of a report about the product.

HR 2715 requires that the Commission *seek to obtain* the model, serial number or a photograph of a product when the information is not included with a report. But there is no consequence to the Commission's failure to obtain any of them, or even to a submitter's refusal to cooperate. The limited available information without the model, serial number, photograph or other essential identifying information is still transmitted to the manufacture, the manufacture is subject to the same time limits, and the report is posted to the public database.

Our Chairman and Ranking Member Henry Waxman are fond of citing the statistic that 80% of submitted reports contain "model or serial number information." But this is misleading. Here are the facts: about 80% of reports contain *some text in the model or serial number field*. That includes characters such as "?", "I don't know", "unknown" and "unsure." The more relevant statistic is the percentages that actually contain a model or serial *number*. For the model number field, that figure is closer to 60%. For the serial number field it is less than half.

Even a manufacturer provided with sufficient information to identify a specific product may not receive enough detail about an incident to understand the role its product played in causing an alleged injury. Moreover, there may be no way to ascertain the truth in those cases where the manufacturer is certain that its product could not have caused an injury in the manner alleged. This is because a third-person reporter is not required to identify the victim or product owner, and access to a firsthand observer of the incident is necessary to resolve issues of fact.

A manufacturer forwarded a vague report has few options. Even where a firsthand observer is identified in the report, the manufacturer is not entitled to the individual's contact information. Without the ability to follow-up with a witness, the manufacturer must base its assertion of material inaccuracy upon the content of the report. In many cases, the report may not contain sufficient information for the manufacturer to ascertain whether it contains a material inaccuracy.

Even with adequate information, 10-days will often be too little time. Obvious cases of manufacturer misidentification may be discernable within the available window of time. But many products of a more generic nature will be very difficult to distinguish without a much more extensive investigation. I have spoken with manufacturers who have needed over 30-days after receiving a consumer complaint to conclude that the subject product was not their own. And those were cases where the company had access to the product. Ten days will clearly be insufficient in many cases, and as a result, materially inaccurate information will remain on the public database well beyond that point.

Even where a manufacturer meets the 10-day deadline to submit an adequately supported claim that a report is materially inaccurate, under the CPSIA as amended by HR 2715, the Commission only has 15 days from when the report was transmitted to the alleged manufacturer to complete its investigation of the claim. If the Commission fails to complete its investigation within the 15 day time period, the report is published on the 16th day. This policy continues to guarantee that inaccurate reports will sometimes be posted. Moreover, the materially inaccurate information will remain on the site until the Commission completes its investigation and makes a determination. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely. Meanwhile, the Commission's efforts to investigate claims of material inaccuracy are hamstrung by its failure to require the identification of victims of harm or firsthand witnesses of incidents raising a risk of harm. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Further, the manufacturer has no right to inspect the product. In those cases where contact information for the product owner is neither provided nor obtainable from the third-party submitter, it would be impossible even for the Commission to inspect the product. Similarly, there would be no opportunity for the Commission to follow up with the consumer under those circumstances. The manufacturer is not entitled to the contact information of a product owner who chooses to remain anonymous.

All of these factors make it inevitable that inaccurate reports will be posted on the database, and that many will remain searchable by the public forever.

A recent example demonstrates that these are not idle concerns. A report was published on the public database in which a parent identified a particular company as the manufacturer of a toy kaleidoscope that injured her child. The report had been forwarded to the named manufacturer as required by the rule, but the report contained insufficient information for the named manufacturer to determine whether it had actually manufactured the product. The company therefore made no claim of material inaccuracy, but posted a comment explaining that it was uncertain whether it had manufactured the product. Subsequently, a CPSC compliance officer obtained the kaleidoscope from the parent as part of its investigation of the product's safety, and discovered that the parent had misidentified the manufacturer. The incident report was then removed from the database, the correct manufacturer was notified, and the report was reposted with the correct information. However, this outcome resulted from happenstance and not any protections built into the database. If the incident had not been one of the approximately 10% that lead to a follow-up investigation, the error would never have been discovered. In addition, the investigation would not have uncovered the mistake if, as the database rule permits, contact information for an individual with firsthand knowledge of the

product and who retained it, was not provided. The fact that an error of this kind has already been discovered, given the short period that the database has been "live" and the small percentage of incidents that are investigated, suggests that this situation is probably not unique. Rather, it indicates that there are likely already a significant number of published incident reports that misidentify a manufacturer and that will never be corrected or removed.

Regulatory Reform: Other Statutory Changes

Two fundamental changes in the law governing federal agency regulatory action would go a long way toward avoiding the sort of economically burdensome unintended consequences that resulted from the CPSIA. First, there must be a mechanism for increasing accountability for the potential adverse impacts of regulatory actions. Second, economically significant regulatory action should not be taken until a thorough cost-benefit analysis demonstrates that the burdens imposed are outweighed by the societal benefits obtained.

Regulatory Reform Must Address All Significant Regulatory Actions, Not Just Formal "Legislative Rules"

Since becoming a Commissioner at the CPSC in 2009, I have seen that immense power is delegated to regulatory agencies-- often with little accountability. An agency's interpretation of one word of a statute can make the difference between the statute's being implemented reasonably, or with massive economic consequences.[2] Even more challenging, much of the Commission's regulatory activity under the CPSIA has not been through "legislative rules". As a result, neither full cost-benefit analyses nor other forms of economic review have been required. In fact, some of the most costly (and unnecessary) decisions made by the agency have come through party-line votes on interpretive rules, Notices of Requirements[3], and petition decisions. None of these are "legislative rules," but they each had wide ranging impact. Thus, when considering proposals for regulatory reform, I would strongly recommend that Congress take into account the full scope of regulatory decisions that an agency makes –not simply the most obvious regulatory vehicle, legislative rules.

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[2] By a vote of 4-1, the Commission voted to interpret the word "any" in CPSIA § 101(b)(1)(A) to mean "zero," rendering the absorbability exclusion of the original statute meaningless, and resulting in the rejection of a petition from a manufacturer to exclude the brass axle of a toy car that had *less absorbable lead* than the FDA permits in a piece of candy.

[3] Notices of Requirements (NOR) are ostensibly procedural regulations that provide notice to testing laboratories on how to become CPSC-recognized labs for the purposes of third-party testing under the CPSIA. However, their issuance triggers the underlying statutory requirement that all children's products be third-party tested to the particular standard listed in the NOR – a huge, new, non-risk-based requirement of the statute with sweeping economic impacts. The Majority has used them to require manufacturers to third-party test to many general consumer product safety standards that I believe should not have been construed as "children's products safety rules" subject to third-party testing under the CPSIA.

Passage of the "Regulations from the Executive In Need of Scrutiny Act" (REINS) Would Ensure Accountability

The discipline of accountability could be brought to regulatory action by amending the Congressional Review Act to require Congressional pre-approval of all "economically significant" rules or regulatory decisions. This idea is embodied in the bill titled the "Regulations from the Executive In Need of Scrutiny Act" (REINS), which provides for expedited review and approval of final rules by the full House and Senate. Under the REINS proposal, Congress would be required to approve any final rules that are "economically significant" or have at least $100 million per year impact. This added step would alert Members of Congress to the most burdensome regulations put forth by federal agencies. It would also prevent unelected agency staff and leadership from continuing to regulate without considering the economic impact of their actions. Moreover, agencies often take years to implement laws passed by earlier Congresses, as illustrated by the CPSIA. Requiring the current Congress to consider significant implementing regulations would help to avoid the unintended adverse consequences of a law and permit changed circumstances to be taken into account.[4]

REINS as currently offered only applies to legislative rules. But given the many other regulatory actions an agency may take to implement a statute, I recommend expanding the scope of this type of proposal to include any rule *or other type of regulatory action* with at least a $100 million impact. The objective would be to include not just high impact legislative rules, but also such interpretive rules, petition decisions, guidance documents, Notices of Requirements, or other types of Commission decisions. I recognize that this may expand the amount of legislative work for Congress and the number of cost-benefit analyses required. However, the scope and impact of these agency decisions more than justifies the added oversight.

REINS could also be expanded by asking Congress to exercise oversight of regulatory actions that result in *less than* a $100 million per year impact. In that case, the process could be streamlined by requiring such regulatory actions to be approved solely by the relevant authorizing Committee(s), and not by the full House and Senate.

Greater Accountability Could Also Be Achieved Through A Mandate for Formal Rulemaking

Greater accountability could also be achieved by imposing more widely on economically significant rules the procedures currently applicable only to formal "on the record" rulemaking. This idea is well articulated by Susan Dudley, Director of George Washington University's Regulatory Studies Center.[5] Agencies normally go through

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[4] Since the CPSIA's passage in 2008, the Commission has received letters from Members of Congress requesting that the Commission provide relief for small businesses and certain industries, numerous bills have been introduced to reform the statute, petitions for relief have been denied, and a CPSIA reform bill was recently signed into law. But more could have been accomplished along the way, and quicker, had there been a "REINS"-like process of congressional approval for all major rules and other regulatory actions.

[5] http://www.regulatorystudies.gwu.edu/images/pdf/regreform_dudley_workingpaper_20110405.pdf

informal rulemaking processes, including notice and comment, when promulgating rules. More formal rulemaking under 5 U.S.C. §§ 556 and 557 require a full trial like hearing, where pre-hearing discovery is permitted, the rules of evidence apply and parties may both subpoena and cross examine witnesses. The agency decision must be made exclusively based on the oral and written hearing record and must be supported by "substantial evidence." These procedures are often used by agencies responsible for economic regulation of industries, and some variation on them may therefore be particularly appropriate for CPSC regulatory action. In those cases where the full scope of formal rulemaking procedures seemed excessive, imposition of the "substantial evidence" requirement would still be particularly effective. It would ensure more judicial oversight then can be obtained under the current "arbitrary and capricious" standard of review that governs agency informal rulemaking.

Cost-Benefit Analyses of Regulatory Actions are Essential and Should Be Performed by an Independent Entity

Economically significant regulatory actions should not be taken until a cost-benefit analysis has been performed that demonstrates a reasonable relationship between the action's costs and benefits. This should apply to all economically significant regulatory actions, not only legislative rules.[6]

In the absence of a statutory mandate, regulatory agencies are unlikely to perform cost-benefit analyses. For instance, the CPSIA did not require cost-benefit analyses to be performed in connection with the legislative rulemaking that it mandated, and the CPSC Majority therefore objected to doing so. In addition, the vast majority of the Commission's actions implementing the law were taken through procedural rules and other vehicles that never require full, quantitative economic analyses. The Commission's Majority refused to exercise its discretion to undertake cost-benefit analyses even of the CPSIA's most costly and controversial regulations, notwithstanding that Members of Congress[7] as well as the President (EO 13579) have called for such analyses.

A federal agency that is required or willing to undertake a cost-benefit analysis of a significant regulatory action is not always equipped to do so. The CPSC, for instance, lacks the expertise and resources to perform thorough economic analyses of all of its rules. Indeed, to my knowledge, the CPSC has only performed one full cost-benefit analysis in its history.[8] If the CPSC had been required to perform a cost-benefit analysis

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[6] For certain rules, such as "Notices of Requirements" under the CPSIA, where the "Notice" itself may not have costs associated with it, but the act of issuing the "Notice" triggers an underlying statutory requirement to test and certify (imposing huge costs), I would recommend requiring that the agency perform a cost-benefit analysis of ***both*** the rule itself and the underlying statutory requirement that is associated with it/triggered by it.

[7] In June 2010, then Ranking Member Jo Ann Emerson (R-MO) of the House Financial Services Appropriations Subcommittee wrote a letter to Chairman Tenenbaum urging the Commission to use available extra funding to begin immediately a cost-benefit analysis of the Commission's testing and certification rule, including all other underlying costs of Section 102 of the CPSIA.

[8] The Commission's 2006 final mattress rule on flammability (16 CFR Part 1633) contained a cost-benefit analysis.

of CPSIA's main testing and certification rule, it would have had to outsource the study, given the sheer scope of the rule and number of different industries impacted.

Even if Commission staff had the knowledge, experience and resources to perform cost-benefit analyses of all the CPSC's major regulatory actions, our Economics department is constrained by its lack of independence. The Economics staff must report to the Chairman of the Commission, who may in some cases favor expedition over the performance of a thorough analysis. Fundamentally, regulatory agencies do not view their primary job to be assessing the economics of decisions. Rather, regulatory agencies focus on ***regulating***—with the natural tendency ***to regulate more***. In other words, the more "tweaks" or requirements that can be added in the name of safety, the better—and the costs of such decisions, even when considered, are always ***secondary***.

An effective way to address agencies' lack of expertise, resources and independence, is to create an independent federal office charged with reviewing or performing cost-benefit analyses of all economically significant rules *or other types of regulatory actions* taken by any federal regulatory agency. Offsetting the cost of such an independent office is the fact that "regulatory flexibility analyses" performed under the Regulatory Flexibility Act (RFA) would no longer be needed. RFA analyses are extremely limited compared to a full cost-benefit analysis that qualifies and quantifies in detail the effects of a regulation. The RFA requires an analysis to be performed only if there is a "significant impact" on a "substantial number of small entities." RFA analyses do not necessarily consider a regulation's impact on consumer choice, prices, or more indirect costs to the broader economy, such as job losses. Most importantly, since I have been a Commissioner, few if any analyses under the RFA have lead to changes in rulemakings the agency has promulgated—and there is no mechanism under which agencies are forced to change what they are doing based on an economic analysis under the RFA.

The Independent Body Charged With Analyzing Agency Action Could Also Analyze Congressional Actions Not Otherwise Subject to Review

The independent office charged with performing cost-benefit analyses of agency action could also be tasked with analyzing those federal statutes that are not subject to a full private sector impact analysis by the Congressional Budget Office. CPSIA was such a statute, and its unintended economic consequences attest to the need for a more thorough examination of economic impact before passage. In addition, analyzing statutes would ensure that statutory provisions that are self-implementing without agency action would also be subject to a cost-benefit analysis. Using the CPSC as an example, such provisions might include those making a voluntary industry standard mandatory,[9] or banning a product or substance. Such information would be beneficial both to the Commission implementing the statute and to Congress, which must normally depend entirely on the regulatory agency (and whatever industry comments the agency receives) for information on the law's total costs and economic impact after its enactment.

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[9] For example the Toy Standard was made law by the statute, not by implementing regulation. CPSIA § 106.

President Obama's Executive Orders No. 13563 and 13579 Should be Made Law

Congress could also ensure that adequate analysis is undertaken before burdensome regulatory action is taken, by passing as law President Obama's Executive Orders No. 13563 and 13579. This would require all agencies, including independent agencies, to "take into account benefits and costs, both quantitative and qualitative" of the rules it promulgates. If the CPSC is any indication, independent regulatory agencies are unlikely to take action beyond the law's minimum requirements, and will ignore or construe very narrowly the nonbinding exhortations of executive orders. Codifying such orders would require agencies to take these necessary steps. Additionally, codifying these requirements for cost-benefit analyses, public participation and other regulatory reform objectives, would subject them to judicial review.

Congress Should Not Except Regulations from Existing Cost-Benefit Analysis Requirements

Congress can sometimes be an obstacle to the performance of economic impact analyses by regulatory agencies. For instance, the CPSIA expressly excepted the CPSC from its existing statutory mandate to perform cost-benefit analyses of its legislative rulemaking under the statute. As a result, no cost-benefit analysis was performed of the CPSC's Testing and Certification rule, or the law's new mandatory standards requirements. Admittedly, the CPSIA did not prohibit the agency from undertaking the analyses, but removing the requirement allowed a Majority of Commissioners disinclined to confront the law's costs to argue that Congress did not wish them to be considered. This situation could be avoided through a new law requiring a separate vote to specifically exempt authorized agency action from cost-benefit or other economic analysis requirements. ***For example, Congress could prohibit the consideration of any bill exempting cost-benefit analysis, public participation, or other necessary regulatory accountability procedures without a separate, stand-alone vote requiring a 2/3 majority to pass the exemption.*** This requirement would permit Congress to ensure expeditious regulatory action where absolutely necessary, but to do so only with added visibility and accountability.

2) Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

Chairman Tenenbaum recently announced that the Commission may conduct a retrospective review of its regulations. She indicated that it would be similar to a review that was undertaken annually for several years prior to the passage of the CPSIA. Such a review could reduce unnecessary regulatory burdens on manufacturers, but only if the Majority prioritizes the review of CPSIA regulations and other agency action taken pursuant to the CPSIA. If not, it is doubtful that such a review will yield many significant changes. After all, the CPSIA's impact across the greatest scope of industries dwarfs that of all other CPSC statutes and regulations since the agency's inception. I

hope the Chairman will be open to my views on how the Commission can most effectively use this opportunity to meaningfully reduce the unnecessary burdens the Commission's implementation of the CPSIA has imposed on American businesses. But I fear that the Majority will proceed with a regulatory review that avoids addressing the major CPSIA regulatory actions that have had the most significant impact.

In particular, the following are Commission actions that should be revisited so that the Commission's safety goals can continue to be met without unnecessary collateral damage to the economy:

- ***Civil Penalties Factors*** – In the Commission's interpretive rule on Civil Penalties Factors, I proposed a number of changes to provide more certainty for the regulated community and to ensure that, while the overall civil penalty ceiling was raised, "technical" violations, such as incorrect paperwork, would not be treated the same way as more serious violations, such as failures to meet safety standards. This is one area of the statute that was not too prescriptive, and a middle-ground could have been reached.[10]

- ***Definition of Children's Product*** – The CPSIA applies to all "children's products", statutorily defined as products "designed or intended primarily for children 12 years of age or younger." To assist manufacturers to identify which of their products are subject to CPSIA requirements, the Commission published a Notice of Proposed Rulemaking defining "children's products." The comments the Commission received in response made clear that the parameters we had tried to set in the proposed definition were not helpful to most manufacturers that produce children's products intended either for ages 10-12 or for an age range falling both inside and outside the upper age limit of 12. They therefore asked for clarification and more specific direction. After receiving these comments, the Commission had a chance to put a much narrower "fence" around the scope of covered products—or to at least define clearer boundaries. Instead, the Majority voted for a Final Rule that left in place a vague definition that has led to confusion among the regulated community[11] and provided insufficient guidance to CPSC staff[12] in their efforts to enforce children's product safety standards.

- ***"Children's product safety rules"*** – The CPSIA requires third-party testing for compliance with all "*children's* product safety rules." Prior to the CPSIA, the Commission promulgated numerous "*consumer* product safety rules", such as those governing carpets and rugs, vinyl, clothing textiles and mattresses. Over my objection, the Commission's Majority has required any such products intended for use in a children's room to be third party tested to those general consumer product safety rules. For instance, a rug with the image of a Disney character and intended

[10] http://www.cpsc.gov/pr/northup03102010.pdf
[11] http://www.cpsc.gov/pr/northup09292010.pdf
[12] Justin Pritchard, "Feds dismiss need to recall lead drinking glasses," *Associated Press*, December 11, 2010, http://news.yahoo.com/s/ap/20101211/ap_on_be_me/us_cadmium_lead_glassware

for a child's room that the CPSIA clearly required to be third-party tested to lead and phthalates limits must, because of this interpretation, now also be third party tested to the rug flammability standard; but a blue rug in the living room does not. I believe a clear distinction can and should be made between "children's product safety rules" and more general "consumer product safety rules." Fundamentally, no safety improvement is attained by requiring the third-party testing of a lamp or rug based on its design, when there is a greater risk that a rug will encounter a fire hazard in a kitchen or adjacent to the living room fireplace than in a child's room. And children play throughout the house. The CPSIA defined children's products as those primarily designed or intended for children under 13. "Children's product safety rules" should be consistently construed to mean safety rules that relate exclusively to children's products, and not to products intended for general use and governed by a longstanding consumer product safety rule. The Commission did not have to adopt a contrary view—and there is no risk associated with these products that necessitates *new* third-party testing requirements.[13]

- ***Public Database***: I proposed an alternative database rule that addresses the concerns I raised above and would have made the database a more accurate source of information for consumers. The Commission's Majority instead passed a rule that went well beyond the statute's requirements, allowing "anyone" to submit reports of harm—even advocacy groups, attorneys, random bystanders, and, as has actually occurred, people perusing the internet that may not have firsthand knowledge of the incident. In total, the Commission Majority's database rule ensures that the database will be filled with inaccurate reports of harm that will be useful only to advocacy groups and trial attorneys, and will be time consuming and costly to manufacturers--particularly small businesses.

- ***Reduction to 100 ppm of Lead***: The CPSIA banned as a hazardous substance children's products containing over 300 ppm of lead. It also provides that children's products containing over 100 ppm of lead shall be treated as a banned hazardous substance beginning on August 14, 2011, "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." On July 13, 2011, the Commission voted 3-2 that there is no product or product category for which 100 ppm is not technologically feasible. The Majority reached this decision despite substantial evidence to the contrary. Commission staff advised that the economic impact of reducing the limit to 100 ppm is a factor in determining the technological feasibility of doing so. In addition, staff identified significant "economic impacts that are likely to occur", including: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the

[13] http://www.cpsc.gov/pr/northup07122010.pdf

substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard. With respect to any potential counterweight to this economic harm, Commission staff concluded that the "overall contribution of" products with lead content between 100 ppm and 300 ppm "to lead exposure in children is minimal." Notwithstanding staff's acknowledgment that reducing the lead limit to 100 ppm will cause substantial economic harm with no offsetting improvement in product safety, the Commission's majority voted to reduce the standard.

In addition to these past regulatory actions with which I disagreed, I also believe the Commission's ongoing approach to regulating is fundamentally flawed. The President's Executive Order No. 13579 encourages independent agencies to perform cost-benefit analyses before imposing new regulatory burdens that could undermine the nation's economic recovery without sufficient justification. This Commission had steadfastly refused to do so, yet some of my colleagues routinely rely on the absence of "data" to justify their refusal to consider the adverse economic consequences of the Commission's regulatory actions. Requiring the Commission to obtain the necessary data and to limit its rulemaking to decisions whose benefits justify their costs would go a long way toward avoiding future regulatory overreach.

Questions for the Record

Subcommittee on Oversight and Investigations
Committee on Energy & Commerce
United States House of Representatives
"The Views of the Independent Agencies on Regulatory Reform"
July 7, 2011

Answers from
The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
August 15, 2011

1. In Chairman Leibowitz's testimony he said that the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all of the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at the FCC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them?

I operate under the philosophy that Congress should tell us what to do, and not the other way around. Given your solicitation of suggestions, however, I will start by raising several possible statutory changes to improve the FCC before moving on to possible procedural reforms.

Twenty-first century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Whether such material arrives over coaxial cable, copper wires, fiber or radio waves is of little consequence to most consumers so long as the market's supply of products and services satisfies demand. Legacy statutory constructs, however, have created market distorting legal stovepipes based on the regulatory history of particular delivery platforms. While consumers demand that functionalities and technologies converge, regulators and business people alike are forced to make decisions based on whether a business model fits into Titles I, II, III, VI, or none of the above. As Congress contemplates FCC reform, it may want to take the current marketplace into account and consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm.

Other statutory changes could include modernizing the Sunshine in Government Act to increase our efficiency and spirit of collaboration while preserving openness and transparency.

Additional suggestions for statutory amendments are listed below:

Reform of the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 et seq.)

- The RFA requires an agency to perform an analysis of the effect of proposed and final rules on small entities, including what steps have been taken to minimize the burden on small businesses.

- The RFA has been ineffective in reducing the implementation of burdensome or overly-regulatory rules.

- Without a cost-benefit standard or mandate to prevent rules that are burdensome, compliance entails creating a report that merely reiterates the boilerplate analysis in the notice of proposed rulemaking or order.

- The RFA should be either eliminated or modified to prevent costly and unnecessary rules.

Forbearance Authority (47 U.S.C. § 160) (Section 10)

- Section 10 of the Telecommunications Act of 1996 mandates that the Commission "shall forbear" from applying any regulation or statutory provision to "a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services" if the agency determines enforcement of such requirement "is not necessary" to ensure that charges and practices are reasonable and "not necessary for the protection of consumers," and that forbearance is consistent with the public interest.

- Given the convergence in the communications industry, it makes more sense for the FCC to review regulations applying to all providers under its jurisdiction, not just carriers and providers of telecommunications services. Congress could consider amending the Act to require a broader and more comprehensive approach.

Section 11 Biennial Review (47 U.S.C. § 161)

- Section 11 of the Telecommunications Act requires the FCC to review every two years those regulations that apply to providers of telecommunications services to determine "whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition,"[1] and to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[2]

- Unfortunately, these reviews have not resulted in much action to actually eliminate rules. As such, the reviews are burdensome and unnecessary. I recommend that Congress amend this section so that following each biennial review, the FCC is compelled to move forward within a specific timeline to repeal various rules or to justify why repeal is not necessary.

- Furthermore, the section only requires the FCC to review regulations that apply to providers of telecommunications services. Given the convergence in the communications industry, it makes more sense for the FCC to review regulations

[1] 47 U.S.C. §161(a)(2).

[2] 47 U.S.C. §161(b).

applying to all providers under its jurisdiction. Congress could consider amending the Act to require a broader and more comprehensive approach.

- Additionally, Congress could amend the statute to require the FCC to conduct the review under the presumption that a rule is not necessary unless the FCC finds compelling evidence to the contrary.

Set-Top Boxes (47 U.S.C. § 629)

- Section 629 requires the Commission, in consultation with standards-setting organizations, to adopt regulations designed to assure the competitive availability of video navigation devices, such as set top boxes.

- Section 629 should be modified to promote competitiveness and innovation, and to ensure our rules do not hinder the marketplace.

- The government does not have a great track record in fashioning detailed technical mandates. For instance, in the case of CableCARD technology, the industry continues to innovate; however, the industry's work on many enhancements, such as downloadable security, has largely stalled as a result of the FCC's regulations.

Statutory Requirements for Various Reports

- Various statutory provisions require the FCC to file annual reports on various topics; such as, the Wireless Competition Report,[3] Satellite Competition Report,[4] Section 706 Report,[5] and Video Competition Report.[6] Preparation of each is a monumental and costly undertaking.

- Rather than requiring that the Commission submit these reports annually, Congress might consider amending the Act to require biennial submissions. For

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[3] *See* The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c).

[4] *See* Pub. L. No. 109-34, 119 Stat. 377 (2005), which amended the Communications Satellite Act of 1962 and is codified at 47 U.S.C. § 703.

[5] *See* 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 *et seq.*

[6] *See* Pub. L. No. 102-385, 106 Stat 1460 (1992). Congress imposed an annual reporting requirement on the Commission in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") as a means of obtaining information on "the status of competition in the market for the delivery of video programming." *See also* 47 U.S.C. § 548(g).

example, filing each sometime within the first quarter of odd-numbered years would allow each incoming Congress to have fresh data at hand for any possible legislative considerations. Moreover, this amendment would remove the Commission from what sometimes seems like perpetual reporting mode.

The 70/70 Benchmark (47 USC § 612(g))

- Provides the Commission with the authority to promulgate additional cable rules to provide diversity of information sources when cable systems are available to 70 percent of U.S. households and are subscribed to by 70 percent of the households to which such systems are available.

- Should be reconsidered in light of the modern competitive marketplace.

- Concerns of a cable monopoly hindering the delivery of diverse programming has been eliminated as a result of deregulatory policies that have encouraged investment and new entry by wireline and satellite providers, in addition to Internet-supplied content.

2. Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

"Net Neutrality" Rules

- For the first time ever, the FCC imposed network management rules on the Internet.

- The rules are unnecessary at best, and will deter investment in badly needed next-generation infrastructure at worst. There has been no evidence of systemic market failure that justifies these overly burdensome regulations.

- Language in the "net neutrality" order itself concedes that the Commission did not conduct a market power analysis or make a market power finding.[7]

- Even though the FCC adopted the "net neutrality" rules last December, they have yet to become effective. In the interim, America's Internet remains open and freedom-enhancing, as it *always* has been.

[7] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, n. 49 (2010) ("Open Internet Order").

Equal Access Scripting Requirement

- A number of phone companies are still required to inform a customer seeking a new local exchange service provider that the customer can receive long distance phone service from another carrier and, upon request, must read aloud to the customer a list of available independent long-distance companies.

- This requirement is an old vestige from the break-up of the AT&T long-distance monopoly. Ma Bell's long-distance arm was declared "non-dominant" way back in 1995, and the long distance market has been competitive for almost 16 years, yet some of our antiquated rules live on.

- While the larger Bell companies and their successors were granted relief from this requirement years ago, it is *smaller* phone companies that must continue to bear the burden of living under them.

Cost Allocation Requirements and Automatic Reporting Management Information System Mandates

- Only the smaller non-Bell companies are still required to follow the cost allocation requirements and ARMIS (Automatic Reporting Management Information System) reporting mandates.

- For carriers living under flexible price cap rules, rates are not dependent on costs and therefore such rules do not make sense. Also, considering that these carriers operate in an environment that is more competitive than a few years ago, these rules are not necessary.

Affiliate Transaction Rules (47 CFR § 32.27)

- These rules require only the smaller non-Bell companies to track the valuation of assets that are transferred between regulated and nonregulated affiliates. The larger Bells are no longer required to follow these requirements.

- For carriers living under flexible price cap rules, rates are not dependent on costs and therefore such rules do not make sense. Also, considering that these carriers operate in an environment that is more competitive than a few years ago, these rules are not necessary.

Continuing Property Record Requirements (47 CFR §§ 32.2000(e),(f))

- Requires incumbent LECs to maintain detailed recordkeeping of their plant accounts such as descriptions of property, and location of property and original cost data.

- These rules have primarily served for states in state ratemaking proceedings, not for FCC purposes. Furthermore, each incumbent LEC has a vested interest in maintaining accurate property inventory, absent these detailed requirements.

- Additionally, over a decade ago, the Commission tentatively concluded that these requirements should be eliminated.[6]

CMRS Spectrum Aggregation Limit (47 CFR § 20.6)

- When in effect, limits the amount of spectrum a given carrier was able to hold in a given market area.

- Rule sunset as of 2003, yet still remains in the CFR.

Rules Applicable to the Provision of CMRS Service by ILECs (47 CFR § 20.20)

- Unique regulatory requirements established for ILECs providing wireless services.

- Rule sunset as of 2002, yet still remains in the CFR.

Mutually Exclusive Applications (47 CFR § 22.131)

- Procedures for resolving mutually exclusive license applications.

- Provisions are moot because the FCC uses auctions to assign licenses based on the submission of mutually exclusive applications.

Competitive Bidding Procedures (47 CFR §§ 22.201, 22.213, 22.225, 22.227, 22.228)

- Procedures for auctioning private mobile services spectrum.

- Duplicates competitive bidding procedures set forth in Part 1 of the Commission's rules.

Antenna Structures (47 CFR § 22.365)

- Requirements for installing and maintaining antenna structures.

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[6] *See 2000 Biennial Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19911, ¶212 (2001) ("[W]e tentatively conclude that we should eliminate our detailed [continuing property records] rules in three years.").

- Duplicates antenna structure requirements set forth in Part 17 of the Commission's rules.

Mutually Exclusive Applications in the Paging and Radiotelephone Service (47 CFR § 22.509)

- Procedures for resolving mutually exclusive license applications.
- Provisions are moot because the FCC uses auctions to assign licenses based on the submission of mutually exclusive applications.

Responsibility for Mobile Stations (47 CFR § 22.571):

- Requires base station licensees to maintain responsibility for mobile stations.
- Duplicates a general provision in Section 1.903(c) of the Commission's rules.

Comparative Renewal Proceedings (47 CFR § 24.16)

- Provides preference in comparative renewal proceedings for licensees who have demonstrated substantial service.
- Licensees are no longer subject to the comparative renewal process. FCC assigns licenses by auction.

Cost Sharing Requirements for Broadband PCS (47 CFR §§ 24.239-253)

- Rules applicable to cost apportionment associated with post-auction clearing of incumbents from PCS band.
- The cost-sharing plan sunset for all PCS entities in 2005, yet these rules remain in the CFR.

Oppositions to Narrowband PCS Applications (47 CFR § 24.430)

- Procedures for submitting oppositions to applications submitted as part of the competitive bidding process.
- Duplicates Section 1.2108 of the Commission's rules.

Mutually Exclusive Narrowband PCS Applications (47 CFR § 24.431)

- Procedures for resolving mutually exclusive applications.
- Provisions are moot because the FCC assigns licenses by auction.

Responsibility for SMR Mobile Stations (47 CFR § Section 90.656)

- Requires base station licensees to maintain responsibility for mobile stations.
- Duplicates a general provision in Section 1.903(c) of the Commission's rules.

Media Ownership Rules (47 CFR § 73.3555)

- These rules – including the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, the local television ownership rule, the local radio ownership rule, and the dual network rule – prohibit the ownership of multiple broadcast/newspaper entities.
- Should be modernized to reflect the current competitive marketplace and economic and technological realities.
- Should consider eliminating the newspaper-broadcast cross-ownership rule.

Leased Commercial Access (47 CFR § 76.970)

- Requires cable operators to lease channels to programmers not otherwise carried on a cable system. In January 2008, the Commission released an order, to which I dissented, that changed the rate structure. These rules are not yet effective due to a stay issued by the Sixth Circuit Court of Appeals and Paperwork Reduction Act delays.
- Should re-evaluate the rate structure, which causes cable operators to subsidize commercial leased access users and determines rates based on the content delivered.
- The rates adopted will result in a loss in the diversity of programming as cable operators are forced to drop lesser-rated channels in favor of leased access requests seeking distribution distorted below cost and market rates.
- The majority also adopted customer service standards, complaint procedures, and reporting requirements, which are all aimed at propping up a regime that is past its prime.

Fairness Doctrine

- Despite the fact that the FCC stopped enforcing the Fairness Doctrine in the late 1980's because the doctrine regulated political speech and is therefore patently unconstitutional, the Fairness Doctrine is literally still codified in the CFR.[9]

- Fortunately, Chairman Genachowski recently informed your committee that he supports removing references to the Fairness Doctrine (and its corollaries) from the CFR and intends to move forward on this effort in August. I look forward to helping him achieve that goal.

Form Requirements

- The FCC has too many forms. For example, there is Form 603; Form 611-T; Form 175; Form 601; Form 492; Form 477; Form 323; and Forms 396, 396-C, 397 and 398, among others.

- To the Chairman's credit, he has launched an initiative which seeks to reform the FCC's data collection processes. I support these efforts and hope that this exercise results in comprehensive reform of the FCC's burdensome data collection procedures as opposed to simply shaving them around the edges.

- While a few forms may be necessary, many could be eliminated or simplified. Several forms require companies to submit data that is no longer needed or is supplied elsewhere.

Enhanced Disclosure Form (Form 355)

- The Enhanced Disclosure Form is a specific example of a form that should be eliminated entirely. The form was previously adopted by the Commission for the purpose of obtaining detailed information from broadcasters about community-focused programming on a quarterly basis.

- Has not become effective due to Paperwork Reduction Act delays.

- Should be eliminated as suggested in the Information Needs of Communities Report. Risk remains that a replacement might simply resurrect the Enhanced Disclosure form's pointless and burdensome mandates.

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[9] 47 CFR § 73.1910 ("broadcasting"); 47 CFR § 76.209 ("origination cablecasting"). *See also* 47 CFR §§ 76.1612-13 (Fairness Doctrine corollaries applied to origination cablecasting).

- Costly, burdensome, and unnecessary in today's highly competitive video market, which motivates broadcasters to respond to the interests of their local communities.

Pending Regulations

Finally, Chairman Genachowski has initiated some proceedings that will help clear away some of the regulatory underbrush, and he should be commended for those efforts. I look forward to continuing to work with him and all of my colleagues on these matters. In the meantime, however, Chairman Genachowski has also initiated many proceedings, through notices of inquiry, notices of rulemaking, or staff-prepared public notices, which seek comment on proposed new regulations.

Although I have supported opening these dockets, I have likewise expressed concern about the seeming rush to regulate. I have urged that the FCC develop a solid record, including a thorough cost-benefit analysis, and allow meaningful public comment prior to forming conclusions and implementing any regulations. While it may be tempting to shrug off regulatory costs, the reality is that businesses pass on their costs to consumers. We all pay for the cost of government mandates. As such, it is important to proceed carefully.

Some examples of pending proceedings are:

Subject	Docket No.
Broadband Speed Survey and "Need for Speed" Information. FCC seeks comment on speed survey results and measurement of broadband speed, and also seeks comment on what kinds of "need for speed" information will be most helpful to consumers in choosing their broadband service.	CG 09-158 CC 98-170 WC 04-36
Network Survivability. FCC seeks comment on current efforts in the industry to ensure continuity during major disasters, existing reliability standards, and the FCC's role and legal authority as to these issues.	PS 11-60; 10-92 EB 06-119
Uniform License Renewal, Discontinuance of Operations, and Partitioning/Disaggregation. FCC seeks comment on creating new requirements for license renewals, to establish uniform consequences for service discontinuance, and to clarify construction obligations for spectrum licensees.	WT 10-112

Subject	Docket No.
Broadband Data Collection. In the April 2010 order, the FCC adopted rules addressing the provision of aggregate data collected from broadband service providers on Form 477. Current rulemaking proceedings propose possibly expanding data collection requirements.	WC 07-38; 09-190; 10-132; 11-10; 11-3 GN 09-51; 09-47
Deploying Aerial Communications Architecture to Disaster Areas. FCC seeks comment on deploying aerial communication architecture to disaster areas.	PS 11-15
Advanced Broadband for First Responders. FCC seeks comment on proposed rules for deployment and operation of a nationwide interoperable public safety broadband network.	WP 07-100 WT 06-150 PS 06-229
Framework for Next Generation 911 Deployment. FCC seeks comment on how Next Generation 911 ("NG911") would enable the public to obtain emergency assistance by means of advanced communications technologies' beyond traditional voice-centric devices.	PS 10-255
E911 Location Accuracy Requirements. FCC requires wireless licenses to satisfy E911 Phase II location accuracy and reliability standards on a county or PSAP-based geographic level basis. FCC also seeks comment on further improvements to the location capability of 911 and E911 services (including indoors and vertically) for existing and new voice communications technologies and new broadband technologies associated with deployment of NG911 networks.	PS 07-114 WC 05-196
"*Bill Shock*." FCC proposes to require mobile service providers to provide new usage notifications and additional disclosures so that consumers would not receive unexpected charges on their bill; *i.e.*, "bill shock."	CG 10-207; 09-158
International Broadband Comparison. FCC seeks comment on improving the International Comparison required by Broadband Data Improvement Act.	IB 10-171
Roadmap for Cybersecurity. FCC seeks comment on creation of cybersecurity roadmap to identify vulnerabilities to communications networks in preparation for potential cyberthreats.	PS 10-146 GN 09-51
Robocalls/TCPA. FCC proposes restricting automated telephone calls ("robocalls") by requiring sellers and telemarketers to obtain written consent from recipient – even where the consumer has established a business relationship – before making these calls.	CG 02-278
Special Access. FCC seeks comment on pricing for access to high-capacity facilities.	CC 05-25
Cramming. FCC seeks comment on proposed rules that could alert consumers to unauthorized charges being "crammed" on their bills; could potentially lead to regulation of billing services.	CG 11-116
Outage Reporting for Interconnected VoIP and Broadband ISPs. FCC seeks comment on new requirements for these providers in the event of a service outage.	PS 11-82

Subject	Docket No.
Lifeline and LinkUp Reform and Modernization. FCC seeks comment on ways to reform the Lifeline and Linkup programs to reduce waste, fraud and abuse; including a proposal for a federal standard as a minimum threshold for verifying continued eligibility in the program and proposals to extend the subsidy to support broadband.	WC 11-42
Video Device Competition/AllVid. FCC seeks comment on rules to provide competition in the retail market for set-top video devices that are compatible with all multichannel video programming distributor ("MVPD") services.	MB 10-91 CS 97-80 PP 00-67
Program Carriage. FCC seeks comment on various revisions and clarifications to the program carriage rules, which prohibit, amongst other things, MVPDs from discriminating against unaffiliated programming vendors when determining carriage or negotiating program carriage agreements.	MB 11-131
Media Ownership. As part of the 2010 quadrennial review, the FCC seeks comment on the state of the media industry and the multiple ownership and cross ownership rules affecting radio, TV and newspapers.	MB 09-182
Broadcast Localism. FCC seeks comment on various proposals – including permanent community advisory boards, renewal guidelines, and a requirement to have a 24 hour physical presence in a station – to ensure that broadcasters are addressing the needs of their local communities.	MB 04-233
Retransmission Consent. FCC seeks comment on modifications to the rules governing good faith negotiations when broadcast television stations elect retransmission consent negotiations as opposed to exercising their must-carry rights.	MB 10-71
Program Access and Tying Arrangements. FCC seeks comment on revisions to the program access rules, which pertain to the ability of an MVPD to access video programming, and retransmission consent rules in light of program tying arrangements.	MB 07-198
Digital Audio Broadcasting Systems. FCC seeks comment on the appropriate treatment of subscription-based radio services and whether digital radio stations should be subject to additional public interest obligations beyond those that apply to analog stations.	MM 99-325
Sponsorship Identification. FCC seeks comment on its sponsorship identification rules and the incorporation of commercial messages into programming; *i.e.*, "embedded advertising."	MB 08-90

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN

August 17, 2011

The Honorable Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Stearns:

Thank you for the opportunity to testify before the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce on July 7, 2011 on the views of the independent agencies on regulatory reform. Enclosed are the responses to the post-hearing questions that Representatives Stearns, Barton, Myrick and Gardner have submitted. Commissioner Moeller has informed me that he concurs in my responses to the questions that were posed by the Honorable Cliff Stearns and the Honorable Joe Barton, as those questions were also directed to Commissioner Moeller.

Should you need additional information, please do not hesitate to contact me.

Sincerely,

Jon Wellinghoff
Chairman

Cc: Diana DeGette, Ranking Member

The Honorable Cliff Stearns

1. **In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." It would be useful to this Committee if all of the agencies in our jurisdiction performed such an analysis. Can you please provide us with a list of any such statutes you have identified to date at FERC, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

Answer: Below are several parts of the Federal Power Act (FPA) that I believe could be eliminated or modified to reduce burden.

FPA section 305(c)

- Section 305 of the FPA concerns officials dealing in securities and interlocking directorates. FPA 305(c) has two reporting requirements. The first is to report a broad range of interlocking officer positions and directorships. The only apparent use for this provision is to serve as a check to ensure that those required to file interlock applications under the much more narrow section 305(b) did so. The second is a related requirement to report each public utility's 20 largest purchasers of its power. I also do not see that this provision of the Federal Power Act serves much purpose. I believe that these provisions could be eliminated, as they are not typically used by this Commission to carry out its functions, and they do not appear to be useful to the general public.
- In addition, Part 46 of our regulations is devoted to the implementation of these two statutory reporting requirements. If FPA section 305(c) is repealed, then the Commission could eliminate Part 46 in its entirety.

Modification to the Commission's hydropower certification statutes

Congress could modify the Commission's authority for licensing hydropower projects in the following ways:

- Exempt all conduit projects from Commission jurisdiction (modeled after H.R. 5922, which intended to exempt 1.5 MW or less).
- Remove projects currently holding a conduit exemption from Commission jurisdiction. In the alternative, allow projects on federal lands, if they would otherwise qualify, to be eligible for a conduit exemption.
- Clarify that 5-MW exemptions may be located at government dams.
- Extend the term of preliminary permits for 2 years if activities under the original permit were conducted with due diligence.

2. Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.

Answer: As I stated in my testimony, the Commission's practice is to engage in constant self-review to avoid red tape or unnecessary regulation that would impose undue burdens on the energy industry. Below are several actions the Commission has taken to reduce unnecessarily burdensome or duplicative regulations. In addition, I welcome the President's new executive order asking independent agencies to engage in a public effort to reassess and streamline their federal regulations and have announced that the Commission will implement the President's executive order. When that review is completed, I would be happy to share our results with you.

Revisions to Form 552

- Under the Commission's Form No. 552, natural gas market participants must annually report information regarding physical natural gas transactions that use an index or that contribute to or may contribute to the formation of a gas index. Order No. 704 required market participants to file these reports in order to provide greater transparency concerning the use of indices to price natural gas and how well index prices reflect market forces. In Order No. 704-C the Commission reduced burden on the industry by revising Form No. 552 so as to (1) exempt from reporting any unexercised options to take gas under a take-or-release contract; (2) exempt from reporting cash-out imbalance and percentage of proceeds transactions, since they were burdensome to report and provided little market information; and, (3) strike the form's references to the blanket sales certificates issued under § 284.402 or § 284.284, since they were burdensome to report and provided little market information, so as to also exempt small entities who were obligated to report solely by virtue of possessing a blanket sales certificate.

Elimination of Form 11

- Form 11 was a quarterly filing made by natural gas companies whose gas transported or stored for a fee exceeded 50 million Dth in each of the three previous years. In 2008, in revising the Commission's financial forms to carry out its responsibilities under the NGA to ensure that rates are just and reasonable, the Commission eliminated a separate filing, Form 11, to streamline the filing process, mitigating the filing burden.

Electric Quarterly Report (EQR) requirements

- All public utilities are required to electronically file EQRs summarizing the contractual terms and conditions in their agreements for all jurisdictional services (including market-based power sales, cost-based power sales, and transmission service) and transaction information for short-term and long-term market-based power sales and cost-based power sales during the most recent calendar quarter. As indicated in a notice issued June 24, 2011, the Commission will be switching the filing mechanics from an outdated, difficult-to-support software platform to a more flexibly implemented process using the current business standard of XML. In this way, the Commission will allow EQR filers to develop their own methods for

submitting this vital part of its market based rate program rather than forcing them to use a system developed almost 10 years ago.

- In order to reduce the burden on companies making corrections to previously filed EQRs, the Commission has adopted a policy of limiting those corrections to the most recent 12 reports (three years) rather than requiring corrections back to the original filed EQRs which could be as early as 2001.

Semi-Annual Natural Gas Reporting Requirements

- Sections 284.13(e) and 284.126(c) of the Commission's regulations require certain pipelines to file semi-annual storage reports at the end of each complete storage injection and withdrawal season. On December 16, 2010, the Commission in Docket No. RM11-4-000 issued a Notice of Inquiry (NOI) regarding whether and how the semi-annual storage reports required of both interstate and intrastate pipelines should be modified in light of (1) changes in the natural gas market since the Commission originally adopted the semi-annual storage reporting requirements and (2) recent improvements in the Commission's other reporting requirements. As part of this NOI, the Commission sought comment on whether to retain a revenue reporting requirement and whether certain semi-annual storage reports should be folded into another form No. 549D. The Commission is still considering comments submitted in this proceeding.

The Honorable Joe Barton

1. **I am aware of a planned hydro project at an existing dam on Lake Livingston in Texas and the license application has been pending with FERC staff for over two years. Can you check on the Livingston application and let us know when the license might be issued?**

Answer: I cannot give you an exact date for when the Commission will act on the application, because the matter is still under consideration. However, I can tell you that Commission staff issued an environmental analysis of the proposed project on February 2, 2011. Staff has all of the information necessary to complete its analysis of the proposal and is working diligently on the matter.

The Honorable Sue Myrick

1. **Due to the significant delay by the National Marine Fisheries Service in issuing a Biological Opinion for the Catawba-Wateree Hydro Relicensing process, what is stopping FERC from issuing the license for the project that reserves the right to reopen the license if/when short nose sturgeon are detected in the river basin?**

Answer: A reopener would not protect the Commission against allegations that it had violated the Endangered Species Act (ESA) by issuing a license without completing consultation as required by section 7 of that Act. Also, in the absence of an incidental take permit – which is issued in conjunction with a biological opinion -- if project

operations resulted in the taking of listed species, the Commission as well as the licensee (and possibly certain individuals) could be subject civil and criminal peoalties for violating section 10 of the ESA. In addition the license cannot be issued without action on the water quality certification from South Carolina.

The Honorable Cory Gardner

1. FERC is mandated, under the Federal Power Act, to provide rates that are "just and reasonable and not unduly discriminatory," but has instead allowed these rates in RTO markets to rise virtually unchecked.

What is FERC's view of its mandate under the Federal Power Act to ensure that wholesale electric rates are "just and reasonable and not unduly discriminatory?"

Answer: The premise of your question suggests several conclusions which are erroneous. It is suggested that FERC "...allowed...rates in RTO markets to rise..." and that FERC did so such that that rise was "...virtually unchecked." First, where competition is adequate, FERC generally does not control the rise or fall of electric rates in RTO markets. Rates in those wholesale markets are controlled by competitive market forces that are directly responsible for the level of those rates.

Next as to the "checks" on the RTO markets by FERC, the FERC oversees those markets and establishes the market rules and tariff conditions that all market participants must comply with or be subject to enforcement action and penalties. The FERC Office of Enforcement monitors the RTO markets on a daily basis and reviews market activity for signs of fraud and manipulation. Enforcement actions are brought if a market participant is not complying with the established market rules. In addition each RTO has an independent market monitor who also oversees market operations, reviews activity for instances of fraud and abuse, determines if the markets are operating competitively, and reports to the FERC Office of Enforcement. These market monitors in their annual reports to FERC for the past four years have reported that each of the RTO energy markets is competitive. So there are substantial "checks" on the RTO markets. But the purpose of those checks is to ensure that they are competitive and to prevent fraud and manipulation. There is no command and control of rates as you suggest in the wholesale energy markets. And historical data has demonstrated that such an uncompetitive system fails to provide optimum benefits for consumers.

Finally, your question seems to assume that rates have risen in the RTO markets. This is in fact not the case. Wholesale energy rates have fallen significantly across all RTOs since 2009. In particular, the chart below contrasts RTO prices for the past three years.

RTO	2008	2009	2010
ISO-NE	$97/MWh	$59/MWh	$66/MWh
PJM	$85/MWh	$56/MWh	$67/MWh
MISO	$53/MWh	$31/MWh	$35/MWh
SPP	$53/MWh	$27/MWh	$31/MWh
CAISO	$53/MWh	$38/MWh	$40/MWh
NYISO:			
Western Zone	$67/MWh	$44/MWh	$50/MWh
N.Y. City	$120/MWh	$66/MWh	$83/MWh

This reduction in rates is due to competitive forces and market fundamentals dictating rate levels. Wholesale prices dropped in recent years due in large part to a reduction in demand for electricity reflecting the economic recession. Electricity markets quickly adjusted to the fundamental reduction in demand by clearing at lower prices for consumers who were in the market, rather than requiring the time and expense of multi-month rate proceedings to adjust wholesale rates through a traditional rate case.

So in summary rates in RTO markets are controlled by competitive market forces that will cause wholesale rates to rise and in the case of the last two years fall depending on market fundamentals. Such market fundamentals work efficiently in properly designed and monitored markets. That market design and monitoring requires effective regulation such as that provided by FERC. By FERC establishing the regulatory framework enabling a fair, open and efficient competitive energy markets in the RTOs consumers will be provided the opportunity to take advantage of wholesale electric rates that are truly "just and reasonable and not unduly discriminatory." This is how competition works for the benefit of consumers.

2. A provision in the 2005 Energy Policy Act allowed for voluntary participation in RTOs by federal utilities (TVA, BPA, WAPA). However, RTO participation seems hardly voluntary when it comes to wholesale market customers. If a distribution utility or an industrial customer, for example, is in an RTO region and the transmission and generation owners in its region have decided to participate, it has no other choice but to take part in the market.

Are small utilities and industrial customers able to "opt-out" of RTO markets if they are located within the RTO's geographic footprint?

Answer: There is no requirement that any entity join (or "opt-into") an RTO or ISO. Membership in any RTO or ISO is voluntary. An entity must apply to become a member, agree to comply with the terms of the appropriate agreements, and pay any applicable

membership fee. For example, the voluntary nature of RTO and ISO membership is reflected in the Operating Agreement of PJM Interconnection, L.L.C. (PJM), which specifies that nothing in the PJM membership provisions "is intended to remove, in any respect, the choice of participation by other utility companies or organizations in the operation of the PJM Region through inclusion in the System of a Member." An entity may join an RTO or ISO and later decide to leave that RTO or ISO under terms specified in the provisions of the RTO's or ISO's tariff. For example, the NEPOOL Agreement in ISO-New England (ISO-NE) allows entities to withdraw from the RTO upon 60 days' notice.

A small utility or industrial customer that is a participant in an RTO or ISO is not obligated to purchase its electricity from the RTO- or ISO-administered markets. All participants may (and many do) purchase their power under bilateral contracts and schedule delivery of their bilateral purchases through the RTO or ISO. Bilateral contracts are fully supported within the market and a market participant does not need to opt out of an RTO or ISO to take advantage of such transactions.

In some RTOs and ISOs with capacity markets, a market participant may secure future capacity outside of the RTO or ISO market. For example, PJM administers a forward capacity market that secures a variable resource capacity requirement for the regional participants for a three-year forward delivery year. Entities may opt out of the variable resource capacity requirement in favor of a fixed-resource capacity requirement and remain participants in the RTO/ISO energy and operating reserves markets.

3. Since their creation by FERC, the RTOs themselves have become regional authorities subject to federal approval that tend to favor transmission owners and remote generators, putentially at the expense of ratepayers. Further, the stakeholder process that is supposed to guide decisions at the RTO is dominated by those entities that own the assets – namely, the power generators.

What recourse does a retail customer in an RTO region have if wholesale power and transmission rates increase without sufficient justification? What recourse does a state public service commission have?

Answer: RTOs and their decision-making processes, by FERC requirement, must be independent of control by any market participant or class of market participants. Commission policy, as detailed in Order No. 719, also requires RTOs and ISOs to be responsive to customers and other stakeholders, and to ensure that customers and other stakeholders have access to the RTO board of directors. The Commission has assessed the responsiveness of each RTO using four criteria: inclusiveness; fairness in balancing interests; representation of minority positions; and ongoing responsiveness.

Each RTO is responsible for developing its own stakeholder process, and those processes vary from region to region. The Commission encourages interested parties to act through the RTO stakeholder process to ensure that their concerns are heard and addressed. By participating in the stakeholder process, interested parties are able to assist

in shaping RTO policy on the ground floor. Many state commissions (and in four regions, associations of state commissions) participate in RTO stakeholder processes.

Any party, including retail customers and state public service commissions, may file comments on RTO rate and tariff proposals pending before the Commission, or file a complaint if they believe that wholesale power and transmission rates are unjust and unreasonable.

4. Over the past four years there have been several cases where the behaviors of certain market participants caused prices to skyrocket. Such cases included the circuitous scheduling of power flows to the NY ISO around Lake Erie that resulted in at least $100 million in excess transmission costs, non-competitive bids of three New York state generators costing an additional $2.7 million, and the Edison Mission Corporation use of a "high-offer" pricing strategy to withhold generation from the market and drive up prices.

Why has FERC chosen not to use its authority under the Federal Power Act to order disgorgement of such dollars or refunds to electric customers who were harmed by such behaviors of market participants?

Answer: The Commission uses its statutory authority to order disgorgement when it determines that: (1) the conduct of a market participant violates the Federal Power Act or other governing statute, or a rule, regulation, or order issued pursuant thereto; and (2) the violation resulted in unjust profits. Since the Commission received its enhanced civil penalty authority in the Energy Policy Act of 2005, it has ordered the payment of over $150 million in civil penalties and the disgorgement of another $35 million in unjust profits. However, in cases where the Commission determines that no violation occurred, or where the facts are insufficient to prove such a violation at trial, the Commission does not have the authority to order disgorgement. The Commission also requires the payment of refunds to electric customers when it is appropriate to do so.

With regard to the three matters mentioned above, the Commission determined either that the conduct of the market participants did not constitute a violation of the Federal Power Act, or a rule, regulation, or order issued pursuant thereto, or that the facts were insufficient to prove such a violation; and therefore, the Commission did not have the authority to order disgorgement. However, the Commission approved a settlement requiring Edison Mission to pay a civil penalty of $7 million and to spend at least $2 million on a compliance plan.

5. How does FERC expect to deter such future behaviors without ordering restitution to electric customers for the excess costs they have paid?

Answer: The Commission will aggressively seek disgorgement in any case for which it is appropriate. In those cases where a market participant's conduct does not constitute a violation and disgorgement is therefore inappropriate, the Commission will seek

alternative, prospective remedies, such as market rule changes to prohibit conduct that caused electric customers to incur excessive costs.

6. If electric customers do not receive refunds or restitution for transactions undertaken without a legitimate commercial purpose that raises prices for customers, how can the rates still meet the just and reasonable standard under the Federal Power Act?

Answer: The Commission is required to ensure that the rates under its jurisdiction meet the just and reasonable standard under the Federal Power Act through ratemaking proceedings, tariff filings, and careful review procedures. When the Commission becomes aware that a filed rate is unjust or unreasonable, the Federal Power Act only authorizes the Commission to order refunds from the point at which the relevant proceeding was initiated by a complaint or Commission order. 16 U.S.C. § 824e (2006). Likewise, when the Commission becomes aware that an existing market rule results in unjust or unreasonable rates, the Commission is authorized to amend that market rule, but it is not authorized to order market participants that have not committed violations to disgorge profits earned through legitimate business activities.

7. In recent hearings held by the Maryland Public Service Commission in October 2010, several independent builders of new generation stated that capacity markets do not provide needed long-term price stability to attract investors in new power plants.

Given that this market pays almost all revenues to owners of existing facilities and discourages new market entrants, how does FERC demonstrate that this market is encouraging competition, improving the reliability of supply, and that the rates produced meet the just and reasonable standard set out in the Federal Power Act?

Answer: PJM, which is the RTO serving Maryland, meets its reliability needs at least cost by securing capacity resources in a three-year forward auction. The PJM auction is designed to encourage competition among all capacity resources on a non-discriminatory basis, and to ensure that PJM acquires adequate capacity resources in a competitive, non-discriminatory auction, so that rates produced meet the just and reasonable standard set out in the Federal Power Act. In the annual auctions, existing and new generation resources, upgrades to existing resources, transmission enhancements, demand response, and energy efficiency compete to provide reliability of supply to consumers. To date, PJM has secured more than enough capacity to meet its needs in each delivery year at a market-clearing price that is lower than the projected cost of new entry. Capacity clearing prices have varied among different regions for some delivery years, but the actual market-clearing prices generally have been less than the projected cost of new entry in even the highest cost regions.

PJM's Reliability Pricing Model (RPM) is designed to provide the appropriate price signals when new resources are needed to meet PJM's reliability requirements. PJM is discussing with its stakeholders additional capacity auction mechanisms and changes to its open access transmission tariff that governs new entry pricing alternatives. Such changes, if adopted, would expand the role of longer-term commitments that might facilitate the building of new generation by providing more long-term price certainty for new generation to enter the capacity market.

8. **The changes to the capacity market rules in both PJM and ISO-NE that FERC has ordered will undo language in the tariffs that was negotiated through a multi-party settlement process. This will be done without a hearing or the opportunity to negotiate replacement protections.**

What is the potential impact of this action on participation by market participants, especially customer and load (demand) representatives, in future settlement processes?

Answer: On April 12 and 13, 2011, the Commission issued orders on proposed alterations to the capacity markets in these regions to address concerns over the exercise of market power in capacity auctions. Parties have filed requests for rehearing of these orders, which the Commission is currently considering. Because both of these proceedings are still pending, I cannot comment further on the specifics of these matters at this time.

Generally, the Commission encourages interested parties to participate in settlement processes starting at the beginning of the process, as this can often be the best way of ensuring that their interests are fully considered. The Commission gives a great deal of consideration to the results of settlement processes as representative of the collective views of the parties involved; however, it is ultimately the Commission's responsibility to ensure that rates are just and reasonable and not unduly discriminatory. When making our rulings, the Commission solicits and review comments from interested parties, including from customer and load representatives.

9. **EIA data shows greater levels of construction of generation capacity in non-RTO markets. A number of studies also project high levels of coal plant closures following implementation of pending EPA regulations – with greater levels of closures in RTO regions.**

Has FERC investigated this disparity, and if so, what steps is it taking to promote the construction of new baseload generation capacity in RTO markets?

Answer: No, the Commission has not conducted such an investigation. As noted in the response to question 7, RTO capacity markets are designed to secure a competition-based combination of capacity resources to meet reliability needs on a non-discriminatory basis. The various competitive market approaches to obtaining capacity are not designed to promote any particular capacity type, such as new baseload generating capacity, over any

other type of new or existing generating capacity resource, demand response, energy efficiency, or transmission capacity resource.

10. If not, is FERC concerned about the low levels of new generation construction in RTO regions given pending coal plant closures?

Answer: The Commission expects that competitive markets will provide appropriate incentives for construction of new generation. It is important to note that available data indicates that the electric utility industry has added significant amounts of generating facilities when circumstances warranted.

Federal Trade Commission

House of Representatives Committee on Energy and Commerce
"The Views of the Independent Agencies on Regulatory Reform"

July 7, 2011

Responses to Questions for the Record to Chairman Jon D. Leibowitz
From Chairman Cliff Stearns

1. **In your testimony you said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." Can you please give us a list of such statutes you have identified so far, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

Commission staff are continuing to try to identify statutes that appear to be of limited value, but that divert business or Commission resources from more pressing work. Thus far, staff have identified two statutorily mandated reports, the benefits of which do not appear to be justified by the cost required to research and produce them.

The first is a statutory requirement to issue reports on concentration in the ethanol market. Section 1501(a)(2) of the Energy Policy Act of 2005 imposes an annual requirement on the Commission to "perform a market concentration analysis of the ethanol production industry… to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior."[1] The Commission has found each year that the market is extremely unconcentrated, and that entry is easy and ongoing.[2] Therefore, these reports seems to provide little useful information.

The second is a statutory requirement for reports on college scholarship scams. The College Scholarship Fraud Prevention Act of 2000[3] requires that the Attorney General, the Secretary of Education, and the FTC jointly submit to Congress each year a report on that year's incidence of fraud by businesses or individuals marketing financial aid assistance services to consumers. Though stopping scholarship scams is an important priority, the report simply describes actions taken to address scholarship scams. Thus, the report appears to provide little valuable information.

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[1] Energy Policy Act of 2005 § 1501(a)(2), 42 U.S.C. § 7545(o)(10) (2009).

[2] Under the FTC and DOJ Horizontal Merger Guidelines, market concentration is calculated using the Herfindahl-Hirschman Index ("HHI"). The HHI measures concentration by summing the squares of each participant in a market. An HHI can be no higher than 10,000, which is reached when a market is a monopoly. The Merger Guidelines regard an HHI below 1500 as unconcentrated. Mergers resulting in an HHI of up to 1500 are unlikely to have anticompetitive effects and generally require no additional analysis. *See* U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, at 24-26, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf. The HHI in the ethanol industry is less than 700, which represents a highly unconcentrated market.

[3] Pub. L. No. 106-420, 114 Stat. 1867

The ethanol report requirement imposes some burden on business, as Commission staff must interview market participants to verify company-specific information gleaned from public sources and reformulated fuels association publications. The scholarship report requirement does not impose any burden on business. However, both reports use FTC staff resources that could be used to address other problems, and neither appears to produce much of value for Congress, businesses, or the Commission.

We would recommend Congress strike the requirements that the Commissions produce these reports.

2. **Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.**

To ensure that the Commission's regulations and compliance advice remain cost-effective, the FTC has engaged in a voluntary, systematic review program for the last two decades, scheduling all rules and industry guides for review on a ten-year cycle. Pursuant to that program, the Commission has rescinded 37 rules and guides, and made significant updates and improvements to dozens of others, since the early 1990s. Please see Attachment A the enclosed document for a complete list of rescinded and revised guides and rules.

Questions for the Record to Chairman Jon D. Leibowitz from the Honorable Brian Bilbray

1. **In a May 2011 interview, Chairman Leibowitz stated that "one of the commission's priorities is to find a pure section five case under unfair methods of competition. Everyone acknowledges that Congress gave us much more jurisdiction than just antitrust." In contrast, in 2009, the U.S. Chamber of Commerce published a 2009 article (attached) that casts doubt on the FTC's authority to expand its jurisdiction under Section 5. The Chamber stated, "The character of many of these proposals, as well as their scope and diversity, highlights key disadvantages of extending Section 5 beyond the range of the existing antitrust laws." Please comment on the Chamber's views that we should look with skepticism at the expansion of Section 5?**

Reasonable people can disagree about when the Commission should use Section 5, but no one debates that Congress intended to give the FTC broader jurisdiction than the antitrust laws. One of the advantages of using Section 5 is that since, by its nature, it is not an antitrust statute, it is much harder (if at all possible) to bring a follow-on private treble damage suit. For that reason, I strongly believe that, once it thinks these issues through, the Chamber will be more supportive of the Commission's judicious use of its Section 5 authority.

Congress established the Commission as a bi-partisan independent agency with a mandate to protect the public from unfair methods of competition. Congress intended that the Commission play a unique role in the economic life of the nation. As the Supreme Court explained in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972), in which it thoroughly

examined the legislative history of the FTC Act, Congress intended for the Commission to proscribe unfair business practices that are not condemned under the letter of the antitrust laws. Senator Cummins, one of the bill's main proponents, squarely stated on the Senate floor: "[t]hat is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law." 51 Cong. Rec. 12,454 (1914). While the vast majority of our antitrust enforcement actions involve conduct that falls within the prohibitions of the Sherman or Clayton Acts, the Commission has a broader mandate, which it discharges by challenging under Section 5 conduct that is likely to result in demonstrated harm to consumers or to the competitive process.

Indeed, Section 5 may be the only practicable means to stop some conduct that harms consumers but that cannot be reached under the antitrust laws. The Commission's recent use of Section 5 demonstrates that the Commission is committed to using that authority in predictable ways that enhance consumer welfare. For instance, the Commission has used Section 5 to prevent "invitations to collude" by fixing prices. A competitor's invitation to its nominal rival to fix prices does not violate the Sherman Act, but it serves no lawful purpose and creates an intolerable risk that price fixing will result. And even if an invitation to collude is rejected by rivals, it can undermine the process by which prices are set by independent competitors and lead to tacit coordination. The Chamber of Commerce already agrees with this as they note in their article that "there are certain, limited forms of anticompetitive conduct that may not be covered by the antitrust laws," including invitations to collude.[4]

Congress chose to give the Commission its broad mandate rather than handing the Commission a list of specific acts to be condemned as unfair because it knew that no such list could be, or long remain, sufficiently complete to protect competition and consumers. To address concerns about the fairness of not doing so, Congress limited the remedies available for violations of Section 5, and Section 5 does not provide for a private right of action. Because of the limited consequences of Section 5 enforcement, the Commission uses its Section 5 authority not to punish the wrongdoer, but to fairly eliminate the conduct that is likely to injure competition and consumers, allowing honest and competitive markets to further consumer welfare.

2. **The Association for Competitive Technology (ACT) represents a number of tech companies including Microsoft, Oracle, and VeriSign. ACT has blogged about Chairman Leibowitz's desire to expand the FTC's Section 5 authority. It wrote that Chairman Leibowitz "is arguing that requiring actual economic analysis of alleged 'harms to competition' is too high a bar for his agency. They need to be able to prevent business practices they believe are harmful to competition and consumers, even if the economic analysis suggests otherwise. And in this new regime, companies will have little guidance as to what the FTC will consider legal vs. illegal." This doesn't seem to be the right policy for the agency to be pursuing. Why is the FTC doing so?**

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[4] U.S. Chamber of Commerce, *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules "Above and Beyond Antitrust"?* Competition Pol'y Int'l, Sept. 2009, at 2.

The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers. As I explained in testimony[5] before the Senate Judiciary Committee last summer, "Of course, in using our Section 5 authority the Commission will focus on bringing cases where there is clear harm to the competitive process and to consumers." That means that any case the Commission brings under Section 5 will be based on demonstrable harm to consumers or competition. For instance, in the Intel case,[6] a unanimous and bipartisan Commission alleged that Intel's behavior harmed consumers and the competitive process in a number of ways, such as raising the price of computers; limiting consumer choice; inhibiting competition from non-Intel chip makers; reducing innovation by computer makers; and reducing the quality of industry benchmarking. Commission staff was prepared to offer proof of these harmful effects to establish that Intel violated Section 5, as well as Section 2 of the Sherman Act. As you know, Intel offered to settle the case, resulting in a Commission order eliminating the harmful conduct.

I realize that Intel is one of ACT's largest members, but for the reasons stated in Question 1, I am confident that it, like the Chamber, and even Intel in time, will be more supportive of our Section 5 enforcement mission.

3. **Following Sherman Act jurisprudence, traditionally the FTC has interpreted Section Five of the Federal Trade Commission Act to require demonstrable consumer harm to apply. But more recently the commission has been pursuing an interpretation of Section Five of the FTC Act that would give the agency unprecedented and largely-unchecked authority. In particular, the definition of "unfair" competition wouldn't be confined to the traditional measures – reduction in output or increase in price – but could expand to, as one commentator put it "just about whatever the agency deems improper." Why is the FTC pursuing what this commentator called "largely-unchecked" authority?**

Congress created the FTC and gave it authority under Section 5 to combat unfair methods of competition. The Supreme Court has on more than one occasion upheld the FTC's authority to use Section 5 to protect competition and consumers.[7] We use this authority to challenge anticompetitive conduct that harms or is likely to harm the competitive process, thereby harming consumers through higher prices, reduced quality and service, and fewer choices. The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers. Its authority is not "unchecked," as federal courts review appeals of FTC cases and ultimately decide the reach of Section 5.

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[5] Prepared Statement of the Federal Trade Commission, "*How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy*," before the Subcommittee on Antitrust, Competition and Consumer Rights of the Senate Judiciary Committee (June 9, 2011), *available at* http://www.ftc.gov/os/testimony/100609dynamiceconomy.pdf

[6] *In the Matter of Intel Corporation*, Docket No. 9341, Administrative Complaint dated December 16, 2009 *available at* www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

[7] FTC v. Sperry & Hutchinson, 405 U.S. 233, 240 (1972). Also, the Supreme Court observed in Indiana Federation of Dentists that the "standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons." FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986).

The Commission uses this authority when conduct and consumer harm cannot be addressed through the antitrust laws. We have an obligation to use this authority judiciously - and I think we have. On this point, our actions speak for us. For example, recently in N-Data, we used Section 5 to stop a "patent troll" from holding the computer industry hostage after that firm reneged on a commitment to a standard setting body. Because the industry relied on the commitment made by a previous owner of the patent and used the patented technology in the standard, the misconduct did not cause the firm's monopoly power and could not have been subject to the Sherman Act. The Commission stopped the conduct using section 5 because the conduct threatened to harm consumers by impeding the standard-setting process and the adoption of the standard in question. As industry participants Cisco, Oracle, IBM and Sun noted in their comment to the Commission in response to the N-Data order: "We welcome the Commission's use of its broad authority under Section 5 of the FTC Act against abusive conduct with regard to patents implicated in standards development processes. The circumstances alleged in the N-Data complaint and accompanying documents exemplify how there may well be abuse of this kind that threatens serious injury to [standards development organizations] participants and to the consuming public but that may be difficult to reach under established Sherman Act standards."[8]

We also used our Section 5 authority in the Intel case,[9] specifically to deal with alleged deception on Intel's part that skewed competition in its favor. In my opinion, this is a great example of how Section 5 allows the Commission to address both deceptive and unfair methods of competition. We also used our Section 5 authority in our recent case against U-Haul.[10] U-Haul is an important case because it shows precisely why Section 5 authority is necessary. We alleged that U-Haul's parent company had attempted to collude with its competitor, Budget, to raise prices in the truck rental market. This is clearly conduct that ought to be prohibited - but the Sherman Act addresses actual collusion, and not mere "invitations to collude." Section 5 provided the right means to stop U-Haul's unilateral anticompetitive conduct before it resulted in a completed Section 1 violation. Commission votes on Intel and U-Haul were unanimous and bipartisan.

4. **Gary Shapiro, the CEO of the Consumer Electronics Association (CEA), recently made the following statement regarding a high profile announcement from the FTC: "The fact that any given company is big or successful does not inherently make it bad. Unfortunately, in America it seems that our most successful and innovative firms attract the most intrusive regulatory scrutiny. These expensive, drawn-out investigations deter innovation, siphon money from productive uses, and place additional burdens on those trying to grow our economy. We urge the FTC to conduct its investigation narrowly and swiftly, and let Google get back to the critical business of innovation and job creation." Please respond to that quote? Whether in Google's case or any other, are successful**

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[8] Comment of Cisco Systems, Inc., International Business Machines Corporation, Oracle Corporation and Sun Microsystems, Inc., In the Matter of Negotiated Data Solutions, File No. 051 0094, *available at* http://www.ftc.gov/os/comments/negotiateddatasol/534241-00012.pdf at 3.

[9] In the Matter of Intel Corporation, Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/index.shtm.

[10] In the Matter of U-Haul International, Inc., File No. 081 0157, *available at* http://www.ftc.gov/os/caselist/0810157/index.shtm.

companies attracting "the most intrusive regulatory scrutiny" and is that a good thing for the U.S. – especially given current economic conditions? What message does that send to foreign antitrust authorities about how they should conduct investigations?

I cannot comment directly on any particular matter, but I can say that we take our responsibilities to enforce the antitrust laws without placing undue burdens on businesses very seriously. Moreover, Mr. Shapiro is of course right: the fact that a company is big or successful or acquisitive does not inherently make it "bad" – nor should it.

But an investigation is a dynamic process. Our staff works closely with parties subject to investigation to gather information quickly and efficiently. Staff negotiates the scope of information required, and modifies and limits information requests as it learns facts that enable it to refine the focus of our investigations. And we have an internal appeals process so that parties may appeal to the Commission any compulsory process requests that they feel are overbroad. Our staff makes itself readily available to meet with parties subject to investigation. To provide transparency to our investigations, staff explains its theories of competitive harm. This gives the parties opportunities to make presentations and provide evidence to explain why they think staff may be wrong.

At the same time, we must investigate credible complaints of anticompetitive conduct and gather evidence needed to enforce the antitrust laws to their full extent to protect competition and consumers from undue harm. We protect competitive markets so that companies of all sizes have the opportunity to be successful and innovative. But antitrust law is concerned with the wrongful acquisition or maintenance of substantial market power, and so it is not surprising that large and successful enterprises may be subject to scrutiny at times. We incorporate sound economic theories into our analyses and assessments of business practices, and we strive not to interfere unduly in the competitive process and to carefully consider economic justifications for business conduct. Even when a business practice may on its face appear to be anticompetitive, the business may have a sound economic justification for the practice which may create efficiencies and allow it to compete more aggressively to provide value to consumers. If we do not have evidence that conduct is likely to create harm to competition or consumers, we will not bring an enforcement action.

We promote these same principles in our international relations. We work with our foreign counterparts to promote convergence and cooperation through organizations such as the ICN and OECD. These programs have promoted more efficient and economically sound antitrust enforcement worldwide.

5. **Prior to Google's announcement of an FTC investigation into its competitive practices there were a lot of news stories about the battle between the FTC and the DoJ over which agency would get to investigate the company. In fact, Assistant Attorney General for Antitrust Christine Varney questioned whether two agencies should have antitrust review powers. She stated "I would leave to Congress how they would like to resolve the overlapping and sometimes inconsistent jurisdiction between the agencies... I think what business does need is clarity, certainty and understanding of the legal**

framework within which their deals will be evaluated." Do you think that the overlapping jurisdictions of the FTC and Department of Justice – and the fights that they produce – are a good thing for American businesses and consumers? If not, how would you propose to fix it?

I believe the FTC and the Department of Justice generally work well together to promote and protect competition and the interests of American consumers and businesses. Both agencies have areas of expertise, and the differences in their organizational structures are deliberate decisions by Congress and provide certain benefits. For example, the FTC was created by Congress as an independent agency with expertise in both consumer protection and antitrust. One of the principal benefits of the FTC is that it is bi-partisan and our decisions require consultation and consensus. That means that our enforcement efforts do not change much as we go from administration to administration. Further, because Congress wisely charged the Commission with competition and consumer protection enforcement, we have a broad perspective that enhances our work. The FTC also was chartered by Congress to use non-litigation activities, such as issuing reports, performing empirical studies, and advocating for pro-competition reforms with other government agencies, to support and strengthen the agency's competition and consumer protection missions.

This year, the agencies worked closely together on several joint policy projects to provide transparency and predictability for businesses subject to the antitrust laws. Last August, FTC and DOJ issued revised Horizontal Merger Guidelines, a core document that provides businesses with a clear view into how the agencies conduct antitrust merger reviews. This year, the agencies also jointly developed a Proposed Antitrust Enforcement Policy relating to cooperation among health care providers organizing Accountable Care Organizations under the Affordable Care Act. These joint statements reflect a high level of consensus and cooperation, and serve as models for competition agencies throughout the world.

To be certain, there are occasional clearance disputes over which agency is in the better position to investigate a matter. In most instances, one or the other agency has greater expertise in the industry of potential concern due to a previous investigation, and clearance is given to that agency right away. But in grey areas, such as where neither agency has conducted an investigation in the past or where both have, both agencies can make a claim that a related investigation gives them a head start on the facts and issues that are likely to arise. The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly, so that one agency can get started on the investigation and minimize any burden on the parties. Recently, as most all observers of the antitrust agencies have acknowledged, clearance disputes have been rare and are handled quickly.

6. **Some people have criticized the FTC's administrative adjudication process as unfair. In fact, the Commission has told Congress that the last time the Commissioners ruled against their own lawyers was in 1995. 1995 – Clinton's first term and the year Yahoo! Was incorporated. Does the fact that neither the ALJ nor the Commission has ruled against its own attorneys in over 16 years cause you any concern about the process being fair and open?**

I believe the Commission's administrative process is open and fair, mainly because Congress built in several fail-safe features when it created the agency. As an independent, bi-partisan agency with law enforcement authority, the Commission, through its career staff, investigates potential law violations and issues a complaint only if a majority of the Commission itself finds that there is reason to believe that a law within its authority has been violated. Depending on the violation, the Commission then initiates a case in federal court or in its own administrative process where the Commission's allegations are tested by an independent administrative law judge and the defendants have the opportunity to present contrary evidence and cross-examine witnesses. Final Commission decisions can be appealed to the federal courts.

Of course, we are always working to improve our adjudicative process. For instance last year, in response to objections that the administrative process took too long, the Commission revised its rules to streamline and improve the agency's "Part 3" adjudicative proceedings. The new rules expedite the prehearing, hearing, and appeal phases; streamline discovery and motion practice; and ensure that the Commission can apply its substantive expertise, as appropriate, earlier in the process.[11]

Questions for the Record to Commissioner William E. Kovacic from Chairman Cliff Stearns

1. **In Chairman Leibowitz's testimony he said the FTC is "seeking to identify acts of Congress that appear to be of little value but that impose burdens on businesses, particularly small businesses and the Commission." Please provide us with a list of such statutes you have identified so far, the reasons they are burdensome, why they do not provide much value, and how you would recommend changing them.**

I endorse the answer provided by Chairman Leibowitz to this question.

2. **Please also list any regulations or other Commission requirements you have identified to date as being unnecessarily burdensome or duplicative.**

I endorse the answer provided by Chairman Leibowitz to this question.

Questions for the Record to Commissioner William E. Kovacic from the Honorable Brian Bilbray

1. **In a May 2011 interview, Chairman Leibowitz stated that "one of the commission's priorities is to find a pure section five case under unfair methods of competition. Everyone acknowledges that Congress gave us much more jurisdiction than just antitrust." In contrast, the U.S. Chamber of Commerce published a 2009 article (attached) that casts**

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[11] *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice*, news release dated April 27, 2009, *available at* http://www.ftc.gov/opa/2009/04/part3.shtm.

doubt on the FTC's authority to expand its jurisdiction under Section 5. The Chamber stated, "The character of many of these proposals, as well as their scope and diversity, highlights key disadvantages of extending Section 5 beyond the range of the existing antitrust laws." Please comment on the Chamber's views that we should look with skepticism at the expansion of Section 5?

In adopting Section 5 of the Federal Trade Commission Act in 1914, Congress intended the FTC to use Section 5's mandate to play a central role in creating norms of business behavior. This role contemplated that the Commission in some instances would prohibit behavior not previously banned by judicial interpretations of the other antitrust laws. Congress expected that Section 5's elastic mandate would provide valuable flexibility to adapt federal competition policy to respond to new commercial phenomena and to incorporate new learning in economics and law. This intuition remains sound today. For a fuller treatment of this point, I refer the members of the Subcommittee to William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 Antitrust Law Journal 929 (2010) (hereinafter "*Competition Policy*").

2. **The Association for Competitive Technology (ACT) represents a number of tech companies including Microsoft, Oracle, and VeriSign. ACT has blogged about Chairman Leibowitz's desire to expand the FTC's Section 5 authority. It wrote that Chairman Leibowitz "is arguing that requiring actual economic analysis of alleged 'harms to competition' is too high a bar for his agency. They need to be able to prevent business practices they believe are harmful to competition and consumers, even if the economic analysis suggests otherwise. And in this new regime, companies will have little guidance as to what the FTC will consider legal vs. illegal." This doesn't seem to be the right policy for the agency to be pursuing. Why is the FTC doing so?**

The Commission should and does rely upon economic analysis when it uses its norms creation function under Section 5 to prohibit conduct. Modern judicial decisions have indicated that the courts will sustain the FTC's use of Section 5 only upon a showing that the behavior at issue poses actual or likely harm to competition. This is fundamentally an economic inquiry.

At the same time, I believe it is appropriate for the Commission to issue a policy statement that describes when the agency will apply Section 5 and states the limiting principles that will inform the exercise of this authority. *See* Kovacic & Winerman, *Competition Policy*, at 944.

3. **Following Sherman Act jurisprudence, traditionally the FTC has interpreted Section Five of the Federal Trade Commission Act to require demonstrable consumer harm to apply. But more recently the commission has been pursuing an interpretation of Section Five of the FTC Act that would give the agency unprecedented and largely-unchecked authority. In particular, the definition of "unfair" competition wouldn't be confined to the traditional measures–reduction in output or increase in price–but could**

expand to, as one commentator put it, "just about whatever the agency deems improper." Why is the FTC pursuing what this commentator called "largely-unchecked" authority?

FTC decisions applying Section 5 are subject to review in the courts of appeals. I am unaware of any trend in the history of Section 5 jurisprudence for courts to endorse the view that Section 5 permits the Commission to condemn "just about whatever the agency deems improper." Not since the 1960s has the FTC prevailed in the courts on a competition claim premised solely upon Section 5. Instead, it has suffered a number of defeats in such endeavors, including a famous trilogy of setbacks in the courts of appeals between 1979 and 1984. See Kovacic & Winerman, *Competition Policy*, at 942. This experience does not suggest that the FTC's Section 5 authority is "largely unchecked."

4. **Gary Shapiro, the CEO of the Consumer Electronics Association (CEA), recently made the following statement regarding a high profile announcement from the FTC: "The fact that any given company is big or successful does not inherently make it bad. Unfortunately, in America it seems that our most successful and innovative firms attract the most intrusive regulatory scrutiny. These expensive, drawn-out investigations deter innovation, siphon money from productive uses, and place additional burdens on those trying to grow our economy. We urge the FTC to conduct its investigation narrowly and swiftly, and let Google get back to the critical business of innovation and job creation." Please respond to that quote? Whether in Google's case or any other, are successful companies attracting "the most intrusive regulatory scrutiny" and is that a good thing for the U.S. -- especially given current economic conditions? What message does that send to foreign antitrust authorities about how they should conduct investigations?**

I have nothing to say about the Google matter or any other law enforcement investigation pending before the FTC.

I am aware of no evidence that supports the statement that the "most successful and innovative firms attract the most intrusive regulatory scrutiny."

5. **Prior to Google's announcement of an FTC investigation into its competitive practices there were a lot of news stories about the battle between the FTC and the DoJ over which agency would get to investigate the company. In fact, Assistant Attorney General for Antitrust Christine Varney questioned whether two agencies should have antitrust review powers. She stated, "I would leave to Congress how they would like to resolve the overlapping and sometimes inconsistent jurisdiction between the agencies... I think what business does need is clarity, certainty and understanding of the legal framework within which their deals will be evaluated." Do you think that the overlapping jurisdictions of the FTC and Department of Justice - and the fights that they produce - are a good thing for American businesses and consumers? If not, how would you propose to fix it?**

Dual, concurrent jurisdiction has created tension between the two federal antitrust agencies since the adoption of the Clayton Act and the FTC Act in 1914. This is an inevitable result of placing two public institutions within the same policy domain. One way to reduce this tension and improve the performance of the U.S. antitrust system is to permit the two agencies to make an agreement that clarifies and rationalizes the allocation of responsibilities between the two bodies. The two agencies reached such an agreement early in 2002, but the threat of congressional retribution caused these reforms to collapse. Reconsideration of such an initiative, with congressional support, would be a useful first step to place the U.S. system on a better institutional footing.

6. **Some people have criticized the FTC's administrative adjudication process as unfair. In fact, the Commission has told Congress that the last time the Commissioners ruled against their own lawyers was in 1995. 1995 -- Clinton's first term and the year Yahoo! was incorporated. Does the fact that neither the ALJ nor the Commission has ruled against its own attorneys in over 16 years cause you any concern about the process being fair and open?**

I see no unwillingness on the part of the courts of appeals to review Commission decisions carefully and reverse decisions that they believe to be improvident in substance or process. The certainty of this scrutiny has provided abundant incentives for the agency to decide its cases in a fair and open manner.

FTC Rules and Guides Previously Eliminated
in the Regulatory Review Process

PART	TITLE
19	Guides for the metallic watch band industry
21	Guides for the mirror industry
22	Guides for the hosiery industry
24	Guides for the luggage and related products industry
228	Tire advertising and labeling guides
229	Guides for advertising fallout shelters
230	Guides for advertising shell homes
231	Guides for shoe content labeling and advertising
232	Guides for advertising radiation monitoring instruments
234	Guides for the mail order insurance industry
235	Guides against deceptive labeling and advertising of adhesive composition
236	Guide for avoiding deceptive use of word "mill" in the textile industry
237	Guides against debt collection deception
241	Guides for the dog and cat food industry
242	Guides against the deceptive use of the word "free" in connection with the sale of photographic film and film processing service
243	Guides for the decorative wall paneling industry
244	Guides for the greeting card industry relating to discriminatory practices
245	Guides for the watch industry
247	Guides for the ladies' handbag industry
248	Guides for the beauty and barber equipment and supplies industry

S. HRG. 112–348

CONTAMINATED DRYWALL: EXAMINING THE CURRENT HEALTH, HOUSING AND PRODUCT SAFETY ISSUES FACING HOMEOWNERS

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

DECEMBER 6, 2011

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ONE HUNDRED TWELFTH CONGRESS

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CONTAMINATED DRYWALL: EXAMINING THE CURRENT HEALTH, HOUSING AND PRODUCT SAFETY ISSUES FACING HOMEOWNERS

TUESDAY, DECEMBER 6, 2011

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washingtan, DC.

The Subcommittee met, pursuant to notice, at 10:03 a.m. in room SR–253, Russell Senate Office Building, Hon. Mark Pryor, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS

Senator PRYOR. I'll go ahead and open this, call this meeting to order. And I want to thank all of you all for being here, I want to thank our witnesses and thank our fellow senators, to talk about this very important issue.

I want to give a special thanks to Senator Warner, because he has been the primary driver in getting this hearing scheduled today. So, Senator Warner, thank you for your leadership on this and many other things.

The purpose of the hearing today is to provide an update on the health and product safety issues associated with problem drywall installed in thousands of homes over the last decade. It's a story that we all know well. Drywall was imported from China in large volumes during the height of the housing market when domestic supplies were low. It was used extensively in Florida and Louisiana following the devastating hurricanes of 2005.

In early 2008, homeowners in Florida and Louisiana began complaining of a peculiar odor that was permeating their homes. They also reported health concerns and serious corrosion of metal in the homes. Investigators were able to trace these problems back to drywall laced with sulphur and sulphide gases.

We last examined this issue in May of 2009. At that time, we heard from the CPSC and the CDC and the EPA about the scope, and the problem of their efforts to address it. Progress has been made, but unfortunately, too many consumers, too many Americans, are left with costly repairs, uninhabitable homes, or health problems thought to be caused by the problem drywall.

In addition to Florida and Louisiana, numerous cases of problem drywall have been reported in Virginia and Mississippi, as well as

Alabama. All told, the CPSC has logged claims of health problems or metal corrosion as a result of contaminated drywall in 42 states and territories.

We hope to establish for the record how multiple Federal, state, local, and even international, governments are working together; make clear the pathways available to provide relief to affected homeowners; and identify steps we must take to ensure this problem does not repeat itself.

Today we'll hear from Mr. Neal Cohen, Small Business Ombudsman at the Consumer Product Safety Commission; Dr. Christopher Portier, Director of the National Center for Environmental Health at the Centers for Disease Control and Prevention; Mr. Bill Shelton, Director of the Virginia Department of Housing and Community Development; and Mrs. Brenda Brincku, a Florida homeowner.

I want to thank all the witnesses for being here today and thank you for your testimony.

I'm surrounded here by senators from afflicted states.

So, Senator Wicker, would you like to have an opening statement, please?

STATEMENT OF HON. ROGER F. WICKER, U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Thank you, Mr. Chairman. And, indeed, I appreciate the scheduling of this hearing today, and I appreciate your interest, and that of Senator Warner.

Tainted drywall has affected thousands of homes throughout the United States. It is most prevalent, as the Chair says, in coastal states. Florida, Louisiana, Alabama, Virginia, and my home state of Mississippi have been hardest hit.

To handle the increased demand during post-Hurricane Katrina rebuilding along the Gulf Coast, as well as during the Nation's housing boom, domestic producers expanded their facilities to increase capacity. However, despite this increased production, unusually high demand required importing drywall from sources outside North America, including China.

Dealing with this problem drywall has been a disaster for homeowners. It causes corrosion to many of their electrical components, and can potentially cause adverse health effects, including difficulty in breathing.

There have been multiple agencies working together: CPSC, CDC, EPA and HUD have been collaborating for the past 2 years to determine the flaws of the drywall—particularly how it is affecting homes and the families that live in them.

Interestingly, no causal connection has been found by the Government between the health effects experienced and the drywall. This perplexes me, and it concerns me, and I hope to learn more about the reasoning for this.

I also look forward to hearing about the CPSC's communication with Chinese officials, and whether there has been any progress on finding remediation options for homeowners.

Again, thank you, Mr. Chairman, for holding this hearing. I look forward to listening to today's witnesses, and getting a full update

on their respective progress and current views on this important issue. Thank you.

Senator PRYOR. Senator Wicker, thank you. And thank you for your interest in this, because I know we've talked about this before, and it's very important to your state and your people back home to make sure we get this right.

Senator Warner.

STATEMENT OF HON. MARK R. WARNER,
U.S. SENATOR FROM VIRGINIA

Senator WARNER. Well, thank you, Mr. Chairman, and let me thank you for holding this hearing.

I've been involved in politics, government for 20 years. I can't think of a more frustrating issue that I've been involved with than this issue of drywall, and, an issue where the affected families—and I know the CPSC's logjam, about 4,000 at this point, that have gone through some level of certification and toward a remediation process—but the numbers are much, much larger.

But, these families' lives have been basically devastated for multiple years, calling in our state, going down and visiting an affected home with Chairman Tenenbaum a couple years back. And it took less than 45 minutes for me to be in the home to come out with a burning nose, headache for the rest of the day. And yet, the families had to go through a year, two-year-plus multiple CDC studies, and then trying to get the Consumer Product Safety Commission to come up with appropriate remediation standards. And many of these families have no place else to turn. And then, if they do move, if they at some point say, you know—to see children with family—with small children living outside, having to then move out of their home, move into rental facilities. And then, on top of that, they have the enormous financial crush that comes from banks that are still expecting those mortgage payments.

We've worked with the banks to get remediation, and we've worked with the IRS to try to get some safe harbor. We're going to hear from Bill Shelton, who is, has been as concerned as any official at the state level that I have been, from Virginia and some of the activities we're trying to do in Virginia.

But, these families continue to get ping-ponged from one entity to another. I've talked to a couple of my constituents here, one who just lost their home this week, and another who has been one of the leaders in this effort. She told me she'll be losing her home on Friday.

One of the things that I think—echoing what Senator Wicker said—you know, the Chinese government, which owns some of these companies, wants to proceed in international commerce; yet they seem to be unwilling to step up and be financially responsible for faulty product that was sold into our country.

There's a German company that sold some faulty product as well, but there was a major settlement. There were, I think we're going to hear from Ms. Brincku on even some American product. But, there has to be a path here for these affected families—and I'm anxious to hear from the testimony—and also, even for families that if, at the end of the day, lose their homes, find a way to get

their, at least, their credit restored, because they got into these circumstances through no malfeasance on their own.

We did work to make sure that, I found in our area in Hampton Roads, a number of folks work for the military. They were potentially going to have not only the health care loss, the housing loss; but if they worked for the military, because they then might have, in effect, a financial blot on their record, they could lose their security clearance and then lose their jobs. So, we finally work with Defense security services to make sure that there would be, again, recognition of this so that when folks were doing their background checks, this wasn't held against them.

So, I again want to thank the Chairman and thank Senator Wicker for his interest, as well. But, this is about as frustrating an issue, again, in, when I started 20 years plus of politics, that I've ever seen. And we need to try to find some way to get these folks some answers.

Thank you, Mr. Chairman.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF HON. MARK WARNER, U.S. SENATOR FROM VIRGINIA

Toxic drywall has dramatically affected over 4,000 homeowners nationwide including many Virginians. In order to capture a portion of the hardships and difficnlties encountered by Virginians, I wonld like to include some their stories in the record for today's hearing.

Ms. Albania Tyler—Hampton, VA

In August 2010, it was discovered that 75 percent of my new home, built 2006, was contaminated with toxic Chinese drywall. The drywall has caused several major appliances to fail. We've have over ten services and repairs to our central air and heating units since 2007, electrical wiring problems throughout our home, and corrosion of our bathroom fixtures. Currently, I have no air conditioning or heat because units are not properly working. We've also have had two minor electrical fires in our refrigerator and doorbell transmitter as a result of corroded wiring. Because the odor has become so unbearable, I have been forced to move my family to rental property. I have attempted to short sale my home to a cash investor but my mortgage lender has denied the sale due to low offer. I am currently facing foreclosure.

Mrs. Karen Tompkins—Williamsburg, VA

In Jannary 2010, our family discovered our home in Braemar Creek, Williamsburg, VA, was constructed with toxic Chinese Drywall. We had three children five years and younger, and because of unknown health risks, immediately abandoned the home. We lived with relatives for several months, while awaiting resolution from our builder and worked with our mortgage company to avoid foreclosure. In order to afford a rental home, we stopped making payments in March 2010. By September our home was bank-owned due to a Deed in Lieu of Foreclosure. Our credit scores suffered greatly. We are still awaiting results of ongoing court hearings and have not given up hope for compensation from the drywall manufacturers, suppliers, and Chinese Government. Thank you for continuing to work on behalf of thousands or residents like us who have lost their homes due to Chiuese Drywall.

Mr. Robert Orlando—Williamsburg, VA

I took a new job and relocated my family to Virginia in 2009. The home we bought was built with toxic drywall manufactured in China. We were forced to move out and lived in a rental home for two years on the brink of bankruptcy. Our mortgage servicer and investor worked with us on a short payoff of our mortgage and our local bank lent us enough money to rebuild. However, this would not have been possible without financial help from our family. We have lost over $200 thousand due to this "drywall disaster" and we need someone to help us recover our losses.

Ms. Michelle Germano—Norfolk, VA

My life was destroyed by contaminated drywall imported from China. The toxins from the drywall destroyed my health, home, personal belongings, and finances. I am liviug iu a rental home with porch furniture. I was forced to leave everything

behind because I was so sick. That was nearly three years ago. At 61, I am forced to re-start my life, broke and sick.

Mr. and Mrs. Jerry Baldwin—Williamsburg, VA

After three years of living in our home we are on our third set of air conditioner coils, our third home computer, and have had to replace a failed air handler motor, a failed microwave, a failed refrigerator and a failed thermostat. We continue to live in the house and pay our mortgage despite the fact that our home is worthless in the open market. We are throwing money away with no hope of intervention or remediation.

Mrs. Zenaida Perez—Newport News, VA

I am a school teacher and a single mother, who built a house at Hollymeade, Village in 2007. Due to the Chinese Drywall situation that we are experiencing, I had to move out of my home and my finances have been terribly affected to the point of declaring Bankruptcy. I don't know how long this situation is going to last, but I feel it's not taking us anywhere and I am facing a terrible situation with the Mortgage Company as well. They don't want to approve a loan modification due to the loss of value of my property that went down from $257,000 to less than $100,000.The worst part is that I invested everything I had on that home, and now it is lost.

Mr. Richard Ilich—Suffolk, VA

Chinese Drywall has ruined me and my family's life. My 6 year old son developed Asthma and suffered violent attacks when in the house. We don't know if there are other long term affects at this point. I've lost my credit, my home which was part of my retirement investment, spent thousands of dollars on appliances, HVAC, and furniture which needed replacement, and to date there is no tangible method/way/or outlook to get out from under this sheetrock. Just about everyone is empathetic to our situation, but empathy does not pay for two homes, it does not pay two heating bills, it does not pay homeowners fees, it does not extend or protect your credit to buy a new car when you need it, it does not prevent the games and hassles the mortgage companies put us through, it does not stop the depression, and it does not pay the medical bills. While I understand the need to let the legal system play out, we are 2–4 years away from that type of resolution. It appears insurance will play no part in the resolution and if the courts come through for the Victims of CDW it would take several years for the remediation to be completed, and that is if we can even collect any money that would be awarded. If we must wait for the courts, only government can create tangible short term solutions to help the victims who are left isolated and devastated from this situatiou. We need to have our credit protected so we can live in the meantime, we need help preventing the games and pressure that the mortgage companies are playing, as well as some short term relief.

Elizabeth Berry—Yorktown, VA

The CPSC states that there are close to 4,000 reports of homes with toxic Chinese Drywall but the number of people actually affected by toxic drywall is so much greater. Yes, we are spread out over 37 different states, and no, Chinese Drywall is not a natural disaster. But how many lives have to be damaged in order for victims to receive recognition and assistance? This is a disaster and we are in need of assistance.

Our homes are corroding, our financial future is in ruins as the biggest investment of our lives is worth nothing, our credit scores are damaged, security clearances necessary to maintain careers are in jeopardy, and we can't afford to move out and pay for two homes. Many of us are liviug in these houses with sulfuric gases—when mixed with moisture—basically acid rain! When I kiss my kids goodnight and watch them the toxic air in our home I become enraged. For the rest of my life I will worry about what toxic Chinese drywall has doue to the health of my two sons.

We must create laws that will require Chinese products to meet the highest safety standards in order to protect our citizens from harın! Men, women and children are suffering. Tax paying, hardworking citizens are being told, "We are working on it, but it is a difficult issue!" How long are we going to continue to suffer in this disaster with no relief? My husband and I have scraped together and borrowed $100,000 into gutting and rebuilding our home. We will never recover financially or emotionally.

Christopher Levy—Virginia Reach, VA

I love serving my country and am writing to you from Kandahar, Afghanistau. I am a military officer, aud as such am vuluerable to be moved at a momeut's uo-

tice. My house is worth $100 as per the City of Virginia Beach because of the toxic drywall. Thus, if I get orders, I won't be able to sell or rent my honse. I will have to leave the service and stay in Virginia Beach, default on my loan, or soak-up the cost of maintaining two households (the latter two options would result in our financial ruin). Please work to retnrn my home to a livable condition. Thank you!

Joseph Anello—Virginia Beach, VA

My wife, mother and I built home together in 2006. Within 6 months our AC unit failed and we replaced the coils twice. My wife and I went to the Philippines in early 2008 to work for Verizon. My mother remained in the home and her Chronic Obstructive Pulmonary Disease got progressively worse. When our A/C unit failed again we first learned of toxic drywall. When my mother's condition rapidly declined we returned to the U.S. and moved her out of the contaminated home. Although she initially improved, she passed away on July 4, 2011 due to respiratory issues. I could not sell the home and needed to move due to employment in West Virginia. We attempted the short sale process but Wells Fargo foreclosed on our home. The City of Virginia Beach had assessed my home at one dollar. Thus we have since lost our mother and our credit is in shambles. We are just awaiting results of the various legal proceedings. Thank you for your support in this manner it is much appreciated.

Mr. Mike Shen—Virginia Beach, VA

In 2011 we spent $250,000 on repairs to our house that was built in 2006. Toxic Chinese drywall destroyed everything in our house that has metal component made from copper including AC copper coils, gas copper pipes, electrical wires, TVs, computers, refrigerator, Wii player, piano strings, etc. The drywall has also deeply affected our family's health. We have suffered from nose bleeding, headaches, foot pain, arm pain, kidney pain, and muscle pain.

Liz, Steve, and Allison Heischober—Virginia Beach, VA

We were so happy to move into our new home on November 10, 2006. This was to be the home where we would spend our retirement years. We are now living a nightmare. We discovered in July 2009 that the home we purchased was built with Chinese drywall. The Chinese drywall was causing physical damage to the home and health problems for our family. All three of us have had physical ailments as a result of the Chinese drywall. Seven months after living in the home, our golden retriever, Kramer, died of kidney failure. Our second dog, Bailey, died in Decenber 2008 of respiratory issues. As of August 2009, we have replaced six to seven coils in two AC units. We have had problems with our flat screen TV, computer hard drives and monitors that crashed, small appliances that failed, a dryer that stopped working due to circuit board failure, and electrical outlets that had to be replaced. Physically, we have experienced unexplained rashes, respiratory problems, headaches, fatigue, insomnia, chronic coughs, and muscle pain. The smell in the house is in our clothes, furniture, mattresses and linens. Our silver jewelry and flatware have turned black and are unable to be cleaned. When we opened our windows, our neighbor complained of the smell that came from our home. We have documentation to prove all of these issues.

Upon learning of the problem, the stress has become unbearable. We moved out of our home immediately in August 2009, leaving our belongings behind, and filed a lawsuit because we had no other recourse since the builder and insurance companies were of no help. We are currently living in a rental. Our home was sold in a short sale in November 2010. We lost $400,000 in equity. This was a major investment for us and through no fault of our own, we've lost everything. Selling the home was in our best interest and that of the mortgage company. Hanging on to a home you can't live in with forbearance on your mortgage, only keeps increasing your debt to the mortgage company. The increasing debt has caused many families to file bankruptcy. We are glad that we were able to sell. Had we foreclosed, the mortgage company would have been stuck with a home in poor, uninhabitable condition. The short sale has caused our credit to be hit and it will be affected for many years. New rules for the underwriting of mortgages and loans need to be updated to make provisions for homeowners that were victims of Chinese drywall.

Senator PRYOR. Thank you, Senator Warner.

In the interest of time, I'll dispense with the longer introductions. And I mentioned our four witnesses already. So, why don't we just dive into this?

Mr. Cohen.

STATEMENT OF NEAL S. COHEN, OFFICE OF EDUCATION, GLOBAL OUTREACH, AND SMALL BUSINESS OMBUDSMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Mr. COHEN. Thank you. Good morning, Chairman Pryor, Senator Wicker, Senator Warner, and members of the Subcommittee on Consumer Protection, Product Safety, and Insurance.

My name is Neal Cohen, and I currently serve as the Small Business Ombudsman at the United States Consumer Product Safety Commission in our new Office of Education, and Global Outreach, and Small Business Ombudsman. Prior to that, I served in the Office of General Consul as the lead trial attorney on matters of problem drywall, and I continue to advise the drywall team on those matters.

I'm pleased to be here today to discuss the CPSC's investigation into problem drywall, as well as to lay out the steps that the Commission has taken to try to assist these homeowners that have been impacted by problem drywall.

Before I begin, I have two important notes: First, the testimony that I give today is my own. It has not been reviewed or approved by the Commission; it may not reflect their views. Second, on a more personal note and in line with the opening statements, the members of the staff and the Commission want to recognize Ms. Brincku and Ms. Stevens and Mr. Bailey, and other homeowners who are here and have been affected by this. We share the sense of frustration, and we recognize the incredible hardship this has taken on your families.

As a government regulatory enforcement agency, however, we must be, and we have been throughout this investigation, guided by the science and by our statute in trying to determine whether the problem drywall represents a health or safety hazard. That's exactly how we conducted our investigation.

In January 2009, we began to look into these reports of noxious odors, corrosion of metal items, and complaints of upper airway irritation in these homeowners.

The principles in our plan, which have been in place from the earliest parts of this investigation—I'd like to set out the paradigm of how we've conducted this.

First what we did was, we analyzed the suspected source of the emissions, the drywall, in a controlled chamber setting so that we could see exactly what chemicals were being emitted from that drywall in a controlled setting.

Second, we conducted indoor air testing on homes that were built or remediated with problem drywall to see what emissions were happening on the actual level of a homeowner's home that they were experiencing in their personal lives.

Third, we took corroded household components that had been exposed to the same conditions over those years of installation, and analyzed to see whether or not there were potential safety hazards that had developed over that time.

And fourth, we looked toward the future and we took new household components, and we placed them in an accelerated aging corrosive environment in order to simulate long-term corrosion, and to also analyze whether there would be potential health or safety hazards over a longer term of up to 40 years.

To do so, we engaged our Nation's top laboratories and scientists, and we relied upon a rigorous process that was methodical; it was scientifically and legally defensible, and informed each of the subsequent studies.

Where necessary, we did additional studies, such as the one on domestic drywall, as well.

Unfortunately, the results of our studies have not permitted us to make a health or safety finding that would enable us to compel a manufacturer to recall this product.

In terms of the safety, we observed no significant declines in performance, and certainly, no safety hazards were observed in any of the experiments that we conducted.

In terms of health, we used advanced techniques to measure the concentrations of chemicals that were found in these homeowners' homes. These concentrations were below the levels where health effects have been reported in the peer-reviewed scientific literature.

Now, although those concentration levels did not permit us to make a health finding, it is possible that the health effects may occur when consumers are exposed to multiple chemicals in this complex setting. The study of that is incredibly complex, and we look forward to the CDC's review of their health consultation to help inform us on those effects.

Throughout the case, we have continually examined our legal options under the Consumer Product Safety Act. Unfortunately, based on the evidence, we have not been able to undertake a case. We have monitored and observed the private litigants in State and Federal court, and note that primarily economic case—those cases of economic losses—are proceeding, and will likely provide a substantial amount of relief for a set of the homeowners, though certainly not for all the homeowners.

We've worked with the Gypsum Association and the ASTM International to make sure that voluntary standards are in place so that this would never repeat itself, and that if such an occurrence were, we would be able to track and monitor the situation better this time.

And throughout all of this, we have applied continual pressure on the Chinese manufacturers to come to the negotiation table to stand behind their product, and to make American consumers whole. Unfortunately, those efforts at all levels of government have not yielded results yet.

That concludes my oral statement, and I would be pleased to take any questions the subcommittee may have. Thank you.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF NEAL S. COHEN, OFFICE OF EDUCATION, GLOBAL OUTREACH, AND SMALL BUSINESS OMBUDSMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Good morning, Chairman Pryor, Senator Wicker, and members of the Committee. My name is Neal Cohen, and I currently serve as the Small Business Ombudsman iu the Office of Educatiou, Global Outreach, and Small Business Ombudsman at the U.S. Consumer Product Safety Commission (CPSC). Prior to assuming the Small Business Ombudsman position, I worked in the Office of General Connsel where I served as the lead attorney on the CPSC's Drywall Team. In my current position, I continue to work with the Drywall Team on legal issues.

I am pleased to be here today to discuss the CPSC's investigation into problem drywall. Before I begin, I would note that the testimony that I will give this morn-

ing is mine, has not been reviewed or approved by the Commission, and may not necessarily represent the views of the Commission.

I. Background

CPSC began looking into reports of noxious odors, and corrosion of metal items inside of homes, especially air conditioner coils, and complaints of short term upper respiratory irritation in late January 2009. To date, the CPSC has received approximately 3,921 reports from residents of 43 states, the District of Columbia, American Samoa, and Puerto Rico who believe corrosion of certain metal components in their homes or health effects are related to problem drywall. After analysis of these reports and other data regarding imports of potentially problematic drywall from the People's Repnblic of China, CPSC staff believe there may be as many as 8,200 U.S. homes containing at least some problem drywall.

In onr first report to Congress, in July 2009, we outlined what we then described as "a mnlti-pronged, concnrrent approach . . . to inclnde import investigations, field measnrements in the affected homes, chamber studies to assess the possible health risks and corrosion to electrical, gas, and fire safety systems." In this testimony, I hope to outline the science-based investigation undertaken by CPSC and our agency partners, as well as onr efforts to provide assistance to homeowners impacted by problem drywall.

II. CPSC's Scientific Investigation of Problem Drywall

The principles in our strategic investigation plan, in place by Jnne 2009, have been followed by CPSC staff throughout this investigation. Where scientific findings and the compliance investigation indicated a need for additional information, staff added multiple distinct, standalone stndies to address those needs.

For more than two years, CPSC has worked with our interagency partners, including the U.S. Department of Housing and Urban Development (HUD), the Centers for Disease Control and Prevention (CDC), and the U.S. Environmental Protection Agency (EPA) (collectively the "Federal Interagency Task Force on Problem Drywall" or "Task Force") and has spent more than $6 million dollars from its general operating fund to conduct this investigation.

Briefly, I would like explain the paradigm we employed; it is one that is reliably used in scientific investigations:

1. Analyze the suspected source of the emissions, the drywall, in isolation to see what chemicals the source is emitting in a controlled environment;

2. Conduct indoor air testing in homes built or renovated with the suspected sonrce of the emissions;

3. Test corroded household components that have been exposed to the emissions; and

4. Expose new metal household components in an accelerated aging corrosive environment to simulate long-term corrosion and analyze for potential safety hazards.

CPSC and our partners also engaged our Nation's top laboratories—Lawrence Berkeley National Laboratories (LBNL), Sandia National Laboratories (Sandia), the National Institute of Standards and Technology (NIST), and the U.S. Geological Snrvey (USGS)—in addition to a well-regarded private company, Environmental Health & Engineering (EH&E).

This scientific paradigm—executed by these top laboratories and scientists—was methodical and iterative, with each step informing the next in the investigation. This rigorous process ensured that the Commission's investigation was based upon the hest, quality-controlled and quality-assured results, each result informing the design and conduct of snbsequent studies.

CPSC also shared the nrgency felt by the homeowners, and we had to balance that sense of nrgency with the exercise of cantion to make certain that all scientific studies concerning the effects of the problem drywall were credible and defensible. To that end, in a somewhat unprecedented move iu a CPSC-compliance investigation, we were transparent and posted all scientific investigations publicly on *www.drywallresponse.gov*, including the underlying raw data. We did so because we recognized the homeowners' need to understand what was going on in their home environments, because we were confident that our science was of the highest caliber and should be held up to public scrutiny, and because we felt that the public was entitled to make use of the information. Wherever feasible, and without jeopardizing the scientific process, investigations were conducted in parallel to increase our ability to deliver sound scientific results to the public iu the timeliest manuer.

A. Efforts to Diagnose and Pinpoint Critical Characteristics of Problem Drywall

In July 2009, CPSC staff contracted with EH&E to study gases present and corrosion effects within homes where problem drywall was installed. This was consistent with onr investigatory paradigm to condnct indoor air testing in homes with the suspected sonrce of the emissions. The 51-home indoor-air study conducted by EH&E was released in November 2009, and allowed the development of certain corroborating factors forming the core of the Identification Guidance, building npon earlier work condncted by the EPA at the CPSC's reqnest to identify chemicals present in certain drywall samples. The 51-home study also informed CPSC staff about low levels of certain sulfur gases and other compounds present in the homes.

While the 51-home study was being conducted, CPSC also worked closely with LBNL, part of the U.S. Department of Energy, to conduct advanced chamber emission stndies to determine the types and amounts of gases emitted by certain drywall in controlled laboratory conditions. The chamber emission studies represented another important cornerstone of onr investigatory paradigm. Those studies analyzed the drywall samples in question in isolation in order to capture which chemicals the samples were emitting in a controlled environment, apart from possible confounding sources in the home.

We relcased LBNL's initial results in November 2009 and March 2010, with the final report on the first round of testing issued in January 2011. Importantly, the findings from the chamber studies enabled CPSC to definitively identify those chemicals being emitted directly from the drywall, apart from the other confounding factors in the home. This work demonstrated the conclusive link between certain drywall and the corrosive emissions of hydrogen sulfide and other reactive sulfur gases. It also demonstrated that some, but not all, Chinese drywall emits hydrogen sulfide and other reactive sulfur gases at much more elevated rates compared to other Chinese and North American drywall.

CPSC staff knew that hydrogen sulfide corrodes copper and silver to produce the type of corrosion seen on those metals in affected homes. However, it was not until this work was completed that we could positively identify the problem drywall itself as the source of that hydrogen sulfide. The levels of reactive sulfur gases, specifically hydrogen sulfide, emitted from the drywall also informed our investigation into potential fire or electrical safety risks. This determination that certain drywall does iu fact emit elevated levels of hydrogen sulfide and other reactive gasses also enabled CPSC and HUD to develop Identification Guidance and Remediation Guidance based on the common sense approach of removing the source of these emissions.

In Jauuary 2010, the CPSC and HUD issued Identification Guidance for homes affected by problem drywall. This Identification Guidance, which was updated in August 2010, was very important for potentially affected homeowners as it provided some common, scientific characteristics for homeowners to use in determiuing whether a specific dwelling contained problem drywall.

Remediation Guidance was first issued in April 2010 by the CPSC and HUD. In its first iteratiou, the Remediation Guidance was extra cautious iu its approach to consumer's health and safety until the results of our scientific investigatory plan became available, including precautionary removal of certain building materials. As the results of the scientific investigation became available, we updated the Remediation Guidance in March 2011 and again in September 2011 to provide consumers with a safe and more cost-effective approach to remediation.

In February 2010, we held a closed meeting with our staff, staff from our Federal Task Force Partner agencies, including the CDC, our private contractor, and scientists from the leading national laboratories that conducted many of our studies. CPSC staff reviewed the strategic plan that we had set in motiou and the preliminary results received to date. There was broad agreement amongst the attendees that CPSC staff had set forth a clearly defined, scientifically defensible plan and one which could also provide the basis for a solid legal case in the event one was warranted.

In the spring and summer of 2010, the CPSC worked with Sandia to design and execute experiments, detailed further below, that would accelerate the aging processes on electrical and fire safety components to simulate the effects of decades of exposure to the types of corrosion exhibited in problem drywall houses.

While we worked with Sandia, we also conducted additional studies to refine how we characterized the problem drywall and to address other concerns that had arisen inclnding the concern regarding the possibility that sulfur reducing microbiological elemeuts may have been a potential root cause of the emissions. In March 2010, the CPSC, in conjunction with EH&E, released a report on a microbiological assessment of a limited number of drywall samples. No difference was found in the presence or absence of sulfur-reduciug bacteria between imported Chinese drywall and U.S.

domestic drywall tested, including those Chinese samples found by LBNL to have some of the highest reactive sulfur gas emissions in the chamber tests.

In May 2011, the CPSC, in conjunction with EH&E, released a longitudinal study of the temporal effects of seasonality and elapsed time on the gaseous emissions and rate of corrosion formation in problem drywall and control homes. This limited study of six homes found that emissions increased during periods of elevated heat and humidity and were markedly reduced in cooler and drier periods.

In June 2010, the CPSC, contracting with EH&E, released a study titled *Identification of Problem Drywall: Source Markers and Detection Methods.* This study confirmed the association between elemental sulfur and the characteristic corrosion associated with problem drywall, and it also provided new information indicating that strontium (when used alone as a marker) possibly could lead to misidentification of problem drywall.

In September 2011, LBNL completed a second round of emissions studies focusing on the effects of heat, humidity, and surface treatments like paint, upon the emissions rates of the problem drywall. The additional testing found that emissions increase with elevated temperature and humidity. Importantly, however, the testing also found that the emissions actually *decreased* significantly over time for the samples, compared to when they had been tested during the first round of testing in 2009–2010. Importantly, all of our modeling and accelerated aging had been based on a worst-case assumption that these levels do not decrease over time.

Also, in September 2011, the CPSC, through an interagency agreement with USGS, conducted additional microbiological assessments of drywall samples and gypsum rocks from relevant mines. Throughout the investigation, there had been many claims of sulfur reducing bacteria actively converting the gypsum in drywall into corrosive sulfur gases. Like the prior EH&E study, the USGS study found no evidence indicating the presence of active bacteria of these types.

In sum, the analysis of chemical content and chemical emissions from problem drywall determined that certain brands of drywall produced around the year 2005–2006 contain elevated levels of elemental sulfur (octahedral sulfur, S_8) and have elevated emission factors for hydrogen sulfide (H_2S) and other reactive sulfur gases known to corrode copper and silver. It also was fonnd that over time, the emission rates for these reactive sulfur gases decreased and that increases and decreases in emission rates corresponded to increases and decreases in temperature and humidity.

B. Potential Health Impacts of Problem Drywall

The report on the 51-home stndy included discussion of health impacts for the compounds found in the home environment. In analyzing the results in that study, CPSC staff relied on the actual measnrements of reactive gases taken in the 51-home stndy as the best approximation of the levels of gases to which homeowners may have been exposed. However, the concentrations of individual chemicals found in the homes were below levels where health effects have been reported in the toxicology literature and did not provide the CPSC with enough evidence to determine that a substantial or imminent product hazard or significant injury or illness occurs due to problem drywall.

Although those concentration levels did not permit the CPSC to make a health or safety finding, it is possible that health effects might occur when consumers are exposed to combinations of chemicals, as found in all indoor environments. The study of health effects related to exposures to chemical mixtures is scientifically complex due to the interactions between and amongst chemicals, as well as the fact that responses to chemical exposures can vary tremendonsly from person to person. Much more study and analysis—beyond the current staff and monetary resources of the CPSC—would be necessary to develop the evidence necessary to conclusively establish the health case.

CPSC staff also used mathematical modeling to predict possible exposures that might result from the reactive sulfur compound emissions measured in the LBNL chamber testing. As with most modeling exercises, this undertaking was complicated by the many assumptions that had to be made about some of the environmental conditions and interactions between chemicals that were occurring in the homes.

In light of staff and resource constraints, the CPSC formally requested that the CDC consider conducting a long-term health study on the effects of problem drywall. In making the request, CPSC staff felt that such a study or series of stndies by the CDC could seek to address some of the deficiencies in the data outlined above. In January 2011, the CDC indicated that it had "carefully considered" a long-term health effects study and concluded that "the best scientific evidence available to [CDC] today does not support" such a study. While CPSC staff hoped the available

scientific evidence would allow the CDC to conduct a long-term health effects study, CPSC staff was encouraged to learn that CDC staff took the time to carefully consider the merits of such a stndy before deciding not to proceed.

In Febrnary 2011, CDC staff reqnested that the CPSC staff provide all information on the addresses and reported health effects associated with problem drywall homes so that the CDC could map the scope and consider the potential health effects. In response to that request, CPSC staff provided the requested information to the CDC to assist in their evaluation of the potential health effects of problem drywall. It is the understanding of CPSC staff that CDC work continues on this health consultation project, and CPSC staff looks forward to reviewing the results when that project is complete.

C. Examination of Any Potential Fire or Electrical Safety Implications of Problem Drywall

In an effort to determine whether prohlem drywall presented any fire or electrical safety risks that could be quantified as presenting a serions safety hazard, the CPSC also hired Sandia and NIST to conduct engineering stndies of the effects of corrosion on electrical and fire safety systems.

Sandia subjected samples to accelerated aging processes to simulate the effects of decades of exposure to the types of corrosion exhibited in problem drywall houses on components, including electrical wiring, receptacles, switches, plus smoke alarms, fire suppression sprinkler systems, and gas service piping. Sandia also conducted engineering analyses of the electrical systems that were aged in these conditions, as well as other electrical components harvested from affected homes. Sandia provided the exposed fire safety system samples to NIST to complete similar engineering analyses of those systems.

The CPSC's study, conducted with Sandia, on the impact of accelerated corrosion on electrical components, which simulated 40 years of corrosion, was completed in March 2011. The results of the Sandia study led the Task Force to modify the Remediation Guidance and to remove the earlier recommendation that all electrical wiring be removed. This study fonnd visnal evidence of corrosion but found that the corrosion did not significantly rednce the overall cross section of copper nor did it decrease the wire's ability to carry its rated cnrrent. No acnte or long-term safety events such as smoking or fire were observed during the course of the experiment.

In September 2011, the CPSC, working with NIST, released a series of staff reports on the effects of problem drywall and related corrosion on fire safety systems and natural gas service piping.

The first report was a study on the effects of simulated 10 years of corrosion of the type exhibited in problem drywall homes on a variety of smoke alarms. NIST also studied smoke alarms collected from homes where they had been exposed to the emissions from problem drywall. There were small but significant changes to performance in some cases, although each set of the smoke alarms continued to meet applicable safety standards. Iu auy case, the CPSC recommends replacemeut of smoke alarms every 10 years aud carbon monoxide alarms after their limited lifespan, typically every five to seven years. Therefore, as part of remediation, it is recommended that all smoke alarms and carbon monoxide alarms be replaced because they have a limited life span and cost little to replace.

The second report was a study on the effects of simulated 20 years of corrosion of the type exhibited in problem drywall homes on a variety of fire sprinkler heads. In additiou, NIST studied fire sprinkler heads collected from homes where they had been exposed to the emissions from problem drywall. Fire sprinkler heads showed small effects due to accelerated corrosion, but were generally within accepted industry standards.[1] Fire suppression sprinkler systems are present only in a very small fraction of problem-drywall homes.

The third report was a study ou the effects of problem drywall emissious on gas service piping. The CPSC collected gas service pipes from homes where they had been exposed to the emissions from problem drywall. NIST also studied copper alloys commouly employed iu the mauufacturiug of gas service pipiug after exposure to the simulated corrosion chamber to achieve 40 years of simulated exposure. The results showed that corrosion of gas service piping was uniform and minimal compared to the thickuess of pipes. No acute or long-term safety eveuts were observed

[1] A single fusible-type fire sprinkler head that had been exposed to accelerated corrosion did not activate when tested. Out of an abundance of caution, CPSC staff recommend the replacement of fusible-type fire sprinkler heads as part of remediation. However, we note that this type of sprinkler head is generally found in commercial, rather than residential, applications and that the sole failure could not be causally linked to the problem drywall at this time.

during the course of the experiment. Gas service pipes are present only in a very small fraction of problem-drywall homes.

D. Additional Targeted Scientific Studies

Additional studies were conducted for targeted investigations on an as-needed basis as new issues emerged during the overall investigation, including (A) investigating the limited claims of problems due to domestic drywall in homes, (B) investigating the indoor environments in two homes at Fort Bragg where mnltiple infant deaths had been reported and (C) investigating deaths reportedly related to problem drywall.

1. Domestic Drywall Study

While the majority of the complaints to the CPSC have been for imported drywall, approximately one to two percent of the total reported incidents came from homeowners who have alleged that corrosion and other problems have resnlted from the installation of domestic, problem drywall. In response, CPSC staff conducted in-depth investigations (IDIs) on a number of these homes and found that some appeared to have Chinese drywall and others did not appear to have the characteristic problems associated with problem drywall.

In addition, the CPSC undertook a limited stndy on 11 homes believed to best represent the types of reports we had received. In April 2011, the CPSC released a stndy on these 11 homes for which the presence of problem domestic drywall could not be ruled out, and the results were inconclusive. Some of the homes in the study were found to have characteristics of problem drywall, but the actual conntry of origin could not be determined conclusively for all of the drywall in those homes. Other homes in the study exhibited corrosive characteristics that were different than those that the CPSC had observed in homes with imported, problem drywall. However, none of the findings resulted in the need to change the Task Force's recommendations in the identification or remediation guidance documents.

2. Investigation Into Deaths at Ft. Bragg, North Carolina

The CPSC provided substantial support to the U.S. Army in the Army's investigation into deaths at Ft. Bragg. CPSC conducted a comprehensive and independent investigation into the indoor environments in two homes at Fort Bragg where multiple infant deaths had been reported. The results of onr study, released on February 10, 2011, concluded that problem drywall was not present in the homes. For the benefit of the Army, our contractor conducted additional environmental testing while in the homes and did not find an environmental cause of these tragedies. Somewhat elevated levels of two pesticides, permethrin and cypermethrin, were found in one of the homes, and the Army is continuing to investigate these pesticide issues on its own. Both of these pesticides are approved by the EPA under the Federal Insecticide, Fnngicide, and Rodenticide Act (FIFRA) for use inside of homes. The Army paid to have EH&E continue to investigate the slightly elevated pesticide levels.

3. Investigation of Deaths Reportedly Related to Prohlem Drywall

On Jannary 31, 2011, the CPSC released the CDC's review of state medical examiners' investigations into reports of deaths in homes alleged to contain problem drywall. The report fouud no connection between the 11 deaths and the drywall; instead it fonnd several other contribnting factors that specifically inclnded pre-existing health conditions. CPSC staff also found no connection between the snbject homes and problem drywall iu our investigation.

III. CPSC and Private Efforts to Assist Impacted Homeowners

A. Problem Drywall Identification and Remediation Guidance

As discussed earlier, Identification Guidance for homes affected by problem drywall was first issued in Jannary 2010, and npdated in Angust 2010. Remediation Guidauce was issued in April 2010 and updated in March 2011 and again in Septemher 2011.

The updated documents clarify that the Remediation Gnidance represents an effective protocol on which a homeowner may rely to make appropriate decisions about remediating their home comprehensively. The current guidance documents are comprehensive and integrate the results of all scientific studies completed as part of this investigation.

B. Development of Standards for Drywall Labeling and Content

During the course of the investigation, one substantial impediment encountered by CPSC staff was the lack of uniform labeling on both domestic and foreign drywall. The bnlk of problem drywall examined by staff contained no marking de-

tailing manufacturer, brand, or country of origin. This substantially hindered CPSC staff efforts to determine the exact source of problem drywall, as well as the scope of the problem.

In an effort to prevent similar problems in the future, CPSC staff worked with ASTM International on a new gypsum board voluntary labeling standard that would require manufacturer name and country of original on the product. We are pleased to note that, as a result of these efforts, ASTM recently approved a revision to the C1264 gypsum board standard.

The revised C1264 standard, which was effective as of last month, requires that manufacturers place either names or unique codes identifying the name of the manufacturing company, facility and production line, date and time of manufacture, and country of origin on each sheet of finished gypsum products. The revised standard also specifies that this identifying information be reproduced at regular intervals on each sheet of finished gypsum products. CPSC staff believe that this voluntary labeling standard should help builders and consumers better understand the origin and source of gypsum products in the future.

CPSC staff also continue to work with ASTM and other industry associations on standards regarding gypsum board content. That work is currently ongoing, and we hope for further progress on that voluntary standard in the near future.

C. The Multi-District Drywall Litigation

Some private parties impacted by problem drywall are engaged in extensive Federal and state litigation, which has largely been consolidated in the Federal Chinese-Manufactured Drywall Products Liability Multi-District Litigation (MDL) in the Eastern District of Louisiana.[2] The CPSC has never been a party to this litigation, although Commission staff has tracked the progress of the case through discussions with parties and stakeholders. Despite the lack of CPSC's formal involvement in the case, the agency's scientific findings have been relied upon universally by the various parties as representing a credible and serious effort to understand and explain the issues associated with problem drywall.

Unlike a potential CPSC recall, which would require the CPSC to demonstrate health or safety hazards satisfying the high burdens set forth in CPSC's controlling statutes (*e.g.*, that the drywall presents an imminent hazard or substantial risk of serious injury or death), the private civil cases are primarily economic in nature and need only prove, for example, that the drywall was not fit for its originally intended purpose. As part of this process, one of the potentially responsible producers of problem Chinese drywall, Knauf Plasterboard (Tianjin), announced a pilot settlement on October 14, 2010. In that pilot settlement, Knauf and certain American companies in the distribution chain of commerce, agreed to voluntarily remediate 300 homes in Alabama, Florida, Louisiana, and Mississippi containing its drywall. Knauf's remediation protocols for this pilot program conform to the CPSC's interim remediation guidance.

During the week of February 14, 2011, Knauf's contractor broke ground on the first such remediation project. The Court and all parties have also sought to broaden the number of homes covered in this pilot settlement beyond the original 300 homes. Some private estimates indicate that Knauf manufactured drywall may be present in 40 to 45 percent of all homes impacted by problem drywall. In addition, almost all impacted homes in Alabama, Louisiana and Mississippi contain drywall manufactured by Knauf.

The MDL Court has also directed the parties in the case to proceed with discovery and depositions, which are presently underway, concerning certain other Chinese manufacturers and certain American companies in the supply chain. The MDL Court represents a credible process addressing claims of economic loss from the plaintiffs, and it will proceed and likely provide a substantial level of relief to a number of homeowners with problem drywall manufactured by Knauf (and possibly a few other companies). It is, however, unlikely to cover all homeowners impacted by problem drywall.

D. CPSC Efforts to Seek Compensation from Potentially Responsible Chinese Manufacturers Outside of the MDL Case

Throughout the problem drywall investigation, the CPSC has continually engaged with our counterpart agency in China, the General Administration for Quality Supervision, Inspection, and Quarantine (AQSIQ), to share information and arrange a meeting between the CPSC and Chinese manufacturers. Specifically, CPSC personnel have engaged in the following face-to-face meetings (in addition to numerous

[2] MDL 2047, Chinese Manufactured Drywall Products Liability Litigation, *http://www.laed.uscourts.gov/drywall/drywall.htm*.

videoconferences and conference calls) with high-level AQSIQ personnel to seek resolution to the problem drywall issue:

- August 2009. CPSC staff traveled to China to investigate the possible origin of problem drywall and to meet with AQSIQ staff regarding the issne.
- Second Trilateral U.S.-EU–China Consumer Product Safety Summit, October 25–26, 2010, Shanghai, China. CPSC Chairman Inez M. Tenenbaum personally discussed the issue with AQSIQ Minister Zhi Shuping and urged the Chinese Government to facilitate a "fair and just" resolution to the issne.
- The Third Bilateral United States—China Consumer Prodnct Safety Summit, held in Washington, DC on October 13–14, 2011. At this meeting, the Chairman again publically called on the Chinese Government to come to the table, resolve this issne and provide relief to impacted homeowners.

To date, the CPSC has used all of the resources available to it, including high-level international contacts by the Chairman and other international diplomatic efforts with the U.S. Departments of State and Commerce to push this item to the front of the agenda with the Chinese government. Throughout many months of diplomatic efforts, the Chinese manufacturers have continued to signal their reluctance to meet with us. The principal Chinese trade associations have stated that their members are being singled out, and refuse to accept CPSC assurances that all responsible parties would be included in a possible settlement.

* * * * *

Mr. Chairman, thank you again for the opportunity to testify regarding the CPSC's scientific investigation of problem drywall, as well as efforts to assist impacted homeowners. I would be happy to answer any questions at this time.

Senator PRYOR. Thank you. And thank you for staying in the allotted time.

Dr. Portier.

STATEMENT OF CHRISTOPHER J. PORTIER, PH.D., DIRECTOR, NATIONAL CENTER FOR ENVIRONMENTAL HEALTH, CENTERS FOR DISEASE CONTROL AND PREVENTION AND AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Dr. PORTIER. Thank you, and good morning, Senator Pryor, Senator Wicker and Senator Warner. Thank you for the opportunity to be here today.

I am Chris Portier, the Director of the National Center for Environmental Health at the Centers for Disease Control and Prevention, and the Director of the Agency for Toxic Substances and Disease Registry.

The CDC and ATSDR are concerned for the health and safety of people who have been living with, or exposed to, sulphur compounds emitted from contaminated drywall.

My testimony today will focus on three aspects of CDC/ATSDR support of the CPSC response on this issue: Number one, CDC/ATSDR's current knowledge and recommendation on human health effects from exposure to sulphur compounds emitted from contaminated drywall; number two, our role and the efforts to date in the coordinated Federal response on contaminated drywall; number three, our public health consultation underway to learn more about potential health effects from exposure to sulphur compounds emitted from contaminated drywall.

Indoor air tests of homes with contaminated drywall conducted on behalf of the CPSC, the lead Federal agency in the investigation of contaminated drywall, found low levels of reactive sulphur gasses, including hydrogen sulphide and carbonyl sulphate. This is a

concern, because at some concentrations, exposure to sulphur gasses may result in eye, nose and throat irritation, and exacerbation of respiratory problems such as asthma or chronic obstructive pulmonary disease. These same symptoms are consistent with what has been reported. However, the levels measured inside of homes with contaminated drywall were below levels linked to human health effects as demonstrated in the scientific literature. Still, it is possible some people are more sensitive than others to sulphur gasses.

CDC/ATSDR believes that preventing continued exposure is the best method to address contaminated drywall. We support the CPSC and the U.S. Department of Housing and Urban Development's recommendations for remediation.

In support of CPSC's leadership of the Federal response to concerns on the contaminated drywall, CDC/ATSDR has put significant effort into helping residents understand the potential health implications through the following activities: We worked with poison control centers and state health departments to develop and share guidance to the public and healthcare providers. We supported Federal response efforts with our extensive network of state health and environmental agencies. This has helped us to understand the types of health complaints being reported, to ensure that up to date and accurate information was rapidly shared, and to ensure that coordination among the involved Federal and state agencies and other partners is effective.

We assisted the EPA and the Florida Department of Health in developing a sampling plan for homes with and without contaminated drywall, and in interpreting results. We engaged our partners to develop precautionary health guidance documents for families and their physicians. And we coordinated with states to review 11 deaths reported to the CPSC.

We are currently modeling indoor air levels of sulphur gas compounds to estimate potential exposure. These estimates will then be used to calculate the risks of human health effects in homes with contaminated drywall. Results should be available in spring of 2012.

This consultation activity involves three main phases: First, we've engaged experts at Georgia Institute of Technology to model indoor air concentrations. They will be using data that measured sulphur gasses emitted by contaminated drywall in a controlled laboratory setting. These data were collected by Lawrence Berkeley National Laboratory on behalf of CPSC.

In the second phase, NCEH/ATSDR scientists will use these estimates to simulate a range of plausible human exposures to several drywall-related sulphur compounds. Finally, our scientists will determine if the levels of exposure could result in possible short term and long term health effects, and what these outcomes might be. This will be based upon health information summarized in existing ATSDR toxicological profiles, EPA guidance values, and then evaluations of scientific literature. This is one of the tox profiles. This is for hydrogen sulfide gas.

In conclusion, CDC/ATSDR recognizes the serious concerns of people living in homes and exposed to contaminated drywall. We are committed to providing appropriate and necessary information

to help answer questions related to health effects from contaminated drywall.

Thank you for the opportunity to present this testimony to you today, and I would be happy to answer any of your questions.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF CHRISTOPHER J. PORTIER, PH.D., DIRECTOR, NATIONAL CENTER FOR ENVIRONMENTAL HEALTH, CENTERS FOR DISEASE CONTROL AND PREVENTION AND AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

"Health Issues Associated with Contaminated Drywall"

Good morning Chairman Pryor, Ranking Member Toomey, and other distinguished members of the Subcommittee. Thank you for the opportunity to be here today. I am Dr. Christopher Portier, Director of the National Center for Environmental Health (NCEH) at the Centers for Disease Control and Prevention (CDC) and Director of the Agency for Toxic Substances and Disease Registry (ATSDR).

The CDC aud ATSDR are concerned for the health and safety of people who have been living with or exposed to sulfur compounds emitted from contaminated drywall used in the construction or renovation of their homes. My testimony today will focus on three aspects of CDC/ATSDR's support of the Consumer Product Safety Commission (CPSC) response to this issue:

- CDC/ATSDR's current knowledge and recommendation on human health effects from exposure to sulfur compounds emitted from contaminated drywall;
- CDC/ATSDR's role and efforts to date in the coordinated Federal response to contaminated drywall; and
- CDC/ATSDR's public health consnltation underway to learn more about potential health effects from exposure to sulfur compounds emitted from contaminated drywall.

CDC/ATSDR's Current Knowledge and Recommendation on Human Health Effects from Exposure to Sulfur Compounds Emitted from Contaminated Drywall

Indoor air tests of homes with contaminated drywall conducted by Environmental Health & Engineering Inc. (EH&E) on behalf of the CPSC, the lead Federal agency in the investigation of contaminated drywall, found low levels of reactive sulfur gases, including hydrogen sulfide and carbonyl sulfide.

This is a concern because at some concentrations, exposure to sulfur gases may resnlt in eye, nose, and throat irritation and exacerbation of respiratory problems such as asthma or chronic obstructive pulmonary disease (COPD). These same symptoms are consistent with what has been reported. However, the levels measured inside of homes with contaminated drywall were below levels linked to human health effects as demonstrated in the scientific literature. Some people are more sensitive than others to chemical exposures; an exposure that causes no problems for one person can make a different person nncomfortable or sick. There are currently no tests available that would identify people in the general public who are more susceptible to exposnre to the sulfnr compounds emitted from contaminated drywall.

With respect to public health, CDC/ATSDR helieves that preventing continued exposure to reactive sulfur gases is the best method to address problem drywall. We support the CPSC and U.S. Department of Housing and Urban Development (HUD) recommendations for remediation that "consumers replace all problem drywall; smoke and carbon monoxide (CO) alarms; electrical distribution components, including receptacles, switches and circuit breakers, but not necessarily wiring; and fusible-type fire sprinkler heads."

Recommendations from the Pediatric Environmental Health Specialty Units (PEHSU), a CDC/ATSDR partner, include eliminating, if possible, or reducing exposure through remediation and ventilation; minimizing aggravating environmental factors such as secondhand tobacco smoke and harsh cleaners; monitoring mental health; seeking medical specialty care; and seeking guidance on medical monitoring from a health care provider.

CDC/ATSDR's Role and Efforts to Date in the Coordinated Federal Response to Contaminated Drywall

Since 2009, CDC/ATSDR has provided public health expertise in support of the CPSC's leadership of the Federal response to concerns with contaminated drywall. As part of this response, CDC/ATSDR collaborated with the CPSC, the U.S. Environmental Protection Agency (EPA), HUD, the Florida Department of Health (FLDOH), the Louisiana Department of Health and Hospitals, the Virginia Department of Health, the Association of Occupational and Environmental Health Clinics (AOEC), and other state and local health and environmental agencies to assess possible health implications from living in a home with contaminated drywall.

CDC/ATSDR has put significant effort into helping residents understand the potential health implications associated with exposure to sulfur compounds emitted from contaminated drywall.

To date, we have conducted the following activities:

- CDC/ATSDR worked with poison control centers and state health departments to develop and share health guidance. This guidance came in the form of easy-to-read fact sheets to help the public understand health and safety issnes and recommendations on how to protect themselves. We provided guidance to health care providers who may be evaluating patients living in homes with contaminated drywall;
- CDC/ATSDR supported Federal response efforts with our extensive network of state health and environmental agencies to understand the types of health complaints being reported, to ensure that up-to-date and accurate information and approaches were rapidly shared, and to ensure that coordination among the involved Federal and state agencies and other partners is effective;
- CDC/ATSDR assisted the EPA and the FLDOH in developing the sampling plan for homes with and without contaminated drywall and in interpreting the results;
- CDC/ATSDR engaged our partners AOEC and PEHSUs with specialties in pediatrics, medical toxicology, industrial hygiene, and occnpational environmental medicine. This resulted in precautionary health guidance document for families and their physicians;
- CDC/ATSDR coordinated with states to review 11 deaths reported to the CPSC. In the judgments of the state medical authorities who reviewed these cases, exposure to contaminated drywall was not believed to be a contributing factor to these deaths.

CDC/ATSDR's Public Health Consultation Underway to Learn More about Potential Human Health Effects from Exposure to Contaminated Drywall

CDC/ATSDR's current public health effort is modeling indoor air levels of sulfur gas compounds to estimate potential exposures. These estimates will then be used to calculate risks of health effects in homes with contaminated drywall. Results should be available in spring 2012, and we expect that this work will provide important and appropriate information to help answer questions related to potential health effects from contaminated drywall.

The consultation involves three main phases. First, we have engaged experts at Georgia Institute of Technology to model indoor air concentrations. They will be using data that measure sulfur gases coming off of contaminated drywall in a controlled laboratory setting. These data were collected by Lawrence Berkeley National Laboratory on behalf of CPSC. In the second phase, CDC/ATSDR scientists will nse these estimates to simulate a range of plausible human exposures to several drywall-related sulfur compounds. This will include a range of home types and patterns of air movement in and out of the homes. Finally, CDC/ATSDR scientists will determine if the levels of exposure could result in possible adverse health outcomes and, what those outcomes might be. This will be based upon health information summarized in existing ATSDR Toxicological Profiles, EPA guidance values, and in evaluations of recent scientific literature.

Conclusion

In conclusion, CDC/ATSDR recognizes the serious concerns of people living in homes and exposed to contaminants from problem drywall. We are committed to providing appropriate and necessary information to better understand residents' concerns related to health effects.

Thank you for the opportunity to present this testimony to yon today. I wonld be happy to answer any questions.

Senator PRYOR. Thank you.
Mr. Shelton.

STATEMENT OF WILLIAM C. SHELTON, DIRECTOR, VIRGINIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Mr. SHELTON. Senator Pryor, Senator Warner, it's a pleasure to be with you today. Shelton. I'm the Director of the Virginia Department of Housing and Community Development. We handle a number of community development and housing issues, but today my expertise is more in the area of building codes.

What I would like to focus on today is how Virginia has responded; the things we think we can do at the state level; and then, perhaps, some of the things that remain undone.

There was a perfect storm—you've already heard the stories—but the one nuance of difference in Virginia, as Senator Warner mentioned, all the product that, we believe, that came into Virginia came through one supplier in southeastern Virginia in the Hampton Roads area through one manufacturer in China. Unfortunately, that manufacturer, we believe, is owned by a Chinese concern, as opposed to the German company. And this has ramifications longer-term that become clear when you get to litigation.

The story was unfolding, you know, we were hearing reports, and we certainly were monitoring this issue. Our first response in Virginia came in early 2009 as we began to hear more and more anecdotal evidence of problems. And basically, the first item was to notify local building officials to be aware of this, especially in the Hampton Roads region. We believe the building officials are the front line defense related to responding to this problem, and notified them to notify all builders and others that this could be an emerging problem. Even if we didn't have authority to ban the product, we were certainly raising awareness.

Governor McDonnell assumed office, and then in early 2010 established a drywall task force made up of homeowners, of, state agencies, and other affected parties to look at this issue. And we looked at a number of different items, trying to outline priorities of how Virginia could response.

There was some state legislation—both proposed and unsuccessful. Perhaps the most substantive piece that passed was an issue looking at the issue of disclosure, making sure that property owners who were owners of these properties and were transferring them, that there was actual disclosure so that the problem was not passed on to other property owners down the road; and there were penalties imposed if that disclosure did not happen. And that was both for ownership, as well as rental. And we think that was the best practice.

Perhaps the most important aspect of what we focused on, though, was this issue of, how would you remediate this problem? How would you begin to do the building part of it? And I know that CPSC and others were doing quality research, and we were very anxious to get the answer, because everyone was stuck in neutral, if you will, and could not move either direction without that remediation standard.

We are fortunate in Virginia to have a uniform statewide building code, and so we used that mechanism working through the

issues with our Board of Housing and Community Development, and other affected parties, and using the recommendations, the interim guidance from CPSC, the National Homebuilders Association, and others who have come forward with a potential remediation. And then, effective this summer, effective in August, we did adopt a remediation standard for Virginia that's built into our building code. So, we have established the standards by which all properties need to be remediated; we have required that a building permit be pulled on the property; that inspections be done; that a testing be done after the initial demolition to ensure that you got all the product out; and then, post- construction, that you test again to make sure that there's no evidence of the gases that are causing the problem in the homes.

We feel this is the appropriate and responsible way to move forward. And once concluded, a letter can be given, then, to the property owner that basically says the property has been remediated, so that you remove the stigma on the property. This does not address how to pay for it, but at least gives a pathway to move forward.

One of the issues is the cost of remediation. If you look at the various standards, the court case in Louisiana established a fairly rigorous amount of work, deconstruction and reconstruction, that have to take place. That worked out to almost $90 a square foot. The remediation standard that we have adopted in Virginia, we believe, will be closer to about somewhere in the $35 to $45, maybe $50 a square foot, depending on the type of construction, which makes it more affordable, but yet, would, in fact, then, remediate the property. So, the difference in pricing, that $86 level would be roughly a $200,000 expense, as opposed to maybe a $60,000 or $70,000 expense with that $35 to $40 a square foot, which we think is more realistic.

We have looked at funding mechanisms. The bottom line is that we have looked at all kinds of debt-oriented kinds of activities. We don't believe the properties support debt. The homeowners are upside-down; we've got a housing crisis; those properties are under water anyway; and the market—and with the remediation, it's certainly not feasible.

And so, we think that it has to be more of a response similar to a disaster response. And we would love to work with the Federal Government on trying to figure out some way to get the responsible parties to come to the table and help provide that financing.

[The prepared statement of Mr. Shelton follows:]

PREPARED STATEMENT OF WILLIAM C. SHELTON, DIRECTOR,
VIRGINIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Good morning, my name is Bill Shelton. I am the Director of the Virginia Department of Housing and Community Development (DHCD). The agency administers a comprehensive set of housing and community development programs that help create safe, affordable, and prosperons communities where Virginians can live, work and do business. The agency is also responsible for the administration of the state's major building safety regulations, most notably the Uniform Statewide Building Code (USBC). This latter role led to our involvement in understanding and responding to some of the serious problems that resulted from the use of defective drywall in residential construction during the last decade. I am here today at the invitation of Chairman Rockefeller to speak about Virginia's experience with defective drywall products.

Background

Drywall, sometimes referred to as plasterboard or gypsum board, is one of the most common building materials. Builders use it for walls and ceilings in home and commercial construction. It consists of a saudwich panel made of gypsum (hydrated calcium sulfate [$CaSO_4{\cdot}2H_2O$]) pressed between two thick sheets of paper. For decades, builders have used drywall as a safe and economical alternative to traditional lath and plaster. However, during the latter half of the last decade, owners and occupants of single-family and condominium units constructed at mid-decade in Virginia and elsewhere began to report problems with significant and unexpected levels of corrosion in HVAC, electrical and plumbing systems, and appliances. Over time, the apparent cause of these and other problems such as the presence of strong odors ("burning matches" or "rotten eggs") were traced to excessive levels of gaseous sulfur compounds such as hydrogen sulfide (H_2S) emitted by specific brands of drywall. While the offending products were ultimately identified with reasonable certainty, uumerous questions remained. These included:

- Determiuing where aud how many residential units were affected,
- Preventing the continued use of defective drywall products,
- Developing and applying appropriate remediation standards to eliminate current and future problems,
- Providing assurance that homes can be remediated and reoccupied safely,
- Estimating the total and unit costs for remediation activities, and
- Determining who would pay for property remediation and other losses incurred by homeowners, contractors, developers and others.

That the problems of defective drywall appeared when and where they did was the result of a kind of perfect storm of circumstances, if you will. These included the need for massive rebuilding in the Gulf Coast following two very real storms–Katrina and Rita–and the red-hot (some wonld say in retrospect "overheated") honsing market found in many parts of the country (including Virginia) during the middle of the last decade. Demand for drywall simply outpaced domestic sources of supply. American distributers of building materials seeking new sources found them in half a dozen or more manufacturers based in China. Their products appeared to be functional equivalents of the familiar domestic materials. In southeast Virginia, one building materials supplier received 150,000 sheets from a single Chinese source. Builders used them to complete projects throughout the region and elsewhere in the state. This set the stage for the problems that have brought us here today.

The Problem Emerges

By late 2008, the federal Consumer Products Safety Commission (CPSC), as well as state and local officials in Virginia and other southeastern and Gulf States, began receiving complaints about drywall-related problems. By January 2009, CPSC had received some 1,500 incident reports from 24 states, with the largest numbers attributable to, in descending order, Florida, Louisiana and Virginia. By the summer of 2010, data received by Virginia's Department of Health, the Office of the Attorney General, and DHCD *confirmed* that at least 250 Virginia homes were affected; it appeared very likely that the total might exceed 400.

While the number of affected homes was small relative to the state's 2010 inventory of more than three million occupied housing units, the consequences for homeowners were anything but small. For some households, the presence of defective drywall has rendered the homes uninhabitable. The threat of fire hazards associated with damaged electrical system components, damaged plumbing and gas piping, dysfunctional or damaged HVAC systems, damaged appliances and consumer electronics, nonworking smoke and carbon monoxide detectors, actual or perceived threats to the health of individual family members, persistent and overwhelming foul odors and other factors all contributed to individual decisions to vacate properties.

Relocation might relieve the family of the immediate threats to health and safety, but it could not relieve them of the financial obligations associated with a house that conld no longer be called home. Although lien holders could offer temporary moratoria, in most cases to avoid foreclosure and long-term damage to the family's credit, mortgages still needed to be paid—even as the stigma associated with defective drywall erased the owner's equity and the property's marketability. Many of the Virginia homes were large, with values above regional averages. In some cases, they represented the owner's primary asset, often the product of years of saving toward the goal of securing the home of their dreams. In still other cases, owners may have had no recourse except bankruptcy to stave off even worse financial consequences for the family.

Owners soon encountered other problems. The underwriting for most homeowner policies requires that the insured occupy the home. While limited abseuces might be permitted and waivers secured in some cases to deal with unforeseen circumstances, in the end homeowners may face the loss of insurance coverage. Because mortgages are predicated on the homeowner maintaining insurance coverage to indemnify the mortgagee in case of destruction or damage to the property, the loss of insurance may ultimately lead to termination of the loan even if payments are being made.

Bad as these circumstances were, the affected homeowners were also caught up in the overall housing market collapse that occurred almost simultaneously with the discovery of widespread drywall problems. Even without defective drywall, homeowners in areas experiencing double-digit declines in property values might have faced the prospect of going "underwater" on their mortgages. With defective drywall present in the home, that prospect became a virtual certainty. This, of course, would preclude seeking conventional refinancing or the leveraging of homeowner equity.

Thus, homeowners generally had limited recourse to the financial resources needed to remedy the problem even if there was an agreed-upon remediation protocol. Some homeowners sought relief from the insurer covering their properties. Except where a specific policy provision covered the risk for faulty materials, insurers generally denied snch claims, asserting that the damage to the homeowner was the result of the use of faulty materials by builders and thus specifically *excluded* from coverage. Litigation to overcome this assertion has generally failed in Virginia state courts and in the Federal court system, once again leaving the homeowner without the resources needed to address the problem.

Homeowners also brought suit in the Federal courts against the manufacturers and distributors of the defective materials. This approach met with limited success. In a noteworthy case brought against a Chinese manufacturer (Tai-Shan Gypsum Co., Ltd.) in the U.S. District Court for the Eastern District of Louisiana, seven Virginia homeowners prevailed. In a default judgment, the trial court awarded damages ranging from $90,000 to more than $441,000. The average award was almost $373,000. However, the plaintiff families are yet to receive the proceeds of this case. Litigation, including appeals from this decision and additional class actions, continues. Within the past week, a Virginia couple also secnred a defanlt judgment against Tai-shan; however, as in the Louisiana trial, actually collecting the award will likely be a prolonged and uncertain process.

Litigation in other states has been somewhat more successful. In Muscogee County (Columbus), Georgia, Lowe's Home Centers, without admitting wrongdoing, liability or fault, agreed to a settlement of a state class action suit that resulted in a total of $5.5 million being available to qualified claimants. In addition, the same Federal court in Louisiana that heard the seven Virginia plaintiffs has agreed to settlements with one of the multinational corporations (Knauf Plasterboard Tianjin Co.) producing drywall in China. It provides funding for the repair of hundreds of homes in four states (Florida, Louisiana, Mississippi and Texas). This case does not affect Virginia claimants directly. It involved products made by a different manufacturer and one that is not a solely Chinese enterprise as was the apparent case in Virginia.

The State Response in Virginia

The legal and factual circumstances surrounding defective drywall claims differ from state to state. Once the nature and the potential scope of the problem in Virginia became apparent, the legislature and Executive Branch agencies became actively involved in responding to defective drywall issues.

Notice to Local Building Officials

As early as 2009, the Division of Building and Fire Regulation at DHCD, responding to initial reports from the CPSC and other sources, sent an advisory memorandnm to all local building officials, the parties charged with enforcement of the USBC. This alerted the officials to the emerging problems associated with certaiu Chinese-manufactured drywall products. The memorandum noted the potential for the corrosion of metals by sulfur compounds and the hazards that such corrosion presented to occupants from a host of causes including malfunctioning smoke and carbon monoxide detectors. The advisory noted that while the CPSC and other agencies were just beginning their research into the problem, the use of the suspect materials should be discontinued and that segments of the construction industry be so advised.

Defective Drywall Task Force

In early 2010, as the scope of the problem continned to grow, Governor Bob McDonnell assembled a drywall task force to learn more about the problem, hear

from homeowners and other affected parties, determine the numbers of affected properties and consider possible areas for action at the state level. Task Force meetings and subsequent town hall events brought together local officials, homeowners, other affected parties and state agencies with potential roles to play in responding to the issue. These sessions revealed more fully and poignantly the extent to which defective drywall had disrupted the lives of hundreds of Virginians. They also began to outline priority areas for state action. These included the urgent need to provide homeowners and contractors with authoritative guidance on appropriate remediation steps as soon as possible. Participants registered their concerns about whether potential homebuyers and renters were receiving proper notice from sellers or landlords when properties contained defective drywall products were offered for sale or lease. Finally, homeowners—frustrated by the response of insurers, manufacturers and the courts–looked to the state to identify funding to support remediation activities once guidance was in place. This proved to be the thorniest issue in a time of overall financial stringency.

State Legislation

During its most recent two legislative sessions, Virginia enacted measures that responded directly to aspects of the defective drywall problem. Earlier this year, the Governor signed HB 1610 and SB 942 into law. These bills, which the Virginia Housing Commission recommended, responded to concerns about the possible lack of disclosure of the presence of defective drywall in properties offered for sale or lease. Real estate professionals engaged by sellers and buyers, individual sellers and landlords with actual knowledge of defective drywall in a dwelling unit must disclose that fact to prospective bnyers or tenants. Failnre to disclose can have real financial and regulatory consequences. These identical bills went further to establish a reassessment process and other provisions that localities could use to grant property tax relief to homes with defective drywall.

Also in 2011, SB 1294 brought defective drywall under the aegis of the Virginia Consumer Protection Act. The law prohibits suppliers, after March 25, 2011, from selling, offering for sale, or using defective drywall in the construction, remodeling, or repair of any residential dwelling in Virginia. This prohibition does not apply to the sale or offering for sale of buildings or structures in which the drywall was already in place.

The first legislative attempt to address funding for remediation took place during the 2010 session. HB 46 created the Virginia Defective Drywall Correction and Restoration Assistance Fund for residential property. Loans and grants from the Fnnd could be used to pay reasonable and necessary costs for: (i) the remediation of a contaminated property to remove hazardous substances, hazardous wastes, or solid wastes, (ii) the stabilization or restoration of such structures or (iii) the demolition and removal of the existing structures or other work necessary to remediate or reuse the property. However, without an actual source of money, and with few prospects for a direct infnsion of state funds given the current fiscal environment, the Fund remains empty. A key provisiou of the bill established a statutory definition of "defective drywall" that drew upon the extant research and findings published by the CPSC.

Other initiatives that the legislature chose, for a variety of reasons, not to enact during the past two years would have:

- Compelled insurers to provide coverage for the damaged property,
- Barred the cancellation of insurance coverage for property that became vacant due to the presence of defective drywall,
- Barred the nonrenewal of insurance coverage or changes in rate structures based on the presence of defective drywall, and
- Required the State Corporation Commission to levy an assessment against state-regulated property and casualty insurers to provide financial support for the Defective Drywall Correction and Restoration Assistance Fund.

Regulatory Initiatives

During much of 2010, affected parties continued to await authoritative guidance on the remediation of defective drywall properties from a variety of sources, including the CPSC. Based on information developed at CPSC and elsewhere, DHCD, following consultation with the state's Office of the Attorney General, concluded that it—or, more accurately, its Board—could act under existing statutory authority to bar the use of defective drywall products and provide remediation standards through an amendment to the Uniform Statewide Building Code.

Following statutory procedures specifically intended to address defective or deficieut building materials, DHCD and its Board conducted a process to defiue defec-

tive drywall, bar its use within the Commonwealth, and provide remediation standards that wonld allow the safe removal of the offending prodnct and the restoration of property to a safe condition. With the participation of representatives of the building industry, the bnilding materials industry, affected homeowners and other interested parties, the Department developed a proposal that was nltimately considered and approved for final publication in the *Virginia Register of Regulations* on August 29, 2011. The new regulation:

- Prohibits the use of defective drywall in new construction,
- Establishes a remediation standard for the removal of defective drywall and the rebnilding of bnildings affected by the installation of defective drywall,
- Defines defective drywall for the purposes of applying the interim performance and remediation standards,
- Reqnires a building permit for the remediation of defective drywall,
- Reqnires use of the remediation standards when defective drywall is replaced and clarifies that the local bnilding official has anthority to consider modifications to the standards,
- Reqnires the removal of defective drywall when remediation is undertaken while permitting non-defective drywall to remain in place under certain conditions,
- Addresses the conditions for the removal and replacement of insulation and flooring materials,
- Addresses the conditions for the removal and replacement of electrical wiring and plumbing and mechanical system components and equipment,
- Establishes cleaning, airing out, and clearance testing criteria post remediation and prior to re-occnpancy,
- Establishes standards for agencies conducting pre-rebnilding or post-rebnilding clearance testing,
- Establishes standards for post-rebnilding clearance testing,
- Addresses final approval by the local bnilding official, and
- Addresses the approval of remediation work undertaken prior to the approval of remediation standards.

As far as we are aware, these were the first general remediation standards for defective drywall to use the medium of nniform building regnlations to give effective guidance for contractors and homeowners restoring residential properties to a safe condition. They are comprehensive in scope. Perhaps most importantly, they provide standards for post-remediation testing. Current and snbsequent occupants of remediated residential property mnst have assurance that the problems associated with defective drywall have been eliminated so that these houses can once again become homes.

Other Sources of Remediation Guidance

While DHCD was considering the provisions for a remediation standard, the CPSC continued to work on its recommended guidance. The National Association of Homebuilders (NAHB) and the Knauf Company (a global supplier of building prodncts) also proposed varying responses. The U.S. District Conrt for the Eastern District of Louisiana inclnded its own scope of remediation in conjunction with the *Taishan Gypsum Co., Ltd.* case. While there was considerable overlap among these proposals, there were also some significant differences. The most notable of these concerned the appropriate handling of electrical wiring in affected properties. The District Court generally required the most extensive remediation steps, going beyond not only the NAHB but also the most recent CPSC recommendations. The Court included the removal and replacement of all electrical wiring as well as removal and replacement of various hard-surfaced components of homes, such as cabinetry and tile floors.

The most siguificant difference between the standard incorporated in the Virginia building code and those of the Louisiana court probably occurs in connection with electrical wiring and hard-surfaced components. Virginia does not *require* the complete removal of electrical wiring components or of woodwork, cabinets, tile or wood floors. Instead, wiring may be left in place so long as exposed ends are removed or cleaned to reveal clean or nncorroded surfaces. Hard-snrfaced-materials *may* be left in place or reused. On the other hand, the CPSC guidance does not go as far as the Virginia regulations in addressing the removal and replacement of items such as HVAC components and water service plumbing. These variations in applicable guidance do have implications for the cost of remediation.

Costs of Remediation

It is perhaps no surprise that the Louisiana Court's remediation protocol, which required the most sweeping actions, appears to carry the highest cost—pegged at $86 per square foot. That would amount to more than $200,000 for a 2,400 square foot home—exclusive of temporary relocation costs and other ancillary charges. The National Association of Homebuilders suggested guidelines would fall well below that range (perhaps closer to $35–$50 per square foot) as would Virginia's new regulations.

Several factors influence any estimate of the aggregate cost of remediating defective drywall in Virginia. These iuclude the actual number of affected properties, the size of the housing unit, the extent to which the offending material is actually present, the number of sheets of new material needed to replace the defective product and the remediation standard. Homes where relatively little of the material was actually present or where it was limited to a specific area may not require as extensive a response. However, where the material is mixed with other drywall or scattered throughout the dwelling unit, the safest and most expeditious response is to remove and replace all drywall.

Assuming that there are at least 400 affected housing units in Virginia, the estimated cost of remediation could reach or exceed $32 million depending on whether only limited amounts of material were present in affected homes nr if all drywall and other affected materials and systems had to be removed and replaced. Given what we know ahout the extent of the problem, it is likely that the costs would reach the estimate. Following the Louisiana Court's protocol would likely double this sum. Note that this only addresses the work done to the property itself and not costs associated with reimbursing residents for the time they would be relocated during the remediation process and other potential costs.

Funding Remediation

Regardless of the specific dollar amount associated with varying remediation standards, the most salient fact is that, for a variety of reasons, most of the parties affected by defective drywall lack the resources tn pursue remediation without assistance. Further, at least in the case of Virginia, few viable sources of funding appear to be available. Unless the manufacturer associated with the materials implicated in the affected Virginia homes agrees to a broad settlement, litigation is likely to be long and frustrating with no certainty that claimants will be ever be made whole. While the state and its local governments have offered tax relief to affected owners, such relief cannot provide the front end funding needed to begin the remediation process.

The straitened financial circumstances of state and local governments make them less able to offer financial assistance to homeowners than might have been the case in earlier times. Annual funding available to states and affected entitlement jurisdictions from formula-driven Federal program sources, such as those administered by HUD, fall well short of the scope of the problem in Virginia and include features that may limit their direct use in the response to the drywall issue.

Virginia has explored other options, including the possibility of setting up a low/no-interest loan fund to give affected homeowners access to the front-end money needed to pursue remediation. Unfortunately, the wider decline in housing market values as well as the even more catastrophic losses associated with property identified as containing defective drywall, means that there is almost no equity in these homes to provide security for loans under current circumstances.

Virginia has used low/no-interest loan programs successfully for many years to finance low-income home purchases, the remediation of indoor plumbing deficiencies and more general home rehabilitation initiatives. In each of these cases, however, the expectation built into the projects was that at some point in the future—whether by a subsequent sale of the property, a market rate refinancing, or even in the case of delinquency and ultimate foreclosure—some equity would be available to return to the underlying program. That assurance does not appear to present in the case of defective drywall homes. As a result, any financial aid might effectively amount to a grant in aid at a time when the state, like other governmental entities is working hard to meet its existing obligations for a wide array of vital public services.

As an alternative, Virginia is also exploring the possible use of HUD Section 108 Loan Guarantees authorized under the Community Development Block Grant Program to provide loans to affected homeowners. It is unclear whether such a mechanism is feasible. Program reqnirements may limit the availability of this option to some affected parties or communities. The ability of homeowners to repay even loans at this relatively favorable rate is a practical constraint. Despite their nominal incomes, many households could find it difficult to repay loans while continuing to

remain current with mortgages—especially when those homes have little or no remaining equity in their current state. Snccess might depend on the willingness or ability of the original mortgagee to agree to a modification based upon the potential benefits of a successful remediation effort, including more stable home valnes, the restoration of equity, and an increased likelihood of future mortgage payments. Nonetheless, even this approach faces long odds and is unlikely to offer a broad remedy for the bulk of affected homeowners.

Closing Thoughts

The circumstances surrounding defective drywall are nearly unprecedented. Previous instances of the failure of construction materials have generally involved domestic manufacturers and snppliers of new prodncts. Defective drywall involves international trade in what was seemingly one of the most mundane commodities used in construction. The fact that some of the manufacturers have virtually no legal or business presence within the United States severely constrains the ability of individuals, or their home states for that matter, to attain redress. The scale of the aggregate costs of the product and the fact that its effects and substantial costs extend across several states strongly snggests that there is a need for the Federal Government to become even more active in responding to this issne. The CPSC and other agencies have provided valuable information that helped identify the source and nature of the problem and lay out a technical path for the safe remediation of affected homes. Now the Federal government needs to consider putting its shoulder to the wheel in addressing the next step of the process–marshalling the financial resources that enable homeowners to undertake remediation.

Virginia, like its sister states, will continne to pursue workable methods for getting the product out of homes and people back into them. In the end, of course, the best solution would be for those who produced a product that has disrupted the lives of our citizens to take financial responsibility for those consequences.

Senator PRYOR. Thank you. Mr. Shelton: That concludes my remarks. Senator Pryor: Thank you. Ms. Brincku.

STATEMENT OF BRENDA BRINCKU—ALVA, FLORIDA

Ms. BRINCKU. Thank you for the opportunity to appear, Chairman Pryor.

I especially want to thank Senator Nelson for personally inviting me here, and for meeting with us in the office in November 2009.

My name is Brenda Brincku, and my test—my drywall home is in Alva, Florida, where I lived for four and a half years with my husband George, my son Harrison, and my two daughters, Christine and Ashley.

Three years ago, a few days before Christmas, we found out that our home was what was making us sick and corroding our electric wires and our A/C unit.

We were both owner-builder of our home in Alva, which was built in 2004 using American-made drywall. I bring this to your attention because so much of the problem has been focused on defective Chinese drywall.

Despite the manufacturer, if your drywall is defective, your nightmare becomes your reality. We suffered the very same consequences as the Chinese drywall homeowners. We got sick; our homes smell; our electrical wiring corroded; and we had seven air conditioning units fail. Our financial well-being has been decimated. My dream home is now valued at zero. My taxes used to be $4,000 a year, are now just $254.

The expense of this disaster has destroyed our credit, and we no longer have credit cards. The simply act of getting a hotel to testify today was now impossible.

Our small family-owned landscape was diminished, and when our clients realized that they had Chinese drywall, and then they,

and their neighbors, due to the loss of the value of the whole neighborhood, canceled their contracts. We had to leave behind bedding due to the fact that our coils inside our beds were corroded.

As grown adults, we are now forced to turn to our parents for financial support, when, in turn, hurt them financially. Never did we, or my parents, imagine that this would be allowed to go on for so long.

I appear before you today representing the tens and thousands of homeowners across the United States that have any type of defective drywall in their homes. Please read the homeowners' testimonies that have been submitted to the Committee so that you can understand what a devastating impact this has been on American families.

Despite what you may have heard in the news, homeowners with defective drywall are still suffering tremendously financially, emotionally, physically. Senior citizens who purchased their home outright are now forced to pay rent to live in a safe environment or are forced to stay in a toxic home. Three of the homeowners sitting here today in the hearing room have lost or are losing their homes.

A Florida homeowner moved into a tent on her property this past weekend. A Virginia homeowner was forced into bankruptcy from toxic drywall, but a mortgage company is holding up the bankruptcy hoping for money from the legal settlement, which could take years. Military families, if they are forced into bankruptcy or foreclosure and or not being able to sell their homes when they get—change orders to their new duty area. This is upsetting for the children, because they have to leave their friends, their neighbors, their schools, and in many instances, their toys, personal items, because odor from their contamination is horrendous.

Families have been told to leave their homes by their pediatricians and physicians due to extreme illnesses, autoimmune, kidney disease, kidney cancer, extreme breathing problems, unimaginary fatigue, death of pets and cats and dogs, death of family members.

Where are families and their physicians to turn to? Where are the families and physicians to turn to for assistance? Many of these families had to seek out professional help, another expense, to help them deal with this surreal experience. The CPSC is too small of a Federal agency to deal with such a large issue. The financial remediation guidance says corroded electrical wiring can remain in a contaminated home; leave the wiring is a miniscule expense in the whole remediation process, and never should be left considering the hazard. Requires electrical wiring check every 40 years. The CPSC says there is no health hazards and no safety issues but yet the drywall must be removed.

What are we to do with this type of information? When would this findings be peer reviewed? What can the Committee and the Congress do to help? The House of Representatives has a caucus dedicated to contaminated drywall. The Congressional caucus and the Committees can. Most important is our health. Require the CDC to start gathering health information, and appoint a specialist to be available to answer ongoing health concerns from toxic drywall homeowners and their physicians. Hold another hearing, and call in the manufacturers to let them know that they will be held liable by our Government for the destruction of these homes,

just like it was done with Toyota, Haliburton, BP and Transocean. Help homeowners restore their credit, via extenuating circumstances ruling to pre-toxic drywall status. Help prevent foreclosures for the few homeowners that wish to try to save their homes in hopes of legal settlement. Meet regularly to craft legislations and produce minutes to be made available to the public.

Call in the insurance industry to the next hearing to discuss lack of coverage. To date, all the insurance from homeowners, installers, suppliers, builders deny coverage, citing the pollution exclusion. Provide legislation that authorizes no-interest loans to help homeowners remediate. Establish drywall standards to help prevent this from happening in the future.

We request the Attorney General look into the fact that some American businesses knew about the problem caused by this toxic problem and chose to cover it up, not inform homeowners or the Consumer Product Safety Commission. If this is not illegal, then laws need to be changed.

The toxic drywall homes that are now owned by the banks need full disclosure upon sale, so that the second generation families will not become victims of this toxic product.

Federal regulators have dropped the ball, and we hope this committee can help turu that around and send Federal assistance to these devastated American families. The victims of toxic drywall have sat and watched our Government rush off to help citizens in other countries for the last 3 years, while we have been completely ignored. We watched as our Government sends $20 million to Pakistan to create Sesame Street. In these dire times in our own country, our money should not be going overseas—taxpayer money should not be going overseas, but staying here and helping to put our country back together.

Once again, I thank you for the opportunity to testify before you on behalf of the homeowners suffering with defective drywall, be it Chinese or American made. If time permits, I will be attempting to answer any questions the Committee may have for me.

[The prepared statement of Ms. Brincku follows:]

PREPARED STATEMENT OF BRENDA BRINCKU—ALVA, FLORIDA

Thank you, Chairman Pryor and members of the Committee for this opportunity to provide testimony to the Senate Snbcommittee on Consumer Protection, Product Safety and Insurance. I would also like to express my personal appreciation to Senator Bill Nelson for his commitment to helping affected homeowners whose houses are contaminated by sulphur compounds emitted from defective drywall. I am convinced that these compounds are causing health and safety problems for my family and countless Americans.

My hnsband George and I are jnst one of tens of thousands of homeowners who, through no fault of our own, have beeu devastated by having defective drywall in our home. Unlike the commou complaint about Chinese Drywall, we had National Gypsum American made drywall in our home. We had no Chinese drywall in our home yet our American drywall was causing the same effects as those experienced with Chinese drywall.

American drywall has destroyed our home. Both American and Chinese drywall have destroyed our landscape busiuess. Many of George's laudscape clients had Chinese toxic drywall in their million dollar homes. Some of our clients that lived in the neighborhoods with Chinese Drywall homes but did not have the defective drywall in their homes felt the toxic drywall homes where briuging dowu the value of their homes. Both sets of clients decided to stop investing money in their homes and landscaping due to the contaminated Chinese drywall homes. A lot of my husband's clients have walked away from their milliou dollar homes siuce their builder

wouldn't step up to the plate and the legal cases are being dragged out in the court system.

We had to move out of our defective American drywall home on March 14, 2009 and we moved into a rental home about 25 minutes away. We have been trying to run our landscape business traveling back and forth between our toxic and our rental home. Our landscaping business was run from our acre and a quarter property where the toxic home sat. Now that we are no longer able to live there we cannot keep our inventory on hand for fear of it being stolen from the property of the abandoned toxic home. Our rental home is in a community which won't allow us to run a landscape business out of our home. George has had to obtain a new position at a nursery and we continue to service our last few clients from the landscaping business.

In 2003, George and I invested our savings and our hearts into the purchase of a property in Alva, Florida. We acted as owuer/contractor in building our home. We made a full effort to employ local subcontractors to help with construction. I remember the many days and nights both George and I fell exhausted from the days work only to strive for the next days tasks to build our dream together.

Shortly after completion of the home in October 2004, we experienced failures of 3 coils in one AC unit and 4 coils in our other air conditioning unit, blackening of electrical wiring and failure of household appliances. After we found out we had the defective drywall our homeowners insurer asked us to turn the electric off to our home when we were not there because they feared there would be a fire. I realize that much of the attention has been paid to those with defective Chinese drywall, yet there is a universe of homeowners like us, with American made drywall, who have yet to be acknowledged as having a problem.

The impact that this has had on my family is unimaginable. My three children lived in this toxic environment and then had their lives turned upside down when we were forced to abandon our home and leave many of our personal items behind for fear of contamination of our new residence. My son lived in this house for half of his life and now, for the rest of our lives, we have to wonder what impact this will have on his future health, the health of all of our family members. If this toxic product has corroded the silver and copper items in our home what has it done to our lungs, our health, our bodies. We know we were horrendously sick living in that toxic home and we must ponder the long term effects forever.

For today, however, I represent everyone across the United States and abroad who continue to suffer the ill effects—physical, emotional and financial—resulting from having defective drywall in their homes.

George and I are among a few outspoken homeowners who have been advocates for these victims. We have been involved from the very start of this problem, yet little help has been provided to us to date.

I would like to summarize what has occurred at the Federal level. However, I preface my comments by stating that, short of some homeowners receiving local property tax relief, the *federal agencies working on this problem for over four years have failed us.*

The U.S. Consumer Product Safety Commission Failed Us

The CPSC is the lead Federal agency responsible for addressing the safety issues surrounding the defective drywall problem in the United States and its Territories. This Agency is ill equipped to deal with such a large scale defective product issue. The CPSC has invested millions of dollars in testing homes with the defective drywall and has made a valiant effort to find a solution. We have been provided with stndy after study, many which are not peer reviewed. The findings of the studies have often been published late on a Friday afternoon to avoid media attention.

The Final report released by the CPSC provided its recommended remediation protocol which told homeowners that it is acceptahle to leave the electrical wiring in a home. To me this protocol is useless and I would never put my family in a situation where we may be killed in a fire cause by an electrical malfunction from defective drywall. I invite the CPSC to talk to some of the contractors who have remediated these homes. In every case they have found that the corrosiou caused by the defective drywall has spread far beneath the casing of the electrical wires. CPSC did offer some advice to homeowners. They suggested that we have the wiring checked every forty (40) years. Imagine that, how would one do that when the average home is sold once every 7–10 years.

I realize that the CPSC has just over 400 employees nationwide and that they spent a major portion of their budget on the drywall problem. Much of the cost could have been avoided if they had in-house expertise. Early on there was a Multi-Agency Task Force Formed to address this, but I found that coordination and commu-

nication among the agencies involved was inconsistent at best and should be considered a failure.

The U.S. Internal Revenue Service Failed Us

I would like to personally thank Senator Nelson for his involvement in directing the IRS to provide homeowners with defective drywall the ability to claim a casualty loss on their income taxes if they had remediated their drywall homes themselves. This provision only helped homeowners who were wealthy enough to have remediated their homes and did nothing for the tens of thousands of other homeowners. While in principal, this tax relief is welcomed, under the provisions issued by the IRS, homeowners who may receive compensation in the courts would then be required to declare that compensation as income making the casualty loss useless once/if court cases were settled and compensation was distributed.

The Federal Emergency Management Administration Failed Us

As homeowners searched for every opportunity for resources, we quickly turned to FEMA to declare the defective drywall problem as a national emergency, thus releasing emergency funding for temporary housing, and for low or no interest loans. The damages from the defective drywall are likened to damages suffered in a hurricane or other disaster. In fact, both Senators Warner (Va.) and Nelson (Fl.) referred to the defective drywall problem as a "Silent Hurricane." We were told by FEMA that they could only act if the Governor of our State requested a Federal declaration.

Homeowners in Florida began petitioning then Governor Charlie Crist to request the necessary declaration; however, the Governor had his Director of Emergency Management request FEMA assistance, which was quickly declined because the request was not from the Governor. Further attempts to have the Governor directly request FEMA help failed.

The U.S. Department of Housing and Urban Development Failed Us

Once again Senator Bill Nelson petitioned another Federal agency for assistance for homeowners. Senator Nelson thought there may be an opportunity to utilize Community Development Block Grant Funding for remediating homes with defective drywall, the premise being that these funds could he used if the homes with defective drywall were considered blight. This idea gave us hope, yet in practice, we found that the funds were administered by the local government and were already allocated; and we quickly found that we would be competing for the funding with Victims of Domestic Violence, the homeless, and Victims with AIDS. In reality, the CDBG funding was so small it would only help 1–2 homeowners if the entire budget was used solely for the defective drywall home.

The Center for Disease Control Failed Us

There are many health symptoms that homeowners and especially children have, as a result of being exposed to defective drywall. Nosebleeds, skin rashes, respiratory issues, sore throats, dizziness, and burning eyes and autoimmune disease are just some of the health problems homeowners are experiencing. Others have reported greater problems including central nervous system effects, restless leg syndrome, hair falling out and some even claim that deaths have occurred from the off-gassing. With all of these complaints, the State Health Department in Florida did uot have the resources for individual testing of homeowners and once again Senator Bill Nelson asked CDC to look into the health aspects.

The CDC reviewed available data and drew a conclusion that the symptoms that homeowners were experiencing were similar to common ailments like having a cold or allergies. The CDC response in their online drywall document was that homeowners should "Go outside to get fresh air" if they could not breath in their own home!

The CDC recently issued a final decision that there will not be a long tern health study associated with the effects of having defective drywall in a home.

The U.S. House of Representatives Drywall Caucus on Defective Drywall has Failed Us

We appreciate those Members of the House of Representatives who have come to our assistance by becoming members of this Caucus. Having said that, it should be uoted that until recently, the group rarely met and attendance was dismal.

Statistics reveal that millions of board-feet of defective drywall enter the United States and its Territories—enough to build 100,000 homes nationwide. Defective drywall has been discovered in at least 41 of the 50 United States. There are 435 Members of the U.S. House of Representatives.

These statistics are telling because the problem of defective drywall is so widespread yet there are only a handful of Members of the House of Representatives who actively participate on the Drywall Caucus. How can that be? I realize that each Member has a lot to do bnt there seems to be a lack of attention to the defective drywall problem on a national scale.

I ask that the Committee consider the following ideas:

- Require the Consumer Product Safety Commission to arrange for a peer review of its final remediation guidance, particularly because leaving electric wiring in a contaminated home is clearly an unsafe condition. Peer reviews are a normal part of any technical decision that affects the public and in this case the CPSC issued its final guidance without a formal peer review process or public hearing and/or public input as required by the Federal Code of Regulations.
- Direct the CPSC to declare this product a hazard
- Direct the CPSC to create standards for drywall content
- Direct the Center for Disease Control, in conjunction with State Health Departments across the United States, to conduct a long term health assessment of the effects of defective drywall on humans.
- This Committee should be the catalyst for Members of Congress to be made aware of and actively participate in the Congressional Drywall Caucus.
- This committee should undertake the responsibility to pursue the availability of low or no interest loans to homeowners who wish to remediate their homes. Perhaps the Small Business Administration would be one avenue to pursue.
- This committee should work to restore the credit of families who, through no fault of their own, have lost their homes due to this toxic product be it via short sale, bankruptcy or foreclosure.
- Lastly, the Committee should consider the possibility of homeowners receiving Federal grauts under a declaration similar to that of a hurricane or flood, aud administered by FEMA. At a minimum the grants should be available to those wishing to relocate to temporary housing.

In couclusiou, I would like to again express my appreciatiou to the Committee and to Senator Nelson for this opportunity to provide testimony on this important issue. I stand ready to answer any questions the Committee may have. Thank you.

Senator PRYOR. Thank you.

Ms. Brincku, let me start with you. And again, I'm sorry that you've had to go through all this. It's just been a terrible hardship. But, let me ask just a few questions. And I think you touched on all these, but I want to make sure I understand the answers.

I want to go back to legal recourse under the circumstances you, in your case, maybe rarer than the other ones, you have an American company who manufactured this. What, do you have any legal recourse against that company?

Ms. BRINCKU. We are going to trial in May, the first 2 weeks in May, at Fort Myers. And, you know, for us, it's the, this issue, the same things that happened to us, just like any other homeowner with Chinese. And we've lost our business; we've lost, you know, our home is, we're going through moratoriums. Every 3 months we get reviewed. And then, you know, fighting for the victims, and watching what has happened to them, it's the same things as what is happening to American——

Senator PRYOR. And your homeowners insurance doesn't cover this?

Ms. BRINCKU. No. Our homeowners, or builders insurance. And our homeowners——

Senator PRYOR. But, there's some sort of exclusion in the policy?

Ms. BRINCKU. Yes. Pollution exclusion. And also, our homeowners insurance told us to flip off the electricity. They were worried and concerned about a fire.

Senator PRYOR. OK. So, you've also tried to work through your contractor, but no——

Ms. BRINCKU. We are the owner-builder.

Senator PRYOR. OK.

Ms. BRINCKU. We are the contractor.

Senator PRYOR. OK. And, you've told us what you think the Congress should do and what the agency should do. So, I appreciate you coming in today, and I appreciate your testimony today. And, we will continue to try to do this. The two senators here, as well as some others who aren't here today have been working on this for a while. But, we've run into some brick walls ourselves.

Mr. Shelton, let me ask you a question about Virginia. You mentioned that you, the state has a drywall task force, and that you've done some requirements now about disclosure upon the sale of the homes, I guess is how that works. And, you have this new remediation standard. And you mentioned that it's hard to figure out how to pay for the remediation. That's a difficult thing. Is it your experience that generally homeowners policies don't cover this?

Mr. SHELTON. That's correct. I think the experience in Virginia was very similar as Ms. Brincku described. There's usually a hazard or a pollution exclusion in those that has been tested through the courts. In fact, there was proposed legislation to try to unwind that in Virginia that was unsuccessful. Generally, the conclusion has been that was a preexisting contract that was defined in the terms, and that's been upheld on the insurance companies. And so, homeowners have not been able to get any relief.

Senator PRYOR. OK. And, you mentioned the costs of remediation in your state, and I wasn't quite sure I followed that exactly, but there may be a national figure, and you guys think you can do remediation cheaper in your state?

Mr. SHELTON. Well, this is an evolving field, so the first standard, I believe, that anyone put forward was in the courts. And there was professional testimony in Louisiana, and that involved removing all of the drywall, all the electrical, all of the soft surfaces, as well as many of the hard surfaces. So, trim; cabinetry; and lots of tile floors all would have to be removed. That's almost——

Senator PRYOR. What about the plumbing? You——

Mr. SHELTON. Not so much the plumbing, unless it was copper. If it's copper line pipes, yes, because—but the plastic pipe didn't seem to be affected. But, it was more the copper elements, or, that would corrode.

That was estimated at about $86 a square foot, which gets up pretty high in many of these homes, which are not, you know, there are different experiences. But in Virginia, they're larger homes.

What we believe is that if you don't require the removal of those hard surfaces, which, we think the testing from CPSC and others shows that you really don't have to do; and then, the big issue was removal of electrical wiring. Initially we were looking at having to remove all wiring. The decision came down after CPSC issued its updated guidance, was that you would not have to remove all wiring. All devices, yes. And you would have to strip the wiring back to show that there was no corrosion. But, if you did that, we be-

lieve that you can leave wiring in place, and that's a major cost factor in this remediation.

So, by doing those things and not removing the hard surfaces, it gets you down, the estimate is somewhere between 35 and 50, depending on the kinds of materials used in the home; but it makes it more affordable.

Senator PRYOR. OK. But that's still a lot of money for people.

Mr. SHELTON. It would definitely be a lot of money, and could not be done within the means of most of these homeowners. That's correct.

Senator PRYOR. And the inconvenience of having to probably move out of the home while that's being done, and——

Mr. SHELTON. Absolutely. But, I think the experience is that most homeowners are not in their homes right now.

Senator PRYOR. All right.

Senator Wicker.

Senator WICKER. Well, it is just heartbreaking.

Let me follow up on that line. Mr. Shelton, at $35 a square foot, which would be the lower end of your estimate, a 2,000-square-foot home, am I right that that's $70,000?

Mr. SHELTON. That's correct, Senator.

Senator WICKER. And some homes are smaller than that, and some homes are larger than that. But, try to do with math with 8,000 homes nationwide, that's over half a billion dollars.

Mr. SHELTON. It's a big number. In Virginia alone, our estimate was on the low side in the 30 million range; and it might be upwards of the 50 million range. That was an estimate of some 300 to 400 homes.

Senator WICKER. Well, you know, the home is the castle. And, Ms. Brincku, I just, I hope there's something that the brightest minds in Washington, D.C. can come up with to give you some sort of solution. And, at least, you have a redress through the courts.

Have any other homeowners from this particular American manufacturer company had complaints?

Ms. BRINCKU. Yes. Yes. There is, there are homeowners. And some have lost their homes in waiting for the process. Their, the banks have taken their homes. The banks refuse to work with homeowners.

Senator WICKER. Approximately how many?

Ms. BRINCKU. Excuse me?

Senator WICKER. Approximately how many homes are——

Ms. BRINCKU. We have about 100 cases of——

Senator WICKER. Of that particular——

Ms. BRINCKU. For National Gypsum that are waiting. There's others that have also had, other American drywall companies have also had problems.

Senator WICKER. Do you think that National Gypsum adopted different standards in the years shortly before you purchased the drywall? What is it that happened all of a sudden with their product?

Ms. BRINCKU. We are not exactly sure. We've done a lot of research. There was a lot of different things going on at that time. And there is shortages. They were running their factories 24/7. So,

there's a lot of different things, theories that we have, that then could have gone wrong at that time.

Senator WICKER. Mr. Cohen, Ms. Brincku suggests that your studies were not peer reviewed. Would you respond to that? You know, I have been someone who for a decade and a half in the House and Senate has always called for sound science: Let's listen to the scientists, and don't jump to conclusions. But, she suggests that a peer review of these various studies might have revealed something more helpful to the cause of these 8,000 families.

Mr. COHEN. Yes, Senator Wicker. The studies that we conducted were conducted with our top national laboratories and using some of the top scientists. And we've conducted those in consultation with our partner agencies and with private scientists as well, to make sure that there was nothing but the highest level of science going on. And we stand behind those results completely. And we feel so confident that the science was of the highest caliber that we posted all of those materials publicly on our website as soon as they were reviewed for quality control and quality assurance.

We've also put all of the raw data underlying those studies publicly available so that anyone in the country can take issue and study, and review our studies if they feel that they're not done adequately.

To date, though, we have received no scientific contradiction to our studies from others who have really questioned the adequacy of our studies. We, our goal was to get that information done right the first time, and to get it out to the homeowners and to the public so that they could use it as quickly as possible, and that's what we did.

Senator WICKER. You're not suggesting that the health symptoms are not there, are you?

Mr. COHEN. I'm not suggesting that at all, Senator. I've been in a home myself. I have experienced them, as have other members of the staff. We've experienced them differently, and different homeowners experience them differently. Approximately half of homeowners report no health effects, and approximately half do. And the half that do report differing levels of sensitivity, from slight sensitivity to a great sensitivity.

We're not suggesting that they don't exist. We're suggesting that we don't—we have not been able to explain them with the low levels of emissions that we're able to measure in the home.

Senator WICKER. OK. Well, so, you haven't ruled it out, then. You simply have not been able yet to establish a causal connection. Would that be a fair statement?

Mr. COHEN. I think that's a fair statement. And we'll be looking to our colleagues at CDC. If they're able to provide us with additional information in their health consultation. We would, of course, consider that in our investigation.

Senator WICKER. Do any of you—maybe Dr. Portier, or maybe Mr. Shelton—can the drywall be tested before delivery at this point? Do we have the scientific capacity now to test drywall for this sulphuric and adulterated presence before it is brought to a home? Can anyone answer that question? Mr. Cohen, it seems——

Mr. COHEN. I'll take the question. Yes.

Senator WICKER. OK.

Mr. COHEN. We are working, as I mentioned in my opening statement, with the Gypsum Association and ASTM International, which is a voluntary standard-setting organization, to do two voluntary standards. One of which, we're pleased to announce, went into effect last month. That standard focused on the labeling of the drywall, because one of the major problems we encountered in our investigation was—it's very hard to track when you go inside a home that's been painted and to get behind the board. Oftentimes the drywall is not marked by point of origin. That will now be changing. It'll be marked by a code. It'll be marked on a regular basis, so that we'll be able to trace the drywall.

The second standard that we're working on, and we continue to work with the Gypsum Association and with ASTM International, is on a performance emission based standard, which is what you're alluding to, which is to be able to measure the levels of gasses, and what acceptable level would be permitted, if any, coming off the——

Senator WICKER. When it is still at the warehouse.

Mr. COHEN. I'm sorry?

Senator WICKER. When it's still at the warehouse, or, the manufacturing plant.

Mr. COHEN. Absolutely. And trying to—there are, there is the technology available to test that. I think that was your first question. And what the industry, and what we're trying to work with industry to figure out is, what are the acceptable levels, if any, of—you know, because some of these materials are naturally occurring, and so you can't completely get them out. But, at a very low level, I think, we're going to agree on a number that will assure, provide some assurance.

Senator WICKER. You know, if Senator Warner will withhold for one final question, maybe I won't take a second round, then.

Tell me, are we aware of any problems that have occurred in other countries that have received this Chinese drywall? It, is it strictly an American phenomenon? Or, should we perhaps have known from other instances before we started actually importing it?

Mr. COHEN. It appears to be a strictly American phenomenon located in your region—the Gulf Coast region, and Hampton Roads area.

Senator WICKER. I just suggest there's a lot we still don't know about the science.

Thank you, Mr. Chairman, for your indulgence.

Senator PRYOR. Thank you.

Senator Warner.

Senator WARNER. Thank you, Mr. Chairman.

And, a lot of questions. One, following up on why, in an inquiry, you asked about, with the insurance companies. As a matter of fact, what even happens, it's so absurd, is if, when you have, we had in Hampton Roads a responsible homeowner, or home builder go into a series of homes and start to remediate off her own nickel, and she got sued by her own insurance company. A major homeowner-developer.

And again, I, Mr. Cohen and Dr. Portier, we've gone around and around on this a number of times. But, you know, this health cau-

sation, it just seems strange to me that we've not been able to determine this health causation issue; yet, we all acknowledge that for many people there are health effects. Anybody that's been in one of the homes can see the corroded wire. There's no doubt about the corroded wire. And even the potential, then, is, as Ms. Brincku said, the potential health hazard from a fire potential on the—and you go ahead and acknowledge that people should go through remediation. It, there seems to be just a disconnect there.

And, I know, Dr. Portier, you said in spring of 2012 now, 3 years after the fact, we're going to get the final CDC back about causation?

Dr. PORTIER. Causation is an interesting term you're using here, so I'm going to take a minute and back away from it a little bit. These particular gasses are toxic to human beings. There is no doubt about that. It's a question about the level of exposure, and whether you would manifest that toxicity for those levels of exposure that you are seeing in these homes.

Senator WARNER. Would you allow your family to live in one of these homes?

Dr. PORTIER. Probably——

Senator WARNER. As a doctor.

Dr. PORTIER. Probably not. That's part of the reason why we are looking at it the way we are looking at it now.

The amount of time it would take to do a formal health study would not do anyone any good in this particular case. What a health consultation will allow us to do in this case is to calculate what we think the peak exposures were in the homes early on, or during warm days, or during days with high moisture in the air—things that would affect what those concentrations were. And, using that, we can look to see if we missed the boat in measuring in the homes—the 51 home study. Because the way you measure is over a longer period of time, and so, it's an average exposure.

So we want to look very carefully at what those exposures might have been in those homes, and think in terms of whether it has crossed a threshold of human health effect.

Senator WARNER. I think the most telling part of your comments was that you wouldn't let your own family live in one of these homes.

You know, one of the things that's also important, Senator Wicker, with, that, we talk about causation, and the lack of a full standard. Yet there are companies out there settling suits on, legal suits on this issue. So, companies don't settle unless they feel like at the end of the day they're going to be found guilty.

And, one of the questions I have, Mr. Cohen, is that, you know, I know that Chairman Tenenbaum has had now, I think, three bilaterals with China on this, trying to force the Chinese companies, and particularly some of the ones that, Taishan, who came into Virginia, to bear some responsibility.

I want you to, I'd like to know what the status of those conversations are; and, as well, again, to Senator Wicker's point about—do, are we aware of how much additional Chinese drywall may be sitting in warehouses around the country? And, God forbid, let's make sure that there's some warning put on that. And is there any possi-

bility that there could be some of that stored drywall still being sold into the marketplace?

So, if you can address both the question of the status of the negotiation with the Chinese, and then, if we have any record of where this drywall, that may not have been sold, is in any storehouses around the United States, and making sure that that's not sold into the marketplace.

Mr. COHEN. Yes. As you correctly noted, we have had some very high level discussions—that Chairman Tenenbaum has had very high level discussions with our Chinese counterpart, AQSIQ, the regulator there.

When this investigation began in June nf 2009, we coordinated with that group, and we had two of their officials visit homes in Florida and visit CPSC headquarters. We then secured an invitation to go to China and send an investigatory team there to look at some of the factories and tn try to get into some of the mines. Since that time, the item has remained on our monthly agenda with them.

But on a much higher level, we've really pushed to raise it, as you noted, to the bilateral China summits, and even the recent trilateral summit involving the EU. We pushed it on very high levels of the Department of State, the Department of Commerce. We've provided briefing papers to former Ambassador Huntsman on this.

As a small agency, we have pushed and pushed. And we know that members of the subcommittee have also done so, and we appreciate that.

To date, there have been no response from the Chinese manufacturers. They are basically telling us, "return to sender," and they don't see a problem with their drywall. And their response has been pretty similar in the private litigation as well. Unlike the one German conglomerate that's made an appearance, these other Chinese companies have not come to make an appearance, and to get involved in the settlement discussions that you alluded to.

In terms of your second question regarding the other Chinese drywall, I'll note that the import of Chinese drywall, which was basically, the vast majority was in 2006, was in a response to the overheated housing market and the post-Katrina and Rita situation. It was a very unique historical and economic moment. So, we don't see the economics supporting any new drywall coming in. And, in fact, we have verified every——

Senator WARNER. What about any of the drywall that may have been imported in 2006——

Mr. COHEN. Right.

Senator WARNER.—sitting in warehouses in the——

Mr. COHEN. We are aware, we have tracked some of that drywall—it is a limited quantity—to a couple of warehouses. And we have, and we do maintain contact with those, the owners of that, and we've advised them that they should not be distributing that in the marketplace, and if they intend to, that they should notify us before doing it, because we may want to take some action.

Senator WARNER. But, is there any basis that they may be still ignoring those recommendations and still selling that old Chinese drywall into the marketplace?

Mr. COHEN. I don't have any information that would suggest there's a basis that they're doing that based on the high——

Senator WARNER. Can you get me some—I'd like to get some documentation on that.

Mr. COHEN. I'd be happy to follow up after.

[The CPSC submitted the following letter and exhibits in response.]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Bethesda, MD, January 13, 2012

Via Hand Delivery
Contains Confidential Information
Protected By Section 6, CPSA (15 U.S.C. 2055);
Provided Pursuant To Section 6(a)(7), CPSA
(15 U.S.C. 2055(a)(7))

Hon. MARK PRYOR,
Chairman,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
Committee on Commerce, Science, and Transportation,
United States Senate,
Washington, DC.

Dear Chairman Pryor:

Thank you again for inviting Mr. Neal Cohen, Small Business Ombudsman, U.S. Consumer Product Safety Commission (CPSC), to provide testimony at the Subcommittee's December 6, 2011, hearing titled, "Contaminated Drywall: Examining the Current Health, Housing and Product Safety Issues facing Homeowners."

At the hearing, Senator Mark Warner requested that Mr. Cohen provide additional information regarding any remaining "stockpiles" of problem drywall that the CPSC has identified in the United States, as well as information on the current status of those stockpiles. Through this letter, we respectfully respond to his request.

In late January 2009, the CPSC began to look into reports of noxious odors, corrosion of metal items in homes, and reports of short-term upper respiratory irritation in new and recently renovated homes. After identifying problem drywall imported from the People's Republic of China as a potential catalyst for these problems, the Commission set forth a multi-pronged, science-based plan to examine the issue. Key elements of the plan included establishing the amount of potentially problematic drywall that was imported, where that drywall was installed, and whether any problem drywall remained in the distribution chain.

By October 2009, the Commission had mapped out many of the contours of the distribution chain. As part of this investigation, the Commission also identified a limited number of stockpiles of remaining inventory potentially linked to the drywall used in houses where metal corrosion and other problems were reported. The ownership, locations, and amounts of the principal stockpiles known to Commission staff are as follows:

(1) Davis Constrnction Snpply, LLC, Newberry, Florida (hereinafter "Davis Construction"). Approximately 394,000 pieces of "Dragon brand" drywall produced by Beijing New Building Materials.

(2) Knanf Plasterboard (Tianjin) Co., LTD (hereinafter "KPT") and Banner Supply Company (hereinafter "Banner"), Fort Lauderdale, Florida. Approximately 50,000 pieces of drywall manufactured by KPT.

(3) Palmetto Manatee Forestry Terminal (hereinafter "PMFT"), Palmetto, Florida. Approximately 39,000 sheets of "C&K" brand drywall.

(4) Habitat for Humanity, New Orleans, Louisiana. Approximately 35,000 sheets of KPT drywall.

In late October 2009, CPSC staff sent each of the entities managing or controlling these stockpiles a letter, by certified mail, requesting that they "notify ns immediately regarding any possible sale, disposal, or transfer, of any sort, of any portion of your stock or inventory of Chinese drywall." A copy of this letter is attached as Exhibit 1. To date, Commission staff has not received any responses from these parties that the stockpiles have been sold, transferred, or otherwise moved out of storage facilities and into commerce.

However, in an effort to continually monitor any remaining potentially problematic drywall inventories, Commission staff recently reached out again to the entities

managing or controlling known stockpiles. Attached as Exhibit 2 are copies of recent letters from Davis Construction, KPT, Banner, and Arrow Terminals, Inc. (USA) (manager of PMFT) stating that the drywall inventories they manage or control have not been released into commerce. It is our understanding from speaking with Habitat for Humanity staff in New Orleans that the stockpile under its control was destroyed according to local waste disposal laws. Commission staff obtained and retained samples of the stockpile prior to its destruction. In addition, it is the understanding of Commission staff that there are several entities that continue to retain possession of small amounts (500 pieces or less) of potentially problematic drywall. To date, Commission staff has no reason to believe that any inventory has been removed from these small stockpiles for use in new residential construction or renovations.

Finally, we note that this letter and associated attachments may contain confidential business information protected by section 6 of the Consnmer Product Safety Act (CPSA), as amended (15 U.S.C. 2055). The Commission could not provide this information to the general public until staff followed all of the disclosure steps required by the statute. Pursuant to your reqnest, however, we are respectfully providing the information pursuant to the Congressional Committee exception in section 6(a)(7) of the CPSA (15 U.S.C. 2055(a)(7).

I hope this information is helpful to you. Should you or your staff have any questions or need additional information, please do not hesitate to contact me at (301) 504–7660, or by e-mail at cday@cpsc.gov.

Sincerely,

CHRISTOPHER DAY,
Director,
Office of Legislative Affairs.

Exhibits (2)

EXHIBIT 1

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Bethesda, MD

Office Of Compliance & Field Operations
Director, Defect Investigations Division
E-mail:dwoodard@cpsc.gov

Dean W. Woodard
Via Certified Mail

RE: CPSC FILE NO. PI090017—DRYWALL IMPORTS FROM THE PEOPLE'S REPUBLIC OF CHINA

Dear [Sir/Madam]:

Per our prior communications, the U.S. Consumer Product Safety Commission ("Commission" or "CPSC") is an independent Federal regulatory agency charged with the responsibility of protecting the public against unreasonable risks of injury and illness associated with consumer products. As you kuow, the Commission is investigating reports that drywall imported from the People's Republic of China and installed in homes in the United States has caused corrosion of metal components in those homes and various health problems to the occupants of the homes.

We understand your firm currently maintaius a stock or iuventory of such Chinese-made drywall. Given our concerns with this product and the related reported health aud safety issues, pursuant to Section 27 of the Cousumer Product Safety Act (CPSA), 15 U.S.C. § 2076, we ask that you uotify us immediately regarding auy possihle sale, disposal, or transfer, of any sort, of any portion of your stock nr inventory of Chinese drywall.

Contact Information

Please direct any such notice to me directly by phone at 301–504–7651 or e-mail at *DWoodard@cpsc.gov*. If I am not available, you may also direct any snch notice to Mary Kroh, Compliance Officer, at 301–504–7886 or *mkroh@cpsc.gov*. Please address your correspondence to Mary Kroh's attention at the following address: Office of Compliance and Field Operations, U.S. Consumer Product Safety Commission, Room 613–15, 4330 East West Highway, Bethesda, MD 20814–4408. The Office of Compliance and Field Operations telefax nnmber is (301) 504–0359.

Thank you for your cooperation.

Sincerely,

DEAN W. WOODARD,
Director, Defect Investigations Division,
Office of Compliance and Field Operations.

Enclosures/Links:

Consumer Product Safety Act—*http://www.cpsc.gov/about/cpsiallegislation.html*
16 C.F.R. Part 1101, Information Disclosure—*http://www.cpsc.gov/ABOUT/guide.html*
Part 1115, Snbstantial Prodnct Hazard Reports—*http://www.cpsc.gov/BUSINFO/frnotices/fr06/E611758.pdf*

EXHIBIT 2

DAVIS CONSTRUCTION SUPPLY, LLC
January 5, 2012

U.S. Consumer Product Safety Commission
Office of Edncation, Global Outreach, &
Small Business Ombudsman
Attn: Dean W. Woodard, Director
Bethesda, Maryland

RE: INVENTORY OF CHINESE DRYWALL

Dear Mr. Woodard:

Thank yon for your call earlier this week regarding our inventory of Chinese Drywall. We have discovered that our initial figures which were provided to your office in June of 2009, were inadvertently understated. As a result of litigation, we have re-inventoried our warehoused drywall since June 2009 and actually have more drywall stored than previonsly reported. Onr revised figures are:

305,628 boards of 5/8″ Type X

89,148 boards of 1/2″ Type X

We continue to maintain that onr Dragon Brand drywall, which has successfully been determined to be non-defective and non-corrosive through independent testing and testing done by the CPSC, should be released for commercial nse. Should you have any questions or if we may be of assistance in any way, please feel free to call or e-mail. We look forward to hearing from you soon and also hearing that the CPSC has released our drywall for commercial use.

Sincerely,

STEFAN M. DAVIS,
President.

KAYE SCHOLER LLP
New York, NY, December 22, 2011

NEAL S. COHEN, Esq.,
Trial Attorney, Division of Compliance,
Office of the General Counsel,
U.S. Consumer Product Safety Commission,
Bethesda, MD.

RE: KNAUF PLASTERBOARD (TIANJIN) CO., LTD. DRYWALL

Dear Neal:

This letter is submitted on behalf of Knauf Plasterboard (Tianjin) Co., Ltd. ("KPT") in response to your inquiry regardiug KPT drywall in the United States that is still in KPT's possession and control. As we discussed, KPT has stored ap-

proximately 50,000 pieces of drywall in a warehouse in Ft. Lauderdale, Florida. The drywall is stored for evidence preservation purposes pnrsuant to an order of the Court in the *In Re Chinese Manufactured Drywall Products Liability Litigation,* MDL 2047, pending in the U.S. District Court for the Eastern District of Louisiana. The drywall is not being stored for distribution purposes. It is K.PT's intention to dispose of the drywall in conformity with applicable waste disposal regulations when permitted to do so by the MDL Court. K.PT has no intention of distributing the drywall for installation purposes.

In addition to the warehoused drywall, KPT's contractor, Moss & Associates, comes into possession of removed KPT drywall in the course of remediating homes pursuant to a settlement program entered into with the Plaintiffs Steering Committee in MDL 2047. Moss has represented that it disposes of the removed KPT drywall in conformity with applicable waste disposal regulations. The removed drywall is not distributed for re-installation.

In addition, some of KPT's litigation experts may have some KPT drywall, but these also will not be distributed for installation purposes.

I would point out that Banner has brought an action to rescind the agreement whereby K.PT took title to the drywall in the Ft. Lauderdale warehouse. Although K.PT disputes Banner's right to rescind, if they were successful, Banner would regain title to the drywall, and KPT would no longer control its disposition.

This response is without waiver of KPT's jurisdictional defenses to CPSC.

Sincerely,

STEVEN GLICKSTEIN,
Kaye Scholer LLP.

SG/js

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
Atlanta, GA, January 3, 2012

Via Electronic and U.S. Mall

NEAL S. COHEN
Small Business Ombudsman
U.S. Consumer Product Safety Commission
Bethesda, MD
ncohen@cpsc.gov

RE: CHINESE MANUFACTURED DRYWALL

Dear Mr. Cohen:

This firm represents Banner Supply Company and a number of its affiliates (collectively "Banner") in the Chinese drywall litigation. As you know, during the relevant time period Knauf Plasterboard Tianjin Co. Ltd and its affiliates (collectively "Knauf) manufactured and sold Chinese manufactured drywall ("Chinese Drywall") to my clients. Banner, a small family owned Florida Corporation, has devoted countless resonrces in pnrsning Knauf for its conduct that has devastated Banner's business and shattered the lives of many Florida homeowners.

I am responding to your request for written confirmation concerning my clients' intentions related to the Chinese Drywall that is currently stored in a warehouse located at 5260 N.W. 10th Terrace, Fort Lauderdale, Florida. This Chiuese Drywall has been stored in that warehouse for years; it is within Knauf's possession and control. Judge Fallon, in charge of the *In Re: Chinese Drywall* Multi District Litigation pending iu United States District Court, Eastern District of Louisiaua, as well as the attorneys for the Plaintiff homeowners that have sued Knauf in Judge Fallon's Court, are all aware of the location of this warehouse and its contents. Again, Knauf has title and possession of the Chinese Drywall in this warehouse; while Knauf and Banner disagree about many issues, Banner does not claim any right or ownership over this Chinese Drywall.

Nevertheless, Banner agrees that it will uot sell or otherwise distribute to the public any Chinese Drywall over which it currently holds title or over which it subsequently obtains title and; further agrees, that if it disposes of such Chinese Drywall it will do so iu conformity with all applicable laws.

My client wishes to continue to cooperate with your office, as it has done in the last several years since the Chinese Drywall inquiry began. Please let me know if you have any additional questions or coucerus.

Yours truly,

NICK P. PANAYOTOPOULOS,
Weiuberg, Wheeler, Hudgins, Guuu & Dial, LLC.

Day, Christopher

From: Woodard, Dean
Sent: Wednesday, December 14, 2011 4:58 PM
To: Anthony.Damron@arrow-terminals.com
Cc: ard@gearbulk.com; Cohen, Neal
Subject: RE: Chinese Drywall at Manatee Terminal

Please notify us before it is destroyed or moved. Thanks.

From: Anthony.Damron@arrow-terminals.com [mailto:Anthony.Damron@arrow-terminals.com]
Sent: Wednesday, December 14, 2011 4:20 PM
To: Woodard, Dean
Cc: ard@gearbulk.com; Cohen, Neal
Subject: Re: Chinese Drywall at Manatee Terminal

Dean,

That is correct the material is still being stored at PMFT in Port Manatee.

brgds

Tony Damron
Terminal Manager
Arrow Terminals, Inc (USA)
Office: +1 337 436 7650
Mobile: +1 337 255 7045
Fax: +1 337 433 5009
www.arrow-terminals.com

Lake Charles Cargo Terminals
lcct@arrow-terminals.com

From: "Woodard, Dean" <DWoodard@cpsc.gov>
To: "ard@gearbulk.com" <ard@gearbulk.com>
Cc: "Cohen, Neal" <NCohen@cpsc.gov>
Date: 12/14/2011 12:33 PM
Subject: Chinese Drywall at Manatee Terminal

Tony,
We are surprised to hear of the Capt. Okland's retirement and wish him well. Confirming our conversation, the problematic imported drywall is still located in the Manatee terminal and has not been sold or disposed in any manner. Is this correct?

It would be our recommendation that you follow through with your local jurisdiction regarding scrapping this material. You should check with your EPA office as well. You will likely find that the best method is a Hazardous Waste Disposal Site.

Dean W. Woodard
Director

Senator WARNER. I don't know—Senator Rubio and his state has been very effective on this. One last question, if I could also get this one in.

Mr. Shelton, I know we've worked with you on a number of ways to try to look at low cost refinancings. Do you have any final comments on that? I know we've looked at a host of different entities, and we're still, now, engaged with Fannie and Freddie. But, if you'd comment on the cost of remediation financing?

Mr. SHELTON. Senator Warner, the most likely looking one was using a HUD product, which is a loan guarantee product which would allow for a fairly low-interest loan to be used to finance the program. It currently operates at LIBOR plus two, so—I meant,

LIBOR, I think, is 2 percent. I'm sorry. I misspoke. So, you're going to be above 2 percent.

The problem is, to pass any kind of reasonable underwriting standard, you would have to have some equity in the home, or some ability to pay. And so, as we've tried to unwind this, we've come to the conclusion that's going to be very problematic. There are other issues with that program and the ability to use it, not the least of which is, it's a difficult delivery system because there are HUD contracts with the larger cities, and there are contracts with the state, and trying to work across that span has been particularly difficult.

But, I think, if it's a loan-influenced product, our belief is, this is not going to work. Someone mentioned zero percent interest loans. If you have to secure with any kind of guarantee on the loan and underwrite it, I don't believe it would pass right now, because most of these were homes purchased in the last six, seven, 8 years, and the equity is just not there.

Senator PRYOR. Thank you.

Senator Rubio, thank you for being here. And welcome today.

And also, I notice that Florida has 56 percent of all the reported cases in all the country, 56 percent.

STATEMENT OF HON. MARCO RUBIO,
U.S. SENATOR FROM FLORIDA

Senator RUBIO. That's correct. Thank you for having this hearing. And this is an issue that predates my service here. I've been here less than a year now. But during my time in the State legislature, we saw a lot about it.

And, Ms. Brincku, thank you for being here and for all your activism on behalf of Floridians who have been affected by this all over the state. We've been hearing about this for years now, particularly after 2004 and 2005, with the building and rebuilding boom.

I wanted to ask you something. I know it's in your statement because I read it, and it talks about credit and the impact that this has on people's personal credit ratings. And you may have discussed this already, and if you have, I apologize. I was a little late. But, the changes you've had to make, and also other people had to make in their lives. They've had to leave their homes behind; they've had to find secondary places to live; sometimes have fallen behind on their payments. I don't know if that's the case with you. But, talk a little bit, if you could, with us about the impact that this has had on the credit rating of victims who have suffered from this and are now trying to recuperate some of that.

Ms. BRINCKU. It's had an enormous impact on the victims. For 27 years, my husband and I had never missed a payment in our lives. We'd always be on time. We had impeccable credit. And our 800, over-800 credit score went down to 500. It, just the simple thing of credit cards, having a credit card, we no longer have credit cards; we no longer are able to obtain credit. By the end of, by the time we get to court we will owe $80,000 in back payments and interest and penalties from our, Wells Fargo.

So, it's, for all the victims, it's had an enormous impact. People that had their houses paid off, it's devastated them because a lot

of them live on fixed incomes. People that have, like, Colleen, behind me, she, you know, over a million-dollar home; had $800,000 credit—I mean, equity in her home, and now she's, you know, short- saling this Friday. So, what is this still going to do her, you know, for her credit rating? On top of, you know, when you go to apply for a job; if you claim bankruptcy; all these things having a huge impact on, you know, our job, our finances, I mean, everything.

And we, my, I had a grandfather that always told me, put your money in your house, because it's always a safe investment. So, I took my entire IRA and put it in my home. So not only have I lost my home—I've lost my IRA, I've lost all my savings. I'd stuck $150,000 into my home so I, you know, I had equity, didn't have—and now, you know, it's gone.

Senator RUBIO. And, I asked that question because you're a victim of domestic drywall——

Ms. BRINCKU. Yes.

Senator RUBIO.—but, the one we hear a lot about is the Chinese drywall, and so we have limits into what we can do to reach these manufacturers—the folks overseas.

One of the things we can do something is about is what you're talking about, and that is the credit rating of individuals that have been directly——

Ms. BRINCKU. Right.

Senator RUBIO.—impacted. Because you can leave the home; you can move away from the drywall; but the credit rating issue will follow for——

Ms. BRINCKU. For the rest of our lives.

Senator RUBIO. Well, at least, for 7 years, or whatever the——

Ms. BRINCKU. Yes. Seven years.

Senator RUBIO.—timeframe is. But it just takes forever to rebuild it. And quite frankly, there's things we can do about that. And we, and I know you've been talking about that with Senator Nelson before I got to the Senate, and that's something we want to work together on with everybody on this panel, because I think it's one of the things we can do something about immediately.

You touched upon something else, which is short sales and transactions. I'm talking to you now because I see you've become an advocate on behalf of other people in the state that have suffered this. One of the things I'm concerned about, and maybe you can touch upon it, is that some homes are being sold, or people are now buying homes without full disclosure as to what they're getting. And, have you heard how many of your victims actually bought homes from either a contractor, or a builder, or another homeowner who basically dumped it on them without disclosing? How much of a problem has that been in terms of the non-disclosure issue?

Ms. BRINCKU. There's just so many victims that have told me and share their stories. I've had cases where I've, I had somebody go over and watch a house be remediated, and they took ketchup and cleaned the wires. I've had, I mean, right here, this wire, it's gone all the way through. And if I cannot remove the wiring from my home, I will not move back in. You can guarantee that. I will not—you cannot have alarms go off in the middle of the night, with your children wondering, is there a fire? Is there not?

I mean, all, like, all my things have turned yellow. It's affected all the appliances in my home, you know. And so, we're worried about the health and safety issue of this. It's a very big concern.

And the thing that, it's not being disclosed. And people are remediating, and there's no set guidelines of how the remediation is going to take place. You have people that are remediating for as little as $6,000, just flipping the drywall, or even patching up. I've heard, you know, them patching up the drywall. Not even tearing the drywall out. One homeowner in California, they did that to her home. They patched it up and put it back on the market, and put some new carpet in it. A lot of times they're, you know, taking the air conditioning out. And so, they're, the banks are taking the air conditioning out; it's bad, and then leaving everything else alone, so, when a homeowner, the first thing they're going to check is what, the A/C coils. When they see the A/C coils is not a problem, then they say, "OK, there's not a problem in the home" and they may not pay for an inspection, or the inspector doesn't, you know, catch it or not, more, you know, educated in the area.

So, these are all things that we see constantly, every day, that the homeowners, this has happened to.

Senator RUBIO. That's my last point, and I'm glad you brought that up. And one of your complaints—and I think rightfully so; I read it in your statement—was that many of these studies that are coming out on the safety and effectiveness have not been peer reviewed, or, not been looked at and compared.

But the opinion of some is that it's okay to move back into some of these homes after certain things are done, but you're saying this is not enough; that in fact—and you just highlighted—you're not moving back into a home as long as this faulty wiring is there, no matter how many reports come out that say otherwise.

How prevalent of a concern is that among folks?

Ms. BRINCKU. It's very concerning. I mean, I've heard it over and over. If these homes are not properly remediated, they will not move back in. And the homes are so upside-down. You know, before all this happened, our home wasn't an upside-down. We had equity in it. And so, that's an enormous concern.

And for the amount that—it's, like, 5 percent to fix the wiring and take it out—why not—well, why, in 40 years, who is going to be here to check this wiring for the next families that are coming in? The average homeowner lives in the house for seven, you know, 7 years. So, who's going to keep passing that information that needs to be changed?

Senator RUBIO. Thank you, again, for the work you're doing on this issue, and hopefully, we can be helpful, as well. Thank you.

Senator PRYOR. Let me say we'll do a second round here, so if anyone has more questions, be glad to entertain those.

Let me start with a little editorial comment, and it follows on something Senator Warner said. And that is, China should take responsibility for the products that they allow to be sold in this country and other countries. And one of the very basic starting points from my standpoint on this is that Chinese corporations should have to register in this country, just like domestic corporations, just like European corporations, for service of process. If there's a

problem, they should have an agent in this country for service of process.

Senator Whitehouse has a bill on that, and I support that. And I think he's going to re-file it soon. I'm not quite sure when. But this is a textbook case of why it's critical that we be able to reach these Chinese corporations if they do anything wrong. They should be held liable, and they should take responsibility just like other companies all over the world. It gives them a huge economic advantage to be able to put all this stuff in all these countries all over the world, and not have any recourse to them.

So, that's my editorial comment for the hearing.

But, let me ask, if I can, Dr. Portier, you mentioned that you, about the health studies, even though your studies are not exactly as conclusive as I'd want them to be, you still support remediation. Did you say you have another health study coming out this spring?

Dr. PORTIER. It's called a health consultation. So, the difference between a health study and a health consultation—in a health study, take a compound like lead in children, you have a clear disease that you can follow; you see neurological, developmental deficits; you can measure the compound in the blood, so you have a good exposure measurement; and that allows you to have a definitive study that you can clearly understand.

Here we have none of those things. So, a health study in this case would not give us a good, definitive answer. We think we would spend a lot of time and effort, a lot of resources, and in the end, we couldn't answer your question.

In a health consultation, on the other hand, what we do there is, we go to well-done studies in the literature, things that have been peer reviewed and have been published—occupational studies, and studies like that where we've seen health effects. From that we extrapolate down into a lower exposure region until we find a place where we think it's going to be safe for exposure. So, you estimate where you think it's safe for exposure. Then, hased upon the exposure reconstruction, the simulation modeling that we're going to do of homes, we bring those things together and make a decision as to whether we believe there are health outcomes that should—that would have been seen in this particular case.

Senator PRYOR. OK. Well, that's helpful.

Mr. Cohen, you heard Ms. Brincku talk about her dire financial consequences with this drywall. In the CPSC's experience of looking across the country at all the states that have been impacted, are you finding those similar stories in all the states, and in—not with every single homeowner, but generally, do you find that same type of story?

Mr. COHEN. Absolutely. And on the majorly affected states that we've discussed, notably, Florida, Louisiana, Virginia, Alabama and Mississippi, we hear these heartbreaking stories, much like Ms. Brincku's, every day. And it, you know, we are homeowners, too. We feel that and we have put our professional lives toward trying to come up with the causation, trying to be able to put forth a case. And we share the frustration, I think, of everyone in this room that we haven't, that the science hasn't provided that yet. And, we, you know, our hearts go out. And we're just going to keep on this thing. And hopefully we, well, might be able to develop with Dr. Portier's

expertise, the modeling that he just described might be able to inform a future legal case that we can undertake under our authorities. But presently, we don't have the evidence to support those.

Senator PRYOR. And, you also mentioned that the CPSC is working with the Gypsum Association. And do you think that the steps that the Association, the voluntary steps they're taking, are satisfactory?

Mr. COHEN. We've been very pleased with the steps that they've taken. Most drywall, just because of the nature of it—it's a heavy commodity product—is generally made and delivered in the area in which it's going to be used. So, traditionally, this whole occurrence is just so out of the ordinary. So, most of, almost all the drywall that's used in this country is produced in North America, mostly the United States, a little bit from Canada, and a little bit from Mexico.

All of the members of the Gypsum Association, including those major producers in Canada and Mexico, have voluntarily agreed to use this new labeling system which just went into place next month, which will have a standardized code and a standardized way that you can recognize the drywall that's been installed in any home across the country. So, we are pleased. We think they've been very cooperative in that regard.

And we have experienced the same cooperation in working toward this performance-based emission standard. Just because of some of the things that Dr. Portier described, it is a more complex standard, and so we'll just continue working. And that's something that CPSC does on a lot of products. We work and try to improve these voluntary standards over many years.

Senator PRYOR. And I think the Subcommittee, as well as the full Committee, would be interested to know what the Chinese government and Chinese companies response is when the CPSC reaches out to them and asks them to provide information, and also, step up on their responsibility to this. What do the Chinese say about that?

Mr. COHEN. As I noted previnusly, they don't believe that the—there's a problem with their product, and they've steadfastly said that. They've said that in open court in the multi-district litigation, when the German company stated that they were going to do remediation. The major Chinese importer, that has not made an appearance, stated to the judge: Judge, we are not standing behind this company, and we're not getting in line to do the same thing. We don't see a product—we don't see a problem with our product. And to the Government, to us, and to others who've raised the issue, they've said the same thing, and they said: Show us the science. Show us where the problem is. We don't see it anywhere. And that's been their response.

Senator PRYOR. Senator Wicker?

Senator WICKER. Well, I won't take a full second round.

Let me echo what the Chair has said. China benefits immensely from trade with the United States. It's time for Chinese manufacturers to step forward and make themselves available for service of process, much as other international trading parties have done.

So, thank you for that, and thank you for mentioning the Whitehouse legislation, which is something that we could use a starting point for a small solution to this.

Mr. Cohen, you said that usually because of the weight of drywall, it's usually not shipped internationally.

Mr. COHEN. Correct.

Senator WICKER. It's only this type of unusual circumstance. You're not suggesting at all that maybe something might have happened in the transportation, you know, oversea transportation of this product?

Mr. COHEN. I'll just, sort of, note, on your first comment—we, the Chairman has also come out in support of this concept of having a registered agent here for these Chinese manufacturers, especially in regards to the large number of consumer products that are imported from China. This has been a real problem for the Consumer Product Safety Commission. So, CPSC staff provided testimony in support of a prior proposal to that effect. And, as I said, the Chairman herself has come out in favor of it.

In answer to your second question regarding——

Senator WICKER. Whether the actual physical transportation might have——

Mr. COHEN. Right.

Senator WICKER.—had something to do with——

Mr. COHEN. We, in our compliance investigation—which we haven't spent a lot of time discussing, but we conducted a large compliance investigation as well—we did look toward, to see if there were any similarities in the way things were shipped, the ships they came on, the sorts of pallets they were shipped on, all the different confounding factors that might contribute to something you're suggesting. We didn't find any evidence of that.

Senator WICKER. OK. Now, with the exception of American Gypsum, we have not had any complaints about domestic drywall, complaints made toward domestic drywall manufacturers, is that correct?

Mr. COHEN. There have been reports—obviously, Ms. Brincku's among them, and others like her—to the Consumer Product Safety Commission of homes reportedly constructed exclusively by domestic drywall exhibiting the same sorts of characteristics of the problem imported drywall.

Senator WICKER. And these are from other manufacturers than Ms. Brincku mentioned?

Mr. COHEN. Due to our statute, I'm not permitted to actually speak about the specific manufacturers here on the record, but I can talk in general terms about the domestic claims.

We did, in June 2010, undertake a study particularly focused on domestic drywall. At that time, we had received over 3,400 complaints of imported drywall problems. At that time, 67 of those were of domestic drywall. Since that time, we've received 10 more.

Based on that, we still felt it was important, because we wanted to be on top to make sure there was not going to be another emerging hazard of domestic drywall in addition to the imported drywall. So, in order to make sure that was the case, we instituted the study. We used the exact same methodologies that we had done on the imported problem drywall studies. We went into 11 homes of

domestic—that were self-reported to be exclusively domestic drywall, and our findings were inconclusive. We did not find another distinct pattern of emerging hazard like the imported problem drywall.

Of the 11 homes, five seemed to match the imported drywall, and very well may be imported drywall, because it's really impossible for us to know what's in that home without completely ripping out every piece of drywall in that home. And that's been the most major challenge of our compliance investigation.

Senator WICKER. But now, at least, with the labeling, that one distinct issue will be better handled.

Let me ask you this——

Mr. COHEN. Yes.

Senator WICKER. The ingredients of the drywall, the components, how different is that in these Chinese manufacturing plants, as opposed to domestic ingredients?

Mr. COHEN. The ingredients of drywall are fairly simple and straightforward, and they don't really change based on the place of manufacture. I mean, they're based on gypsum mined, usually either gypsum mined rock, or reconstituted ash, fly ash. But, all of those are basically reconstituted into gypsum. They are put into a sort of mush, and pushed between two pieces of paper, and basically baked and cut. It's a very simple process.

Some of the issues that are known in the industry are that the rock that you're mining may have contaminants in it, of course, and so there needs to be some level of quality control or quality assurance on the input side of your factory. We're not sure, because we just don't have complete access to know what happened on that side of the Chinese manufacturing process—how they were able to assure that there were no impurities in that gypsum rock that formed the basis of the drywall.

Senator WICKER. Thank ynu.

Mr. COHEN. Thank you.

Senator PRYOR. Thank you.

Senator Warner.

Senator WARNER. Thank you, Mr. Chairman. Again, I'll be, try to be brief here.

But, some of, one of the things that there—there was the German company, though, who settled, correct? So, there was——

Mr. COHEN. They have engaged, and they have done some pilot settlements, and they are engaged in major settlement talks. That's correct.

Senator WARNER. And, how do we make sure that, you know, even if there's not—we went down the road of what might be sitting in warehouses and trying to make sure those folks are notified. And I want to see that documentation.

And then we also, you know, God willing, we may have another housing boom at some point. And if we start importing again, how do we make sure that we never repeat this? Even if we're not at the final stage of causation—to make sure that going, on a going forward basis, there's some ability to check whether imported drywall, whether it's from China or anywhere else in the world, isn't being mined in a, with faulty materials?

Mr. COHEN. Again, I would, sort of, harken back to my earlier comments about our voluntary standards development. That technology does exist to test the rock, the raw rock, and also the gypsum itself. You can test the elemental components that make up, make it up. And so, I think in the near future here—I don't want to give an exact date—but, in the matter of months we should have a gypsum standard that we can be able to have a baseline measurement, to be able to answer that question, Senator Warner.

Senator WARNER. Well, it seems to me we've got a couple of different paths we need to continue to pursue. One—and I'm going to echo what my colleagues have said in terms of holding the Chinese responsible and making sure that if they're going to do business in this country, they meet minimum fair business practices, and trying to work with your agency and other agencies of the Federal Government to force the Chinese to accept this responsibility, since some of these companies were, in effect, state-owned enterprises in China, so this directly bears back on a responsibility of the Chinese government.

Number two, there's a question of both for this, these circumstances on a going forward basis, what do we do in terms of these pollution exemptions on insurance contracts? I mean, it seems to me, if I was a homeowner and I bought a house that, through no mistake of my own, ended up with a faulty product in the wall—when I first heard there was an exemption and that insurance companies somehow weren't covered on, through that basis, why do you buy homeowners insurance in the first place? And I'd like to get a comment from someone on the panel on this.

And then, the third is, it appears that many of these families are going to be engaged in some form of litigation for some time to come. And it appears that, while we have, at the state level, working with Mr. Shelton, and these offices, and I know Senator Nelson has been working with us as well, we've tried to work with the financing organizations on how we can, ease the pain a bit, forbearance. The IRS has gone ahead and given safe harbor in terms of being able to write off; we've made some progress there. We've been able to work with the Defense security services to make sure people don't bear that blemish that might hurt their secret clearance or clearances with the Government.

But, as one of the Virginia families mentioned to me, you know, "Just tell me how I can get my credit back." I know this is not either of your particular expertise, Mr. Cohen or Mr. Shelton, but, you know, I would be interested in comments on that. If someone is forced into a short sale, forced into losing their home, how do they not let this disaster be something that blots their next 20 years of their financial future? Question—comments?

Mr. SHELTON. Senator, that is not my area of expertise. You know, in the mortgage crisis that we've just had, there's been a lot of work done on that. Clearly, that would take, I believe, some intervention, perhaps at the Federal level, since most of the, what we've experienced in foreclosure is that no action at the state level will address this, because most of the servicers are beyond the reach of the individual state. They exist outside the state. So, that's, it needs a national solution.

I don't know that solution yet, although I think that some standards for making sure that—similar to what, exemptions for military families, or some ability to at least get some response from the ratings agencies directing, or, as, the situation, if this is a one-time occurrence, it's a catastrophic loss, but, at the same time, it was beyond the control of the individual, so therefore it's not the individual's personal credit. It was beyond their control.

I think the ultimate answer is that either through settlement with the manufacturer, or through some other intervention, as someone mentioned earlier, that if there is not an ability to bring a product in to essentially remediate these homes without putting additional burden and debt. I mean, you bring the homeowner back current, then I think it gives more standing to go back and say that the problem has been cured both in terms of physical structure and the financial piece of this.

My worry is that most homeowners will not last through this crisis. Many, as we've already heard today, are going under.

Senator WARNER. Mr. Cohen?

Mr. COHEN. I'd agree with Mr. Shelton. It's certainly not my area of expertise; but I would certainly associate myself with those comments. I think that it is a tragedy, what's happening, that through no fault of their own, these homeowners' credit is being eviscerated, in addition to the loss of their homes. Some of the issues are state law issues. The insurance issues are state law issues.

But perhaps there is some sort of Federal policy distinction that can be made as well, akin to the military situation.

Senator WARNER. Well, Mr. Chairman, I want to again thank you for holding this hearing.

I agree with both of you that we need to make sure that if Chinese companies are going to do business in our country, they play by fair rules, and are subject to our processes.

The insurance issues maybe have to be dealt with on a state level, but I'd look forward to working with both your offices, and other members of this committee, to at least also try to—as Mr. Shelton said, it may require legislation. It may also simply require us going at the credit rating agencies a bit, that there should be some exemption so that these families don't have a blot on their financial records which, candidly, is not due to any inappropriate actions on their part.

I know we've worked with the banks and the IRS, and since the IRS has been willing to note this and put safe harbor, perhaps we can at least go down that route, as well as some of the legislative route.

But, I want to again thank you Senator Wicker and Senator Rubio, for your interest in this.

I'll close with where I started—in 20 years being in government and public service, I can't think of a more frustrating example of families through no fault of their own being kind of ping-ponged from one governmental entity to another, all being sympathetic and empathetic, but not getting them the relief that, quite honestly, I think they deserve.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

I would like to say, I want to thank all the witnesses for being here, but, Ms. Brincku, you especially. And I'm curious about how many other victims are in the audience. Let's see. There's three of four back there.

Well, we want to thank you all for coming. And we know this has been a terrible hardship on every level. And so, thank you all for being here.

What I want to do is, we're going to leave the record open for 2 weeks. We're also going to encourage any Senator who has any more questions to go ahead and get those in in the next 7 days, so that we can get these to our witnesses for them to answer.

And we think that we may have one Senator on the way, but let me check.

Well, we had one senator on the way, who we think may be caught up in the Intelligence Committee, we think. And we prnbably just shouldn't wait any longer, because he's a little bit out of communication right now.

But, anyway, thank you all for being here. Thank all the witnesses for being here. And I know the Government witnesses are trying to resolve this and sort this out. But, like Senator Warner said, this has been a real conundrum, or, a very difficult problem to solve, and it's a real problem, and it's just been hard.

So, thank you all.

Did you have anything?

Thank you all, and we'll conclude the hearing, but we'll leave the record open for 14 days. Thank you.

[Whereupon, at 11:25 a.m., the hearing was adjourned.]

APPENDIX

LETTERS FROM THE GENERAL PUBLIC

Dear Natasha,

Please enter my story with all of those received as evidence to the hardships, non-restored health and financial welfare most of us face.

Important Points: My home was remediated, but after some months of living there, I left again because symptoms came back; my Homeowner's Insnrance, St. John's, dropped me, lying on paper that I was an "unknown homeowner—1 yr." and while in forbearance Bank of America made me take ont Lender's Insurance at over $900/day while my builder was remediating and I was out of my home. Bank of America had me pay a small escrow each month, even though I kept asking about paying more, especially when they forced me to carry Lender's Insurance. I was told repeatedly not to worry. Bank of America understood, would keep my forbearance until my home was completed, then would send me a Loan Modification, and would lower my interest, maybe stretch out years, and do what was needed so I could live in my remediated home again. This turned out to be false. As soon as they got the call from me that my home was completed, and I requested the loan modification, they stopped communicating. Instead I received a letter to tell me that I had 1 month to pay about $17,000. When Sen. Nelson's office contacted them in my behalf, I did receive the BOA Loan Modification packet in recognizable fed ex. What was never conveyed was any amount I could be paying them, so I sent in my basic principle and interest payment for 2 months while I was waiting for the loan modification packet. Meanwhile, without any communication to me, foreclosure proceedings were begun by them on June 6, 2011. After that, I had received a call from someone who was from the CEO's office who let me know about Sen. Nelson's office sending a complaint. She was the person to assure me that I would get the loan packet. *However, she told me that it did not mean I would get it. This was the first time I was told that this would not be automatic because of my contamination loss.* When I received the packet, I sent it back, and again, never heard from Bank of America. I never heard that I was already a defendant in a foreclosure proceeding. Plus, I never received any communication for more than 2 months. One day, I went looking for a used car to replace mine, and I was told by the manager that he could not help me—BOA stated on my report that I was 6 months in arrears and in foreclosure. I was in shock and shaking when I left. Again, I went to Sen. Nelson's office, and received a copy of a letter sent back from BOA saying my loan modification packet was not complete. *No information about what was incomplete was given.* After leaving messages, I finally reached [redacted]. She told me at first, that my modification loan was thrown out now, because it went 90 days past, and that my loan application was scanned and sent to another dept. Her dept. only worked on forbearances. When I questioned where it went, who was then responsible for it, and on what date was it sent, she conld not answer my questions. She had me on hold for a while. As soon as I told her that she was not truthful to me during my forbearance as to what the steps would be, and I was angry. Also, I complained that it was not fair to have no one communicate a foreclosure proceeding, tell me what could be missing from my loan application packet, nothing! I told her that all of this seemed so wrong, and I would probably go to an attorney. Suddenly, she changed, and told me that I could speak to someone right away to begin another loan modification application. She just happened to have someone! I was in disbelief!

I told her that I still wanted answers to my questions, and called back and left a message that I wanted to know where and to whom my loan modification went, and to whom, and the date, and I am requesting this in writing. *I have requested this again, but to this date, I have not received this.* [Redacted] did call me back to tell me that she now got special permission to handle solely a new loan modification request, and wanted to send it to me to complete. She said that she would be the only one handling it (which was not reassnrance really, given her "track record" with me so far). She told me that this would not stop the foreclosure from moving

forward, even though I told her this was not fair. She said that, if a sale date is set while the loan modification was proceeding, BOA would notify the court that they were considering the loan modification. For the first time, Isabel said that this application was not a gnarantee. She had been the one during the forbearance who led me to believe it was! I did complete and mail this on Nov. 25, 2011. I have heard nothing. However, I did receive a "Notice of Action" telling me Bank of America has filed against me, and I am required to serve a copy of written defenses to the plaintiff's attorney, Paul M. Messina, Jr. of Kass Shuler, Tampa, FL on or before January 9, 2012. It is dated December 1, 2011. *Why am I going through all this when I have had a disaster destroy my home and most of its contents?* I have had the FL. Health Dept. Radioactive Testing Div. test my home for remnants of strontium becanse I am trying to figure out why the same smell that was in my home has once again, permeated through all of my clothing in my closets, and why I started with headaches, cramping in my stomach, incredible pressure in my head, bnrning chest, and cough again. When I looked at my certificate of testing during and after remediation by tbe builder's appointed investigator, this document just said all the sulfides were no longer present. I told my builder, KB, that strontium was also found in my home. But the letter did not even mention that testing. Upon moving out a second time to see if my symptoms subsided, I contacted the FL Health Dept. to investigate. They did and said their meter was not making repeated, fast beeps so there was not strontium left in it. What do I do now? I am back and forth to my house, but feeling insecure. Do I now have to pay more money to have my home tested again? A home that Bank of America is foreclosing on anyway? These are my most recent concerns aud situations. I am a teacher, but have been planning to retire soon. My pay checks are losing 3 percent this year, due to a Florida law, and we have been told that another 2 percent may begin to be added to this come January. I am single and a mother of 2 grown children, hut I do belp one as I can. In fact, last week, she asked if I would be a co-signer for her on a student loan so she can start school again, and I sadly had to tell her what is going on, and that Bank of America has totally ruined my credit statns. I instead will be able to do nothing as far as helping myself or my children for a very loug time. In fact, I am 64 now. I try so hard to deal with the emotional pain and stress. Knowing now that my HOA can also foreclose on me and have a judgment against me, even thongh I am paying my HOA, causes more stress and embarrassment. The development I am in, KB Sunset Pointe Townhomes have most remediated homeowners not returning, and renting. Also, I saw last week that still another home is vacated and is beginning to be gutted out.

More information and how this began:

*In July, 2007, I pnrchased my townhome in KB Homes" Sunset Pointe Townhomes, Lot 3, Block 27, as a 30 yr. fixed mortgage with Conntrywide as being the noted lender. It was a Freddie Mac. Purchase: 135,000.

*Started with strange health problems: rashes on my face; feeling my chest ache; sudden weight loss for no apparent reason; congh; terrible jaw and head pain, dry, burny eyes; mouth always feeling like it is burned inside. I also had cramps in legs and stomach at times. I complained of hlacking out twice.

*Nov. 2009: Service on home A/C reveals mnltiple holes, leaks and copper tubing is black. Kross Inspection confirms contaminated drywall in December, 2009.

*Neighbor told me to call Bank of America for a forbearance, which I did and was told to continne paying about $276/mo. escrow.

*Signed to have KB remediate my home, with agreement giving me per diem to move out and back in, pay for rental, and other living expenses. Told I wonld be provided testing and a certification that my home would be safe upon completion. I was told that I would also get 3 reports dnring the process and wonld have access to the information abont the drywall as they pnlled it from my home. (I was never given this.) I was told that I could still sue KB or any entity for health but not for other reasons about the damage.

During this time, I also gave the Consnmer Product & Safety Commission my information on this disaster. I also notified the Florida Health Dept. In addition, I went to my physician, Dr. Weiss, and told her that I had been exposed to 2 toxic gases, and wanted to have her check my health. But she told me that she didn't know what to do, and did nothing.

*Upon leaving my home in Nov., 2009, I noticed the terrible pitting and corrosion on metal bathroom hooks. Jewelry was rnined. When I make calls to inquire what would be safe to remove in my home and what I would need to discard, I was told by beth the FL Health Dept. and the Consumer Product and Safety Commission that they did not know the answer to that. What I found was just from my own research on the gases.

*My living elsewhere, transportation, faxing, calls etc. were solely paid by me from November, 2009–April 10, 2010. I took little out of my home, washed clothing according to Internet directions, aired out things I took for days, but most, I was afraid to touch anything, and afraid to go to my home to take out. *If the metal hooks were so pitted and corroded, and holes were made by these gases, what possibly was it doing to me?*

**2010—contacted my Homeowner's insurance. *Told they were protected from claims by a 31-year-old air pollution law. When I pointed out this was not air pollution, he said still protected. Insisted that I still let them do a second inspection on my home, saying it would help me have more information for down the road.* This was done by Burton Investigation.

*Finally, April 10, 2010, KB Homes is ready to have me move out so they can begin remediation. Upon moving out, there was *still no information on what could be safely removed and reused.* I therefore, removed and discarded most of my contents. What I was told by Mr. Wallace at the FL Health Dept. was that he would not save any thick porous items, like mattresses, metal things, appliances, sofas, chairs, etc. I even threw out a year-old TV! *Whatever I replaced had to be my expense!* Everything I kept left me great concern but I aired it out for a long while.

*May, 2010, receive notice from homeowner's insurance, St. John's that they are not renewing my contract. Even though I had been calling my insurance agent to give an update almost monthly, they say "Homeowner unknown 1 yr." Actual cancellation July 2010. Previously, my building manager and I had sent a letter, giving approximate date when remediation wonld be done, and details, but to no avail.

*June 2010, BOA continues forbearance, and even with telling me in July that they need to force Lender's Insurance on me, [Redacted] kept telling me not to worry—all would he worked out upon completion of my home, getting the letter of certification my home was safe, and getting new homeowner's insurance. A loan modification would then begin to be in place. Not to worry.

*Feb. 2011—My home is completed, right after I was given Lender's Insurance, I was notified by Tina Calderon, Bank of America, that Isabel would no longer handle my case—Tina would!

*Although health improved while out of my home for remediation, I had been admitted to Lakeland Regional Hospital on Dec. 25, 2009 because my throat and breathing felt like it was closing off. At this time I was told the lung X-rays showed signs of COPD. This has not changed thus far.

*When two members of the Consumer Product and Safety Commission came to meet with "victims" in Sarasota, FL, even though over a year had gone by, or longer, they still lowered their heads toward the floor when asked our questions, and kept repeating, "We don't have any answers yet on that", or "we didn't see any reason to investigate that further". That is a disgrace! So many sick, and perhaps some have died (even 12 infants in Ft. Bragg), and they feel no investigation is needed? An injustice and a disgrace!

*Health questions and concerns have remained unaddressed by 3 of my doctors over the past 2 plus years. They have stared at me and said "I don't know what to do for you." I even had one leave the room, come back 10 minutes later to inform me that she looked up "hydrogen sulfide on her computer but the only thing she found were lawyer advertisements." Again, a disgrace.

*I am 64, a teacher for about 30 years intermittently, hold a Master's degree, with a small retirement savings. I have raised my children, helped them in every way I could, and love them dearly. I plan on leaving my teaching career, hut now I have my life in great jeopardy, with health fears, a closely timed foreclosure, and probably an impending bankruptcy. I have to still wonder, because of recent health, if my home is safe. *Did I purchase this home with any knowledge of this disaster? Did I do something to cause all of the following hardship and disaster? Will I end up with more losses? This is unjust, and I will not stop speaking out for myself and for all the other victims until there are answers to our questions and justice is served by giving us aid to move forward, with or without our homes.*

Builder: KB Homes Lender: Countrywide/Bank of America/Freddie Mac Home: Lot 3, Block 27 Sunset Pointe Townhomes

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It's difficult to express the devastating impact living in a toxic home has had on our lives, home, health and retirement. We all have been affected and need our government to step up look past the lobbyists and help the families that have been devastated by Toxic Drywall; both American and Chinese.

We purchased our *Lennar home* new and moved-in Oct. 2004.

Within weeks of us moving in we smelled rotten eggs and called the gas company twice who came out and checked for gas leaks but found nothing.

But we have tests that show toxic drywall directly linking to our health problems.

We had experts test the drywall twice and the test were positive for sulfur and strontium both times. The experts pointed out signs of copper corrosion on the water heater, AC unit and electrical in the walls; noting it is less than the higher humidity climates but that we definitely had copper that was blackening. Additionally we've had electrical components, appliances and computer equipment, smoke detectors, and alarm system repeatedly fail or sound randomly with no explanation.

Our home has no Chinese markings but *Blanks* and confirmed *American Gypsum* aud *Georgia Pacific* with the following markings:

- Georgia Pacific—Tough Rock
- American Gypsum—Albuquerque NM "350 Crew 1 7/13/2004",
- Unidentified markings "250 7/11/04 H. Smith 12:12".
- Unidentified markings that have Spanish words "1 Pieza" "2 Por Paquett"
- Unidentified markings that are stamped "CAN" possibly for Canada

The fact that we found 5 different brands/markings in our home is an indication the builder was gettiug multiple shipmeuts of drywall from different sources. It is clear it was not all shipped at once from the same place.

The problem we face is we have no idea what manufacturers *Lennar Homes* used aud *Lennar Homes* is refusing to remediate. *Lennar Homes* came to iuspect our home and they did air quality tests and then refused to release the results or address our concerns. They have been provided our positive test results and they continue to deny us remediation and discriminate against us (as they are doing remediation elsewhere) because in Nevada they claim there is not a problem.

Georgia Pacific also came to our home, and they took a sample and said they would test it but wheu we asked for results they ultimately told us they were instructed by their attorney's not to speak to us.

The health of our family has seriously deteriorated while living in the *Lennar* home.

Health Issues

We were seen by an environmental toxicologist Dr. Robert Harrison (UCSF). He confirmed we had *Sulfur poisoning at levels of 5000 mg daily compared to the average American exposure of just 2 mg daily.* We have long term exposure to Sulfur Dioxide and Hydrogen Sulfate, which has caused long term health problems.

We also confirmed we hoth have the hlood tests results showing Strontium (Jason at 38.2 ng/ml and Olivia's at 26.7 ng/ml) due to long term exposure to Strontium.

Our water heater and PEX plastic water lines were so discolored and had absorbed so much of the toxic gases our water turned orange and we are *not* on well water. The city water right up to our drive way tested at perfect levels, yet in our *home, our water tested Sulfur at 200,000 ppm and Strontium at 4500 ppm which is 5000x higher than the average American.*

Additioually, we've met with the CPSC and have had our test results reviewed by both the CPSC and the CDC. The CPSC has a formal report from their investigation on our home. The CDC provided us a guideline and based on the test results in our home, we exceeded acceptable levels of these toxins by 1000 times or more. They referred us to DR. Robert Harrison, the toxicologist at UCSF.

Our bodies were husy fighting unexplained rashes, bloody noses, constant sinus infections, migraine headaches, sore throats, vomiting, burniug eyes, blurred vision, memory loss, fatigue, slurred speak, loss of coordination, loss of vision, unexplained nerve damage in Jason's face, and ultimately unexplained lesions found on Jason's brain.

We spent countless hours and thousands of dollars in medical expenses for doctor's appointments, emergency room visits, tests and prescriptions trying to diaguose and treat unexplaiued symptoms.

Health Issues include:

- *Chronic migraines* and light sensitivity
- Chronic sinus infections and daily
- Bloody noses
- Laryngitis (for over 6 months
- *Lesions throughout brain*
- Paralysis on his face (uerve damage)

- Loss of vision
- Slurred speech
- Loss of taste
- Jumbled of words
- Loss of motor function
- Red burning eyes
- Difficult to keep eyes open
- Burning sore throat (Choking)
- Shortness of breath/Chest pain
- Nausea/Vomiting and choking
- Digestive and upper and lower GI health problems (constant antibiotics)
- Fatigue
- Insomnia
- Olfactory sensitivity
- Headaches
- Constant tearing eye
- *Growths on Vocal Cords (requiring surgery)*

The neurologist knows of the toxic drywall test and the Strontium heavy metal poisoning and he advised we vacate the home immediately. We received the same advice from the ER doctor while my wife was treated for a migraine.

Our health issues have devastated our health so severely we've shut down our businesses as we cannot function at the same level we used to. We have no way of knowing what the long term medical damages are, but we are very scared as we see the deterioration aud know the damage this has done to our bodies. We fear for our future.

In Nevada new homes were built at a rapid pace of 35,000—45,000 new home per year during the period from 2001 to 2006 with the pace slowing iu 2006–2007 but the builders have a lot of clout here as they have contributed to the economy greatly over the past decade.

Additionally we have information and photos on our website *http://toxicdrywalllasvegas.blogspot.com/*

We ask that our government take action to protect us (it's citizens) and make us whole again by holding the builders, suppliers, and manufacturers liable for the damage they have caused so many Americans.

Thank in advance for your time and consideration.

My husband served 20 years in the AF, then had another career after that. I retired from DoD in Feb 2007 after 27+ years. We lived in many places and were looking forward to settling down in our forever house in warm, sunny, Florida living on a canal where we could have a boat. Our builder went out of business after 30 years of buildiug homes in the SW FL area a few days after we moved into our "dream" home. We started receiving dunning phone calls from sub-contractors who said they hadn't been paid, followed by certified letters. Every time the mailperson pulled up and got out of her car, I was about ready to bawl. After a year and a half, we had those legal situations taken care of and figured we could finally start enjoying life. About a year later, our air conditioner wouldn't turn on.

We had a home maintenance agreement and they came out and replaced the coils. They told us they'd fix them once, but we had defective drywall and they wouldn't do it again. Our entire house is filled with ProWall drywall—all Made in China. We're the lucky ones, if anyone with CDW cau be called lucky. Our house doesn't smell, and we haven't had anywhere near as many things go kaput as a lot of people have. Our son's house which is 40+ years old has bright copper wire, our house has black copper wire. Both my husband aud I have rashes that appeared after we moved in and won't go totally away—mine so bad I regularly see the dermatologist. She keeps trying different ointments/creams. Not sure if the drywall is the culprit or uot. The value of our home for tax purposes is $0.0. Our home equity loan has been frozen. We can't sell without remediating (or we'd have to practically give it away and still be stuck with a $200K mortgage). Our lawyer has told us that since our builder is out of business and we dou't have Knauf drywall, we're going to have trouble getting anything from the class action lawsuit, and we definitely should not count on getting enough to remediate completely. Oh the Golden Years. How they suck!!

PREPARED STATEMENT OF ROBERT D. GARY OF GARY NAEGELE & THEADO, LLC

I want to thank the Committee for focusing its attention on the devastating problem that has been caused by the off-gassing of drywall which has forced people to abandon their homes, often with catastrophic financial and personal consequences.

My uame is Robert D. Gary and my law firm, Gary Naegele & Theado, LLC, together with the undersigned attorneys, represent [redacted] and others whose homes are uninhabitable because they contain not Chinese drywall but drywall domestically produced by Americau companies. I have represented the [recacted] since early 2009.

My coucern is that innocent homeowners who have domestically produced defective drywall in their homes have been poorly served by the very Federal agency whose sole purpose is to protect consumers from defective products. To some degree, and at the urging of [redacted], the Consnmer Prodnct Safety Commission undertook a much delayed study of "non-Chinese manufactured drywall". That study referred to domestically produced drywall with the cnrious ambiguons description of "often referred to as domestic drywall by consumers."

The critically important issue before the Consumer Products Safety Commission shonld be "is American-made drywall exhibiting corrosion problems?" It is beyond dispnte that the now notorious Chinese drywall is destroying homes. Our American homeowners deserve a full study into whether domestically manufactured drywall has also experienced corrosion caused by the drywall in their homes. Rather than address this issue, the CPSC chose instead to side-step the question in its report issued on April 15, 2011.

For pnrposes of its report, the CPSC tested eleven homes which "the homeowners self-reported were constructed with domestically produced drywall." See Exhibit A, attached hereto, at page 2. The results of this study were anxiously awaited by those homeowners who clearly had corrosion bnt no evidence of Chinese drywall in their homes. Nine of these eleven homes were confirmed to have "evidence of blackening of copper wiring or cooling coils. Water was eliminated as a possible source of the indoor corrosion.

Prior to the issuance of this report, I, along with my colleagues and Pamela Gilbert, a former Executive Director of the Consumer Product Safety Commission, met on April 5, 2011 with the Commission. We urged at that meeting that the Commission test for sulfur-reducing bacteria which conld have established that the drywall, and not another source, was causing interior corrosion in the tested homes. The Commission declined to do this testing or to do the well-established chamber testing of the drywall. Presumably the issue was the cost of the testing.

The issue of whether American-manufactured drywall was causing interior corrosion was and remains a vitally important qnestion to the American homeowner. Yet the CPSC failed to make the most basic determination in its testing of the eleven homes. The CPSC made no effort to confirm whether the drywall they were testing was in fact American-mannfactnred. Instead the CPSC relied on self-reporting from the occupants of the homes that the drywall was constructed solely with domestically-manufactured product. It would have been a simple procedure to confirm the identity of the mannfacturer of the drywall the CPSC was testing. All domestic drywall has run codes printed on the back which would have identified the time, place and manufacturer. The failure to take this simple step rendered an expensive study all bnt nseless because it never segregated out the origin of the drywall it was testing. As counsel for the Brinckus, I can state categorically that their home has no Chinese drywall, yet because of interior corrosion, it is uninhabitable.

Rather than providing protection for the consumer, the net resnlt of the CPSC stndy instead provided cover to the drywall mannfactnrers who cite the stndies of the CPSC in its press releases to confirm the safety of its drywall products. I have attached two such examples as Exhibits B and C. National Gypsum has repeatedly nsed the flawed study of the Consnmer Product Commission to discredit any claims about their drywall and even specific victims including George and Brenda Brincku. For example, note the following from a National Gypsum press release:

> *CPSC Report Determines National Gypsum Drywall in Brincku Home is Not Defective:* In April 2011, the Consumer Product Safety Commission (CPSC) released a report on testing of domestic drywall as part of a broader investigation into problems associated with defective Chinese drywall. The report determined that the National Gypsnm drywall in the [redacted] home was not defective.

A critically flawed stndy by an agency whose mandate is to protect the consumer is being used to discredit the very consumers the CPSC is supposed to protect. The most casnal visit to the Brinckn home will qnickly reveal that the home has been destroyed by something that is corroding copper in the home. The Brincku's attor-

neys have confirmed the presence of sulfur-reducing bacteria while the manufacturer of the drywall suggests the problem arises from the well water.

The CPSC has eliminated well water as a possible source of corrosion. If, in fact, as the domestic drywall manufacturers allege, the well water in Florida is so corrosive that it can destroy copper through air born transmission the problem for Florida and its real estate market extends far beyond the confined problem of defective drywall. It would mean not only has there been a catastrophic failure by those agencies that regulate Florida water quality but the real estate industry with equally devastating consequences would have to alert home owners to this menace emanating from the well water. Neither of these concerns will be realized because the attack on Florida's well water is a red herring.

In conclusion, a separate study of the potential problems with American drywall remains regrettably an open question despite the considerable costs of investigating drywall-related problems. The CPSC's explanation that it did not want to do extensive removal of drywall begs the question and could have been eliminated by testing for sulfur-reducing bacteria. This simple test would have established that hydrogen sulfide is being produced by drywall as a waste product of sulfur-reducing bacteria.

We, the undersigned, urge that the agencies of the Federal Government not close the door on problems created by domestically manufactured drywall before even the most basic questions have been answered. At the very least, we ask that the Consumer Product Safety Commission confirm the origin of the drywall from the eleven homes already tested.

Thank you for your consideration and please submit this testimony for inclusion in the Congressional Record.

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April 15, 2011

U.S. CONSUMER PRODUCT SAFETY COMMISSION STAFF SUMMARY OF CONTRACTOR'S EVALUATION OF HOMES REPORTED TO BE CONSTRUCTED WITH DOMESTIC DRYWALL[1]

Background

The U.S. Consumer Product Safety Commission (CPSC) contracted with Environmental Health & Engineering, Inc. (EH&E) to conduct an investigation of a few homes where consumers have reported health and corrosion problems and where they also reported that the homes were built with what they identified as non-Chinese manufactured drywall (often referred to as "domestic drywall" by consumers). Although these reports alleging problems due to non-Chinese drywall represent a very small fraction of the total reported incidents, the CPSC investigated them as part of its overall investigation to gain a comprehensive understanding of the reported problems.

Earlier investigations conducted by EH&E under contract with the CPSC identified a link between problem drywall in a home and increased levels of hydrogen sulfide in indoor air and increased rates of copper and silver corrosion. They also found that orthorhombic sulfur (S_8)[2] was a useful marker for identifying problematic drywall (EH&E, 2010a and 2010b). These findings, in part, formed the basis of the Federal Interagency Task Force on Drywall's Interim Guidance for Identification of Homes with Corrosion from Problem Drywall (CPSC/HUD,2010).[3]

This guidance includes two steps: (1) a threshold inspection of the home to identify blackening of copper electrical wiring and/or air conditioning evaporator coils and the installation of drywall in the time period of concern; and (2) the verification of corroborating evidence. In accordance with the Identification Guidance, either two or four pieces of corroborating evidence are required to identify a home as one with corrosion from problem drywall. Homes built or renovated between 2001 and 2004

[1] This document was prepared by CPSC staff and has not been reviewed or approved by, and may not necessarily reflect the views of, the Commission.

[2] Also referred to as "elemental sulfur."

[3] Recent investigations indicate that the years should be expanded to include 2009. This has been reflected in an update of the Identification Guidance, March 18, 2011.

require at least four pieces of corroborating evidence, and homes built or renovated between 2005 and 2009 require at least two pieces of corroborating evidence.

Corroborating evidence can be: the detection of elevated S8 levels in samples of drywall taken from the home; corrosive conditions; the formation of copper sulfide on copper coupons placed in the homes for 14 to 30 days; visual observation of markings, indicating the origin of the drywall; elevated levels of specific sulfide compounds from chamber testing of drywall samples; or corrosion of copper metal coupons to form copper sulfide when exposed in a chamber with drywall samples.

Study Design

CPSC staff contracted with EH&E to perform this study to assess whether the objective criteria reportedly associated with problem imported drywall and outlined in the field-based component of the Identification Guidance were present in complaint homes allegedly constructed of domestic drywall. CPSC staff also wanted to compare the data collected from these homes with results obtained in the initial, large-scale investigation of homes with problem drywall (referred to as the "51-Home Study"). This comparison is important because the 51-Home Study was the largest study, to date, conducted on problem drywall homes using consistent and rigorous testing parameters. Testing performed as a part of the present study was conducted with methods identical to the 51-Home Study to ensure comparability. In this way, the results of the present study on 11 homes could be placed in context with the results of the larger study. CPSC staff asked that EH&E:

- characterize the indoor environment in consumer complaint homes that were reported to the CPSC to be constructed with domestic drywall, and
- compare the drywall composition, indoor air quality, and corrosion conditions in these homes to corresponding parameters observed and measured in residences in the 51-Home Study.

This study, like the earlier 51-Home Study (EH&E, 2010a) was intentionally designed to identify source characteristics of drywall and characterize the indoor environment in the home where the complaint was reported. Thus, the study was conducted as a field study at the home, and chamber emissions testing and chamber-based corrosion testing were not performed as part of the suite of tests.

CPSC staff selected 11 homes for the study. Homeowners self-reported that their homes were constructed with domestically produced drywall; and before undertaking this study, CPSC staff performed in-depth investigations to remove homes from the study where Chinese markings were clearly present. CPSC staff selected the homes, located in Florida (n=9), North Carolina (n=1), and Pennsylvania (n=1), from drywall-related consumer incident reports that the CPSC received between December 2008 and April 2010. Staff developed a ranking system to guide the current study, which like the 51-Home Study, considered location, date of construction or restoration, severity and extent of reported health effects, and corrosion. Staff also considered consumer-reported manufacturer of drywall as a factor in the home selection, as well as consumer willingness to participate in the study.

Between September 20, 2010 and September 29, 2010, EH&E field teams visited the humes and scanned multiple locations on the walls in each home with an x-ray fluorescence (XRF) analyzer as a screening tool to aid in detecting possible markers of problem drywall; collected drywall samples to analyze for orthorhombic sulfur; inspected ground wires and air handling units for corrosion; conducted air exchange, temperature, and humidity measurements; deployed passive air samplers for measuring indoor air concentrations of hydrogen sulfide and formaldehyde; placed strips of copper and silver metal called corrosion classification coupons in the homes to measure the rates and types of metal corrosion; and analyzed water samples to rule out alternate sources of sulfides in the homes. The full report can be found on www.drywallresponse.gov. Key results are detailed below and presented in Table 6.2 of the full report, which is attached to this summary.

Key Results

- Nine of the 11 homes (Homes A–E and H–K) had evidence of blackening of copper wiring or cooling coils and were constructed/renovated in the relevant date range (2001–2009). However, homes investigated to date, impacted by problem drywall, meet a common set of parameters, not all of which were observed in each of the nine homes.
- Five of the 11 homes (Homes A–E) met the criteria for identification of homes with problem drywall in accordance with the Identification Guidance, including elevated rates of corrosion and elevated concentrations of S8 in drywall samples. Hydrogen sulfide was detected in the air in only three of the five homes

(Homes A, B, and D) at levels that were similar to those levels found in problem drywall homes in the 51-Home Study.

- In five homes (Homes A–E), indoor corrosion rates exceeded ontdoor corrosion rates by as much as nine times. These results are consistent with the results found in the 51-Home Stndy.
- The presence and percentage of drywall samples with sonrce markers (S8 and strontinm/carbonate) in Homes A–E varied by room.
- Two of the 11 homes (Homes F and G) do not have the characteristics of homes with problem drywall consistent with the characteristics found in the 51-Home Stndy or in accordance with the guidance for identifying problem drywall homes.
- Four of the homes (Homes H–K) had a corrosive environment based on elevated rates of corrosion, as determined by the visual observation rating system and mixed findings of corrosion on the copper and silver coupons between and within each home. The S8 marker was not found in the drywall samples from any of these fonr homes.
- In four homes (Homes H–K), ontdoor corrosion rates were sometimes similar to the indoor rates.
- All of the homes in this study had air exchange rates that are typical of North American residences.
- Formaldehyde levels in the 11 homes were consistent with levels fonnd in recently constructed homes and results of the 51-Home Study and were not associated with the drywall.
- Sulfides were not detected in any water samples from any of the 11 homes and, therefore, were not likely a potential contributing factor to measured indoor corrosion rates.
- Average humidity and temperature conditions in the 11 homes were typically within the ranges recommended for summer months by the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE). The temperature and humidity levels were generally higher in homes in Florida in comparison to the two homes (Homes F and G) located in North Carolina and Pennsylvania.

Other Issues and Study Limitations

- Informatiou that these homes were constructed solely with domestically manufactured drywall as opposed to Chinese drywall was obtained by self-report from the occupants. CPSC staff and EH&E were not able to confirm independently that all of the drywall in the homes was produced domestically. This would have required extensive removal of the drywall and destructive testing of the residences.
- An elevated rate of corrosion in homes is not sufficient, by itself, to conclude that the corrosion is associated with problem drywall in the home. Outdoor corrosion rates may be the source of indoor corrosion in some of these homes (Homes H–K). Or, the corrosion source might originate from something other than the drywall.
- In its report, EH&E suggested that additional chamber emissions and chamber-based corrosion studies may help identify whether the drywall is the source of corrosion versus some other factor or source inside or outside of five of the subject homes (Homes H–K). While CPSC staff understands the reasoning for the recommendation of additional study, the CPSC has determined that due to the relatively limited number of homes affected, the uncertainty concerning the drywall's origins, agency resource constraints, and that any findings of problem drywall would not change the current Task Force recommendations, it cannot authorize further expenditure or study on this issue at this time.
- While a sufficient number of drywall samples from each home were analyzed for elemental sulfur (S8), and the selection of samples to analyze was based on the presence of a secondary marker (strontium) to increase the likelihood of selecting a sample with elevated elemental sulfur, it is possible that, even with the robust study design, problem drywall with elemental sulfur exists on a small number of boards in Homes H–K; however, it was not detected.
- There is a possibility that some problem drywall, including domestic drywall, may have different characteristics from the originally defined problem drywall. For example, there may be differing mechanisms of chemical off-gassing or compositions of source materials; or S8 might be a good marker for a particular type

of problem drywall (for example, problematic Chinese drywall) but not all problem drywall. If that is the case, this study would not have been able to identify this drywall as problematic because it had materially different characteristics from the problem drywall studied to date.

Conclusions

Based on the characterization of the drywall and indoor environments of the 11 homes tested, comparison of the results with existiug data from homes classified as problem drywall homes (51-Home Study), evaluation of the test results in relation to the Identification Guidance, and EH&E's extensive experience in conducting investigatious of problem drywall homes, EH&E reported that five of the homes in the study (Homes A–E) have drywall that is consistent with problem drywall. However, because EH&E was unable to confirm independently that all of the drywall in the homes was produced domestically, and without detailed documentation of the drywall's origin, or without damaging the homes through extensive removal of the homes' drywall, it is not possible to conclude that only domestic drywall is present throughout the homes.

Four of the homes (Homes H–K) had a corrosive indoor environment, but the test results were not consistent with previous findings related to the identification of problem drywall. It appears that the indoor corrosive environment might be influenced by outdoor corrosive conditions. Based on this study, other indoor sources, or the presence of a limited amount of problem drywall, cannot be ruled out as a source of the indoor corrosive environment. Conclusions regarding the potential of domestic drywall to be problematic cannot be confirmed at this time without further extensive investigation and detailed documentation of the origin of the drywall in these homes.

References

EH&E, 2010a. *Final Report on an Indoor Environmental Quality Assessment of Residences Containing Chinese Drywall.*

EH&E, 2010b. *Identification of Problematic Drywall: Source Markers and Detection Methods.*

Table 6.2 Environmental Test Results for Each Home, by Location

Step		Criteria	Home A	Home B	Home C	Home D	Home E	Home F	Home G	Home H	Home I	Home J	Home K
1	(a)	Blackening of copper?	■	■	■	■	■			■	■	■	■
		– AND –											
	(b)	Drywall installed 2001–2009?	■	■	■	■	■	■	■	■	■	■	■
2	(a)	S_8 Marker?	■	■	■	■	■						
	(b)	Copper Sulfide on coupons?	■	■	■	■	■			■		■	
	(c)	Markings of Chinese origin?	NF	NF	NF	NF	NF	NF	NF	NF	NF	NF	NF
	(d)	H_2S, COS, CS_2 in chamber test?	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
	(e)	Copper Sulfide in chamber test?	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Other Factors	(a)	Silver Sulfide on Coupons?	■	■	■	■	■		■		■	■	■
	(b)	Strontium/Carbonate Marker?	■	■	■	■	■						
	(c)	H_2S in Indoor Air?	■		■							■	■

S_8 elemental sulfur
NF not found in the limited areas accessible for visual inspection
H_2S hydrogen sulfide
COS carbonyl sulfide
CS_2 carbon disulfide
NA not applicable

■ meets or exceeds the decision criteria
■ meets or exceeds the decision criteria, potentially impacted by outdoor sources

From "Evaluation of Homes Reported to be Constructed with Domestic Drywall," April 12, 2011, Environmental Health & Engineering.

I am writing to tell you about the nightmare my wife and I have been living since discovering in 2009 our home contains contaminated Defective Chinese Drywall. We are unable to attend Tuesday's hearing but hope that our story can be shared.

After 23 years of marriage and living in the same home for more than 19 years my wife and I felt we were in a secure financial position to build the home of our dreams on 11 acres in the County. I am a contractor by trade and at the time owned

a successful construction company. We purchase the land in 2005 and began to design the home. In late 2006 we broke gronnd on what we had planned to be our final home which would later be a great financial investment to us in our retirement years. In July 2007 we closed on the $402,000.00 mortgage and began to enjoy our new County lifestyle. This home was our dream over 4,500.00 sq ft appraising at closing for over 550K and we couldn't believe we did this and seemed to have done it all right. In early to mid 2009, we began to start having issues with first our security system panel, which effected our inter-come system and security cameras. Then 2 televisions went out. Small appliances such as 2–3 coffee makers, toasters, and other strange electrical things. The small mini central A/C unit that fed our oldest sons room went out. We began to see increased electric bills and realized our other 2 central units were working very hard and running constantly. There was a strong smell in the house when we got home in the evenings, and my wife's jewelry began to discolor. Being a contractor I had begun to hear rumor of the Chinese drywall. I did some checking with the wires in our home and found that they were corroded. I did some further research on the Internet and began to realize what was going on. It was probably 2 months before I got the courage to tell my wife. She was just 19 and I was 21 when we married. Like all couples we had dreamed for years of building a home like this. Finally iu our 40s we felt we were in a position to do just that. Our home had been featured in a local magazine for it's design, style and features. Now I had to tell her our home was basically worthless. I learned in my research that the drywall affects metals; our home is built entirely out of metal studs including the trusses. All I could envision was that the home would have to be demolished! I finally told her. I can actually say it was probably oue of the lowest points in my life. I was a builder, how could I have missed this? How will I be able to afford to move my family, aud do we let the house go back to the bank? I had never had to foreclose on mortgage what would that do to our finances? How am I going to take care of this for my family? I felt as if I had disappoiuted my wife and let my entire family down. On top of all this, as the economy was failing so was my construction busiuess.

Once my wife's initial shock wore off, she began to do her own research. Her biggest fear was/is what are the health effects on the kids. Our oldest son who is 22 constantly suffered from sinus infections. He has now moved out and the infections have stopped. Our 13 year old son was diagnosed with allergies about 8 months after we moved in the home. He spends most months congested. And now takes monthly injections. We constantly wonder is it related to the drywall? We have a 12 year old daughter, is she being effected in a way we have yet to see? Center for Disease Control says "no health effects" . . . this stuff turns metal black, kills appliances and electronics, and we are supposed to believe that? In October of 2009 we learned of a law-firm handling the defective drywall in our area. We contacted them, and after a consultation, they scheduled us for the Environmental testing. In November 2009 it was confirmed, we had the defective drywall. The markings on our boards were not clear enough to immediately determine our manufacturer. We were told there are suspected 5–6 Chinese manufacturers. My wife and I were pretty much in a fog the rest of the year and into early 2010. Not only were we trying to fignre out what to do about the house as we watched things unfold in the news and on the Internet about drywall, my business was not getting any better. I had worked in construction for 25+ years owning my own business since 2003 and now I couldn't land any jobs for my company. I had to cut my salary back to try and keep my business a float. Eventually by late March, I had to lay off all of my employees. I laid myself off and went on unemployment in May of 2010. I tried to find work in my industry all the time bidding jobs for my company in hopes of landing just one job. In April of 2010 the BP Oil Spill impacted the Gulf Coast bringing further damage to our towns failing economy. My wife works full time but her salary really did nothing more than cover health benefits for the family. It was time we notified our mortgage company and asked them for a modification. By this time, the appointed court in New Orleans to oversee the drywall cases had come up with a remediation plan. I obtained estimates in accordance with the remediation protocol to provide to the bank to show them what it would cost to renovate the house. The estimates were close to the mortgage amount of 400K. We notified our property appraiser of our County, our home that once appraised on the tax rolls for 445K was reduced down to 218K. All of this documentation was provided to the mortgage company along with the testing results, letter from our attorney financial statements from our business and personal accounts. We pleaded with them to do something to help us, statiug that we were willing to try and keep the house iu hopes that the economy would turn around and our government would step in and make the Chinese do the right thing and fix our home. With the assistance of our attorney we tried to convenience the bank that they didn't want this house that it would beu-

efit them to modify and keep some type of payment coming in rather than have another honse on their books that they more than likely could not sell. The response we got was we conld run 30 days late hut that was it. Even the government loans that were being offered to individuals in crisis with their mortgage were not an option to ns. So we made a decision to stop making the mortgage payment pnt that money back and let them kick us out. By not making the mortgage payment we would stop depleting our savings and hopefully be in a position to rent somewhere when we were eventnally forced out of the house. In a last ditch effort, we hired an attorney to try and fight the foreclosure, you know try and prove the note etc. in hopes to buy 6 months or so. Our first mediation rolled around in early October of 2010. Our attorney re-submitted the documents we had previously provided to the bank in early 2010 adding his legal verbiage which we paid for of course. We decided not to have the attorney attend mediation. He basically told us the mortgage company didn't care that the house was of no value we were just another number they would write off. So we decided to attend withont him and go through the emotions . . . after all we would have had to pay him to be there and he was not enconraging. Well needless to say the mediation was a joke. Onr mortgage service company is PHH Mortgage ont of New Jersey. A local credit nnion Pen Air holds the note. There was a mediator, an attorney for the bank and my wife and I. My wife was crying nncontrollably the entire time. A bank representative was snpposed to call in for a conference call at a certain time and they were late. Their attorney finally had to call them some 45 minntes later only to get a person who said they had to fill in, that the original person who was listed on our documents to attend, was called into a meeting. Needless to say this person was not prepared. Their own attorney who was in the room with us was clearly frustrated. When we were asked why we were not making our payments we told them a combination of the problem with the drywall and a reduction of incomc. The representative on the phone said what is Chinese Drywall? As I tried to explain it to her she said she jnst Google'd it and couldn't believe what she was reading! "What a devastating position to find yonrselves in" she stated. She further said she did not see where we had submitted any of the docnmentation to them regarding the drywall and then their attorney spoke up and said "you have to have it, I have it in my packet that yon all sent to me"! Finally she said she was in no position to make a decision, that she felt that Pen Air Credit Union had to make a decision on the modification. By this time the mediator was totally frustrated and called the meeting adjourned citing that no decisions could be made because the appropriate parties were not present. He ordered the attorney to reschedule and have a representative from Pen Air attend the next mediation. That next mediation did not take place till mid November 2010. In attendance, a representative for Pen Air, the same attorney, my wife and I. The Pen Air representative started the meeting hy saying very kindly, "we had no idea about the drywall"! "We are a home town lending institution and are in the business of keeping people in their home." We are not a construction company in the business of renovating homes ". . . the Board has reviewed your file and we are going to do what ever we can to keep you in your home." Basically what she was saying is we don't want to be stuck with that toxic home! If you people are stupid enough to stay in it and pay us to do it we will take your money! The meeting was adjourned and we were told they would work up the figures and re-schedule the meeting. The next mediation was the end of November 2010. By this time I had found work in my industry with another company. It was not the salary I had once had, but it was not in the poverty level of unemployment either. It put us in a position to really be able to give a firm figure to the bank on what we could try and modify to. The modification terms proposed by the bank were to take onr interest rate down from 6 percent to 2 percent for the next 5 years stating they hoped by that time the drywall litigation would be settled. That reduced our payment by about $1,100.00 per month. And they would do that by adding only $47,000.00 to our loan . . . great deal hnh?! Reluctant, my wife and I signed the note believing that certainly this issue would resolve, the economy would get back to normal and our dream life would go on.

Here we are 1 year after modification and not one step closer to getting the house repaired. Our drywall case is a bit uuique. I have uo builder to sue, I was the builder. The courts have ruled I cannot file this as a claim on my insurance company. I purchased my drywall from our local Port, Pate Stevedore. Just this month, we received a letter from our attorney telling us they have decided uot to sue Pate Stevedore for a number of reasons the most important being "they do not have the insurance or assets to pay a judgment in our favor." It was determined that our drywall manufacturer is Taishau Gypsum Co., Ltd. The letter we just received from our attorney stated, "we are continuing to pursue every avenue possible to bring that company (Taishan) to justice in the American court system but we face a number of obstacles, not the least of which is their challenge to jurisdictiou because they

do not have minimum contacts with our Nation. They further state this is a battle we will wage for some time in the court system and through political and other channels. *Wage for some time!* Nothing I have heard is encouraging to my wife and I. We don't have years to invest in this political battle. We cannot nnderstand our own government not stepping np to help us. My wife and I are doing everything possible to try and keep this house and not become another number in the mortgage crisis. *We are trying to keep up our end of the deal despite every obstacle we have faced.* Please we urge the government to step in and help us! When you look at the scheme of this drywall crisis the government gives away billions of dollars. There are just an estimated 10,000.00 homes effected by this drywall, just a drop in the bucket don't yon think? We should not have to suffer because our own government allowed China to import to us this defective product and as we all are aware of many, many more defective products. I thank yon for yonr time and enconrage yon all to help make this right for us.

Chinese Drywall and Cancer

I am an Engineer, Shipbuilder, Hnsband, and Father of 2. In 2006, my wife and I upgraded from a starter home to a beautiful, four-bedroom home in a family-oriented neighborhood. The home was sold by a repntable developer (East-West Partners) and built by a reputahle huilder (Orleans Homebuilders, based in Philadelphia).

In July of 2009, we initially suspected that we had Chinese Drywall after our 9th air-conditioner evaporator failure, and in September, our builder cut into our walls and confirmed it. In October 2009, an X-ray fluorescence evaluation confirmed all walls and ceilings on the second floor were Chinese Drywall, all ceilings on the first floor were Chinese Drywall, and about 25 percent of the walls on the first floor were Chinese Drywall. Our builder promised to stand by his work, and would commence remediation "after the holidays". After some stalling tactics in January and February of 2010, Orleans Homebuilders declared bankruptcy on March 1, 2010. We were on our own.

A contractor provided an estimate to repair the home, which, coupled with moving expenses approached $150,000. Both my wife and I rely on security clearances in our careers, so a foreclosure or bankruptcy was out of the question. Due to the nnknown health concerns at the time, we decided to self-remediate. In May, 2010, my wife and children moved in with local family, and I turned the children's attic playroom into a dormitory, and worked 42 hours per week on average over 5 months to remediate the home. Along with family and friends, we logged 2,930 hours and spent $59,000 to remove all drywall, clean thoroughly, and then replace all wiring, copper plnmbing, HVAC, insnlation, drywall, and trim. On October 22, Isle of Wight County conducted the final inspection, and the home remediation was complete.

Our first child was born in July 2006—one month after moving into the home. Between 2006 and 2010, there were respiratory issues in the children that did not raise mnch concern at the time, but in hindsight we now know the children's bonts with illnesses lasted much longer than normal. In addition, my wife was diagnosed with hypothyroidism while in the toxic home. The real health concerned appeared in 2011—almost a year after the remediation was completed.

In July of 2011, I was diagnosed with a 6cm mass on my right kidney. It was found by nltrasound, confirmed by CT Scan and MRI. No biopsy was condncted because even if the mass were not cancer, it could become so in the future, so given my age, my doctor recommended an open, partial nephrectomy (partial kidney removal). The surgery was conducted in August. While recovering in the Intensive Care Unit, my doctor informed me that the mass was Papillary Renal Cell Carcinoma—kidney cancer. My surgeon informed me that at 3cm, the cancer typically starts to spread. At 6cm, my cancer showed no signs of spread, and was classified as a Stage 1, Grade 2 cancer, and the surgery was declared "curative". I was lucky. I have monitoring and scans for the rest of my life, but the prognosis is good.

I have since learned that Papillary Renal Cell Carcinoma is a relatively rare form of kidney cancer, and 95 percent of those that are diagnosed with it have a family history. They are also at least in their 5th decade of life. I have no family history. I am not in my 5th decade of life. I am personally convinced that my cancer was the resnlt of exposure to toxic drywall. I cannot say whether it was the chronic exposure from 2006–2010, or the acute exposure during the self-remediation. I tend to think a 6cm mass wonld not have grown that quickly in the single year since the acute exposure, but there is little data available on the rate of growth of these cancers since these cancers are typically removed soon after detection.

Are there other people diagnosed with kidney disease with Chinese Drywall? Yes. Are there others with cancer—that remains to be seen. In the years to come, it will

take dedicated studies to identify the health connections and risks. I need to know for the sake and safety of my 3-and 5-year old children, what risks they have been exposed to, what scans they may need, and what health tests should be scheduled and when. The Victims need the U.S. Government to sponsor these studies.

OSHA and EPA have the best publicly available data on the health risks of Hydrogen Sulfide gas exposure, however dne to the nature of the responsibilities of those organizations, the data is focnsed on short term, high concentration exposure. There is little to no data, at least publicly available, on long-term, low concentration exposure. The CDC is performing a study relying on modeling a toxic home for personal exposure levels, and correlating available data to assess health impacts. Since there are no data on long term exposure, what conclusions can that study possibly draw?

From a consumer protection and public safety perspective, and as a victim of Chinese Drywall and Cancer Survivor, I call on the U.S. Senate to:

- Fund a University or Government Lab to conduct studies to assess the impacts of long-term, low coucentration exposure to Hydrogen Sulfide gas, and other Chinese Drywall off-gas products, on appropriate laboratory animals. These studies should supplement the studies CDC is already conducting.
- Fund a Health Organization to conduct a comprehensive epidemiologic study on not only respiratory issues, but potential long term issues on cognitive function, endocrine systems, renal (kidney) functiou, muscular-skeletal systems, liver fuuction, aud publish the results.
- Identify a Federal Government POC, by name, for collectiug health information on CDW—be it CDC, HHS, CSPS, or other; and publicize it ou government websites. Make CDW Health Impacts and studies the responsibility of au ageucy, and fund it.

Thank you very much for allowing me to present my family's testimony today. We are a family of three: myself, my husband, and our 12 year old son. We own a home in a master planned community in Hillsborough County Florida.

Do you know how my family discovered our toxic drywall? I became sick after living in our new home for just 2 years. I visited internists, a pulmonologist, and an infectious disease doctor. No one conld tell me what was making me so sick. My patient files said amongst other things, "fever of unknown origin." I had multiple x-rays taken, ultrasounds (tbey feared it was my heart), CT scans, and I even allowed them to inject me with radioactive material to do gallium scans because they feared it might be cancer. I have never had asthma. Now I spend most days thankful if I can run 2 miles without stopping to gasp for air. Singulair doesn't work. Advair doesn't work. I have few days without chronic sinnsitis. I have had dizzy spells, hallucinations, nausea, diarrhea and vomiting for days because I have been in the house too long. I have lost quite a bit of hair. I am the worst off because I spend the most time home . . . until now. Our son has become sick. He now has the same symptoms: diarrhea, chronic sinusitis, dizziness, nosebleeds, and breathing trouble. I asked him what he would like to say to you. He sadly replied, "Tell them that now I know how you feel." Far more troubling, his doctor just tested him for celiac disease and hypothyroidism to determine why he is vitamin D deficient. Celiac disease and hypothyroidism do not run in our family. He is also having vision trouble while in the house—it is a red/green color distortion.

We have been fighting our builder for years now. We have been through multiple home testings and had multiple lawyers. We are furious that homeowners like ourselves are being left to bear the burden of this financial disaster while big business is let off the hook. *We* are the *victims*. We did not purchase our homes knowing they were full of toxic materials which destroy our health and render our properties worthless. Our insurance companies have left us high and dry. The builders are escaping culpability. Their insurance companies are being absolved of responsibility. We receive no assistance from our government and to add insult to injury, all onr health complaints have been ignored to date. This will be another asbestos disaster. We are all guinea pigs who will be forced to bear years of health problems and more litigation down the road when we have cancer and mesothelioma. I am disgusted and feel we have been sacrificed so that every corporation making profits from these toxic materials can continue to rake in billions. These products are dangerous and the truth must come out. Their use must be discontinued and there must be a cooperative assistance from builders, suppliers, and insurers to fix our homes and give us safe places to live. This is America. Why aren't we looking out for our own?

We own this home. We invested every cent we had into it. We face financial ruin if we walk away. We face risking our lives if we stay. Are either of these choices fair when we bought this home before the words, "toxic drywall" hit the airwaves?

Thank you.

November 29, 2011

Hon. MARK WARNER,
United States Senator,
Washington DC.

Dear Senator Warner:

We live in Williamsburg, VA, and are a family that has been devastated with owning two homes that are contaminated with Chinese Drywall (CDW). Chinese Drywall has not only destroyed copper & silver in our homes; it has also devastated our families' health and financial well being! My parents moved into one home and my father-in-law into the other home (both in their 80s). In the first year there were many mechanical issues with the thermostats and air conditioning coils in both of their homes.

My father-in-law died unexpectedly (7/2008) only two years after moving unknowingly into a CDW contaminated home (Respiratory Failure). *Our family will never be convinced that the CDW did not potentiate his death?* Imagine our guilt for not knowing what was causing his extreme weakness. My father-in-law experienced weakness of his legs and was falling which, was not normal for him. He was an active healthy man until unknowingly moving into a tainted CDW home. My father-in-law left the home to go into in-patient rehabilitation and improved tremendously only to revert back to his CDW health related issues upon returning to his toxic CDW home. If we had only known he was living in a toxic environment we would have moved him out and saved his life. My mother also experienced some of the symptoms. As soon as we became aware of the CDW we moved my parents out of their tainted home!

According to news articles, the primary reports of deaths to the Consumer Product Safety Commission (CPSC) were of the elderly or youths with medical problems. This should not be a surprise to the CPSC! If an adverse reaction would be experienced the above mentioned populations are the ones you would expect to see the most severe reactions. You can *not* convince me that the toxic drywall's hydrogen sulfide off gas, which is both an irritant and a chemical asphyxiant, does not affect the body's ability to use oxygen; especially in the elderly. This part of the population spends more time in their homes and therefore has more exposure to the toxins than people who leave their home for work everyday. This does not mean we should *accept* that their lives were cut short by this toxic product.

How can this situation not be considered a disaster? How can Venture Snpply and *their* insurance company not be responsible for not following the "International Safety Standards"? Why do companies pay thousands of dollars for insurance protection and yet have no coverage when needed? We homeowners did not cause this problem and should not be the one's left holding the bag!

When will the U.S. Government hold China responsible for the atrocities it has bestowed upon tens of thousands of innocent American families!?

House built 2001—Florida

My husband and I built our "dream retirement home" in Delray Beach, Florida in December 2001. We replaced the air conditioner coils in 2002 and 2003. In September 2004 we purchased a new air conditioner rather than replace the coils again. We replaced the coils again in 2007 and 2008 as well as replacing the heating element and fan. We replaced the light fixtures in our bathroom because of pitting, replaced mirrors due to black spots, have black "copper" pipes under the sink as well as black wires in back of the refrigerator and inside the electrical outlets. In April 2009 we hired an attorney and had the house tested. They found drywall that said "Made in China" and the air in the house was found to be unhealthy. My husband and I suffer from burning eyes, runny noses, insomnia, fatigue, coughs, headaches, memory loss, etc. We pray the house will be remediated. We are senior citizens living on a fixed income and cannot afford to move out of this toxic environment. We hope to see a positive outcome from this toxic disaster that will make us "whole" again in our lifetime.

We have just purchased a third air conditioner in 2011.

Please help us.

Forgot to tell you we don't have a mortgage on our home. Being seniors we cannot afford to move out. We need money to gut the house and rebuild.

Thanks.

Date: December 1, 2011

In August 2010, it was discovered that 75 percent of my new home (built 2006) was contaminated with toxic Chinese drywall. The drywall has caused several major appliance failures including new refrigerator, central air and heat units (over 10 services/repairs since 2007), fireplace, electrical wiring problems throughout home, and corrosion of bathroom fixtures. Currently, I have no air conditioning or heat because units are not properly working and I have had two minor electrical fires (refrigerator and door bell transmitter). The odor has become so unbearable to the point that I have been forced to move my family to rental property. The Hampton City Assessor has deemed my home uninhabitable and has decreased the building value from $227,000 to $100. I have attempted a short sale to a cash investor but my mortgage lender has denied due to low offer. Because I cannot afford to pay mortgage and rent, I am currently facing foreclosure.

Ms. Mbabazi,

For the record, I want to express my appreciation for the work done by this committee thus far on this growing issue of contaminated drywall. My family, here in Alahama, has been affected by this complicated disaster. I will not take np your time with our recent history of hardship and surveillance, only inform the committee that my family is stronger for it. Our value is here and available for any assistance we may provide the committee as it examines solutions. Please feel free to contact me anytime.

My family, here in Alabama, has been affected by this complicated disaster. I will not take up your time with our recent history of hardship and snrveillance, only inform the committee that any family is stronger for it.

Our value is here and available for any assistance we may provide the committee as it examines solutions.

December 2011

Dear U.S. Senate Committee of Commerce, Science, and Transportation Members:

Our American dream has become an American nightmare. My wife and I are writing to express our imperative plea for legislative assistance regarding families effected by Chinese drywall. The CPSC and CDC continue to ignore long term health effects of people living in this toxic environment. No long term health studies have been released. *Please read this letter with vigilance and understand there are several people experiencing long term health effects of Chinese drywall.* In September 2006 we built a new home in the beautiful Ross Bridge community where our children would have access to wooded paths, commnnity gatherings, parks, and a wonderful school system. We entered a lawsuit against the builder within 18—20 months after moving in due to numerous electrical problems including breakers tripping on a weekly/daily basis, Christmas lights catching fire, new bnlbs blowing out frequently, failing A/C units requiring multiple repairs, appliance replacements (refrigerator, washing machine, three coffee makers, waffle irons, hairdryers and roller sets, etc.), and foundation issues. Soon after entering the lawsuit we discovered many of these problems were associated with Knauf Chinese drywall that was installed in our home. Within six months of living in the home health issues developed within all family members, but we were not aware these issnes were related to the toxic air we were breathing.

In August 2010, eight months after learning we were living in Chinese drywall, we made a decision to move into an apartment to avoid continued exposure to the toxicity of hydrogen sulfide that was taking a toll on our children's health. Despite the enormous financial strain this created, the health of our children was paramount under current circumstances. Other families in our lawsuit have also moved out prior to litigation resolution to protect the health of their children. You may have read initial reports regarding the health effects associated with people living in Chinese drywall, such as nose bleeds, respiratory and siuns infections, skin rashes, itchy eyes, but the CDC is releasing new information regularly that is revealing other abstract health concerns that may not be diagnosed and treated immediately. *Neurological, circulatory, and decreased bone growth are surfacing that we have per-*

sonally experienced. No one can confirm the long-term health effects that may transpire from this tragic event. We feel compelled to share our health concerns that have developed since living in our home. It may contribute to your knowledge of the concern many families in Alabama are facing.

Health Concerns of [redacted] (age 44)

Chronic Fatigue Syndrome (aching joints; no energy; depression; loss of concentration; memory loss)

Mycoplasma (320+ considered clinically significant—two lab reports reveal David's count at 1427 and

1913—well beyond clinically significant—doctors cannot determine cause for extremely high numbers)

Irritated Eyes

MRSA/staph infections

Skin rashes

Respiratory infections

Paranoia

Severe Insomnia

Depression

Significant Stontium/Lead levels present in blood tests 1.5 years after moving out of house!

Health Concerns of Spouse, [redacted] (age 43)

Osteoarthritis and Rheumatoid Arthritis

Joint pain

Fatigue and loss of concentration

Insomnia and depression

Vitamin D deficiency

Meneire's disease

Significant Stontium/Lead levels present in blood tests 1.5 years after moving out of house!

Health Concerns of Son, [redacted] (age 12)

Multiple antibiotic prescriptions for respiratory infections

Inhaler for asthma

Sleep problems

Anxiety

Major concern: 55 percentile drop in height and weight in TWO YEARS—Previously averaged 80–100 percentile

Significant Stontium/Lead levels present in blood tests 1.5 years after moving out of house!

Appetite loss

Health Concerns of Daughter, [redacted] (age 13)

Auto-immune diseases—celiac

Development of seizures

Concentration problems

Vitamin D Deficiency

Swollen lymph nodes

Multiple antibiotic prescriptions for respiratory infections (three rounds of antibiotics from April–June 2010)

35 percentile drop in height in TWO YEARS—Previously averaged between 90–100 percentile

There are other health issues, but we wanted to highlight those of greatest concern. *Some* of the above concerns have improved since moving out in August 2010, but our daughter continues to struggle with clinically significant auto-immune and Vitamin D deficiencies despite substantial changes in our regular diet. The physical development and decreased bone growth implications are unknown. Our son continues to be well below his projected height despite the fact we have been out of the home a year and half. Some research states strontium in the drywall replaces calcium. Bone and lung cancer are serious concerns based on preliminary research

released from toxicology experts conducting more in-depth research. Other Chinese drywall neighbors of onrs have children who have also experienced many of the above concerns. It is too ironic for this to be occurring with several children in the same neighborhood with normal pediatric history prior to living in CDW. One week prior to moving out of our home, our son had a friend to spend the night who had a history of asthma. The child had not had an asthmatic attack in fonr years, but went to the Emergency Room the next day after experiencing the worst attack in his life. Chronic fatigue is still an issne with David who even recently continues to exhibit clinically significant mycoplasma lab resnlts. *The CDC and CPSC are NOT taking this issue seriously as they have not looked into the particulate matter or heavy metals that have a greater impact on long term health.* Please read the toxicology report we will attach for further scientific research being conducted in one of the hardest hit areas, post Hurricane Katrina.

We share this information so you may have a personal acconnt of the mnltiple financial and health matters that are effecting victims of Chinese drywall. Your leadership in assisting families in the same situation is greatly appreciated. We were debating the possibility of filing for mortgage modification through a forbearance, but have concerns of how this will effect our credit that has been snperior to this point. Currently, our mortgage holder will only allow three months forbearance bnt will make us pay postponed payments at the end of three months, with additional fees attached. This is disheartening when we spent three years paying hundreds of additional dollars toward the principal of our mortgage, only to pay the loan off faster and save for our children's college edncation. We are forced to continue payment of a mortgage, rent, and utilities at both locations since onr homeowner's insurance requires power and utilities to be turned on for coverage. We have spent close to $50,000 of onr children's college savings and personal savings to avoid exposing our children to the chronic health issues experienced! God blessed us with the financial means to move out sooner than later, but this is not the case for many other families in our sitnation.

We need all politicians to demand additional involvement and corrective action from The Department of Homeland Security, FEMA, mortgage industry, and other Federal agencies to provide assistance to families devastated by the import of Chinese drywall and other toxic imports. Many doctors are "scratching their heads" as to how to treat families who are experiencing many of the long term exposure symptoms that are now surfacing. China has continned to import a multitude of toxic products that are not only killing our citizens, but effecting our economy by forcing Americans to buy their cheap products. *We need updates on health studies immediately. Time is running out!* A neighbor in his 50s recently died of lung disease. . .CDW?

Please help us!!!! Demand more information from other governmental agencies. We voted for you to represent the people. People are dying from this and everyone wants to turn their head! If you would like additional information, please e-mail us. Our community is arranging town hall meetings, and we encourage you to attend.

To Whom It May Concern:

I purchased my brand new home on December 15, 2006. I took one month to make the home my own. Shortly after moving in I began to have nnmerous electrical problems in my home. I have spent close to $70,000 in to this home.

The first things I began to notice in my home were numerous cable television problems. Cox Cable had been to my home around 15–20 times with in a 12 month period. I lost many DVR boxes and had television reception problems. Dnring the first 12 months I was in the home, I lost an ice maker in my refrigerator, dish washer, and many other small appliances. In the meantime, I also lost three 50" Plasma Televisions.

I thought my house was haunted and actually became the joke of my friends. They would routinely say that my home was built on someone's grave. In the summer of 2007 I lost my air conditioner coils. I paid $750.00 to have this repaired because the company refused to stand behind the installation. In the summer of 2008 I lost the same air conditioning coils again. At this point, I am really wondering what I have done to deserve all of this stress. Then in August of 2009, I was getting off work around 4pm. My neighbor comes over and asks if I was having problems with my home. I had never met the gentleman and he was very npset. After a long chat he and I had shared many similar stories. He and I decided that we needed to figure out what was wrong with our homes.

That night, I was determined to get to the bottom of this issue. I posted on facebook that my home was cursed. A friend read my post and said I might have

something that a friend of his has called Chinese Drywall. He gave me the number to his friend, and I called him. After a long chat with him on the phone I thought I finally might be on to something. I attended a meeting in Norfolk, Virginia about Chinese Drywall. This was when reality set in.

I thought to myself, this should be easy go to court and get this house fixed. Well after two years I am no closer to having resolution to this matter. I have not lived in the home for a long time now, as I am afraid to be in the house.

Our government has not done anything to stand up for it's tax paying residents against China, the bnilders, or the insurance indnstry to help us. I cannot even begin to describe the mental anguish this has caused in my life. I have always paid my bills, taken care of myself, and paid my taxes. I am almost 40 years old and wonder if I will ever be able to recover from such a devastating man made catastrophe. I have been denied homeowners insurance, a claim against my builders insurance. Why should I be left holding the bag for something I had no part of? I cannot understand why our government is not here to help us. After all, they are the ones that negotiate trade deals with foreign countries. Not me!! Everyone involved in the construction of my home should be forced to step up to the plate, and right the wrongs they have caused. I am afraid by the time our government does something, I will have already lost this home!!

UPDATE: I lost my home yesterday on November 29, 2011

Regards

Natasha,

Hi I was told to write you about health concerns with the Chinese Drywall. We did an addition to our home in 2006 and come to find out it was Chinese Drywall. In May of this year our then eight year old son suddenly developed a severe headache. I gave him tylenol and he laid down then I went to check on him and he couldn't pick his head up or turn his head. I took him to Dr. [redacted], when we got out of car he was having trouble walking on his own. The Dr. sent us to E.R. to check for meningitis. He had a spinal tap and did not have it, so they gave him strong anitbotics and sent home. His white blood level was elevated high. He slept most of the next day (Thnrs.) then on Fri. I went to wake him up and he could not get np. I helped him sit up on the bed and he cried when I moved him. He conld not stand up and said his legs felt weird and would not work. I took him back to Dr. as he cried all the way there. We had to put him in a wheel chair to take him in and his legs would not work. He also was having a severe headache. The Dr. could not get a reflex on his legs. He finally calmed down after about 4 or 5 hours and was finally able to walk. The Dr. wanted us to go have lunch and come back for some of blood results. We went back and he was able to walk in and the Dr. and nurses were all relieved. The blood tests did not show anything so he wauted us to follow up in a few days with a Neurologist.

We left and as we got close to our car he said "mom my legs feel weird again" and they gave out. I caught him and we put him in the car where he started screaming with his head again. Took him back into the Dr. and he sent ns to USA Women's and Childrens Hospital where he spent 3 days. Doctors could not pin point anything and we did say something about the drywall and the Dr. said we were the second family that week to ask about drywall problems. They sent us to another Neurologist and Rheumatologist and he had MRI's, nerve test, and EEG done and found nothing. The doctors have all been baffled.

Long story short, he had about 2 or 3 episodes a week for 4 months and after everyone asking if we thought the drywall could have anything to do with it we paid someone to tear out the drywall out of the addition and have been airing the room ont and blocked off from rest of the home. His episodes after 4 months have basically stopped now.

Also another thing I really wonder about is, my four year was born with a birth defect of the eye. It did not develop in the back and she had Cataract, Detached Retina, a mass behind the eye and a distorted optic nerve. She was a full term baby and the Doctors were baffled that she was not a premie with all those troubles. I was pregnant with her when we did the addition and always in that room. She almost lost her eye and get a prosthetic. She is now blind in that eye. This is just 2 things that concern me about being linked to the Drywall. Anyway I have a journal of the stuff with my sons' problems. I am curious if anyone else has had any of these health problems associated with this drywall.

Thank you for your time and hard work.

December 5, 2011

Ladies and Gentlemen,

I just watched footage from a hearing you had on this very topic on May 21, 2009. How completely sad that it is over 2 years later and you are having another hearing on December 6, 2011 "Coutamiuated Drywall: Examining the Current Health, Housing and Product Safety Issues Facing Homeowners". Nothing seems to have changed in my mind for the Homeowners. Have you been able to sleep comfortably in your homes since 2009? My family has not. Have you been hounded by your bank, ignored and dismissed by your insurance agency? My family has. Through no fault of your own have you been pushed to the brink or over it financially? My family has. Have any of you lost a beloved pet, because the air in his home was toxic? My family has. The current "issues" are the same "issues" we had 2 years ago or 5 years ago. The victims of this disaster need you to examine how to help us now, right now.

My testimony is: my home has toxic Taishan Chinese Drywall. All the metal in my home is/was corroded, pitted and black. My family and I had nose bleeds, respiratory problems, lethargy, headaches, skin rashes and situatioual asthma. We fled our home to a rental, rather than risk our health any longer. Our homeowners insurance denied our claim and then non-renewed us. I reported to every local, state and Federal agency. The only help came from Lee County Property Appraiser; they valued our home at $0. We joined the lawsuit in Louisiana. My bank, Chase, who owns stakes in Taishan drywall and who has been bailed out by our government quickly, after much harassment of us, finally gave us a special forbearance. But we can only have 2 choices, special forbearance or short sale for 6 months. They are waiting to see how this all shakes out in terms of money for them. I cannot take the Federal tax exemption because I have not remediated. There is stress involved in every aspect of this disaster, even down to little things like getting out of a cable contract prematurely because your house is rotting their equipment, because no one cares if you have toxic drywall or not. This is only a brief synopsis of the living hell we victims endure on a daily basis.

Our country gives billions of dollars in aid to other countries, we are building houses in Haiti and meanwhile there are over 10,000 families in the U.S. suffering because our government allowed this toxic product into this country and our government is ignoring this crisis. Please end this madness, now.

Toxic Home: Cape Coral, FL built 2006

Addendum:

Please do not think that yesterday's settlement news from KPT has been the magic answer for the Victims of Toxic Drywall. Thousands of us still have Taishan drywall or American drywall. Judge Fallon is going to Hong Kong next month for Chinese depositions and the American drywall victims do not go to trial until May!

As for the science part of this drywall fiasco, I would like to add my thoughts. My home has been vacant since approximately October 2009, with no air conditioning on, in SW Florida. There is no mold growing and there are no bugs alive in it. I have seen pictnres from other victims of dead rats. Nothing can live in these toxic conditions.

I personally think some of the science must have to do with drywall eating bacteria, bnt I am not a scientist.

I am a homeowner, who has paid her taxes her whole life. I have been blindsided by Chinese Drywall that was allowed into this country. I have been abandoned by almost all government entities. Do you know what it felt like to watch the President of the United States wine and dine the President of China? Why has he not uttered the words "Chinese Drywall" yet? Why hasn't he surveyed the damage this disaster has caused, like he does with other disasters? Ask him for me please.

I would also like to address the Federal tax break again. It is real simple. I have documented toxic drywall, I can have a catastrophic loss deduction. Done. Not the convoluted law we have now, that only if it is remediated silliness. That is what I would like to see.

I implore you to help the Victims of this disaster now and do not allow toxic imports in again, for my children's sake.

Do not drop the ball. We Victims need help!

Thank you.

We were so happy to move to our final home on November 10, 2006. This was to be our home that would take us through our retirement years. We are now living a nightmare. We discovered in July 2009 that the home we purchased was built with Chinese drywall. The Chinese drywall was causing many physical problems in

the home and for our family personally. All three of us have had physical ailments as a result of having Chinese drywall in the home. Seven months after living in the home, our golden retriever, Kramer, died of kidney failure. Our second dog, Bailey, died in December 2008 of respiratory issues.

Now we know why all of these things happened. Chinese drywall!

We purchased and moved into our home in November 2006. After living in the house for seven months, we began to experience problems with the air conditioning. As of August 2009, we have replaced six to seven coils in two AC units. We have had major repairs to our flat screen TV, computer hard drives and monitors that crashed, small appliances that failed, a dryer that stopped working due to circuit board failure, and electrical outlets that had to be replaced. Physically, we have experienced unexplained rashes, respiratory problems, headaches, fatigue, insomnia, chronic coughs, and muscle pain. The smell in the house is in our clothes, furuiture, mattresses, linens, and silver jewelry and flatware have turned black and are unable to be cleaned. When we opened our windows, our neighbor complained of the smell that came from our home. We have documentation to prove all of these issues.

Upou learning of the problem, the stress has become unbearable. We moved out of our home immediately in August 2009, leaving our belongings behind, and filed a lawsuit becanse we had no other recourse since the builder and insurance companies were of no help. We are thankful that our AC repairman was the one that discovered the cause of our problems. We are depressed and saddened at the current statns of onr life. We worry about our two other dogs that lived in the house all day long. The outcome of their health and our own is yet to be known. If the drywall is corroding copper and other metals within the home, what is it doing to our bodies?

We are cnrrently living in a rental. Onr home was sold in a short sale in November 2010. We lost $400,000 in equity. This was a major investment for ns and throngh no fanlt of onr own, we lost it all inclnding the home we loved. Selling the home was in our best interest and that of the mortgage company. Hanging on to a home yon can't live in with a forbearance on your mortgage, only keeps increasing yonr debt to the mortgage company. The increasing debt has caused many families to file bankrnptcy. We are glad that we were able to sell. Had we foreclosed, the mortgage company would have been stuck with a home in poor, nninhabitable condition. The short sale has caused our credit to be hit and it will be affected for seven years. Families that are dealing this will be held prisoners by their credit. They will not be able to purchase new homes or buy cars at a decent interest rate, if at all. We have always maintained excellent credit, and now because of Chinese drywall that has also been damaged. We are not deadbeats that have not managed onr finances. We attempted to get a new loan and were told by a bank aud mortgage company to come back in three years. They did not even want to deal with ns. Our local commnnity bank is giving ns an adjnstable rate mortgage at 5.5 percent that they are holding on their beoks since it cannot be sold. This is not a bad rate, but rates for conventional loans are mnch lower. We will have to refinance later to get a conventional loan when our credit rates improve. Another financial burden! New rnles for the underwriting of mortgages and loans need to be updated to make provisions for homeowners that were victims of Chinese drywall. Chinese drywall is an "extennating circumstance", yet there is nothing written about that so loans can be given. This is something that the government can do.

We are victims of Chinese drywall. This product was allowed in our country. Please work on safety regulations for imports and make foreign countries abide by our regulations.

We will continue to move ahead and work with local, state, and national officials to rectify our situation and the situation that countless other hard working, tax paying citizens are facing. As of today, very little if anything has been done to help American citizens in this situation. We received two forbearances on our mortgage prior to selling the home in a short sale . . . this is only a band aid on a much larger problem. We did not cause this situation and we need help from our government to assist and ensure safety standards for all Americans. We have contacted the White House on uumerous occasious and have uot heard one thiug back regarding our situation. We run to foreign soil at the drop of a hat. Why can't our own country do something to help its own citizens? You have done nothing! We are ashamed to be citizens of a couutry that does not come to the aid of those that do deserve it. We will tell you that each and every family that we have met that has Chinese drywall are hardworking American citizens that pay their taxes and contribute to society. We deserve some help as well. Our government is a travesty! Actions speak louder than words and we are tired of the lip service we have received. Wake up and take action! Help the hard working American citizens and their families that have beeu victims of Chiuese drywall.

December 8, 2011

ADDENDUM TO TESTIMONY

I attended the U.S. Senate Committee on Commerce, Science, and Transportation on December 6, 2011 in the Russell Senate Building. I would like to add my comments regarding the health aspects and credit issnes in the form of an addendum to my testimony turned in prior to the hearing.

It was noted by the CPSC and the CDC that there is no specific canse for concern regarding health issues and toxic contaminated drywall as a result of their stndies. How do we know what significant levels are for exposnre to these gases from the drywall? It is very possible that jnst an average nnmber was nsed based on the studies. In their studies, did they use a significant number of homes where physical complaints to this exposure were reported or was it just a random sampling? Every home may have been different based on the geographic location of the home.

Our family had two very healthy dogs nntil we moved into the honse with Chinese drywall. The dogs are in the home 24 hours a day for the most part and stayed by the front door on the lower level jnst waiting for us to come home. The gases are heavier ou the lower levels as we now know. Our home had three levels. Seven months after moving in, our golden retriever developed issues with his kidneys and could not recover from them. For a week to 10 days, he was at the vet for treatment. My husband, [redacted] also had some issues with his kidneys that required treatment. Our standard poodle had a skin reaction that caused her nose to become crusty, peel and then crust up again. This was ongoing the whole time we lived in the house. She died two years after living in this house due to respiratory issues. My husband had a severe rash that could not be explained by the doctor. He called it "contact dermatitis" and the doctor told him something was irritating his skin. No changes were made to detergent or anything else that could irritate his skin. It looked like he had chemical burns all over the trunk of his body, up his neck, and onto the scalp. Nothing made it go away. Our daughter, who was away at school, would break out in a rash on her lower torso, and strangely enough when she went back to school, it would disappear. This only happened to her in this house. We lived in both houses when she was in college. I had a chronic cough, headaches, and fatigue (and I am a high energy person that used every minnte of every day—not in this house). About three months after moving out of the toxic home, our physical symptoms went away. We wonder; if the gases corrode metal pipes, what do these gases do to the inside of our bodies? Only time will tell. What families have reported is enough to know that you can't live in these houses. I felt the need to explain in more detail the physical problems that we experienced.

Congress also needs to address the financial situation that has been created by the Chinese drywall situation. Forbearances were only a Band-Aid solution for a much larger and longer lasting problem. Forbearances allowed us to move out of onr homes and rent something. Forbearances were short-lived. Banks are not going to continue to give them to you and your debt keeps rising for a house that is uninhabitable through no fault of your own. I addressed this in more detail in my original testimony submitted prior to the hearing. It has come to my attention that if the credit is able to be restored for some families, that it may not be retroactive. Please do not do something for "some of us" and not all of us. We had our short sale a year ago. We have no idea at this time how long this will affect our credit. According to the info I received from the bank, it will be seven years unless it is an extenuating circumstance. I have yet to really get a clear answer on "who" makes that call. Who is going to tell us that we did have an extenuating circumstance? When will we be able to get a conventional loan? Don't penalize good, hardworking Americans that were victims of Chinese drywall because they could see that nothing was going to be happening anytime soon. We had to act responsibly regarding our finances, as we always have our entire lives.

When you think about it in our situation, we dealt with the problems caused by the house with Chinese drywall for two and a half years. We had the physical problems both with the honse and personally. These resulted in numerous expenses for items that were not covered by warranties—appliances, electronics, AC coils, vet bills, and personal medical bills. Insurance did not cover any of this. And now, we have been out of our house for two and a half years. All in all, we have been dealing with this nightmare for *five years*. We need help now and not years later. We should not be penalized. We are well aware that not every individual that had Chinese drywall had the same credit ratings. You can make some decisions that would restore our credit back to what it was prior to having had to have a foreclosure, a short sale, or a bankruptcy. Make decisions that will help all of us—not some of

us. Please do not form another committee to investigate. Take action now and please do it as soon as you can.

Think about it this way. It is your house and your family. What would you want done to help you recover?

To Whom It May Concern:

On November 1, 2010, we bought our dream home at [redacted]. We bought this home thru a Foreclosure. We hired a Chinese Drywall "expert" to examine our home to determine whether or not it had defected drywall. The report came back negative so we proceeded to purchase the home. Within days, we experienced unusual health problems. My 8 yr old (7 then) developed Hives from his groin area to his knees. He had never had Hives before. My 5 yr old (then 4) developed upper respiratory problems for which he was put on an inhaler. He had never been put on an inhaler before. My wife developed daily Migraines. Now, she gets Migraines on average 1 migraine every month. Always around her menstrual cycle or if a large weather front comes thru. I have known my wife for 18 years and never has she had more than 2 migraines in a month and this was DAILY migraines. My 2 yr old (1 then) developed an upper respiratory infection and her first ear infection. She has not had a respiratory or ear infection since we moved out over a year ago. Personally, I developed heavy hreathing. It was like someone was standing on my lungs is the only way I know how to explain it. Even with all these health problems, I first attributed them to the "stress of the move". However, after about 3 weeks of living at [redacted, we received a letter from Doyle law firm stating they had evidence that over 450 sheets of Knauf Drywall had been invoiced to our house back when it was originally built in 2007. After almost throwing the letter away (remember the part we had a Chinese drywall Inspection done) I decided to call Jimmy Doyle. He came out to our house the following day and within 10 minutes had located an entire area with Knauf "Made In China" drywall. I contacted our pediatrician and informed her of this discovery. She advised us to vacate the premises immediately. So, after living in our new home for about 3½ weeks, we moved out of the house that night into my Mother-In-Law. To put it lightly, it has been HELL for our entire family since the discovery of the Knauf drywall. On a good note, all of onr symptoms went away after a few days of being moved out of [redacted]. However, I do not need to wait for tests to determine if this will cause very serious health problems over long exposure. I know first hand what it does to your body in about 3 weeks, so common sense tells you it will only get worse with long tern exposure.

We are in the class action lawsuit against Knauf. It has been VERY slow moving. However, at least until now, onr bank, Regions, (who sold our mortgage to Freddie Mac after I told them of the drywall problem) has issued a forbearance on the loan. We cannot afford paying a mortgage payment and rent payment, nor should it be expected of us. We also have a lawsuit against Griffith Home Analysis (the supposed "Chinese Drywall Expert). I hope this e-mail helps, I really can't stress enough the emotional strain we have been under. Please feel free to e-mail me back with any questions you may have.

Thank you for any help you can provide.

Chinese/American Defective Drywall

I am a Disabled Veteran who purchased a new home in 2007. My home was built in 2006, and contains United Gypsum. After living in our home for 39 months, and 6 hospital visits, with two additional visits post-moving, we are still waiting for help from someone!

I listened to the Commerce, Science, and Transportation Subcommittee Hearing on Drywall recently by videocast. I am quite dismayed by some of the answers that were given, especially by Mr. Cowen in his testimony before your committee. I believe that I may answer some of the questions that you were looking for.

Drywall Differences

What most people don't seem to comprehend is that there are similarities between the true Chinese Drywall, and the American Drywall, hut there are vast differences also. The true Chinese drywall that is marked (ex: Taishaun, Knauf, China, or others) turns everything black quickly, you normally lose you're A/C coil qnickly, and most of the time there will be a smell such as rotten eggs. At least with these signs people can get out of their homes much quicker.

But with the American Drywall such as mine, as I only have United States Gypsum, we had A/C issues right from the start. We started feeling sick about 6 months

in, and other things happened that were unexplainable. The lights would flicker, we started losing small appliances, and at times we thought we smelled something.

Then we lost our electric kitchen stove, and then the water heater went, and my wife started having kidney issues. Being a Disabled Veteran with an already compromised immune system, I started having additional breathing issues. This was followed by kidney problems also just like my wife had. Then I had blood pressure problems for the first time, followed by heart problems.

Now over 4 years later we have discovered that it took our home with American Drywall about 2–2½–3 years to become fully evolved. It seemed to evolve and cook more and more throughout this time period. You could notice the progression, if you inspected the house about every 3–4 months. You could see the changes in the copper wiring, and the odor increased significantly. In the American Drywall homes it comes across as a sweet-sickly, chemical smell, and you can taste it on your lips and tongue. I and my wife, (but more myself) have become so sensitive after living in this for so long that when we cross the threshold of a door we can tell if that home or building has bad drywall in it. In some cases you do not even have to make entrance, as you can smell it coming from the soffit under the eves of the house.

Commercial Exposure and Food Products

I am very concerned as in this past year we have discovered many commercial businesses that have bad drywall. I have tried talking to the Managers, but most of them usually think that I am crazy, or have came back later and stated that they checked and do not have any problems. I am in the process of sending a letter to the Health Department of Florida listing the businesses I have observed bad drywall in.

My biggest concern is the food stores with the meats and open exposed goods. Also the gases that permeate the cardboard boxes. We have discovered stores from Estero to Sarasota, Florida. In Estero alone there are in a 5 mile radius 4 Publixs', 2 Super targets, 1 Sweetbay grocery stores that are infected. Then there are 2 extremely large shopping malls that were built during this timeframe,and we have discovered some of these businesses have bad drywall.

Residential and Real Estate Dealings

We moved out of our home in the middle of October 2010, and moved about an hour South to Estero, Florida in a home that I knew was free from any bad drywall. Prior to our first year expiring we started looking for a place to rent, back in the area where our home is located.

We were shocked as we searched for a place to live, finding mainly homes that were exposed to bad drywall just like our own home. The smells were identical to our own. What was even more frightening was the fact that some of the homeowners and Realtors, knew that the homes contained bad drywall, or that at least there was a problem. Others were in denial, and even after I talked to them trying to educate them, I also told them some websites to assist them in learning more about the problems, many of them didn't care and still rented or sold the homes to unsuspecting people. In a 3 month period we encountered over 50 homes, as well as some Real Estate offices that were contaminated.

Foreign Drywall

One of your committee members inquired at the hearing if anyone knew of any foreign entities that had bad drywall. I wanted to shout through the webcast at that time because my wife was back home visiting her mother in Yalta, Ukraine. My mother-in-law's apartment is on the 1st floor, and constructed of all concrete inside. About 1 year ago she had some new windows and interior doors replaced. In the bedroom my wife grew up in they installed a new wooden door, and they had to add some drywall around the door after framing. This was the only drywall in the entire apartment and it was Knauf brand. When my wife first arrived at her mothers, as she entered the front door she smelled the drywall, as stated before she also had become quite sensitive to the odor.

Drywall Time Frames

In our search for a place to live we encountered mostly homes that were built in the years of 2004—2006. But we did find homes that were constructed in different areas, by different builders, in 2008 and also in 2010. We also found many older home when we changed our search requirements, that had been remodeled and contained contaminated drywall.

Builders, Suppliers and Installers Knowledge

As a homeowner and also a Victim of this Disaster, I am enraged that many of the builders, suppliers, and installers were aware of the drywall problems back in

the year "2006". When the judge opened the Settlement Agreement in the Miami trial, that was made between Knauf and Banner Supply, after reading the documents it made me sick.

If these facts had been revealed to the public, I don't think that many of us homeowners who are sick and suffering, would be in the position right now that we are in!

Conclusion

My wife and I are still sick, with an unknown future as to our medical health. We are out Thousands of Dollars, and our Credit has taken a hit because we could not afford to pay our Freddie Mac loan and rent at the same time.

I would like the opportunity to speak before your panel because I am tired of listening to experts who know nothing, and sugar coat all the facts and details. I have lived it, I have breathed it, I have studied it, I like the other tens of thousands have had the same medical symptoms—I have suffered it, so why not ask a real professional—I do have many answers and also some snggestions for a solution.

Re: The Toll Chinese Drywall Has Taken On Our Family and Commuinity

We want to share the absolute tragedy our family has faced as a result of a toxic foreign product which was allowed into the United States. We are 100 percent innocent victims who will pay the price for this oversight the rest of our lives, and we are pleading for help from our political leaders.

In 2006 we wanted to move our growing family into a larger home in a promising development. We moved in August of '06. Immediately after moving in we began experiencing problems with the home and unexplained health symptoms. The builder had a long "punch-list" of items which were never completely resolved and resulted in us and several of our neighbors taking legal against the builder after 18 months. Upon lawsuit inspections, we discovered many additional issues with our homes which were in direct code violation and never should have passed inspections. Then, in September of '09 we also discovered our home was built with Knauf Chinese Drywall—as were 35 percent of the homes on our street.

Problems with our home:

— Water flooding and year-round standing water in the yard due to improper drainage and grading. Water ran underneath the home soaking support structures and elevating moisture levels. Later we would find that this elevated moisture further exacerbated the off-gassing of our Chinese Drywall.

The following are all issues resulting from Chinese Drywall:

— Failing HVAC system: frost on interior walls from Freon leaks, five failed AC coils, and the furnace setting off smoke alarms etc. There were 9 HVAC repair visits in the first year.

— Wiring problems: lights which turn themselves off and on, light switches which "pop" when used, and rooms full of lights which would "dim" when an appliance was turned on etc.

— Failing electrical and appliances (big screen TV, smoke alarms, security system, constant replacement of light bulbs, washing machine, stereo receiver, DVD players, speakers, computers, printers, and multiple small appliances which stopped working after 3–4 months etc.).

— Batteries which quickly died, including car batteries from the vehicle which we parked in the garage. Our family van had 2 batteries die in the first year of use.

— Smoke alarms and the security system would sound for short intervals and then silence. In one 2008 instance the fire department was called. When the firefighters arrived at 3:00 a.m. they said the home smelled like burnt matches (sulfur) but could not locate a fire. Later we would learn that many other victims were experiencing similar alarm problems due to CDW dust on alarm sensors.

— The drywall itself is "weak" and crumbles around nails and hanging brackets in the wall. A large 4' x 7' mirror pulled away from the wall and fell toward our 3yr old while he was at the sink. The nails and brackets holding the mirror up were black and corroded and the sheetrock itself had crumbled and given way. Several wall hangings and curtain rods fell off the walls in similar fashion. On another occasion our 7 yr old accidentally slid into the wall while running and punched a hole in the drywall with his knee. The drywall gave way under relatively low-impact.

But all of these issues pale in comparison to the severe health problems my husband, I, and our three young children have faced in the last four years. *Health symptoms started with the tell-tale nose bleeds, respiratory and sinus infections, skin rashes, itchy eyes, chronic coughing, but grew to include broader neurological, circulatory and bone growth delays.* These are all outlined as the effects of hydrogen sulfide, strontium, carbon disulfide and carbonyl disulfide poisoning. This information is available via the National Library of Medicine.

We discovered the vast majority of our home was constructed with Knauf drywall in September of '09 and since have learned that the following health issues follow similar patterns across the nation:

— In the first few months in our new home, my husband developed severe sleep-apnea to the point where he was having an apnea every 60 seconds while sleeping. Sleep deprivation and pulmonary strain followed.

— Our youngest child immediately developed chronic chest congestion and was diagnosed with asthma which required he receive nebulizer treatments 2–3 times a day.

— All three children (ages 18 months, 3 and 6 at the time) quickly developed skin rashes, eczema, bladder infections, yeast infections, loss of appetite, ear infections, and repeated respiratory complications. The children wonld constantly cough after waking—a symptom which would go away when they left the home or were in school.

— Adults suffered chronic fatigue, loss of sense of smell, memory loss, inahility to concentrate, insomnia, nausea/vomiting and depression.

— Visiting family members became ill—65 year old father was hospitalized with pneumonia and 61 year old mother developed a severe sinus infection after staying with us for just a few days.

— Every member of our family was diagnosed with ADD/ADHD within 18 months. This was accompanied by high-anxiety and irritability requiring medication for all, ages 4 through 45.

— Onr youngest child spent the majority of his life developing in this toxic home has experienced the most severe symptoms. After four years of symptoms, he was tested by the Hoover school system in the spring of '10 and diagnosed with high ADD and had boarder-line Autism scores. He was issued an IEP and placed in Early Intervention Pre-school. *Additionally his growth rate dropped from 97 percent percentile at age two, to 30 percent percentile at age 5.* Tests were condncted for endocrine fnnction, growth hormones, celiac disease, liver function etc. and all cam e back normal indicating something else was the cause. In June '10 we believe we discovered the cause; our Knauf drywall contains very high levels of strontium. Our drywall was inspected with an XRF detector revealing boards with strontium counts as high as 3300 ppm when the allowable level is below 200. Strontium is absorbed into the bone and replaces calcium, stunting bone growth.

— *By July of 2010 we had spent thousands on doctor visits and had over $700 in monthly prescriptions to treat all of our health symptoms.*

We then made the difficult decision to evacuate our home to alleviate our children's current health problems and for fear of future health complications. Since moving ont of onr toxic Chinese Drywall home:

— The children's appetites have increased and all have gained weight. The youngest grew a 3 inches in the first year we were out of our toxic home.

— Skin rashes have minimized and there have not been any bladder or yeast infections.

— All have been able to reduce medication.

— And most importantly, our youngest was re-tested by the Hoover school system in October and scored completely "normal" for his age and no longer needs ADD medication.

— Unfortunately, many health symptoms remain and doctor visits are frequent.

We are thankful our health problems are improving, but we are now faced with the financial burden of paying our mortgage, rent and utilities on two households which is unsustainable. *We filed suit against the manufacturer in '09, and while the legal process is moving quickly, homeowners like us are running out of time.* Settlements are only covering repairs and 3 months of relocation and are still many months away. Like many homeowners, we will be faced with months of relocation

costs which will never be reimbursed and forbearance costs for which we'll never be compensated.

We are sharing this personal information so you can understand the toll Chinese Drywall is having on many families in Alabama. Current AL statistics are significantly understated and true impact could be as high as 3500 homes based on the gap between reported vs. confirmed cases in Ross Bridge. *Your leadership and focus on this issue is imperative.*

We purchased our "retirement" home in Sun City Center, Florida in February of 2007. Built in September of 2006, it had never been lived in. It was a home we could be proud of and fit our lifestyle perfectly, as we love to entertain. We also enjoy having family and friends visit us when it's cold up north and they need a break from snow-shoveling.

We noticed a "different" smell to the home. It didn't smell like most new homes. But we thought that was due to it's being closed up for a few months. After we moved in, we noticed some discoloration of many of the metal items in our home over time, hut didn't think much of it. We found that we both suffered a few more headaches than we usually did and onr eyes bothered us, as they often itched or burned. We treated both with over the counter medications.

In 2009 we learned that we had Chinese Drywall. From that point on we have learned, through experience, what living with Chinese Drywall really means. We have had to replace our air-conditioning coils and one very expensive refrigerator. Our lamps are not working well, many of our switches for our overhead lights have quit working and onr smoke alarm has failed. Additionally, our mirrors are getting little black specks or drips in them. Our fixtures are getting pitted in our bathrooms. The replacement refrigerator had to be fixed (fortunately not replaced, this time). Some of our jewelry and decorative items have turned black with corrosion. Anything silver is tarnished beyond normal tarnishing.

As the economy has affected the value of homes, our home has taken an even worse hit. It isn't worth anything. The house is totally unsellable at any price. We have received a little help from Hillsborough County, in the form of real estate tax relief. Our house has no value as far as they are concerned. And there are no instructions as to how we might be able to claim this loss on our taxes.

This house is a sick house. We don't know the full ramifications of the long-term effects on our health as a result of living in this house. But we do know that it has already been costly to live in this house, compared to living in a similar home of the same design and age.

We victims of Chinese Drywall deserve for our government to back us. This is too big a problem for ordinary citizens to solve without the help of those who should be overseeing the products that come into our country. For most people, one's home is their largest single expense. Most of us don't have the necessary resources to fix our homes. Through no fanlt of ours, we are having to pay for the problem financially, physically and emotionally. Please help.

I finally after 47 years had the money to build my dream home on my little 8 acres of paradise in the country. After working and saving and paying on mortgages and children and I could finally say I had accomplished something. Every penny I had would go into this little home, so that I could afford to live there in my old age and leave something to my danghter. Two years after moving in the nightmare was realized. My A/C stopped cooling it was still under warranty so I called my A/C man, it was then that he told me I had Chinese drywall and what it had done to my A/C coils. I began my research, and then nnderstood that strange smell the sinus problems and beadaches that I had had. I could not afford to keep fixing my A/C I now have an ahandoned home, no money to fix it its been a disaster to me just like if it had been a tornado or hurricane without insurance! My daughter had given me a house warming plaque to hand over my front door, it reads, "God is the head of this home and the unseen guest in every room". I still have it hanging there, because it seems that he is my only hope, no lawyer, and no government cares about the injustice that has happened to all of the CDW victims.

Dear Senate:

I have written numerons letters to agencies aronnd the connty all-the way to the president of the United States of America I hope this will have different outcome.

There a few words to describe Chinese drywall a living hell a nightmare you can't wake up from. Financial disaster

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December 08, 2011

RE: TESTIMONY CONCERNING IMPACT OF CHINESE DRYWALL FOR THE SENATE COMMITTEE ON CONSUMER PROTECTION, PRODUCT SAFETY, AND INSURANCE

Dear Senate Committee:

This letter is to document the negative life impact created by owning a home that was constructed with Chinese Dry Wall (CDW). I am one of the many homeowner's, whom through no fault of their own, discovered their homes contained "toxic" Chinese dry wall.

I pnrchased my condominium at [redacted], Williamsburg, VA, in October of 2007 after retiring from 27 years of service in the U.S. Navy. It was a lovely home that suited our every need. After the first year of living there however, we began to notice that something was not right; as my wife and I were often ill and suffered enduring headaches, skin rashes, burning eyes, and respiratory distress. As a hardcore runner, the respiratory issues began to take their toll on my running performance. With the summer heat of 2009, the toxic fume level inside the home had become extremely noticeable and very unbearable. Then that August, the builder informed me that he had received word from his drywall supplier that shipping records indicated that the home had been built with a significant amount of Chinese dry wall installed. I immediately had the builder test the home. If our health issues were not evidence enough, his actual tests without doubt, confirmed the presence of Chiuese Dry Wall.

We were forced to evacuate the home on 31 AUG, 2009 due to the extremely unhealthy environment that was actually worsening each day. My wife and I had uo other choice but to remove all our household possessions from the home for further risk of them being cross-contaminated (the toxic hydrogen sulfide fumes emitted by the Chinese dry wall actually penetrate and are absorbed by anything that is porous or permeahle; clothing, pictures, books, paintings, upholstery, bedding, mattresses, etc.). We temporarily relocated to a hotel for three months while we attempted to negotiate resolution with the builder. After numerous unsuccessful attempts at eugaging the builder to remedy the situation, I was forced to take legal action and I joined a forming class action law suit, as well as a case filed at the State level. These suits are agaiust the entire supply chain involved with the manufacture, procurement, distribution, and installation of the Chinese dry wall in our home.

The Federal District Court in New Orleans heard the original six cases for homeowners involved from Virginia. The presiding judge, [redacted], ruled in their favor, however since the ruling was against a Chinese company, appropriate restitution has not been forthcoming. Additionally, the other part of his ruling determined the "official protocol" for remediation, which to date had been in question (remove just the Chinese drywall, or gut the entire home?). His determination at that time was the only acceptable remediation method is the complete gutting of the home dowu to the framing studs. This includes removal of all insulation, ducting, appliances, wiring, plumbing, etc. to prevent any further cross-contamination. He estimated the cost at between $80–90/sq ft, meaning a 2000 sq ft home such as ours would cost as much as $180,000 to remediate fully, to restore it to a safe and livable condition. His remediation protocol has since been refined slightly by the CPSC.

After three months of hotel living and no reasonable solution within sight, I purchased another property at my current address in December 2009 to help restore some "normalcy" and sense of balance to our lives. This was an important step in trying to place behind us the absolute nightmare and absurdity of the previous three months in losing our home for no visible or apparent reason. As a side note, while moving in to our new home we had to discard over $30,000 of our personnel possessions due to their being cross-contaminated by the fumes (they stank of the noxious gas). This was a considerable financial burden in itself to replace these possessions, and having to essentially "start over" to equip our new home (this was NOT covered by homeowners insurance).

We were then in a situation where we are paying over $5000/month in mortgage cost alone for two homes; one of which is completely vacant and useless; *a true financial "black hole"*. Through no fault of our owu, we were left with a property that *we could not sell, we could not rent, nor could we "live" in it.* The property was completely worthless until proper remediation could be performed to remove the toxic Chinese drywall restoring the property to a "clean and livable state". It was during

this time that I requested a forbearance from Wells Fargo. I was asking for some "relief", or time, while the legal process was taking its course and future corrective action could be directed. *I was doing everything in my power to do the right thing, fulfill my obligations, and to prevent a foreclosure on the loan.* Wells Fargo did uot grant a forbearance, but they did allow for a loan modification that lowered my monthly mortgage by about $200/month.

Thankfully, in October of 2009, I received an offer from the builder to buy the property back, however at a significant loss to me of my down payment and equity, as well as having to cover the remaining balance of my loan. I originally purchased the condominium in October of 2007, at a selling price of $427,000. Faced with the situatiou of paying two mortgages, on two homes at close to $5000/month, and *one of which is completely vacant and useless,* I made the decision to accept the builders offer of $220,000. As part of this agreement, I also had to agree to drop any further claims against the builder in any future CDW legal actions. We settled on this sales transaction on 21 December, 2010.

I had requested from Wells Fargo a "short-sale" of the home, since my loan balance was $325,000; however, I was disapproved because of for all reasons, I was *not* delinquent on any of my payments. You had to be delinquent on your payments to be considered for a short sale; which is an absolutely absurd policy that penalizes those homeowners who are doing everything possible to NOT be delinquent in their payments (less it affects their credit score). Since I was not approved for a short-sale, I then had to pay the $105,000 difference from my savings to cover the remaining balance of my loan and protect my credit score. This completely wiped-out my savings; however, the builders offer to re-purchase the home was an opportunity to put this nightmare behind me, even though *it was a catastrophic loss and at great cost.*

Besides the obvious financial impact, and potential health complications that are still being evaluated, there is the "human and moral" impact side to this story. To be sitting in your lovely home one day, and then to have it completely useless to you the next, for no reason of your own, is truly incomprehensible. It's just not right. The feeling that you have been "violated" is overwhelming, and it continues to be with me each and every day. I lost my home; then I lost my savings to get out of it, and into a new one; and then I lost my wife, as the duress and strain dealing with this unbelievable nightmare for two years was a stress our relationship could note endure. This nightmare of Chinese drywall was at great cost to me, and not for anything that I did wrong. Please help the victims of Chinese drywall who are completely innocent Americans who did absolutely nothing wrong to bring this catastrophe upon themselves.

Thank you very much for your time, consideration, and assistance in helping those of us homeowners who have been significantly impacted by the effects of Chinese drywall.

TESTIMONY, (KNAUF—TINJUIN DRYWALL)

My family, [redacted], had Chinese drywall in our home. We remediated last year from January 2010—August 2010. We Could not afford an apartment so we moved in with our in-laws. I did a lot of the work myself since I work for a contractor. During the demolition process my brothers and dad helped me remove the gypboard, insulation, cabinets, wood trim, doors, we salvaged cabinets and doors, basically had to trash the remainder. We would do this work at nights after work and weekends. Most of the time working to midnight. We had to use our savings and take out a home equity loan to pay for the efforts, also plenty of credit card debt, which is mostly outstanding. I was able to subcontract out the remediation and testing. I did have to clean every square inch of insulation from the studs and plywood. This alone took about a week of scrubbing the wood and using a shop vacuum to remove the insulation in the corners of the wood framing. I also subcontracted out the paint, insulation, electrical, and HVAC. I was able to rework the plumbing on my own. Meanwhile my wife got sick, she has crones disease, found ont we had it about the time we moved into our new home in 2006. With the stress of money issues and no home, it activated the crones disease into a state where she required surgery (flare up). In may during our remediation efforts [redacted] had to have 18" of her intestines removed. It was a three week hospital visit, not to mention the bills that came later. My yard is destroyed from the vehicles, dumpsters, and material unloading dnring the efforts, though I do not have enough money to fix to date. It was 8-months of hell, late nights working every day during my normal work hours ordering materials and making sure the subcontractors were showing up, performing and making trips for lnnch to check quality, etc.. That's it in a nutshell. Thanks for lis-

tening. Only God got us through it. By the way, we still are using our same appliances and we have to get them worked on about once a month. We spent about $50,000 total.

Dear Sir/Madam,

Here is my story. . .

A Human Disaster—Toxic Chinese Drywall

Thank yon for taking the time to ask for comments from American citizens! I hope that you will research the situation my family and thousands of other families have been dealing with for over 2 years! Please see these sites/articles for more information.

http://victimschinesedrywall.com/default.aspx

http://www.facebook.com/DefectiveDrywall

http://abclocal.go.com/wtvd/story?section=news percent2Flocal&id=7767973

China needs to be held accountable for the toxic imports being sold to the USA and other countries!

It seems unbelievable to me that the leaders of our country refuse to publicly acknowledge this as the *Disaster* it is for American families! This story has been kept out of the national media spotlight to "Preserve our relations with China", I assume. What if it was made public? What if our children's lives were more important than China? What if China had to face a national audience to offer some explanation concerning their *toxic* product? Our government has kept things quiet while we have been dealing with this tragedy for *years*!!!

The CPSC states that there are close to 4,000 reports of homes with toxic Chinese Drywall. That number does not come close to showing how many *people* live in those homes and are affected. The fact is that the true number of *human lives* being damaged by this product that was allowed iuto the U.S.A. is not being reported. The uumber of *people* being affected by Chiuese Drywall is *so much greater!* Yes, we are spread out over 37 different states, aud no Chinese Drywall is not a natural disaster. *But, how many lives have to be damaged to get the officials of this country to recognize this disaster and give these victims some help?* The fact that we do not show as one huge group suffering in one location from some act of nature should not sway anyone from seeing that this disaster has occurred and we are in need of assistance!

Our homes are corroding, our financial future is in ruins as the biggest investment of our lives is worth nothing, our credit scores are damaged, security clearances necessary to maintain careers are in jeopardy, and we can't afford to move out and pay for 2 homes. Many of us are liviug iu these houses with sulfuric gases—when mixed with moisture—basically acid rain! *When I kiss my kids goodnight and watch them sleeping and breathing the air in our home, I become enraged!!*

I don't care if our country owes China. *We* still hold the power over them because we can stop purchasing products from their country! Or at *least*, we must create laws that will require their products to meet the highest safety standards and protect our citizens from harm!

If we could gather up all of the people affected in this *disaster* from all 37 states and plop them in front of the White House to protest the *complete lack of concern for human life* we would. However, most of the Victims of Chinese Drywall *cannot* take time off from jobs they can't stand to lose to go into D.C. to be a show of force!

We are barely holding on as officials seem to *do nothing to hold china accountable* for *all* of the *toxic products imported into the U.S.A!* Bring China to the table. Hold them accouutable!!!

Men, women and childreu are suffering. Tax payiug, hardworking citizens are being told, "We are working on it, but it is a difficult issue!" How loug are we going to continue to suffer in this disaster with *no relief*?

NOTE I created this letter about 1½ years ago. At this point, my husband and I are having to put $100,000 (scraped and borrowed that we will be repaying forever) into gutting and rehuilding our home. We will never recover financially or emotionally. We will worry for the *rest of our lives* about what Chinese Drywall has done to the health of our 2 sons!

Respectfully,

WORRIED MOTHER/DISGUSTED CITIZEN/CHINESE DRYWALL VICTIM

Don't understand why elected officials will not help us.
My bank, B of A has created all sorts of felonious charges.
Help!

My name is [redacted] I live in Port St. Lucie, Florida with my husband, daughter, son in law and grandson. We have endured severe health conditions with the drywall being in our home. The worse is having to see my small grandson get up in the middle of the night due to bloody nose, he has also been diagnosed with Asthma due to the toxic drywall. We adults are exhibiting severe headaches, watery eyes along with other issues. My credit score as been damaged due to this issue also.

At this point we have seen no one in the government or these companies that imported this toxic drywall be it from China or the States as suppliers, builders etc. who have compensated us and helped us out in a remediation issue with our homes. We bought these homes in good faith aud therefore this situation has beeu devastating to us. I only hope that in me e-mailing this letter along with the other with the other homeowners who are suffering due to this will bring a prompt conclusion to our paiu and sulferiug.

After the recent Seuate Hearing on Chinese Drywall (CDW), I was told I ueeded to send correspondence to this e-mail address to tell about our CDW experience.

When Hurricanes Jeanne and Frances hit the area around Vero Beach, FL around September 2004, we were out of our Condo until it was repaired and finished the middle of August 2006. We had installed a new Air Conditioning Unit at that time. By February 2010 we had to replace the A/C coil 2 times so that is when we discovered we had CDW iustalled in our unit. The Sulphur Dioxide emissions had eateu up 3 A/C coil and turned all other copper pipes and exposed copper wiring black, plus any silver and some other metals also turned black from the emissions of that gas. We coughed a lot and finally had our lungs check, but the Doctor discovered no damage to our lungs. However, when we returned to our home in Haymarket, VA in early May 2010 our coughing stopped within a week. Even though, the Presideut of our Condo Association at first said early in February 2010 the Condo Association would take care of the CDW, she later said in April 2010 that they were not responsible for tainted products, even thongh the Condo Association had put in the drywall after the hurricanes. My insurance company would not pay for the repair as the Condo Association is responsible for the drywall and everything behind it.

Finally, in May 2011, with new Board Members on the Condo Association Board and a new President of the Board, they began to take action. They had all 246 condo units inspected and found around 60 units with CDW and 16 as bad as onrs. The new President and Board did replace all tainted drywall at Association expense. However, the unit owners were responsible for removing their furniture and belongings out of their nnit. Before the drywall could be removed and replaced, all trim had to be removed as well as all bathroom and kitchen cabinets. All light fixtnres and fans also had to be removed. All that had to be put in storage. Once work was started, progress was fairly swift. We hired a Contractor to do all the work, except the drywall, and to put the unit back together as it was before. We began moving our stuff back into our unit by late August 2011, completing the move by September 5, 2011. Our remediation cost to ns for our unit was approximately $40,000, plus another $4,000 for moving and storage expenses.

We live in Haymarket, VA and spend 4–6 months each year during the winter in onr condo in FL. We feel that tainted products, snch as Chinese Drywall, should have been inspected by the U.S. Government before allowing these tainted products to be used in the USA for construction purposes.

To Whom It may Concern:

The enclosed will recount my families nightmare reference the Chinese Drywall Disaster. My wife and I purchased our dream home in November 2006 from WCI (the builder) at the Parkland Golf and Conntry Club in Parkland, Florida. Little did we know that this dream home would turn into such a nightmare ultimately affecting onr health and destroying our credit along with taking much of our life savings with it. Soon after purchasing the home we began to smell something in the home that did not seem right. When we contacted the builder we received no help. As the months went on our handlers needed repair and replacement as well as our microwave and dishwasher. Still nothing from the builder explaining the root causes of

such issues. Then rumors began to spread around the neighborhood (which was a new community) that WCI suspected that faulty drywall had beeu used in the coustruction of the homes. Later we found out during the WCI bankruptcy that WCI kuew the drywall was defective but still elected to build our homes with it and knowingly closed on our homes with this defective material. Several months after living in the home my wife, son and I all began to experience different health effects that we were unclear where they were coming from. My son began to experience asthma like symptoms with deep bouts of extreme respiratory congestion. My wife began to develop extreme swelling in her joints and found it difficult to sleep through the night. I experienced similar issues of breathing difficulty and had problems sleeping through the night as well. Then in 2009 our little dog fell ill and we had her examined by our vet and he found a cancerous tumor had developed in her body. Several months later she died. Additionally throughout the neighborhood we heard of similar health issues and in fact to homeowners in the community who had CDW were diagnosed with cancer and both have since passed. Late in 2008 WCI (in their bankruptcy documents) finally admitted that the CDW (Knauf) was present in our homes and we hired an attorney to represent our interests. First we started with our homeowners insurance policy as well as our builder's insurance policy we received as part of our closing. The builder's insurance was denied immediately since they considered the CDW a pollutant. Our homeowner's Insurance claim was a longer process (Lexington Insurance—an AIG Company) where we paid for expensive testing and they performed testing as well only to find that our home was indeed infected with the Knauf CDW. Ultimately Lexington denied our claim as well citing non-coverage due to the CDW being a pollutant. The funny thing is that during the CDW testing large sections of drywall sections were removed from our walls. Because of this the air became worse as it was almost as if the walls were free to bleed more toxicants. Additionally, we tried to get some relief from our bank reference our mortgage but this was a futile effort as well. Ultimately, we decided for health reasons that we needed to move out and find a healthy place to live. I can tell you that almost immediately our individual health issnes went away. There is no doubt in my mind that breathing in sulfur in an enclosed box has and will have serious health consequences. It may vary in degree as we are all made up differently but unfortunately people will die from this much like asbestos poisoning. Once we moved out with no relief in near sight we did not have the financial ability to continue to pay our mortgage and pay for a rental property as well and ultimately after being refused a short sale by our bank the Bank purchased the property back thru a foreclosure and REO process. The funny thing is that our bank was Bank United and because they were a hank that had failed during the 2008 financial crisis we believe their losses were covered by the U.S. Government. So onr story is simple. Many parties have been involved in our situation and the only people who have lost and are without hope are ns the former homeowners. We did nothing wrong and our laws and our government has failed us. Our government has not done one thing to help us or others like us. The key parties in this transaction were:

WCI—Builder who knowingly sold us a defective home but was then protected by the hankruptcy laws.

WCI Independent Insurance Companies—We were sold a builders assurance policy which was later deemed worthless for this loss.

Lexington Insurance (AIG Company)—Our insurance company who made us go thru a sham of a claim process later to deny our claims. Funny how we bailed out AIG and once again they do not have to make good on an insurance policy.

Bank United – Bailed out by the U.S. government.

Mike Ryan—our lawyer—Mike has tried his best to move the various cases along and now seems as frustrated as we are with our failed legal system. We ueeded immediate relief not a 4 to 6 year process that may never provide us relief.

Our government—All the various agencies and senate and congress members who have been involved with this issue who when you cut to the bottom line have done nothing concrete to help those who have been wronged by faulty, defective and toxic product imported from China. As my mom always told me proof is in the pudding and quite frankly this pudding is now rancid from the broken dreams of tax paying U.S. citizens.

In conclusion I was always taught that this is why (these situations) we have a set of laws and a government. And for all of the agencies who have said there is no health issue with the CDW shame on them. They would not have wanted to live in onc of these houses. Our government has failed my family. I want you to know that tears are streaming down my face as I write this knowing that what I was

taught to be true as a child was not the case and nobody was there to help us during this tragedy. Our government has failed us and they were not there to help us out from this disaster. We would have been better off if a hurricane had destroyed our house. At least FEMA would have stepped in.

Lastly, I am pretty sure my letter will change nothing but I was asked to send it in and that is what I have done. Please help us.

Re: Chinese Drywall Victims
Dear Natasha,

My husband and I are victims of Chinese Drywall. We saved up and bought our new home in Florida in 2002. The home was built in 2001 and we were its' first occupants. From the day we moved in, I had trouble breathing. We had leaky evaporator coils, blackening of the wires and metal in our home and knew something was seriously wrong.

My health has deteriorated. I now have asthma and am taking many expensive medications. My husband has early COPD and we can only breathe comfortably when we are outside our home. We cannot afford to move and are therefore, trapped in this miserable situation. I am starting to lose my hair and am tired all of the time. My energy level is low and after mnch testing the doctor attributes it to the toxic drywall. This is so depressing. We have tried to get help from the builder, installer, supplier, insurance company and manufacturer to no avail.

We need help and we need it now. We have lived in these conditions for 9 years and feel that our health has definitely heen compromised.

Why doesn't our government realize that so many of its' citizens are suffering from this terrible devastation? We haven't done anything wrong and yet we are the ones' suffering.

Thank you for your attention in this matter. I hope and pray that someone will be able to help us.

My uame is [redacted] and I live in Venice FL. We had Chiuese drywall in our home and we found out about it in March of 2009. We are just one of the 50 to 60 home owuers in our community that were affected by the tainted drywall. For 3 years, we could never figure out why we had so many electronics failures, discolored metal items, and repeated health issues. Some of the health issues were respiratory illnesses, sore throat, nose bleeds, headache, nausea, eye irritation, and a persistent cough. Other people have had much more serious problems.

From May until November we could no longer sleep in our own home. We cannot iuvite family and friends to visit us for fear of their health. Those families with children also have the stress of what to do about their children's health. We still had to make our ruortgage payments, insurauce payments and pay our association fees on a home that was worthless. We cannot live in them and we cannot sell them. This has beeu described as a "silent hurricane" where the damage is as bad as a hurricane, but we do not have photos from the air that shows the devastation. In some regards this is worse because our insurance companies are not covering the damage. As a result, throughout our cities people are making choices between their health and their financial futures on whether to stay. As people leave, the blight of abandonment will take over and further negatively impact our local economies for years. There is also a financial burden to the local economy, the people who are only here for the winter are not returning, so they are not here spending any money in the local areas. The loss in the value of our homes is in the millions of dollars and the decreased assessed values will affect property taxes. This may also bring about another round of home foreclosures for the area.

We were fortunate enough to be able to remediate our home at a cost near $150,000.00. The IRS changed the disaster tax laws, but it did not really help. Many of the young working families do not have the cash to make the repairs and the people who are retired who may have the savings to make repairs do not have the income to use the deduction from the remediation.

We are the victim's here we did nothing wrong. We have been given the run around by every level of government and agency involved. No one will take responsibility or hold the manufacturers accountable. Our elected officials should be ashamed of themselves.

Ms. Mbabazi:

I would like to add out voice to the many Americans who have a house that was built with Chinese Drywall. Three years ago when we found out about this our house originally purchased new for $395,000 is now basically worthless. You can imagine the concern an d pressures that has put on a working family finding their largest asset is worthless. I am so hopeful and faith in our government's ability to work with us and find a solution to this horrific problem.

Thank you for you compassion and concern.

My name is [redacted]. I have a Masters in Nursing, so I am well awure of the physical changes that occurred to my body while living in the home. I was a healthy strong fit woman when I moved into that house. I have been diagnosed with neuropathy and fibrocystic lungs.

When I heard the "experts" at the Senate hearing say there are no health effects, I sat here and cried as I watched it live on the internet. I will stand up in any Senate hearing or conrt of law and tell you the hell that I have gone through because I bought a Chinese Gas Chamber.

On June 1, 2006, I purchased a home built with Chinese Drywall (CDW). It is a toxic drywall that emits the following "nerve gases", hydrogen sulfide, carbonyl sulfide, and carbon disulfide, as well as the metal, strontium. The CDW first began eating my house, and destroying anything with a silver or copper finished. It corroded the electrical wiring, copper fixtures, electronics, appliances, mirrors, and all the silver fixtures throughout the home. It emitted a noxious smell that permeated my furniture, clothes, and anything else porous in the home. The fibers in my clothes and shoes were breaking down. My knit suits were losing their form. My hose would disintegrate as I tried to put them on, and the dyes would get on my hands and the skin on my legs. My shoes were leaking dyes onto my feet. There were also physical changes happening to my body. My skin was absorbing hair color, and my skin would peel off when I had my eyebrows waxed. My nails began peeling. I was having neuromuscular pain in my legs, back and neck. I would have trouble walking because of the pain. My balance perception was off, I would fall or lose a stairstep. I started having daily headaches, and I could no longer wear my contacts. My eyes felt like I had glass in them. I started having trouble breathing, and developed a noticeable raspy voice. We now call it the "CDW voice". It was eating me alive and attacking my lungs, eyes, nose, throat, muscles, nerves, genital and anal mucus membranes. I was dying in that house, I just knew that something was drastically wrong. I had rationalized all I could! I was in so much pain I was crying everyday. When I finally found out what it was, I left that house and have not gone back. That house frightened me.

I have over 30 documented Doctor visits during the 3 years that I lived in that home. It has taken me nearly 2.5 years to feel some normalcy in my health. I can no longer run, and I have pain every day.

It has cost me thousands of dollars. I had $50,000 in savings which I burned through paying rent, condo fees on a Chinese Gas Chamber, mortgage, thousands in medical expenses, medications, replacing necessary items for daily living, lost work, not to mention the thonsands spent while in the house replacing almost every electrical item I owned.

I lived, worked, and worked out in a 3 story townhome that had 153 sheets of CDW.

My dog nearly died in the house. She would not come in, I would have to pick her up to get her in, and when she was in, she was hiding under something to filter the air. She developed kidney disease. I spent thousands on her medical care, too.

I spent over 40 years of my life working to have the American dream of owning a beautiful home. It is all gone now, and I start my life over at 61 years of age.

The builder, developer, supplier, insnrance companies have left me with the "empty bag". My credit has been destroyed, and I have a mortgage and interest accumulating, and condo association suing me.

Make the Chinese accountable because if you don't, they will continue to export every toxic waste in their country with "goods" to America.

Good morning,

I was given this e-mail address as a point of contact to provide 'testimony' to Senate Consumer Protection, Product Safety, and Insurance. I am curious why the Consumer Product Safety Commission isn't providing records of the homeowners who have registered with them? It would seem the CPSC could easily provide all rel-

evant data that includes the number of residents stricken with Chinese Drywall as well as other demographics that were included in the CPSC registration process. This included information like nnmber of family members living in the home effected with Chinese Drywall, health issues, property damages, and so on. As a government employee I find it painfully ironic that as a busy, working, tax-paying American citizen I have to take yet more time out of the day to write 'testimony' to the Senate about how this Chinese Drywall is effecting me and my family. Why don't you all also subpoena and examine the insurance claims filed and denied by homeowners stricken with Chinese Drywall? Why is the burden of informing my elected representatives on me? My congressional representative is Bobby Scott and his office has plenty of information on my particular case as I routinely shared information with them last year as I worked through the self-remediation process. I stopped contacting his office as it was apparent my government could care a less about fixing this problem.

In a nutshell, here is my testimony. In order to fix the Chinese Drywall problem in my home I self-remediated the drywall from my home as no one was providing stricken homeowners with any assistance! The cost of this self-remediation was well over $65,000. My personal savings is depleted; I am in deeper debt as I used credit to purchase materials when my savings ran out. I did receive forbearance from the bank but now my credit is ruined and in much need of repair. The downside of any forbearance is you're listed as 'seriously delinquent' for not making your monthly mortgage payments something the bank assured me would not happen as I was trying to fix my house—a shared toxic asset that both the bank and I would lose money on should I have chosen to abandon the property vice fix it!

Where has my government been during all this? They were and remain Missing-In-Action and silent as could be . . . the Chinese have yet to be held accountable for the destruction they've caused to so many Americans. Yet, I continue to go to work, pay my taxes, and serve my conntry fulfilling my end of the social contract between the citizens and this government. Pathetic is the only word that can best describe the lack of action and performance of our current government. There is little wonder why the United States government has the lowest approval ratings in its history. Trust me, I know first-hand the frustration and disappointment many Americans feel toward their government. My message is simple—do your damn job and represent the citizens of the United States! Protect us from these types of unnecessary damages! You failed to regulate the import of this toxic Chinese Drywall, and now you stand silent as the Chinese stonewall us from getting answers to why and how this happened!

A beautiful home it was when we moved into it 2006, the answer to our golden year dreams. And how soon this dream was destroyed!

Chinese Drywall reduced our lives to that of Nomads. For nearly five years we have spent 40 percent of our time away from the odors and gases in order to minimize exposure to same.

It has been and still is a nightmare. Expensive replacements of AC components, electronic equipment, electrical motors of washing machines and wiring.

My question to our government is: How long do we have to wait for action?

I would like to wish every Senator and Member Of The House a happier Christmas than what ours is going to be. When you see the smiles and happy faces in your homes, please think of us.

Merry Christmas

Greetings—

My home in FL is in Sun City Center and we built it in 2006 . . . evidently not a great year for building in FL since many of us have found ourselves with Chinese Drywall in our homes. We discovered this in 2009. Since then, our builder, WCI has gone bankrupt and all other responsible parties have been running for cover. I see from recent articles that members of the Senate are feeling frustrated by the lack of progress in resolving this issue. Needless to say, we homeowners are feeling frustrated along with a feeling that this might never be fairly resolved.

My home is in Sun City Center and is a 55+ community. We don't have $100,000 in our bank account to remediate our home on our own. Our home is toxic. You only have to step into our front door to smell the disintegrating Chinese Drywall. All products, whether they're produced in the U.S. or imported from abroad should be held at consistent standards and if those standards aren't met, then they need to

be recalled and fixed. This is done with many products. . .cars being one example . . . this should apply to Chinese Dry Wall as well.

I hope you can help . . . maybe it takes a woman to lead the charge to resolve this issue.

Please let me know if there's any further information that would be helpful.

Best regards.

To Whom It May Concern,

The home we purchased in March of 2008 has Chinese Drywall.

We are part of the class action lawsuit which to date has provided zero relief. Additionally, our Federal government and it's governing bodies (house, senate, president, etc.) has provided zero relief. The consumer protection agency has provided zero relief. The only thing the Federal government has done successfully is spend tax payer money discussing and discussing the problem while American's that have found themselves in this same situation have been victimized. We have been victimized by builders, realtors, lenders and everyone else that was part of the transaction to sell us our home. While they all retained the proceeds from the sale/purchase of our home we have lost everything related to the purchase of our home including many possessions we had prior to owning the Chinese Drywall home because of the corrosive effects of this product on possessions like TVs, computers, small and large appliances and family air looms like silver trays and other precious metals that corroded.

We ended up short selling our home and losing everything we put into it because we could not afford to fix it and we have not received any relief or assistance to complete the repair. The Federal government can't even agree on how to fix the problem. We couldn't live in the house and we couldn't rent it so we ended up letting it go.

We had been believers iu the Americau dream of home ownership but because of the financial hardship associated with the Chinese Drywall home we may uever owu another home.

While we suffered through this tragedy we watched as our government bailed out huge financial institutions that should have been stopped from their aggressive irresponsible behavior. Additionally, the cost of operating the multi-district litigation has reached millions of dollars between court costs, legal fees, communication costs, on and on and none of that expense has yielded any relief to victims. The best course of action in this scenario would have been to give the home owners their down payment back plus verified improvement costs and let them pursue another home. This would have addressed not just the personal crisis that each victim was dealing with but it would have helped with the larger housiug market issue of unsold homes. The Federal government could levy a tax on iustitution from the builders to the lenders to cover this cost. They all contributed to the sale of these homes and only the home owner was impacted. They should feel the bruut as well. They would get some of it back if these home owners turued around aud purchased another home. To be sure the federal, state and local governments aren't dealing with secondary issues related to these homes years from now these homes should be bulldozed and disposed of like the toxic waste they are.

The Federal government needs to make these home owners whole again and provide ongoing medical monitoring to ensure major health side effects are identified, communicated and addressed quickly. Many of us have communicated the health effects such as sinus infections, migraines and nose bleeds and yet the Federal governmeut wauts to continue debatiug if there are real impacts. The government should assume there are and monitor auyone that lived in these home nutil such time as it can be definitively proveu there are no effects.

As much trouble as the Federal goverument has had dealing with this issue I hold little hope that it can preveut other foreign countries from selliug the United States similar products that present hazards to health, environment and the economy. Something needs to be done to stop similar products from entering our country.

The Federal government has failed it's citizens completely. This was not a hard issue to understand and the impact was easily identifiable and the number of people impacted was not as large as other national disasters. If our government can't solve these kinds of problems how can we ever expect bigger things from what is supposed to be the most powerful country in the world. It is no wonder why the American people have lost faith in our leaders.

Please do something and soon!!!

Good Morning,

My name is [redacted] and I live in Va. Beach, Va. I am 54 years of age—a college graduate, former teacher/coach and a law abiding citizen. In 2005 I went through a divorce aud my former wife and I reached au mutual agreement of what would be best for our two sons. One is currently a sophomore at Ole Miss and one is in the Math and Science program at Linkhorn Park Elementary School. I share this with you because what I am about to share with you has pretty much ruined my financial freedom that I had worked my entire life—thus affecting my dear family.

Upon buying my ex wife out of our million dollar home, I came to the conclusion in 2006 to downsize for the sake of my boys and I. This was my attempt to prepare for retirement. I sold my home that I had been in for 23 years and with proceeds bought a new condo a short walk to the ocean for my boys and I. I furnished this new home with state of the art appliances, new furniture iu every room of the home and upgrades throughout. Within a few months of living there I had to call and express concern about my air conditioning not working, my 50 inch television not working and uoting that something was goiug on with my health. With joint custody of my boys and a rotation of every other week my ex wife and I became concerned because of nose bleeds, rough coughs, congestion, and fatigue being exhibited by onr boys. We determined that it only occurred when they were with me. I also went to the Doctor and it was determined that my thyroid was not functioning and I am now on medicine for that. In addition, I am fatigued, out of breath with short walks, and ultimately respiratory problems that do not seem to be getting any better.

Imagine my surprise when my neighbor said that he thought we had Chinese Drywall. I immediately put the pieces together and after a little research knew that what had been happening was due to CDW. I moved my boys out right away. I have been leasing a place for the past 2 and half years. I sold my condo at the urging of Chase for land value—my total loss was 500k (*five hundred thousand dollars*) *Yes*—that is the cash I had put into this final retirement home. Absolutely—no one in our government has done anything to help those of us that have this problem which is tied directly to the *Chinese government.*

My once sterling credit rating of 54 years of paying taxes and contribnting to society in a positive way is no longer. I could not even get an apartment with one landlord because of my credit and having to jump through hoops for Chase and my second lien Gateway Bank. And, I offered to pay 6 months in advance. I continue to pay my fair share to my ex for our boys, college for my son, taxes that come my way—but yet am told that this is several year away from being settled in litigation and payback for those of us whose lives were ruined. You might understand that I am a little bitter and I look at our leaders in Washington feeling ashamed that no one has made this a top priority.

I have been to Washington 3 times over the past few years. Most recently at the feel good about one another Chinese—US Summit this fall. What a joke!

Well—there it is—a brief story of my journey with Chinese Drywall. I have told this story so many times to our leaders that honestly—I have *no* faith that anyone will finally step up and make us whole again.

Without prejudice,

My husband and I had to downsize to a smaller home he had suffered a stroke in 2001 at the age of 55. He is currently on disability and at home 24/7. We build this home and moved in March of 2006. We put all our money from the sale of our previous home into this home. We wanted to make this our perfect home and our last as I reach retirement. We did many upgrades inside and ont. At this point in our lives we do not have the resources to start over again if you know what I mean. We have both worked hard all our lives for what we have. I have great concerns about health issues with my husband's health issues, and I am a cancer survivor since 2003. There are 7 homes in our subdivision that have Knauf drywall mine is just 1 of the many stories out there. We are praying for a reasonable settlement so we can rebuild our lives.

Thank You.

It is with reluctance that I write, because I don't like the doubt and questioning that the current administration is putting on those of us who have this problem. However, I feel this issne is so important that I must do something.

When my wife and I built our dream vacation house near Cape Coral, FL in 2006, we were ecstatic. But within a few years we had two air conditioning units go bad; all our faucets, chrome trimmed lights and some mirrors had to be replaced and the

microwave stopped working. The refrigerator required several service calls and still does not work right. Every time we went to stay there for a while I would get terribly congested and had a hard time breathing. This condition cleared up within a week or two after we left.

Finally in 2010 we had our house inspected for Chinese drywall and they found that we have about 50 percent CDW. Not being able to stand it any longer, in 2011 we contracted to have the CDW removed according to the court ordered specs and to be cleaned, sprayed and rebuilt.

We had to make special financial arrangements to do all this work which cost approx. $88,000.00.

So far we are satisfied with the contractor, but the expense, hassle and inconvenience is unbelievable! I can understand why some people just walk away from their home.

Something needs to be done to help the people with CDW. Why doesn't the government set up a fund like they did with BP in the Gulf disaster?

I find it incredible that in this country, such an obvious problem can be swept under the proverbial rug.

Thank you for all you are doing to help us.

To Whom it May Concern,

My wife and I own an apartment in West Palm Beach FL that is tainted with Chinese Dry Wall. The unit at The Whitney Condominium was purchased for $303,000. While home values have dropped nationwide, we have been hardest hit because no one would buy an apartment that you can't live in. Conservatively, the unit value is barely $115,000. We owe double that to the mortgage company. Fixing the problem will cost tens of thousands, and no entity is stepping up to resolve the matter. We are stuck with a $220,000 mortgage.

Dec 06, 2011

PREPARED STATEMENT OF HUSBAND, PARENT AND OWNER OF HOME BUILT BY LENNAR WITH TOXIC KNAUF DRYWALL FROM CHINA

I appreciate the opportunity to come before you to discuss the problems with this defective home building product, and also discuss measures that will assist current owners of properties where this defective material was used, and remedies to help prevent further financial and health damages to everyone affected that result from the use of this dangerous product.

My name is [redacted], and my wife [redacted], and 11 year old son [redacted], moved into a home at [redacted], on November 30, 2006 that was purchased from Lennar.

The purchase price of the home was $420,000. We added another approximately $25,000 in home improvements. We have very good credit, put approximately 30 percent down on the purchase, and can afford the mortgage. We invested a majority of our savings, believing, we would be living there for many years. All of our hopes were shattered, and a nightmare began for us after less than a year in the home.

Soon after moving in during December 2006, problems both medically and with the house HVAC system began.

In January 2007 we required a service call on the HVAC system as it would not work in the heating mode.

In March 2007 a second service call on our HVAC system resulted in the copper coils being replaced on the larger system due to Freon leaks.

We have a 2 zone independent of each other, HVAC system. One cools and heats the main portion of the home, 2BR's, FR, LR,DR, Kitchen, 2 Bth Rms and Den and the other system supports the MBR and bath area.

In July 2007 the smaller HVAC system had their coils replaced. Thru out 2007 my son [redacted] and I would develop random nose bleeds. I began to get severe headaches as well. My doctor could not locate a specific problem even though I complained of unexplained illness and respiratory problems. I started to get Angina attacks that I never experienced since before my heart bypass surgery in 1997. Since living in this house I was given nitro stat patches to wear and began to carry nitroglycerin pills that I used almost daily.

In 2008 three set of coils were replaced in our HVAC systems with the last one happening in November 2008. The house began to have a strange odor in it when we needed to use the heating part of the system. The A/C people in November said I should speak to Lennar because I may have a home infected with "*Chinese Dry*

Wall". I placed a call to Lennar and was told by them that their records indicate I have a home constructed with *"Chinese Dry Wall"* !

I did a *"Google"* search on *"Chinese Dry Wall"* and it scared the heck out of me based on what I read. I immediately contacted Lennar and told them I wanted out of this house ASAP. They promised to get back to me right away. Two weeks went by with no word from Lennar so I hired an attorney to go after Lennar on our behalf. My attorney informed Lennnar in writing we were making a claim per Florida Statute 550.

Lennar assured my attorney that they would move the "MEDICO HOME" up to the top of their priority list as they were dealing with other homeowners in the Heritage Harbor sub division with the same problem we were faced with.

In mid December 2008, I was contacted by Lennar who said they wanted an Air Quality inspection firm to test my home for air contamination. I agreed to accommodate them ASAP. I was told by Lennar to set my A/C temperatnre at 68° the night before the test so the honse would be cool when their testing company came. I did this and "ENVIRON" of Tampa, FL performed the air qnality test the next day.

I did a "GOOGLE" search on testing homes for Chinese dry wall emissions and all indications were that the home should be warm not ice cold as I was told to do so.

I received a letter from ENVIRON that no toxic gasses of any type were found in my home. I called the President of ENVIRON regarding the test results and indicated that I felt the test was set up to benefit them. I said my honse smells awfnl and his results were in error. Several days later ENVIRON issued to me a second report that indicated Toxic sulfur emissions were detected in my home bnt the levels of toxicity were not harmful to our health. I questioned ENVIRON on making this statement and came to the conclnsion that they had no medical qnalification to make such a claim.

The home became so fonl smelling that I purchased a highly rated Air Purifier that I kept running constantly in the MBR area where I stayed with my wife and son. We avoided being in the rest of the home as much as possible and ate our meals out at restaurants constantly until we moved.

From December 2007 thrn March 2008 when we vacated the home we noticed a very fine black soot was appearing thrn out the house on onr fnrnishings, rugs, works of art, jewelry and especially on anything made of or containing silver .

Our furnishing, oriental rugs, beddings, linens', etc all smelled of sulfur and our jewelry and works of art all became heavily tarnished and pitted beyond anything I've ever seen before.

Our personal property losses from CDW are well over $250,000 and we are making a claim reqnest against Lennar for this loss.

We thonght that overall, we were lucky to have Lennar for our builder, but this may not be the case if repairs are not done properly. It wasn't until after we moved into a rental home, that we discovered just how badly all of our personal belongings and furnishings had been cross contaminated to the core. They were so badly contaminated, some of the gnys doing the move, which had allergy sensitivities, were having a terrible time handling it. The rental home smelled like a Chinese drywall home with our belongings in it.

We informed Lennar. They said they would send someone out to HEPA vacuum the belongings (they did this), and to then air it out and it would all be fine soon after. Well, it is 10 weeks later, and we are still getting exposure symptoms from the off gassing of our belongings, such as continued headaches, sore throats, stuffy noses, raspy voices and breathing difficulties.

We are convinced that the exposure to the sulfur gases are in fact, the cause of all of our health problems, while living in that house.

There is no decontamination solution for the personal property that Lennar must replace. We now have approximately $250,000 in belongings and furnishings that are contaminated and useless to us.

We have also had to bear the expense, of buying some new furniture, as well as dry cleaning bills to remove the contamination from bedding, and clothing.

No oue is waruing people who move out, that their furuiture has also been contaminated, and that it may, still cause them trouble with exposure symptoms to the gases.

In additiou, after the home was gutted to wooden studs, trusses, plywood and block, after 5 weeks of airing out, it still reeks of sulfur gases, and can quickly in this hot and humid environment cause exposure symptoms within ten minutes or so upon enteriug the home.

Lennar is ignoring this continued contamination of our home and was continuing with repairs. I had the home inspected by a professional construction firm that has iuspected over 100 Leuuar homes for Chiuese Dry Wall coutamiuation. They con-

firmed the presence of very strong odor within the home. I forwarded this report to Lennar as a courtesy.

I believe Lennar intends to leave these cross contaminated materials in the residence, as well as reinstall cross contaminated wood cabinetry and window treatments. Unless Lennar can find a safe and proven decontamination solution, or agrees to replace all contaminated materials, I cannot feel it is safe to move my family back into this house.

We will then have to bare the expense of paying rent elsewhere when Lennar declares themselves finished, and we will not be able to continue paying the mortgage and additional rent as well.

We will face financial ruin, thru no fanlt of onrs, over this toxic construction material that was allowed to come into the conntry.

Lennar assnred us in writing that we would virtually have a brand new home interior. This is turning out not to be true, as they are intending to re-install, numerous cross contaminated materials that still reek of sulfur. We had uo way of knowing about the block and wood cross contamination at the time either. We truly were assured that the home, when completed would be 100 percent fully free of the toxic sulfurous compounds coutamination and odor. However, it appears to me and others as well, that Lennar is not now doing this because of the unexpected climbing costs to do this.

I implore you to aide in the removal of this dangerous blight, further weakening au already distressed housing market. These homes may be going into foreclosure, if the banks will eveu take them, will most likely become left abandoned, and further hurt neighboring home values, or further hurt new and unsuspecting owners. They should all be identified, torn down and taken to the toxic waste dump. Then they should be rebuilt, or the owners reimbnrsed, all at the expense of everyone who profited from this toxic drywall along the way.

The housing market aware of this problem is scared right now with this toxic wild card out there. Far too mauy families, suffering deteriorating health, have yet to even learn that it may be the drywall iu their homes causing their families chronic illness. We are still finding them in our neighborhood. This problem ueeds more regular press, without the added minimization of health and safety risks.

In my experience, these structures are toxic gas chambers, not safe homes for families to even live in again.

I am now personally aware of 7 year old boy from our sub-division, diagnosed with an auto immune disorder, and numerous children being diagnosed with asthma.

Is the Health Department going to wait for children to end up with permaneut braiu, heart, lung, liver, kidney, or central nervous system damage or dead, until they get serions and consisteut with their alerts for parents to find their children, safe havens away from these homes?

Is FEMA ever going to step in to provide a temporary safe haven, for families that cannot afford a mortgage and rent, nntil a permanent solntion is found? I think it is more then called for.

Further, I would strongly advise any health or product safety authorities to not further minimize the health risks of chronic domestic exposure to these chemicals. Yon will ouly loose more consnmer trust, and pnt more families at a greater health risk, for more serious chronic exposure effects. They have been waiting on direction from you, and yon are failing them right now.

In my experience, these structures are toxic gas chambers, not safe homes for families.

I would like to thank Senator Nelson and his staff for answering onr pleas for help and everyone who has taken the time to come visit these homes and families, to get firsthand knowledge of the gravity of this problem, and take action to help resolve it. And I thank you for the opportunity to share my first hand experience and suggestions for much needed, emergency assistance.

I implore you, to find some way, to help people save their good credit, who could have maintained making mortgage payments, or tried to sell, and then couldn't because of a CDW disclosure, and had to flee for health reasons.

They did not engage in an irresponsible financial act by moving out and foregoing mortgage payments if they had too. They are acting on behalf of secnring the health and safety of their families. They are the ones being truly responsible parents, looking out for the well being of their children first, and should not be punished on their credit reports for that.

What have we come to as a society, if we cannot snpport parents who do the right thing, but rather seek to punish them, just for caring for their families well being.

I am asking Legislatures for assistance in many areas on behalf of all those impacted by the use of this defective and dangerous construction material.

Please provide adequate funding to the proper departments so they can do the job that tax payers pay them to do. That involves, banning and recalling defective and harmful products from the USA market place again.

The CPSC claims it has not had the funding or resources to put a ban and recall on this product by now. Though I think they can at least do that, until more can be learned.

I think it is shameful, that the health department has had to claim, they do not have the funding or resources, to better inform the public.

I also recommend that you get the best of the best on this. I find it appalling, that so many so called professional toxicologists seem to have not a clue, about the cumulative effects of low level exposure to these chemicals, or knowledge, easily obtainable from NIOSH, that the immune system can lose tolerance to hydrogen sulfide at chronic low level exposure, and that higher level exposure.

If we can so easily bail out Wall Street with billions, surely we can help the American people thru this mess that is not of their making.

This is my testimony of my experience as a parent, husband, and owner of a Toxic Chinese drywall house, as I know it to be the truth. I also believe that I speak for many others who have not yet come out of shock and denial, and into anger and found their voice, experiencing the same nightmare my family has been living through, facing the same tough choices between their families health, or financial ruin.

Thank you for your time.

Thank you for your thoughtful consideration of our desperate crisis. As I write this letter to you on the 5th of October, 2009, I cannot begin to imagine the challenges of representing a populace so expansive. Which cases does one pursue and which ones are left to themselves? My prayer for you is that God will empower you with such strength and virtue that every person's needs in your constituency will be fully met. Nothing is impossible with Him.

On November first of 2007 my wife and I left a closing attorney's office excited and filled with vision for this new season of life to which God had called us. With our three children, we were relocating from Richmond to Newport News for our first lead role in a burgeoning church. We knew the work would be difficult and demanding but deeply fulfilling. We also knew that having just the right home for our family was paramount to successfully transitioning from where I had called home my entire life. Walking into our brand new town home in Hollymeade, we knew we had chosen well.

I just celebrated my 42nd birthday in March of 2009, now having suffered from chronic pain since the spring of 2008 that is symptomatic of lupus, medically documented signs of a degenerative spine condition, as well as everyone in our family struggling with fatigue, and our middle child having serious bouts with eczema and needing steroid breathing treatments. Our family was a picture of perfect health the day we moved into our home, with proper diet, exercise, and a weekly regime of rest being core values for us. Now, thousands of dollars in medical bills in hand, we remain sick. We have moved out of our home fearing the health of our family, desperately needing your attentive, aggressive, and unrelenting help, action that will be timely and substantive.

There had always been an odd smell in our home, what I would describe as an aged wood smell and sometimes gunpowdery. We had constant hvac problems in addition to intermittent issues with our smoke detection system. There were leaky plumbing problems in the kitchen, a failed ceiling fan and other small electronic devices. In August of 2009, we learned we had all the symptoms of Chinese Drywall and upon further inspection, we found corrosive ground wiring, tarnished door hinges and jewelry and upon removing a core sample of drywall, found a smell in our walls that was frightening.

We know that God is working to help rescue ns and our neighbors from this tragedy, but we know that throughout history, He has demonstrated a fondness for rescuing citizenry through those in authority. Help us; be the saving grace of His hand.

To the Senate Subcommittee for Consumer Protection, Prodnct Safety, and Insurance,

My wife and I worked long and hard all our lives and finally were able to retire in 2006. We purchased our dream honse in Sun City Center, a 55+ commnnity south of Tampa. It is a gorgeous home . . . Everything we had hoped for when we retired.

However, it wasn't long after we moved in that our horrible nightmare began . . . We learned that contaminated Chinese drywall was used in the construction of our home. We have replaced two air conditioning units, the microwave and just recently, the refrigerator. The gases given off by the Chinese drywall corrode copper, silver and chrome . . . It is only a matter of time before the rest of our electronics and appliances succumb to the same fate. And only the Lord knows what these corrosive gases are doing to our respiratory systems!

Sun City Center is a beautiful little town where many, many homes have fallen victim to this terrible problem. Here we have solid citizens who have worked hard all their lives, done what was asked of them to help make this country great, and uow are faced with a major crisis through uo fault of their owu.

Because drywall made in China was used to build their homes, their property values have gone down by 75–80 percent and in many cases they have been forced to move out of their homes because of resulting health problems.

Also, because most retirees live on a fixed income, they cannot afford the cost ($100,000–$150,000) to remediate their homes. Many will be forced to abandon their homes while others will be forced to deplete the remainder of their life's savings to fix this problem that they did not create.

There are thousands of homeowners around the country that have been devastated by this crisis. My wife aud I have been in limbo for several years waiting for direction and help from our government. Unfortunately, none has come. How can this government, the richest country in the world, sit back and ignore the thousands of homeowners (tax payers) that are suffering from this crisis. How cau this country continue to send billions of dollars to countries all over the world and not help the citizens in this country that are ultimately paying the tab?

We uuderstaud that alliances are importaut but there is nothiug as importaut as keeping our own house strong and in sync with the values that this country was founded on.

My wife aud I extend an open invitation to all members of the Seuate Subcommittee to visit our lovely community and home to see (and smell) firsthand this China-made disaster. We need your help. Don't turn your back on us. We need you to get behiud your own people and help those that have helped make this country great.

Respectfully

I have a home in Parkland, Florida that is effected by CDW. I have had all sorts of electrical and minor health issues. We have to completely gut our home to fix it. It is a terrible situation that my family aud I have had to endure. We are victims that have not been helped. Please help all of us out of this mess.

To Whom It May Concern:

I am writing this to give you a brief history of what my wife and I have had to go through regarding this problem. We built our dream home in Cape Coral, Florida in 2001. Since my wife's firm had split and my company had been sold we decided to move 10 years before we had planned to retire and find jobs in Florida. In October 2001 we moved in to our home. Immediately we started to have problems. A sulphur smell in the home was blamed on the water, so we put in a whole house reverse osmosis system. Our cast iron sink started to rust on the edges, fixtures in the home were corrodiug, our antique silver spoon collection in glass cases were tarnishing within days of cleaning. Our treadmill electronics went out, after 10 months our A/C coils failed. My wife had repeated sinus infections and headaches. I was treated for severe dry eyes aud had my tear ducts plugged. Both of our cars that were garaged started to have electrical problems, the smoke alarms would go off at 2:00 am, two TVs failed within months. We had to replace the system board on our uew computer and the printer stopped priutiug in the middle of a print job. Our floor tile started popping up, especially close to walls.

Of course we attributed all of this to just bad luck. In the following eight years we replaced our A/C five times, replaced all of our appliances, even though they were Maytag's top of the line. Oh, and five TVs. My wife had a tumor on her thyroid develop, which a specialist said was caused by an environmental problem. I developed prostate cancer at age 54 aud had it removed. I also developed Type II Diabetes and had a heart-stent put in two years ago. (We were both in excellent health prior to moving to Florida, I had a complete heart scan in 2000, they found zero plaque and no family history.)

In July of 2009 I read an article about Chinese Drywall. It mentioned that most of the homes had been built in 2004 thru 2006. But a few were built in 2001. After doing further research, I concluded we had all the classic symptoms. I then got up in to our attic, the first piece of insulation I pulled away from the ceiling drywall had printed in big blue letters, "Made in China". Of course both our homeowner's and my builder's insurance denied our claims due to their "pollution exclusion"! You have got to be kidding me!

Earlier this year, with no recourse in sight we decided to get a new mortgage and pay for remediation. After $110,000 in expense we moved back in our home in April. Yes we could have walked away and let the bank have it, but I have never walked away from any obligation and I wasn't going to here either. Due to the economy, my job was eliminated effective May 1st. Finding a job has been a real task, who wants to hire a 63 year old with health issues? I was forced to take out social security. One major concern I have is that when all the wiring was removed from our home it was placed into a large pile on our driveway. The smell was awful, the biggest problem I saw was the scorch marks on the wiring insulation. Obviously, at different times our wiring got overheated! It is amazing to me that we did not have a fire. It is my understanding that the Electrical Contractors Assoc. and the CPSC has stated that the wiring does not need to be replaced. Maybe for those homes bnilt recently, but who has studied the homes built in 2000 & 2001???

Our home is wonderful now, but my wife will have to work until 65, I am still looking for employment. We are very concerned about the long term effects on our health.

Some say that heat and humidity aggravates the problem. Could there be many more homes in the U.S. with the problem and it hasn't been discovered yet? I believe this could be bigger that asbestos, but we have only seen the tip of the iceberg.

I purchased my brand new home just off of [redacted] in the Buckingham/Lehigh Acres Fl area back in January 2008. This was my first home I purchased on my own and I was so proud of myself . . . "my own little home". I purchased the home that was brand new and never lived in from M.W. Johnson Homes. It had a one year warranty and I thought this is the way to go . . . new house and no worries about things breaking or needed replaced.

I lived in the house about a 1 year and 3 months when I started to get sick.

I had sore throat, glands were popping out of my neck, my Dr. put me on a breath in-hailer-like I had asthma, I started to itch, I had a rash on my legs and rash on my chest that were so bad that it would bleed, I had 16 hour headaches and fatigued. I went to my doctor and countless others that could not find anything wrong with me and they said it was all in my head.

So finally in May 2009 my A/c went out on me and I called my girlfriend and started crying and said "I just can't take this . . . My a/c broke not working and I'm so sick". I was at my wits end . . . I called a friend that did a/c work and he came over to look at my a/c system. He said that I had Chinese Drywall that's why my a/c was broke. My heart sank . . . I knew a little abont this stuff but not bad it really was.

I lost everything. I lost my past, my pictures of my life and the different countries I lived in and all the stuff that I had inherited from my parents that both are gone. I lost my perfect credit score of 790 that I worked my ass off to get everything that I wanted. These item you cannot attach money to.

The truth I learned. I lost all my money that I put down on the house. My belongings were all ruined and they were all contaminated by the gas. I tried to clean them but they still had that crap on it. I tried to professional clean it . . . but it still did not work. I tried to clean it and bring it to my sister's house where I stayed for, for a few weeks while I looked at an apartment. But my belongings off gassed at my sister's house and then contaminated to her house and I had to move out.

How do I know it was still contaminated . . . . . any time I get near anything that has the Chinese drywall gas on it ..it makes me itch. Not just a little itch but the worst itch you ever had in your life time's 4.

So I lost everything like those people on TV that were hit by earthquakes, tsunamis, flood, hurricanes and or tornadoes. They can qualify for help threw a numbers of different types of help.

We get *no* help what so ever. Our government helps everyone else in this world but not us.

There is more to my story that it's hard to tell the whole thing.

Hello,

My hushand is in the military and had a permanent change of duty which moved us to Florida.

We purchased the home new from the Bank. Shortly after had air conditioning issues which have been ongoing for 3.5 years.

We have no markings on the back of our drywall after two inspections that Morgan and Morgan arranged. No one to pursue legally.

Our builder is out of business and it's a hopeless situation. We expect there will be no remediation for us. My Husband, daughter and I have frequent dizzy spells and consulted with our doctor who advised with the unknown effects to move out of the home.

We are moving next month. My husband has to have good credit for his security clearance through the DOD. We can't afford to rent and pay the payment, but our health prevails.

A new home, this is the American dream we worked for. No one to protect us from this?

Thnak you

To Whom It May Concern:

We built a new home in Tampa, FL in 2007 to ensure we had the latest hurricane standards. We huilt a Custom Built home with concrete block. We moved in the home November 2007. In February 2009 we had an issue with the evaporator coil in the downstairs air conditioning unit and due to the media around Chinese Drywall, were instructed to investigate Chinese Drywall. The evaporator coil was replaced.

We spent time researching and contacted our builder who confirmed that the Drywall supplier did stock Taihe (Taishan) drywall at the time our home was built. In June we had non-destructive testing done that confirmed the presence of Chinese Drywall. We were instructed to file a home owner's insurance claim and we did. The claim was denied. Our insurer was Olympus Insurance. Further sampling confirmed Chinese Drywall made by Taishan. The builder made a claim with his insurer who denied the claim. We started litigation, hut to date have had no luck and see no future of a settlement as the builder is bankrupt, the drywall supplier is bankrupt, the insurers are all denying coverage and Taishan is owned by the Chinese Government who is denying the claims are even valid.

We had 4 evaporator coil failures, constant electronic issues, some appliance failures and many fixtures tarnished and pitted. On top of the problems with the home, our Homeowners Insurance decided to non-renew our home and we were denied coverage by every insurer, secondary insurer including Citizens. After countless hours (50+) of phone calls, research, and the help of the Insurance Advocate Citizens decided to insure us. This would have never been accomplished without the Insurance Advocate.

Seeing no help in sight and determining that walking away from the home was not a financial option, we began the remediation process. We moved out in June and four years to the date finally moved back in. The remediation was entirely self funded.

We find there are many misconceptions about our situation. 90 percent of people believe it is covered by insurance. Another large percentage possibly as high believe we will receive a settlement. When we moved back into the home our window coverings no longer fit the windows in trying to determine how to retrofit them or how to obtain a discount, we were told, 'Oh you will definitely get reimbursed for this kind of thing. You should be looking into that.' I would like to know where this settlement is coming from since everyone is either denying responsibility or bankrupt. This is the majority of people in our situation. Very few were lucky enough to have a large builder who paid the bill. Even fewer had their case taken to court and won. The fact remains no one is taking responsibility for this tragedy. Yet we continue to import other toxic Chinese materials into our country.

I am often asked why aren't the people who allowed the toxic drywall into the country being held accountable. I have no idea. I tried to contact these agencies, but had no response. I have no idea why there seems to be no restrictions on China importing more products based upon this problem and the other toxic products they have had over the years. I have no idea why no one in our government believes any of these issues are their problem to help correct. I have no idea why there isn't a fund setup to help people in this situation. I have no idea why this problem has largely been ignored and it seems like everyone just thinks it will fix itself and go away. You bet I will take this information with me to the polls and so will every

other individual in this situation. We know who was responsive and at least tried to help and care and we know who largely ignored our calls and e-mails. We have legislatures spending time and money on demanding that schools change the name Winter Break to Christmas Break, yet they don't want to spend any time debating helping victims of Chinese Drywall.

To those who are soliciting feedback and debating this issue we thank you. We appreciate your efforts to try and help us. This is an important issue and again we thank you for your time and effort.

I am currently one of the thousands of homeowners who unknowingly purchased a home contaminated with Chinese drywall. In July 2007 I was transferred from my Federal law enforcement position in NY to beautifnl Miami. It was the opportunity I had been waiting for, I finally made it down to Miami and now would be able to purchase my first home. Living in NY on a Federal salary made it difficnlt to pnrchase a home therefore I felt very prond that I was finally able to have a piece of the American Dream. I purchased my 2 bedroom condo in Doral, FL for $270,000.00 and was expecting to someday have a family where I can already have an established home.

Towards the end of 2008 I began hearing reports of some homes in the Doral area that had been bnilt with toxic drywall and that people were having problems with their air conditioning, home appliances, and began having health problems. I began investigating a little further because the symptoms that were being discussed sonnded very familiar to me. My home always had a certain smell to it that I always believed was like fresh paint and I assnmed it was because it was a newer home. I also recalled having burning eyes and sore throats often especially when I wonld wake np in the morning. I remember seeing pictnres of corroded wiring and decided to look at my air conditioner and this is when I discovered that my AC hose appeared to be tarnished. I immediately reached out to my developer and advised them of my finding. They sent someone to look at my AC and my electrical panel and they confirmed it was corroding. I spoke to the attorney for the developer and he advised me not to worry about it that they would see what they could do. I never heard from them again, my developer disappeared, the attorney never returned a phone call again. 1 contacted the City of Doral and they sent an Inspector who confirmed that my property contained toxic drywall, the minute the Inspector walked in he knew because of the distinct odor. At this point was when I realized that all my years of hard work had all gone down the drain. My home was toxic and dangerous to my health.

Over the next several months and years my AC failed 4 times, I purchased a new coil and within a few months that began leaking as well and was completely corroded. The AC tech actually thought their had been a fire inside my AC because the copper coils were completely black. My stove's electricla panel stopped working as well therefore I needed to pay several hundred dollars to get it fixed. I continued getting sore throats and burning eyes but I had nowhere to go so I continued living there hoping for a quick solution.

I contacted an attorney in January 2009 and filed a lawsuit. I continued making my mortgage payments because I did not want to ruin my excellent credit history bnt I finally gave up in July 2011. I got married in November 2010 and realized that the health of my wife and mine was more important then maintaining my credit history. We wanted to begin a family and we knew that we did not want our baby anywhere near this home. I decided to move into a rental home that at least I know is not detrimental to my health.

It deeply angers and saddens me to see how our government has done nothing to help homeowners with this problem. These homes were built with faulty and dangerous materials and everyone has walked away from us. The government, the bank, the association can care less. They still want their taxes, their interest, and their monthly dues and could care less that these homes are unliveable. In the U.S. we have the lemon law to protect car buyers but I find it unbelieveable that when someone buys a new home there are absolutely no protections. Buy at your own risk. . . . I didn't know I had to inspect the drywall when purchasing a new home and neither did the bank because they appraised it. . . .

I don't expect this lawsuit to go anywhere and decided to cut my losses now knowing that the banks will probably come after me to pay up in the future for a home that recently was appraised at $75,000.00 due to the toxic drywall.

My home is currently in foreclosure, my credit has been ruined, I will probably owe taxes, or the bank will try to sue me for the default amount on the mortgage. This is a "lose lose" situation for all the homeowuers involved.

As a Federal law enforcement officer that investigates fraud, I feel like I have had the biggest frand in U.S. history committed against me and my government (and employer) has done nothing to help.

I wish everyone luck with their homes and hope that someday we can come ont of this nightmare and maybe help make changes so that no other American falls victim to anything like this again.

I would like to tell you our story, of two disabled person's struggling to survive this Toxic Chemical Drywall Disaster. [Redacted] was deemed totally and permanently disabled as determined by the two years of the required Government evaluations, Government Doctor's exams, Laboratory, and other extensive testing as required by the SSD process with a personal appearance and found conclusive by the Federal Court, I do not reveal all of this health information lightly but it is in the best interest of all parties/victims who have suffered and continue to suffer with disabilities and also Toxic Drywall. All information is based on sound Science. He was severely injured and has some genetic problems that contribute and now he is poisoned.

His Parents came to America, fleeing the War torn Hungary in 1956 during the Revolution to find their American Dream. His Parents became Citizens, built their own home, started their own Machinery Facility and contributed to this United States of America. [Redacted]'s Father was a manufacturer for the United States Military, building parts which were considered to be of high security clearance, he even designed a part that is now on the moon, part of the Lunar Lem.

[Redacted] learned this trade from his Father and has great knowledge and expertise in the manufacturing field, all fields. He is a former Certified OSHA General Industry Outreach Trainer, this before his disability. He is highly qualified with several Certificates in various fields including being a Former Licensed Insurance Agent for the State of Florida. I am a former bookkeeper and Office Manager before being stricken with Lupus at an early age. In 2005 [redacted] and I decided after my Disability continued and all of the issues along with that and now his Disability that we would build, using his 401k money, a home specifically designed for our Disabilities. We could no longer climb stairs, no longer bend at certain degrees, we had and still have severe limitations. Our home was very well thought out. Every aspect, the counters are a perfect height, the Refrigerator is elevated, we have a Physical Therapy Whirlpool, Our shower is built with five shower heads as with Lupus, hot or cold changes affect me tremendously. I will go as far as to tell you that we even have a restroom built for Disabled Persons. Our home for our disabilities was perfect. I cannot tell you how much we have missed it over the past almost two years now. It is only 900 sq. ft. but built on a bigger slab of concrete under roof and above code for possible hurricanes,(irouically), so that I do uot have to be in the sun, you see with Lupus, the sun is a trigger as well as stress, actually, stress is the number one trigger for a Lupus Patient resulting in a Flare and with this Drywall Tragedy, I have had aud coutiuue to have pleuty of unwauted and uudeserving stress.

We were the Owner/Builder, as this is allowed in Hillsborough County Florida as long as we adhere to all contracting guidelines. *i.e.*, hiring licensed, Bonded and Insured Sub-Contractors. So in doing this we find it very dishearteuing that we adhere to the guidelines but the sub-contractors do not, or I should say they should share responsibility in the materials installed in our home. There should be product accountability wheu they purchase the drywall and briug iuto the home. We Sub-Contracted out the drywall, etc. to Companies that we thought we could trust. We moved in in January of 2007, so happy, we finally could live out our limited days or I should say difficult days in a perfect place for us. We were thrilled. My Lupus was in remission, [Redacted] had his disability but he was o.k.. Shortly after moving in, we began to have issues with the smoke detectors, air conditioner, I started noticing corrosion in the bathroom but although I saved and waited for my bathroom fixtures to go on sale and bought the best, I thought maybe I would take them back to the store. Then . . . I began to cough up blood, trips to the hospital and emergeucy room left [redacted] and I with a visit, per the hospital, to a visit to the local health department for possible TB testing. We were both coughing up blood and horrendous phlegm, not to be gross on a public document but factual. The testing was done, we did uot aud do not have TB.

We continued to feel ill. I had continuous nosebleeds and a severe rash which was thought to be shingles but was treated and left unexplained. [redacted], under routine labs begau to have pancreatic issues that he never had before and had previously before moving into the home had routine blood work every 3 months. He also had a return of his childhood asthma which in almost thirty years of marriage he never used a rescue iuhaler. He was put ou one. I awoke to being numb ou the

left side and paramedics were called when [redacted] could get no response from me one morning, I went into now I know what was a hypoglycemic stroke/coma with an unexplained flare of Lupus and was hospitalized on Mega IV doses of medications, and remain with neurological damage. I suffered from breathing issues/ hyperinflated lungs and severe fatigue. [Redacted], after many, many trips to the physicians, and emergency rooms was put on mega doses of antibiotics for what the Physicians believed was a lung issue . One morning after his now normal pattern of having to sleep sitting up, I noticed he was extremely cold, I took his temperature over a few hour period and it was extremely low. I phoned the doctor where he stated that [redacted] was hypothermic. I rushed him to the ER once again, he was hypothermic, and had bi-lateral pneumonia.

The Physicians were puzzled because his immune system was basically non-existent. Knowing that he had routine labs they, asked me what was different. At this point I had heard of Chinese Drywall and saw the signs in our home but never in a million years did I think we could have it. I trusted the Sub-Contractor/Supplier . . . no longer. While [redacted] was still hospitalized after 17 days, I contacted the Florida Department of Health, they instructed me on what to do. Our Air Conditioner Contractor came out, (the owner) and actually looked at the coils, he had seen this many times and stated that we had bad drywall. He did look at the rest of the home after that. I immediately told the Physicians. We could not go home. They were going to put [redacted] in a nursing home. This would be the first time in 28 years that we would be separated, luckily we had a little money left so I rented an apartment and took my Husband home to hopefully recover after having to purchase new beds, furuiture due to the gases and contaminants. He was now so weak. The first couple of months he did get somewhat better but never the same.He now has COPD, not before. He continues with left-sided kidney pain, His pancreatitis did immediately go away as did my problem with my blood sugar. He has lung damage aud now marrow issnes. We will never be the same. We were not this way, even with our Disabilities. There has been a drastic change since moving and living in that home for two yrs. We have been "Poisoned" just as it is written on the CPSC document done by Mr. Glen Dunlap, as well as other homeowner's documents.

While living in the first apartment, we have since had to move to another, I contacted the CPSC for the second time, the first while [redacted] was hospitalized. I got a reply e-mail from Christopher Day and then a follow-up phone call from Mr.Dean Woodard, at the time he was the Defect Investigator. He told me that Mr. Glen Dunlap would be in touch. Mr. Glen Dunlap did phone me and wanted to talk about our health first and then go to the home. We did. Mr.Dunlap left the house with his eyes burning. He saw tbe Domestic Drywall Barcode, the same piece that the Insnrance Company had tested the month prior via an Engineering Firm, and finding Defective/Reactive/Contaminated drywall with Impurities.. Not Chinese. I asked Mr.Dunlap if he wanted to test the piece also and he stated that he did not need to. I gave Mr.Dunlap all of or most of our medical records, including the photos of the inside of [redacted]'s windpipe. Approximately one month later we received an e-mail from Mr. Dean Woodard for us to contact him. We did, he told us specifically that he wanted to contact the Domestic Wallboard Manufacturer and get them to settle. I found this to be the best news that we had heard in a very long time. The Domestic Manufacturer did come into our home, along with onr Attorney at the time, Robert (Bob) Gary, and it is videotaped. The Company, tore our house apart finding nothing but their labels, taking pieces for testing and has and continues to refuse to release our testing. Our Attorney at the time did testing by a Doctor that found problems. I have recently contacted Dean Woodard who stated that he cannot get our results from the Domestic company now and that he bowed out due to us hiring an Attorney,(we had to because the Domestic Drywall Company could not tell me on the phone that we would have access to the results and even with an Attorney and a signed agreement, they fulfilled that statement, breaching the agreement)

This makes no sense that Mr. Woodard would state this, given the fact that Mr. Cohen stated yesterday that they have "no legal recourse at this time to make the manufacturers do a recall" and they are the Government Agency that is suppose to handle this type of problem.and was willing to handle ours . . . why? To the Senators: how can an official from the Consumer Product Safety Commission offer to get a Domestic Drywall Company to settle with us based on the facts he has in his/ their investigation(s) and now refuse to help? In the hearing, Senator Warner stated that "some companies have settled and they usually do not do that unless they know they are going to be found guilty". How and why did the Consumer Product Safety Commission try to get the Domestic Drywall Company to settle . . . I firmly believe that what Senator Warner stated rings true, and apparently the Consumer Product Safety Commission thought so as well. But what about the other Families with this product ? They have been reported and some have not because they hear

that the Consumer Product Safety Commission will do nothing, so why bother? I have written to them so many times.

I also contacted Senator Bill Nelson's office over the past year and a half for help, as well as Senator Rhonda Storms for food assistance, for FEMA for something. They have tried and helped as much as possible. It is greatly appreciated.. I wrote and copied all of them that [redacted] and I after selling everything that we own can no longer afford rent and will be moving into a tent on onr property as soon as the order is fixed, we cannot afford for the County to condemn our home.They do not strive to Condemn homes but it cannot sit there, empty, being a blight to the Community although we have bartered with a kind Family to keep up the yard. Hillsborough County is trying to expand and improve our Community. We cannot get help, we live on a severely fixed income and are paying half on rent. Budgets are constrained in this County. They have done all that they can. We did get a permit via help from a friend and luckily it was half price . . . to remediate, inch by inch, extremely slowly, when and if we can, this is keeping the home from being Condemned. The Building Official for Hillsborough County, Mr. Wayne Francis knows of our plight and is very supportive.

We need help from FEMA. I have so many details and so much more to share about how the CPSC and the other Federal Agencies, including others . . . have failed us. We have got to hold the Manufacturers accountable, the voluntary system/ labeling is a smokescreen, if they will not even fix our home what makes the Government think that they will be voluntarily labeling anything and in actuality what chemicals will they be labeling, as Mr. Cohen stated about the process of making drywall to Senator Wicker. "They use fly ash, and bake it". If not scrubbed properly, the fly ash will end up making everyone ill, it contains over 22 contaminates and this will continue. Fly ash is a general term, used by Mr. Neal Cohen, of the combination of ingredients given off after burning coal and these ingredients are mercury, lead, strontium, etc. There needs to be oversight. Some fly ash is imported. This should be looked into. The Installers need to be held accountable, the Suppliers, the Insurance Companies, all the way down the chain. This will happen again or worse yet, continue to happen if something is not done.

The bottom line for us is, how does a Federal Agency step in, say they will help and then step out. How do they get to in my opinion, not be entirely truthful with the Senate as to all of the facts and get by with it. As an American Citizen who has to wear a respirator to go into her own home and does live by the laws of this Country, I, we would like to know when if anything will be done to fix the damage from this Toxic Chemical Hurricane so that [redacted] and I can live in our home, our American Dream, our Safe Haven and live out the rest of our days, now even lessened.

We would just like to thank Chairman Pryor, Senator Warner, Senator Wicker and Senator Marc Rubio for the questions asked of the witness panel yesterday. The Witness Panel including Mr. Neal Cohen of the Consumer Product Safety Commission, Dr. Portier of the CDC, Mr. Shelton of V.A. and Ms. Brenda Brincku of Alva Fl. Now that I have told you our story of our life and experience with Toxic Domestic Drywall, (which is a different Domestic Company from Ms.Brincku)I would like to address the answers given by some of the witness panel. I am doing this as a Victim and I speak for my Husband [redacted] as well. As to Mr. Neal Cohen's testimony, in my opinion he did not answer the questions completely. There were direct questions posed to him about causation, there were many theories that the C.P.S.C worked on including the Sulphur Reducing Bacteria issue and if looked at closely (Peer Reviewed, not just put on the Internet for anyone to contradict, which is not a peer review study) then it would be mentioned in the hearing that they did not find zero Sulphur Reducing Bacteria. This is one causation, they, the CPSC also found other bacterium. I would just like to say that I, as an American Citizen did contact the "CPSC'S expert scientist". I have sent my serious concerns as to a possible health aspect of just this issue in numerous e-mails to the CPSC, the CDC and anyone and everyone that would listen. The only person that responded was the Scientist and Mr. Christopher Day who said he forwarded.

As to other homeowners filing reports about other Domestic Drywall Companies. I cannot say with certainty that Mr. Cohen is accurate but I have read all of the In-Depth-Investigative reports on line. Our Report has not been released on line. I do not know the Statute that Mr. Neal Cohen quoted as it pertains to releasing the Domestic Manufacturer's names but I would like it quoted and made a part of record. From my experience there are quite a few Domestic Manufacturer's that have been reported about/on. There is/was a Domestic Drywall Problem. Mr. Cohen's quoting of the 11 home study in 2010, was not complete either. They did find problems. Please ask for all documentation.

Mr. Portier's statement about these gases including Carbonyl being Toxic is accurate. So given that statement, why then should the American Citizen's have to wait another moment before our Government declares this a National Disaster (it is a Toxic Hurricane) within our own homes. We have been "Poisoned" and it is written on not only ours but other In Depth Investigative Reports under . . . Injury Diagnosis.. If this were a Hurricane, we would have a FEMA Response. We have, all, the victims have, begged for FEMA'S help. So many of us have been or are still homeless. We are the ones that Ms.Brincku so diligently pointed out when asked, that will be living in a tent on our property, we have ordered it and had to reorder, as mentioned in our story. We implore and have implored the CDC through Christopher Day of the CPSC including sending photos of my Husbands windpipe while hospitalized from the gases that Mr.Portier referred to, to help us and all of the other victims that are suffering from tremendous health problems from, immune issues, insulin, bone marrow, blood, kidney, seizures nasal sores and cysts, etc. even cancer. Creating a "safe level" of these gases is unacceptable, it is too late for us, we have all had long-term exposure even at low levels. There should not ever be a standard level for these gases and impurities. My County even refers to it as "Septic Drywall". That along with Dr. Portier's statement about not allowing his family to live in this environment speaks, as Senator Warner stated "Volumes". We need to be followed for this just as the CDC lists asbestos on their registry, so should these gases be. Lead, Asbestos, it makes no sense to not include this Drywall as a health hazard although basically if listened to very closely, the words spoken at the hearing by a couple of the witnesses, do just that.

To Whom wants to listen,

My name is [redacted] and my family and I own a Chinese Drywall home. August 2009 is when our nightmare began!

We moved to Florida from Kansas, we had never even heard of "Toxic Chinese Drywall"! WE did all the right things when you buy a home, we had it inspected (Little did we know, Chinese Drywall was not an item covered by the inspection), we bought a home that we could afford and did research on the ueighborhood and schools. Within 90 days of moving in, we had to move out! Our home was never lived in so it took only 90 days for the AC aud man made humidity to start the effects of producing a "firecracker factory" odor in our home. My 6 year old son's room was the worst. He is my most precious gift and I was not about to risk his health!

We all started getting sore throats, upper respiratory congestion, muscle fatigue, I was the worst because I was in the home all day and night. Needless to say that once we tore out two closets in the house, we left never to return shortly after words. I'm predicting that Chiuese Dry wall is the "next asbestos" health concern. Is our country really going to just wait and see how many of our children develop serious illnesses as Adults due to Chinese Drywall? Just the fact that so many people are complaining of illness should cause the CDC to ban and recall the stuff! If it isn't dangerous to one's health why are so many of our government agency's going in to homes wearing full protective garb?

We have been faced with having to move several times(the first home rented was foreclosed/short sold-the owner was taking our money and running, never paying the mortgage). Three moves within a year and a half. Financially, we will never be able to recover what we have lost, not to mention having worked hard all my life to have perfect credit and having to face that being destroyed. Emotionally, hours of therapy and meds just to control my since of dispare that we had no where to turn to fix the problem. You see my home being poisonous was not something that I did yet I am paying the price.

We live in a wonderful country full of opportunity and justice. I'm proud to be an American. I'm glad that my tax dollars help the needy and that we are a nation under God. My question is this, why is it so hard for me (a born and raised U.S. citizen) to get help when I need it? A portion of the millions of dollars we send to other countries in need would help put the lives of us "victims" back on track. Not to mention how many jobs this could create and how the housing market may get a helpful hand in rising home values. When are we going to make China accountable for all the dangerous products that they are making and sending over here?

I just hope that some of you have the heart and passion to take serious action and help those who have been effected by Chinese Drywall. The homeowners are the "real victims" whose day to day lives and health are affected the most.

May you do the right thing,

My families story is complicated and has been a horrendous experience for all of us but the thiug to keep in mind as you read this is that I cousider my family to be one of the lucky (if that is even a word you could us in describing anything related to this disaster) ones in this Chinese Drywall (CDW) disaster. We were able to remove our family from this toxic environment over 2.5 years ago. I have spent more hours than imaginable for the last two and a half years listening to the stories of American families facing sure financial ruin and unknown health conseqnences due to the toxic import of Chinese Drywall. We lose our house this week to the bank and this toxic import!

In March of 2009 there was a story written about Chinese Drywall being installed in onr area in homes that had been built in 2006. While I had not experienced many of the problems with my home that were listed in the article I decided that I should give a call to my drywall installer and obtain a letter saying they did not use CDW in my home. This way, in the future, when I was ready to sell my home, I would have a letter in hand stating that it was not a toxic drywall home. This is when the nightmare began. A few days later the owner of the drywall company called to tell me that they DID install Chinese drywall in my home aud that there were 40 sheets (we found out later after obtaining the delivery records that it was not 40 but 77). 1 was on a field trip with my 9 year old daughter and her classmates in Jamestown when I received this phone call. Needless to say I, realized the enormity of this news and that our lives would be forever changed.

What hit me the most that day was the realization that this was why my family and I had been so sick for the last 2 years. My oldest daughter, then 11, was extremely ill and had missed so much school that her doctor was running all kinds of blood tests, including mono, to try and figure out why, what was once this health, extremely active, dancer, honor student, could barely get out of bed. The next day I called my oldest daughters doctor and tried to explain what little I knew about Chinese Drywall. She told us to come in immediately. Upon arrival she told us to get out of our the house for a week and see how we all felt. Friends were going out of towu for Spring Break so we weut and lived at their home. My youngest daughter at the time was 7 and begged us to have Easter at home. We spent Easter morniug at home and moved out that afternoou. Never again have my daughters been back into their home, seen their rooms or played with their toys.

After the week in our friends house another friend loaned us their 37 foot travel trailer and our family of 5 lived next to our million dollar waterfront home in this trailer for 3 months. Remember, I told you that we were the lucky ones. We did have friends that were able to assist us and we did finally have the means to move our family into a tiny new home, all he it a safe home, to raise our girls. That was over 2.5 years ago! Just as a point of refereuce to explain more about my husbaud and myself. My husband came to this country when he was 5 from Vietnam. My husband being the oldest and the rest of his family of 6 escaped the day the country fell and arrived here with the clothes on their back. My father was a hard working New York City fire captain who worked numerous jobs to support his family and get all of his children through college while my mother worked in the school systems because she understood the importance of having somebody home to raise the children. My point in all of this is that my husband and I came from very hard working middle class families, worked our way through college and graduate school and worked very hard to obtain what we had. We had built our dream home on the water to raise our three girls, kayak, fish and enjoy the outdoors on our beautiful 2 acre property.

Two and a half years into this legal and political battle we realize that by the time, if ever, any of this is settled our children will most likely be grown and hopefully able to afford to attend college. I have dedicated my life for the last 2 years to working to bring attention to this issue. We have worked with our government officials, starting locally going to our Congressman and Senators and then coming back to the state level. Nothing over the last 2 years has been done that would actually assist these Victims of Chinese Drywall (VCDW). There may be other things happening in the world but to these American families this is the most tumultuous part of our lives. What we don't understand is our government's lack of acknowledgement of this issue that is destroying tens of thousands of families. Please stop worrying about offending China and realize that American homeowners and families are being offended.

The Victims of Chinese Drywall are hurt and destroyed every time we hear a story about our tax payer money going overseas to help foreign families while we are all devastated by this toxic import. This is not a simple choice of recalling yet another toxic product Made in China, the estimate we received to restore our home was $380,000. While we did have equity of $800,000 in that CDW home we cannot justify pouring any more money into a home that made ns so sick and that we may

never be able to sell after it is "restored" because there is no real "protocol" that is accepted by all in the field or the government agency, CPSC, that are dealing with this situation. This toxic product does not discriminate. Young families and singles who are just starting out have lost everything. Seniors who put all of their money into purchasing their retirement home are forced to remain in these toxic homes dne to lack of fnnds to move out and pay rent someplace else.

I mnst point out that we are over two and a half years into this disaster and over two and a half years into not being able to live in onr homes and yet we still have no answers. We don't know how to fix these homes, we don't know how this happened to the drywall, we don't know how the drywall manufactnrers can ensure that it will not happen again and we still don't have a content sheet for what drywall is allowed to contain. To top it all off, during the last two and a half years it has never been made illegal to sell or import this product into the United States. What are we doing to protect American families from this toxic product?

Toxic products have been entering our country from China for more than 12 years now. China started sending us small toxic products that could be recalled and now we have let this grow into a product that has destroyed American homes and made American families extremely ill. If nothing is done to counteract these toxic imports the question is—What will be next?! By ignoring the Chinese Drywall disaster we have given the Chinese manufacturers carte blanche to do as they please and send us whatever toxins they want to send our way!

While my daughters are very strong and have lived with what life has handed them I feel this has taught them extreme disappointment in their own country that never would I have expected for them to learn EVER no less at such a young age. Sure they have met with Senator Warner, Congressman Nye and nnmerons other officials but then only to realize that after we leave onr elected officials NOTHING happens to right this wrong that has been done to their family and thousands of other families across, what we used to think of as, this great country of ours.

The Congressional caucus and this Committee can:

(Most important is our health) Require that CDC start gathering health data and appoint a specialist to be available to answer ongoing health concerns from toxic drywall homeowners and their physicians.

Hold another hearing and call in the manufacturers to let them know they will be held liable by our government for the destruction of these homes, just like was done with Toyota, Halliburton, BP and Transocean

Help homeowners restore their credit via extenuating circumstance ruling to pre toxic drywall status

Help prevent foreclosure for the few homeowners that wish to try to save their homes in the hopes of a legal settlement

Meet regularly to craft legislation and produce minutes to be made availahle to the public

Call in the insurance industry to the next hearing to discuss lack of coverage. To date all insurance from homeowners, installers, suppliers and builders deny coverage citing the pollutiou exclusiou

Provide legislation that authorizes no-interest loans to homeowners to remediate

Establish drywall standards to help prevent this in the future

Require that a governmeut orgauization coutiuue studies to fignre out how this happened to the drywall, was it bad mined gypsum, coal flue gas desulfurized gypsum drywall, recycled drywall or improperly cured drywall, to help ensure that this problem never happens again?

We request that the AG look into the fact that some American bnsiuesses kuew about the problems caused by this toxic product and chose to cover it up, not inform homeowners or the consumer product safety commission. If this is not illegal then laws need to be changed.

The toxic drywall homes that are now owned by the banks need full disclosure upon sale so that 2nd generation families will not become victims of this toxic product

CPSC has stated that they informed U.S. Customs that CDW should not be allowed into our country. Where is this letter?

CPSC has stated that the owners of the stock piles of CDW that are stored around the United States have been told not to sell the drywall. Where is this letter?

Federal regulators have dropped the ball and we hope this committee can help turn that around and send Federal assistance to these devastated American families.

MY CHINESE DRYWALL PROBLEM

This is my story about a condo I purchased in the summer of 2009 from Fannie Mae. Fannie Mae sold the unit to me with no disclosure that the unit had Chinese drywall. After some investigating I found out the unit and approximately 80 other units have Taishan drywall and were unlivable. To date I have not slept one day in the unit and it is financially running my life. This is the general timeline of the events that happen to me and my family. The condo is part of a planned community located in Port Saint Lucie Florida.

- May 2nd we mailed Bayshore management an application to be approved for the full time residence. My wife and three year old child and I purchased the unit to relocate from New York to Florida.
- June 25 we were scheduled to close but the approval letter from the board, permitting me to move in, was not returned because the lawyer for Bayshore management Association was still negotiating back fees. To date $11500 was owed to Bayshore for previous maintenance fees. The president of the Board of Directors had to sign off on our background check allowing me and my family to move in.
- July 1st, 2009 was a second closing date and we did not close again, because Bayshore management's lawyer agreed on amount to be paid back but did not sign the documents allowing the closing to proceed. My wife went to [redacted], the manager of Bayshore Management, asking him for pool key. He refused to give key, questioned her about the payment of past association fees that were owed.
- July 3rd, 2009 Liberty title closed property through mail and computer with Fannie Mae. They wired the money to Fannie Mae and closed for me. I wired money to Liberty title about two weeks prior.
- July 4th and 5th three families moved out from our street. Out of 22 units next to mine only 5 units had people in them.
- July 6th at 9:30 am I was outside with furniture deliveries and lady across a street and another neighbor told me I can't move small child into the unit because it was toxic. I said "It can not be, the inspector check it". I refused to believe it. The neighbor and I went into my unit where he start taking out the electrical outlets. The ground wires were black along with AC coil. Along the same wall two appliances were missing. The corrosion would rust the electrical components that would render the appliance non-working. The neighbor told me that over the last two weeks about twelve neighbors have moved out because of corrosion and health problems linked to Chinese drywall.
- July 6th about 10:30–11:30 I went to the satellite office of Bayshore Management to speak to [redacted], the association manager. I asked him if my unit has Chinese drywall. The receptionist had a colored chart on her desk that he looked at and said" Yes, your unit has a "mild case" of Chinese drywall. I would not bring my child in there." He also recommended not taking the furniture out from there, suggesting cross contamination.

When I asked why he did not tell us prior to closing he replied" I can be sued for blowing a sale. And you should have been told by the seller."

In my case Fannie Mae had deed to the condo and the original owner was not on any of the closing contracts only Fannie Mae. I purchase a toxic condo from Fannie Mae.

The chart that [redacted] was referring to was created by the president of the Board, [redacted]. [Redacted] was paid to determine all of the condo units with Chinese drywall; this was months prior to my contract to purchase. Approximately eighty of the one hundred and ten units had Chinese drywall.

[Redacted] did the unit evaluation back in March and with the Board of Directors did the mailing to the residents informing them of the toxic drywall in there unit. This letter went out in April certified mail.

The letter for my unit went out and was singed by the previous owner that was foreclosed over a year previously by Association and the bank.

- July 10th at 11:30am I called the PSL Property Appraisers office. Their # is 772 337 5760. I told them about my problem and they said to contact [redacted]. He is the president of the Board of my condo association. They informed me that Howard was at the Property Appraisers office month ago giving them a list of all the toxic properties in my neighborhood.

  The list would let the Property Appraisers office deduct the amount of money to fix unit called "Right to Fix" from the Appraised value which in turn lowers your taxes.

- July 10th at 12:30 pm I called Fannie Mae at 972 773 4663. I told them that the unit they sold ns is toxic, and I and my family are homeless. They said they will do a "Page send" and someone will call me in two days.
- Jnly 13th or 14th a rep called from Fannie Mae saying that it was my job to do Due Diligence to find out history of the unit. I told them that they did not disclose the findings of the unit knowing that last owner foreclosed because of Toxic drywall. The inspection service for the bank is First American Field Service, there phone number is 1800 873 4532. I called them and they said to call the bank if I have a problem.

  First American Field Service left a large sticker across the condo's front door with their name and phone number that said they inspected the unit.

Additional information found on my closing contract:

- Fannie Mae File #SL–09–0171. Alfred L. Gonzales of, as partner of Adolno & Yoss LLP, Attorney in fact of Fannie Mae A/IC/A/Federal National Mortgage Association.

Additional information:

- Fannie Mae 972 773 4663 in Texas.
- Liberty Title Company of America inc. 10060South Federal Hwy., Port saint Lucie, FL, 34952 (772 335 7474). Sharon Evans was handling the closing.
- Property Appraisers office PSL (772) 337 5760. "Cost to cure" adjust value paperwork was given to them by association president. This outlined all of the infected units.
- Business Tax Office. A&A Inspections is inspector we hired to check the apartment for Chinese Drywall. I called them if inspector is licensed and insured. He is licensed in PSL. However, inspector is not a "trade" in Florida, therefore NO insurance is required. The owners name is Steve Frank at 514 SE Guava Terrace, Port Saint Lucie, FL, 34983. The office number is (772) 336 0936, cell (772) 240 6219. He is in the phone book as Licensed and Insured, but does not have insurance. I called him to put in claim. He said "NO insurance, sorry"?
- First American Field Services for Fannie Mae 1800 873 4532, inspected the place for the bank prior to me buying it.
- Burt is a property manager his onsite number is (772) 345 0596. He told me that I do not own outside walls, walls touching another condo, ceiling and floors of my condo. However they did not disclose to us that "their" part of the condo I purchases is toxic. He is on the Board of Directors. Their position is that the sell is required to disclose not the Board.

In July of 2009 I purchased a two bedroom two bathroom one car garage condo in a plauned commuuity, located in Port Saint Lucie Florida. I purchased the unit in good faith from Fannie Mae not knowing or ever hearing of Chinese drywall. I am from New York and this is a problem typically found in the south. The unit was inspected by prior to my purchase by First American Field Services I suspect this was for Fannie Mae when they tool ownership, the finding were not disclosed to me. I am presently strapped with a unit I can't live in, sell, or rent because people are getting sick from the drywall. The Chinese drywall problem has created a lot of foreclosures and in my case the person required to disclose doesn't and the new homeowner is stuck with a toxic asset.

Thank you

RE: Defective Drywall

We recently watched our dear frieud, Brenda Brincku, testify before your commission regarding the plight of thousands of homeowners that have been plagued with defective drywall, without any assistance from our insurance carriers or Federal goverumeut. The recognized affects of defective drywall has been acknowledge for

nearly four years now. There have been countless studies that seem to prove inconclusive as to whether there are any health or safety hazards. Yet every victim of a defective drywall home can testify of numerous safety hazards in their homes along with varied health conditions caused by the defective drywall.

My family has also been a victim of defective drywall at our Cape Coral, Florida home. And, like the Brincku family, we were the owner/builder that hired all of the sub contractors to build our dream home. Therefore, we had no builder to go back to for any form of restitution for this uightmare. We turued to our builder's risk insurance, only to be denied, due to tbe pollution exclusion, which is in virtually every insurance policy.

Before discovering that our home was built with defective drywall, we encountered numerous malfunctions of various electrical components throughout our home. Our alarm system would go off for no reason; some of the plastic components of the alarm system completely disintegrated; the control panel on our wall oven (that may have been used a total often times) completely malfunctioned and had to be replaced, our pool control panel had to be replaced, brand new computers stopped workiug, ceiling fans burnt up; and a sprinkler clock had *to* be replace. A majority of our plumbing fixtures were pitted, mirrors were blackened along the edges, two year old paint cans were completely rusted through, screws completely rusted and pitted, and various tools rusted.

If the defective drywall can cause such damage to hard metals, imagine the affects it can cause to the delicate tissues of the human body.

I have been an electrician for 32 years and have never seen copper wiring turn black as I did in my own home. I initially did not feel that the electric needed to be completely removed until I stripped several feet of romex wire in various locations throughout my home. To my surprise, the blackened copper had traveled intermittently throughout all of the wiring in the house. The exterior of the romex had also turned brown in various locations on all of the romex. I do not how the CPSC can conclude that the wiring is *not* a safety hazard.

As far as the health affects, everyone in our family was affected differently. I would get sore throats, headaches and cough, my children were always lethargic and slept most of the time, and my wife would get rashes, nose bleeds and headaches. These symptoms would always subside after a few days back home in New Jersey. These are the varied symptoms that are synonymous for every victim of defective drywall. Fortunately for my family, this was not our primary residence, and we had somewhere else to go to breathe clean air and not be sick on a daily basis.

Financially, the defective drywall has devastated our family. We invested over $500,000.00 to build our dream home. We used our lifelong savings along with taking a mortgage out on our primary residence in New Jersey. When we discovered our home had the defective drywall, we could not just walk away like so many families did, because we would risk loosing our New Jersey home, in which the loau had been secured with. We opted to fix our home immediately, instead of waiting years in hopes of any type of lawsuit settlement or help from our government. This was not an easy task, my wife and I were both employed full-time iu New Jersey, with two children, then ages 13 and 19. We flew back and forth to Florida over 18 times in one year, along with driving to Florida for one month to completely demo the house and rebuild it. We rented au RV to sleep in ou our property and worked 16–18 hours every day for a month to get our home back to a livable condition. We had no cooking facilities, because the Township would not permit us to hook the RV up to any of the utilities, for fear of ground contamination. We kept one toilet bowl iu place along with a shower in the house. We showered at night with flash lights for weeks while the electrical was ripped out, with no walls for privacy. We had an outdoor sink for cleaning and brushing our teeth. We also slept on our outside lanai a few nights before we received permission to have the RV on our property.

I understand that you have not received many letters from the thousands of victims of defective drywall. Please realize that we have all been asking for help for several years now, only to have our pleas fall upon deaf ears or have "so called experts" say that there are no health or safety hazards. I invite each and every expert to spend one week iu a house with defective drywall, then tell us agaiu that there are no health or safety hazards. During your defective drywall hearing, Senator Warner questioned Dr. Portier of the Center of Disease Control if he would allow his family to live in a house with defective drywall and his respouse was "probably not". Those words speak volumes as to how he can then say that there are no health issues with the defective drywall. Unfortunately, many victims have simply given up the fight aud have walked away from their homes and are now liviug iu finaucial ruin. I applaud the Brincku family for not giving up and renewing my faith that someday someone will listen and help the thousands of American people that have been affected by this disaster.

Thank you for the opportunity to share our story.

To Whom It May Concern:

We had built our home in Vero Beach, Florida in 2006. We paid top dollar for it as it was the height of the market. We filled our home with beautiful furnishings and things that we love. We were all prepared, in September 2009, to sell our place in NY, retire and move to Vero Beach. As luck, or should I say, as life happens our move never happened. When we went down to our home in June of 2009 we realized our A/C unit had yet again failed. Upon consultation with our AC repairman, we for the first time heard the term Chinese drywall. Needless to say, after months of painstaking agony we realized that our beautiful home was being eroded from the inside by sulfuric acid.

We contacted the builder, who we learned was in the process of filing for Chapter XI protection. We were devastated to learn that our 10-year structural guarantee was not worth the paper it was written on. We proceeded next to our insurance company. They informed us that they would not be getting iuvolved with CDW because our insurance policy precluded such coverage. No matter who we contacted, no one was interested in our problems.

We next realized the only way to proceed was to hire an attorney which we did. However, we were told that we were required to pay all of the expenses of the home, mortgage, taxes, insurance, etc., on the house. We could try to get our mortgage company to give us a forbearance or we could sell the house. How could be sell a house with toxic drywall to anyone else? So we were doomed to deal with this nightmare alone.

Thereafter, we spent five hours a day for two years trying to contact our Florida and NY representatives, hut to no avail. We begged and wrote letters to anyone that we could think of. This too was of no use. There was no one out there who gave us any hope. It was either paying all of our bills in a timely fashion or losing the credit it had taken us a lifetime to build. Not to mention the house was uninhabitable and corroding.

My husband, in the meantime, had sold his husiness in anticipation of retiring to Florida. He was left unemployed, which has gone on for the past 2.5 years. He has been forced to take menial jobs just to make minimum wage. I was forced to put my retirement off and am working double duty to try to make ends meet. This is the "gold years" for us. A time in of our lives when we were hoping to be able to rest and slow down, we have been forced to work harder than we ever imagined.

Our home in NY in June of 2009 was worth $200,000 more than it is worth today. My husband and I are unable to sell our NY home, unable to sell our Florida home (it is currently underwater financially)and we are living a meager and depressed existence awaiting a settlement or resolution of this horror. What should be the best years of our life have turned into the worst.

During the course of the past two-and-a-half years I have been shocked to learn that our government has refused to acknowledge the desperate straits that working, responsible, middle class families have been put in due to the corrosive product that was allowed into this country. How can it be that here, in the land of opportunity, when you pay your bills and abide by the laws of the land, that such a devastation can occur? How can there be no criminal repercussions? How can tens of thousands of families he hung out to dry after spending their life savings on what they believed to be their dream homes? How can children not be protected from illness and death due to toxic products being allowed into our country?

Perhaps we are naïve, but these American families, who are responsible, hard working people, were taught to believe their country and the values of right and wrong. These are the same values we teach our children. Many of our victims served in the armed forces to protect our country and the lives of its citizens. Yet the government has chosen to remain silent and let us lose everything we have spent our entire life working for. It just doesn't make any sense.

If we can provide you with any further information, do not hesitate to contact us.

December 8, 2011

To Whom It May Concern:

My family and I are Toxic Chinese Drywall Victims. We built a house with Knauf Drywall and our lives have been turned upside down ever since. The roller coaster of emotions almost tore our marriage apart. We lived there without knowing that we had it, and we all kept getting upper respiratory infections. It got to the point where we were all on antibiotics for something or the other all year. At one point,

they thought my son had Mono. They drew blood and took X-rays. That's the image I have in my mind the most through all this. My son with his arm begrudgingly out having blood taken out. Now, all I worry about are the long term health effects that our exposure will have on onr kids. My daughter is having stomach aches for no reason at all. My mind wanders down paths of their children being born with defects or maybe they're sterile. Nobody knows yet what will happen to them. As far as my wife and I are concerned, we have tingling in our hands and definite neurological issues.

As for the house, it is getting remediated. We were one of the lucky ones who hung in there and paid our mortgage and were fortunate to have Knauf and Banner Supply make things right. The stress has been immense. There are days when I feel like I could snap for the least little thing. Not only did the drywall take away our sanity, but it took away thousands of dollars in antiques, car alternators, air handlers, TV's, microwaves, hard drives, air purifiers, jewelry, and God knows what else. But, what about the people who did not have Knauf or any other help? What about the people who rented this houses and were exposed to the gases? What about the workers who installed the original product?

In a few months the "Drywall Family" will be moving back into our neighborhood. Maybe now people will let their kids come over to play with my kids. Maybe now they will come inside instead of standing out in the rain. Maybe now we can move on. Maybe . . . if the health issues go away. I know for a fact that there are going to be long term health issues with myself, and that my exposure to the gasses will shorten my life. That's no problem. But, what's really unsettling is that my grandkids who aren't even born yet, might be dealing with a birth defect because a builder didn't notify me, or that my kids will deal with the harsh realities of a government who did very little in the wake of their countries number one consumer product safety issue to hit dnring their watch.

December 8, 2011

On behalf of my family I am personally asking for your help. I am an Army Special Forces Lieutenant Colonel with over 20 years of service, and found out a year ago that our house has Chinese Drywall. As you are probably aware, tainted Chinese Drywall emits toxic fumes that erode metals in the home (copper wire) and has been linked to numerous health problems. Since we moved in the house in 2008 my family has had two hospitalizations for respiratory related issues that we attribute to these toxins. Since determining that our house was infected, my family has lived in a single room of the drywall house (most ventilated space), in a camper in the garage, and finally in a small house. To say that two mortgages (with related costs) is a huge financial drain is an understatement—I honestly don't know how long I can maintain this.

The emotional toll that accompanies this issue has dominated my family for the last year. Although we are signed up with the ongoing class action law suit in Lonisiana, and have contacted all of our State and local governmental officials, very little progress is being made overall. Local officials look at the problem as a Federal issue, and those in D.C. see it as a litigation and/or Chinese diplomatic issue. Therefore, almost nothing is being done to help those like my family who are having significant challenges. This issue has affected my career, in that I cannot realistically deploy without serious negative repercussions to my family's ability to maintain two houses, one of which requires constant maintenance dne to the toxins' effects on the appliances and internal wiring. I'm hoping that you are able to influence our Nation's leaders to introduce legislation, or influence our press corps to report on this issue to force our governmental to acknowledge that more should be done. You have always been supportive of our military, and have made a career of providing a "voice" to those like me who don't have one—thank you.

As a military member I've been conditioned to offer recommendations whenever I have a problem or complaint. Therefore, short-term our government should establish an immediate financial remedy, allowing us to fix and move back into our home. Mid-term, legislation should be established that includes the Chinese Drywall issue as part of a more encompassing package. Because thousands of homes are affected, and it will take 20–30 workers to fix each, the overall "throughput" back into our Nation's economy will be counted in the millions—both in dollars and jobs. By establishing a funding line now, immediate impacts will be felt at the local level, regionally and eventually throughout the Nation as a whole. Finally, long-term solutions must center on addressing China directly, by taking responsibility for the problem and for the forgiveness of a portion of U.S. debt to reimburse the "up front" costs to our government.

I sincerely thank you for taking the time to address this issue.

To Whom It May Concern:

Our drywall story begins back in February 2007. We built our home on land which was given to ns by [redacted] father. Within a little over a year of living in the new honse, onr A/C coils quit working. Within the 2.5 years we lived there we lost 3 sets of A/C coils and other things broke as well: computer, microwave, our doorbell, and an electric dog fence controller that was in a window sill. We had more items malfnnction, bnt those are the main ones that come to mind. As far as the A/C unit we assumed we had gotten a defective one, and even spoke with Penny-Worth Homes (onr bnilder) abont this issne. They said there was nothing they could do becanse onr warranty had expired. We had a lot of corrosion to the light fixtnres, and the mirrors began to bevel.

Immediately npon moving in, [redacted] began to develop migraine headaches daily. She had headaches in the past but never as frequently as in this home. We both had nose bleeds, and general fatigue. In August of 2007, we welcomed into the world our son, [redacted]. He was born with respiratory issnes and was in the NICU for 8 days. When he came home, [redacted] began a battle with chronic ear infections and rashes. Over and over we were at the pediatrician for the same thing. Later, when they began testing of the home and cut into the walls, he developed a nose bleed and from there he had CHRONIC bronchitis. It seems for the past couple of years he has been constantly battling some kind of respiratory issue. We've seen numerous doctors and the best explanation we can get is: "Healthy children can fight off these bacteria they normally are exposed to bnt since he lived in a toxic drywall home, it can be more difficult to recover quickly." Nebulizers and inhalers have become routine in onr home, even thongh we no longer live in the toxic house. I am convinced this all happened when they opened the walls and exposed us to the drywall dust.

[Redacted]'s mother had heard abont Chinese Drywall on the news and said, "Maybe you all have this issue." We laughed it off since things like that do not happen in Interlachen, Fl! Then in August of 2009, a friend posted online that she had not been around because they had to move due to Chinese Drywall. She posted a link to the state of Florida site that tells the signs and symptoms. Honestly, some of the pictures were so similar to our home! We were in shock. Immediately we hired an investigator who said that we had all the signs of the problem. . . . *Except* he couldn't find Chinese Drywall . . . only National Gypsum. Over the next several days we spend hours researching defective American drywall and learned of Brenda and George Brincku who had the same problem as us.

We have since had other experts including one of the leading environmental researchers from the University of Florida out to test the house. This particular expert said that our drywall was off gassing sulphur almost as much the Chinese cases. Iu fact, he said it was the worst American Drywall off gassing he had seen.

Through our attorney's investigation, it has been concluded that our National Gypsum wallboard has come from their Apollo Beach, FL plant. After the chemical testiug was completed it was determined that the most problematic board was National Gypsum's greenboard which was removed from the market in 2007.

Our lender is OneWest Bank and they are not working with us. We recently had to hire a foreclosure attoruey to help us deal with this issue. This whole ordeal has taken a big financial impact on us as well. Hiring the lawyers, and paying rent for the apartment, which is more expensive than our mortgage payment and smaller, is costly. Jim's credit has already taken a huge hit due to the missed payments, even though it was perfect before the drywall incident.

We now are in a lawsuit with the Brincku's and the Garcia's against National Gypsum. There is a big problem here, and we ueed answers. My child has suffered from this, and still talks about the drywall even though it's been almost two years since we left the house. He will be four in August, and he really misses his "blue house" and living uext door to his Minima (grandmother)! I am worried about future health risks. I need answers about my baby's health. I want to know this is not something that will haunt us for years to come. Please help with this issue!

August 16, 2011

President BARACK H. OBAMA,
Washington, DC.

RE: Chinese Drywall

Dear President Obama:

On August 3, 2010 we found out that we were among the thousands of victims with homes built using defective Chinese drywall. Construction on our 4,000 square foot home commenced in January 2006 and we moved in over the Labor Day weekend 2006. Between the day we moved in and August 3rd of last year we had to replace our HVAC coils three times and we had to replace two flat screen televisions. We thought we were just having an unusual run of bad luck. Little did we suspect that our bad luck wonld soon turn in to a nightmare. In July 2010 we received an unsolicited letter in the mail from a local attorney which included a copy of an invoice indicating that over 250 sheets of suspected Chinese drywall were delivered to our lot during construction. The letter advised us to have the home tested, which we did, confirming on August 3rd 2010 that we in fact did have defective Chinese drywall in the house.

We immediately joined the support group, Victims of Chinese Drywall.com, started meeting with our elected Representatives and Senators and quickly concluded that any help from our Government would be years, maybe decades down the road. We became part of a class action lawsuit against the Chinese manufacturer of the defective drywall and filed lawsuits against our bnilder and the snpplier of the drywall. We expect to win judgments against both U.S. companies but we also expect both to declare bankrnptcy in order to avoid compensating their victims. We have no idea how the litigation against the Chinese will turn out as they are seeking to avoid jnrisdiction in the United States. It also appears that the insurance industry has found the loopholes they need to avoid being part of the solution too. Another looming unanswered question was what kind of impact was this contaminated product having on our health? We could clearly see evidence of pitting and corrosion on our lamps and jewelry, what was happening to our lungs? We then decided that, like everything else in our lives, it would be up to us to remedy the unfortunate situation we fell victim to.

In January of this year we hired a contractor, packed up and moved out of the house, tore out everything inside, including drywall, electrical and plumbing fixtures leaving nothing but the studs. We let the gutted house air out for a month, had an environmental engineer certify that all defective drywall had been removed and the remains cleaned, and proceeded to rebuild. We moved back in at the end of May having depleted a significant portion of our life savings to cover all of the costs. The anxiety hanging over our heads was now behind us. We were one of the fortunate ones with the means to take care of ourselves and feel sorry for those victims who are still living with the nightmare. There is a saying that we are all two disasters away from financial ruin. Well we are now down to one. The one bright spot, and the only Government agency to offer any direct help to victims that we know of, was the City of Virginia Beach which reduced the real estate tax assessment on our home for a two year period.

Please give us an update as to where you are in addressing the following questions—Where are you and Secretary of State Clinton in pressuring the Chinese to compensate their victims in removing and replacing the defective Chinese drywall similar to the way the you made British Petroleum set up a "victim's trust fund" during last year's oil spill disaster?

How do we get this situation declared as a National Disaster so that Federal assistance dollars can be made available until the Chinese step up to meet their obligations?

Who is pressuring the Insurance industry to step up and share at least some of this burden?

When will CPSC Chairman Tenenbaum finish the CPSC analysis of this defective product and issue final remediation guidance?

When will Fannie Mae President Williams provide clear, uniform guidance to lenders and servicers for the victims of this defective product?

It is our understanding in talking with other victims that these questions have been pending since early 2009. We urgently seek your help in getting answers to the questions posed and look forward to your response as quickly as possible.

OUR CHINESE DRYWALL STORY

I worked part-time last year, after several years home with my son. My entire salary and more is being absorbed by a defective condo that I had to vacate but am still obligated to maintain. I worry *daily* about the financial future of my family and about the possibility of permanent health effects from having lived in a toxic condo for 4 years. I want to go back to school to train for a new career, but I can't afford to, and resent that unforeseen outside forces have so much control over my life and thoughts.

I respond to every plea from a charity (or my child's school) with "No," though I believe in their mission, and I tell them why. When my country aids victims of natural disasters, instead of feeling proud, I am embarrassed at my reaction—what about the loss of *my* home and the thousands of other families whose homes and futures have been ruined by another unforeseen disaster, Chinese Drywall and the nearly complete *absence of responsibility* by involved parties? Recent tornados have me thinking, "Gee, I wish a tornado or hurricane or fire would erase my Florida home, because THEN someone would care, and insurance would pay, and maybe even charitable organizations would help!"

I check the "Made in" tag on *every* item I contemplate purchasing, and walk away from the "Made in China" items whenever possible (I'll pay more for a similar item from elsewhere, or I don't need it). I throw away my son's Halloween candy that is Made in China—at least he won't *eat* their tainted products (my brother who works at Borden says they mix Chinese-made chemicals into some dairy products, so maybe I can't prevent it . . .). I successfully filled the goody bags from his last birthday party with only home-made items, but he receives bags at parties full of potentially toxic Chinese junk.

I once had a different attitude. I contributed thousands of dollars over the years to charities. I used to enjoy shopping. Now, it is a game of Keep Away from China! What happened? My home, built in 2006, contains Chinese Drywall and the concomitant corroding metal and vanishing value. My builder? Gone. My homeowner's insurance? Not their problem. My attorneys? They'll get nearly half of any settlement, if there even is a settlement, *unless* a U.S. judge can get the involved *foreign* companies not only to remediate the homes, but to cover all attorney and court costs—unlikely. Now, I wonder not only if my son will go to college, but if my husband and I will ever retire. We have both volunteered time and energy to help build Habitat for Humanity homes—but no one will help us re-build our home? My husband and I gladly put together a care package to send to an unknown family after Hurricane Katrina. Ironically, that hurricane indirectly caused my problem, by helping cause a domestic drywall shortage because of post-hurricane re-building. We volunteered at a post-tornado clean-up a few years ago; where are the post-drywall volunteers? The Wizard of Oz has nothing in his bag for *us*.

We didn't go blindly into the abyss. Our home inspector detected nothing amiss. If only he had been in on the communications between Banner Drywall Supply and Knauf Plasterboard Tianjin! *They were aware* that something was smelly in the drywall business, soon enough that we, and many other families, could have backed out of the purchase and been spared all this agony. But *they conspired in silence*, so we had no way of knowing about the Chinese Drywall problem at that time. We excitedly closed the deal, and got take-out food to eat on our new kitchen floor that evening. Hey, as long as the fine folks at Banner and Knauf and Taishau are making money, well that's what's really important!

What led us to this home? In 2006 my husband accepted a career opportunity which moved us to Lee County in Florida; this was to be a stop of 3–4 years before moving on to the next opportunity (his career benefits from his working in different locations). We sold our home in Tennessee, and logically desired to put *all* that money into a new home. We were fortunate enough to get a mortgage and purchase price within our means. (Nevertheless, we have watched our home value decline as the market has declined, and so started singing the blues!) After 6 months of renting, we moved ourselves and our healthy two-year hold into a new condominium in Avalon Preserve in Ft. Myers.

In under two years, I noticed bathroom fixtures corroding—drain covers in the tubs are pitted and flecked with black, mirrors have black spots of de-silvering, and lavatory faucets we had upgraded are pitted/flecked. I called the customer help line at Peerless to get advice on these faucets, hoping that they were still under warranty (no such luck). I was advised to clean them with vinegar and to keep them waxed; some of the black did come off when cleaned, but built up again quickly, despite the waxing. The other items? The builder must have put in the cheapest possible stuff, we figured. Also in under two years, we had to replace a smoke detector

and a ceiling fan due to malfunction; both of these were still under warranty. We also replaced a vacuum cleaner, and threw out a VCR and two "boom boxes."

In Dec. 2008, I read the first article in the *NewsPress* about families having defective drywall that required replacement of the AC condenser coils as often as several times in a year. Because we had no trouble with our AC, I didn't connect the dots to discover the source of my bathroom fixture troubles. Suspicion began when I noticed AC service trucks frequently parked in driveways on my street, and recalled that there had been talk of defective AC parts in units on our street since the first were occupied in summer 2006. When the unit below mine was inspected and found to have defective drywall, I called for AC service and learned that we, too, have defective drywall and a deteriorating AC coil. Two drywall inspections and the video we took during construction confirm the drywall source as China.

Our neighborhood has 104 condominium units in 26 buildings, all completed in 2006 and 2007. It is unclear at this time how many units have bad drywall. Our neighborhood clubhouse also has defective drywall. Discovery of defective drywall has been a factor in several foreclosures and sales well below expected market value. This in turn has stressed *all other owners*, because the neighborhood association is not receiving quarterly dues from owners of many affected units, resulting in higher dues for the rest. And the reputation of the neighborhood is tainted in the realty market.

In our building, two families that were renting on a yearly lease moved out upon discovery of defective drywall. We were the only owner-residents, and became solo residents of the building in 2009. We also experienced our first AC coil failure that year. We didn't feel we could afford to move out, but my husband began looking for a new position in earnest, and in Nov. 2010 we vacated our condo and moved away from Florida. We may have to pay for not only our own remediation (or just walk away from lots of equity), but also be forced to help pay for the clubhouse remediation.

Now, we pay a mortgage, electricity, and association dues for a nearly new condo we do not live in, can not rent out, and are afraid to sell at the price that defective drywall homes command. In addition, we are paying monthly rent and utilities where we are now living. While we are grateful to have a place to live, this rental house does not meet our needs but we can't afford better rental property or a second mortgage. Could my husband have delayed his job search until this situation is resolved? I suppose, but why should a circumstance like this be allowed to *permanently alter* our life course? And how long will it take to resolve in the courts? And what are the long-term health consequences? After reading the suspicions that several infant deaths at Ft. Bragg may be associated with defective drywall, it was clear that we had to put the health of our child before our financial fears.

Time will tell if it has affected our health. While living with defective drywall, I was diagnosed with irritable bowel syndrome and had my gall bladder removed. Recently I was diagnosed with thyroiditis, which is known to be affected by pollutants.

Please, please, please Mr. Obama and others—*acknowledge* that this disaster is on par with "natural" ones, help all affected families, and stop doing business with irresponsible, unrepentant China!

To Whom It May Concern:

June 21, 2002: How excited and proud I was that day when I moved into my first home. Just four months later, on October 22nd, the air conditioner stopped cooling. There was a leak, and when I called the builder, his A/C contractor added Freon.

That day was the beginning of my story—a different one because over the past **nine** years I have had numerous air conditioning technicians look at the A/C coil failures with curiosity. They could only speculate on what was causing black soot to appear on the copper. Each time, they charged the A/C unit with Freon until, ultimately, the coil had to be replaced. I have had **eleven** coils installed at my expense, spent thousands, including a very expensive coil coated with a substance made to sustain salt corrosion in the islands. It started leaking 8 months after installation. I told myself that was it—I am not putting in another coil, however, with the cost of putting in Freon once a week . . . I even bought my own tank! It only made sense to purchase yet another on Sept 3, 2011, knowing in 6 months it will need to be replaced. Every 6 months I listen for the last bit of Freon to run out from a corroded coil .

Unfortunately I will be long gone by then, having finally exhausted myself mentally and physically—fearful of what 9 years of stress has done to my body, let alone

wondering what the toxicity that has blackened 11 coils could've done, tarnished jewelry, electrical wiring corrodes. I have had to replace five projection lamps in my Samsung DLP TV. My 2006 Jeep, which I keep in the garage with the A/C air handler, has had mysterious electrical issues. I have been afraid to turn the gas on in winters, in fear those wires have become corroded as well. Eventually I can repair my credit (the only way for me to escape completely was to file bankruptcy), however, no repairing my health. I absolutely can't do this anymore.

My home was inspected by a certified inspector. He sent core drywall samples and pictures showing "Made in China" to Atlanta, confirming the problem originated from **contaminated Chinese Drywall.** My entire house was built with tainted drywall.

I feel my situation is atypical because I am not in a neighborhood with others that have the Chinese Drywall. My lot sat empty for a couple years before Kimball Hill Homes built on it. My builder filed Chapter 11 bankruptcy in 2008. It seems to be a no-win situation, so much for the American dream.

THE CHINESE DRYWALL TOXIC ENTOMBMENT—LET OUR STORY BE HEARD

On January 10, 2007 we bought and moved into our home at [redacted] home in Founder's Pointe. We were so excited to have finally bought our dream home that we had saved for all our lives in a great neighborhood. We met many friendly neighbors and thought we could uot be happier.

We noticed (even before purchasing our home) from the start that this house had a peculiar odor that was hard to describe. It was not pleasant but was a sharp, caustic chemical uuusual smell that is hard to describe as we had never smelled anything like this before. We believed when we questioned the bad smell, the Founder's Pointe East West realtor, Amy Geaphart, told us, "It is a new home smell." I mentioned that none of the other new homes we were looking at had this smell but she insisted, "That different builders use different glues and products that make each house smell different". She was aware evidently as she didn't disagree that the house smelled of something odd. We innocently believed her. We continued for 3 years to notice the smell that we referred started to refer to as the "Chip Smell" (builder's first name) since he was the builder. We could not understand but hoped it would eveutually go away.

Then the nightmare began to unfold.

I developed a chronic "choking" cough immediately that sent me to the doctor. This was somethiug I had uever had in my life. Finally after changing doctors three times, in attempt to find out the cause and treatment I was being treated for asthma. I continuously coughed each morning and night as if I was choking to death. I woke in the night gasping for breath on more than one occasion. My husband started having nose bleeds that he had never had in all the years together. Our HVAC went out after turning it on the first summer. The builder ([redacted] with ABT Custom Builders, formally known as Area Builders of Tidewater) replaced the parts. Then the upstairs HVAC unit went out within the same time frame. This happened continuously throughout each of the three summers until they had been replaced/repaired a total of 9 times. The last time our builder, [redacted] informed us we had nothing but Chinese Drywall in our home. We were devastated beyond words. Over the 3 years living there, we have lost 2 flat screens TV's ($3800.00), computers, cameras, heirloom silver tea set, jewelry, all lamps wiring are black and corroded. Since leaving this toxic chamber or horror, three years living in a house of 100 percent CDW was too long. After moving, we realized how bad everything smells (furniture, sofas, mattresses, rngs, comforters, pillows, blankets, curtains, clothing, linens, sheet, etc.). We've had to dispose of all the big items such as sofas and mattresses). Also, our appliances and electrical items will most likely not last as they were already coded (refrigerator, stove, microwave, dryer, washer, lamps all have coded cords). The casualty losses have been devastating not even including the CDW honse loss.

The smell was in our furniture and everything to include our coats and clothing. Our losses are overwhelming not to even mention our health!! Plus financial devastation of onr huge down payment and house loss entirely. The house is now valued by Isle of Wight at $1,000.00 dollars.

The nightmare continues like a black cloud following us. Aside from the financial losses and major health problems there is no words to describe the mental torture we've had to endnre. We lived in this homes for 3 years before this toxin was realized and we watched and felt our health deteriorate, never imagining that it was from toxic drywall used in their home. Our health, home, and finances are destroyed.

There is no help for the victims. We just had to leave with 247 sheets of this toxic drywall (entire honse—worst in the neighborhood). On our moving day, I had to go to the Chesapeake General Hospital Emergency Room for chest pains, heart and respiratory issues. It just got too bad and we had to go. We hope someone will help ns.

We are approaching retirement age and have lost our home—couldn't take it anymore. The depression and health problems were too much to bear after realizing no one is helping. Not the bnilder, bnilder's insnrance, home owner's insurance, installer, snpplier, and we are left with the Chinese manufacturing company that will not even respond to the court hearings. The class action law suit is nothing but an empty jndgement. It is like looking np a giant mountain to move and we are holding two little shovels all on our own. It is bigger than ns—we've given up. We've recently discovered after moving that all our lamp wiring is totally corroded and black (clear, gold tint cords show this evidence). Also, couches, mattresses, pine furniture, chairs with cushions and worst of all, my lifetime work of original oil paintings all ruined with toxic sulfur smell. What will happen to them eventually? We are afraid of the fire hazard from the corroded lamps now in our new home and all onr electrical items—refrigerator, stereo, DVR, phones, 3 flatscreen tv's, cameras, microwave, computers, etc. etc. The nightmare continues. More importantly we are very worried about long term health effects since living in this toxic chamber of horror entombment for 3 years before our builder told us we have 100 percent nothing but CDW. He or anyone has done nothing to help us. We cannot remediate as it would be too expensive and the house would never be value it shonld have been for resale. We have moved out and are done with this. The health effects remind me of Agent Orange. At first the medical authorities said Agent Orange had no major health risks and it turned out to be just the opposite. Also, radon—2nd leading cause of lung cancer. This is such a shame and tragedy for our entire country.

We have suffered enough emotionally, financially and mentally through this toxic tragedy and onr lives have been turned upside down and inside out. We would have been much better if a tornado, hurricane, flood or fire destroyed our house. As it is now, the house is worthless and has in addition destroyed our lives. At least tornado, hurricane, flood and fire victims are covered by home owner's insurance. Nothing is helping or covering our loss. My husband [redacted] served in the United States Marine Corp for 26 years and is a retired officer. He feels as though he has been left on the battleground to die.

"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing."—Albert Einstein

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To: Whom it may concern 12/8/2011

We have Chinese drywall

We built our home in 2006/2007 with Monopoly Builders, who are now baukrupt, and the 2 principals have fled to Mexico to be outside of our legal system. [Redacted] the owner, placed all funds in a trust for his wife and together they fled to Mexico protected by the trust in her name

I am 60 years old, and have had my same job for 33 years. [Redacted], my life partner, owns the home with me and we live here full time

We bought a lot in the Cape for appx $ 175,000, planning to build our dream retirement home.

We built the home and have just over $500,000, in cash tied into the home plus the $175,000 for the lot.

The home today is valued at, $61,370 by the Lee County Tax appraiser. That's value is based on the pool and the land . The House is of Zero value due to the Chinese Drywall

We have Pro-wall which was made by *Taishan* a company that's owned by the Chinese Government. They claim that the U.S. courts have no jurisdiction over them. They said Judge [redacted] rulings do not apply to them.

Our 2 AC units have had the coils replaced twice. Home Tec, a local service provider in SW Fl will no longer repair any AC damages under our 5 year home a maintenance agreement.

State Farm has now taken our insurance rates up from just over $3,000 per year to over $7,000 for the same coverage. They of course denied any liability on the deffective drywall issues.

I believe that the rate increase is their way of forcing ns to fine new coverage which would then release them of any liability should a court find that the Insurers are accountable

We have had 2 inspections of the home and both have confirmed the drywall

Our attorney believes that it came from Stock Building supply.

[Redacted]'s danghter and son in law live here in the area as well they used to often stay the weekends with us. They will no longer stay and visit us mnch less often as they are concerned about their 3 year olds exposnre to the contaminated drywall.

I see the government spending billions of dollars to other countries.

I have been a productive, taxpaying, law abiding citizen my entire adnlt life.

What now? How do I stay here and continne to live in fear of the effects of the drywall. I do not have the funds to walk away and buy another home. As it is I will need to work way past my retirement age.

My neighbors have asked what you are doing to fix the problem. Our rednced value of the infected home is reducing the average market value in the neighborhood. I guess that's the world we live in today.

Please do nse all measure possible to force the Chinese Government to come to the table in Jan in Hong Kong and make resolution so we can remediate and live onr lives in that American Dream we have worked so long and hard to achieve

Please do contact me with any questions that you may have.

What joy filled my heart in 2006 as I moved into my 'golden years' dream home that I had built with a snpposedly fine bnilder, WCI. I had fonnd the perfect place to live and enjoy golfing, traveling, fun stnff, and lots of volnnteer activities, so many wonderful things available here in Sun City Center!

Why was some of my 14 karat jewelry tnrning dark? Why couldn't I keep my silver polished as I had been doing all my married life? Why was I snddenly getting headaches which I had never, ever had before? Why were my eyes burning all the time?

Why within the warrantee period did my kitchen TV go bad? Happily it was replaced without any cost to me. But within the next two years my microwave went bad (a microwave???? I've had several bnilt-ins in honses I have owned and never a problem!!!) costing $145 to repair, labor only. Then my 32" and 42" TVs went bad. The 32" was $480 to repair and the 42" $535, but of interest: when my repair man called the Toshiba repair desk about the 42" one to get some help, they informed him that in all their years of business they had never, ever had this problem before with one of their sets!

I've had to replace the a/c coils ($878), the disposal ($205), the ever-hot water at the sink ($365), the ice and water dispensers of my refrigerator replaced ($538) and when the microwave went out the second time, I opted for a countertop model which is now showing signs of not working (three and six don't work). And I have now had to replace the 42" TV ($695) and my compnter ($469). My telephone set-np consists of a base-station with a hands-free set and three chargers each with a hands-free set. Two of those chargers no longer charge. I'll have to replace the system ($200 approximately). We're talking about lots of $$$$$$s here that I cannot afford! And when will it end.

My home owners insnrance company took my claim quite serionsly and employed an engineering firm to study my situation at a cost of $3500. Their report shows my home riddled with bad dry wall, but did not identify what causes the problem. I have the pictnres showing the corrosion of receptacles, mirrors, jewelry, air conditioning coils, etc.

I feel like I am sitting on all kinds of 'time bombs,' not knowing when the next one is going to explode and cost me additional fnnds I do not have, were certainly not in my tight budget, should not ever have had to spend, keeping me from traveling or do other things I should be able to do in my 'golden years,' but can't because my house is worthless, just ask any real estate agent. You can't put it on the market. No one would buy it.

All this through no fault of my own . . . . . I did not cause this, am in no way responsible for this. I don't know which way to turn. I cannot afford to fix my home, canuot afford to take out a low iuterest rate loan to fix it, cau barely get by on my present income. I planned very well to live very comfortable here and even when the economy turned sour, I have been able to manage, but to have this Chinese drywall (CDW) dumped on me is just too much. The strain, the pressure is just wearing me down . . . . . the stress is getting to me, and that is totally wrong.

Testing of the CDW is going on, but it is taking too long. We need answers now. We ueed to know what can be doue and who is going to do it and pay for it. Those in our neighborhood who have been told they don't have the problem want to know how they can assure buyers of their homes that they are free of CDW, so they are just about as involved in this problem as we are.

We get some feedback off and on from our elected officials, but it isn't enough. We need action qnickly in the form of pushing CPSC, FEMA, the Chinese government, and others harder to fix onr problem quickly.

This horrible stress is like a knife cutting into every minute of our lives, causing ns to bleed onr 'golden years' out in pain, instead of enjoying those years.

To Whom It May Concern:

While living in a home at [redacted] St Estero Florida our family experienced many serious health related issnes, inclnding hospitalization for pnenmonia, bronchitis and later pnlmonary embolism. I was 48 years old at the time and in good health. Once we moved from the rented home our health issues resolved and have not been present since. This entire sitnation almost took my life, I spent 18 days in intensive care in Naples Florida. I feel most likely others have lost their lives in this fight to prove that Chinese Drywall is harmful to your health. My story is long and painful, I wonld be happy to elaborate with the health issues if anyone is interested in listening.

MY CHINESE DRYWALL PROBLEM

This is my story abont a condo I pnrchased in the summer of 2009 from Fannie Mae. Fannie Mae short sold the unit to me with no disclosure that the unit had Chinese drywall. After some investigating I found out the unit and approximately 80 other nnits have Taishan drywall and were unlivable. To date I have not slept one day in the unit and it is financially running my life. This is the general timeline of the events that happen to me and my family.

- July 1st my wife went to Bayshore management office and spoke to Burt Kelly about reqnirements for the door handle. She also asked: "Is there *anything* we need to know before we start to move to the apartment". *He said "No"*. Nataliya, my wife, as well asked for the key to the pool. Then Burt said that we can not be moving in yet becanse they don't know who we are and they don't have a deed.
- May 2nd we mailed Bayshore management an application to be approved for the fnll time residence.
- Jnne 25 we were going to close but the letter from the board allowing me to move in was not in the packet and the lawyer for Bayshore management was negotiating hack fees. To date $11500 was owed to Bayshore for previous maintenance fees. The president of the Board of Directors had to sing off allowing me and my family to move in as my new full time residence.
- July 1st, 2009 was a second closing date and we did not close again, because Bayshore management's lawyer agreed on amount to be paid back but did not sing documents of onr approval. My wife went to [redacted], the manager of Bayshore Management, asking him for pool key. He refused to give key, questioned her abont fees.
- Jnly 3rd, 2009 Liberty title closed property throngh mail and compnter with Fannie May. I wired money to Liberty title about two weeks prior.
- July 4th and 5th three families moved out from our street. Out of 22 units next to mine only 5 units have people in them.
- Jnly 6th at 9:30 am I was outside with furnitnre deliveries and lady across a street and another neighbor told me I can't move small child into the unit because it was toxic. I said "It can not be, the inspector check it". I refused to believe that. I went upstairs with the neighbor and start taking out electrical outlets. The ground wires were black along with AC coil. Two appliances were missing. The empty neighborhood, moving ont neighbors. Now it all made sense.
- July 6th abont 10:30–11:30 I went to the satellite office of Bayshore Management to speak to [redacted]. I asked him if my unit has Chinese drywall. The receptionist had a colored chart on her desk that he looked at and said" Yes, your unit has a "mild case" of Chinese drywall. I wonld not bring my child in there." He also recommended not taking the furniture out from there, suggesting cross contamination.

When I asked why he did not tell us prior to closing he replied" I can be sned for blowing a sale. And you should have been told by the seller."

The chart that [redacted] was referring to was created by the president of the Board, Howard. He owns the Chinese Drywall screening company. The Bayshore Management paid him $2300 to do the screening of all apartments. Howard did the screening back in March and with the Board of Directors did the mailing to the residents telling them of the intensity of toxic drywall in each unit. This letter went out in April certified mail.

The letter for my unit went out and was singed by the previous owner that was foreclosed on 1.5 years previous by Traditions and the bank.

- July 10th at 11:30am I called the PSL Property Appraisers office. I told them about my problem and they said to contact [redacted], The president of the Board of condo association for help. Howard was in here month ago giving them a list of all the toxic properties in the Promenade. Their # is 772 337 5760. The list would let the Property Appraisers office deduct the amount of money to fix unit called "Right to Fix" from the Appraised value which in turn lowers your taxes.
- July 10th at 12:30 pm I called Fannie may at 972 773 4663. I told them that unit they sold us is toxic, and I and my family are homeless. They said they will do a "Page send" and someone will call me in two days.
- July 13th or 14th a rep called from Fannie Mae saying that it was my job to do Due Diligence to find out history of the unit. I told them that they did not disclose the findings of the unit knowing that last owner foreclosed because of it. The inspection service for the bank is First American Field service 1 800 873 4532. I called them and they said to call the bank if I have a problem.
- Fannie Mae 972 773 4663 in Texas. File #[redacted]. [Redacted] of, as partner of Adolno & Yoss LLP, Attorney in fact of Fannie Mae A/IC/A/Federal National Mortgage Association.
- Liberty Title Company of America inc. 10060 South Federal Hwy., Port Saint Lucie, FL, 34952 (772 335 7474). [Redacted] was handling the closing.
- Property Appraisers office PSL (772) 337 5760. "Cost to cure" adjust value paperwork was given to them by [redacted. for the Promenade at Tradition.
- Business Tax Office. A&A Inspections is inspector we hired to check the apartment for Chinese Drywall. I called them if inspector is licensed and insured. He is licensed in PSL. However, inspector is not a "trade" in Florida, therefore NO insurance is required. The owners name is [redacted] at [redacted], Port Saint Lucie, FL, 34983. The office number is (772) 336 0936, cell (772) 240 6219. He is in the phone hook as Licensed and Insured, but does not have insurance. I called him to put in claim. Hi said "NO insurance, sorry"?
- First American Field Services for Fannie Mae 1 800 873 4532, inspected the place for the bank prior to me huying it.
- Chinese Drywall Screening LLC, [redacted]. Office (772) 224 8660, cell (772) 201 0006.
- [Redacted] is a property manager for the Promenade section at Tradition for Bayshore Management. On site number (772) 345 0596. He told me that I do not own outside walls, walls touching another condo, ceiling and floors of my condo. However they did not disclose to us that "their" part of the condo I purchases is toxic. He is on the Board of Directors.

I am 76 years old; my wife is 72. Our retirement dream home has been devastated and our health has been severely compromised by the "silent, invisible hurricane of toxic Chinese drywall."

We retired to Florida ten years ago, initially living in a condo along the beach in the Clearwater area. In mid-August, 2004 we had our first experience of hurricanes. Clearwater residents were warned to prepare for a direct hit. As Hurricane Charley gathered strength, heading for the Gulf Coast, we evacuated our 16th floor condo . Reaching winds of 145 miles per hour, Charley turned towards land further south at Charlotte Harbor and Punta Gorda, inflicting unbelievable devastation on the residents there. While we were enormously relieved, we realized that every serious hurricane threat would require evacuation.

Withiu a mouth, Hurricane Jeaune, made its way uorthward through the center of the state. While we were not in the direct path of destruction, we were amazed at the ferocity of 70 to 80 mile per hour winds. At one point we heard two loud crashes as the winds swept loose pieces of tile from the roof of a neighboring condo,

smashing into the glass sliders of the condo immediately above and immediately below us, exposing the condo iuteriors to the wind and rain, inflicting extensive damage, ruining drapes, rugs and fnrniture. We were grateful for heing spared again!

As we reflected on the widely circulated projection of 10 years of more intense storm activity, we decided to move to a more secure inland location. We began to search out 55+ communities within driving distance of Tampa We visited the impressive WCI Sales Center and heard the story of how Del Webb selected the Sun City Center location because of its elevation, distance from the water and history of no hurricanes. We were fascinated with the gracious, outgoing, welcoming way of being of almost everyone we met and the incredible number of activities available. We closed on our new home on December 1, 2006. Not having children, this was to be our retirement dream home until age or decreased mobility required a move to a Continuing Care Facility offering Independent Living, Assisted Living & Nursing Care. Equity in our home was foundational to our plauning for later years. Today, our primary asset, a mortgage free home, has little or no value; it is basically unsellable"

Since moving into our home in December 2006, we have experienced many health problems. Early on, we experienced nose bleeds, eye irritation, constant runny nose, chest congestion and uncharacteristic susceptibility to the flu before we knew anything about toxic drywall. Two years ago, I was diagnosed with "early Parkinson's disease. In April of this year, my wife, [redacted], was diagnosed with breast cancer, followed by a lumpectomy, 18 weeks of chemotherapy and is currently completing 35 sessions of radiation. In August, breathing difficulties resulted in my being hospitalized with an eventual diagnosis of severe bronchitis; it took weeks to regain my strength.

In our very senior years, after a lifetime of careful and conservative financial planning, we find ourselves financially devastated by the unforeseeable and catastrophic storm of Chinese drywall. Since moving in, our health has been seriously compromised.

We are beginning to lose hope for any positive results from the complex and extended legal procedures. Our bnilder, WCI, declared bankruptcy; onr toxic drywall was manufactured by Taishan, a Chinese company. The anxiety about our situation is incredibly stressful.

Along with many of our friends and neighbors, we need the assistance of government, at local, state and national levels to help us recover from the effects of this unforeseeable catastrophe.

We hired Aranda Homes to build our Florida dream house. We moved in October 2006. From the start we had an unspecific smell in our home. We assumed it was a "new" house smell. We chalked it up to everything being brand "new". About 6 months later, as I was walking across the floors with heels, I could hear "hollow" sonnds. I became a little concerned. I called [redacted] at Dom Izzo Tile. Through Aranda we were connected to Dom Izzo Tile. (Aranda and Dom Izzo are partners.) It was there that we picked out our carpet, cabinets, knobs, granite, tile, etc. . . . [redacted] said there was nothing wrong. A couple of months later I was hearing much more hollow sounds. Some of the tiles began to crack. Pete had someone come to our house to fix the cracked tiles. As the repairman tried to chisel out the broken tile(s) a domino effect would take place. The surrounding tiles would "pop" up. Sometimes they cracked and could not be reused and sometimes they didn't. After numerous repair jobs we were running out of spare tiles. [Redacted] had the repairman drill holes sporadically in the tiles and fill it with some kind of adhesive. This did not work. The tiles tented. Again the repairman came. Finally, one man came who said the tiles just could not be replaced anymore. The tenting was in too many spots. In July 2008 we had all our tile floors pulled up and replaced. We could not get the same tiles anymore as they were discontinued. We were very unhappy since this was a major factor to ns building this home. The inside tiles flowed to the ontside lanai. When the slider and pocket doors were open it all looked like one. However, this was another problem as we later learned. Dom Izzo Tile used indoor tiles on onr ontside lanai. When we first moved in, we'd get out of the pool and the floor became very slippery when it was wet. We called [redacted] and he came over with something that he brushed on the tiles. They became very dull but it did fix the slipping problem for a period of time.

Approximately April 2009 we hired a handyman to install a ceiling fan in the master bathroom because it was just too hot in there. About a week after the installation he called us. He said he was tronbled abont the wiring when he changed the fixture. He told us the wires were very black for a new house and that they should

have been a copper color. We had recently heard about Chinese Drywall and the problems it was causing. His concerns set off an alarm in our heads. We began investigating. We took the switch plate covers off all the outlets and sure enough the wires were black. Our mirrors, faucets, and toilet valves were pitted. We originally thought this was due to the fact that we live on the canal and the water and humidity had something to do with it. We also thought maybe they were just cheap fixtures. But now everything was beginning to make sense. In May 2009 our air conditioning broke. Tnrned out the coils were all black. Needless to say we were in denial for a while even though the facts were all there. Eventnally, reality sunk in and we knew we had to do something. We had a professional home inspection done. We had too much money invested in this house. We bought the land and built during the housing boom. With the Chinese Drywall it was worth uothing! In June 2010 we began remediation with Shannon Holland of Abisso Cleanse. He and his company did an outstanding job.

As I write this I am thinking about my next project. The outside lanai tiles tented just last week. Does it never end?

I find it very disheartening that our government is turning its back on us. There are so many people that have become ill because of this contamination in our homes. We were fortunate enough to be able to remediate. There are many families who just can not afford to leave their homes. I feel so sad for the families that lost innocent babies at Fort Bragg. Coincidence? I don't believe it! Will it take 10 years like it did with September 11 to realize these sulfurs and chemicals are harmful? We even have to pay taxes on a house that is worth $0. I think if this happened in another country or to a group of well knowns it would have been dealt with already. However, we are just a group of middle class people, barely audible. When is the United States government going to take a stand and do something to help—Go after the companies that knowingly brought this crap into the our country!

To Whom It May Concern,

I have a historical house in Ft Lauderdale Florida. In 2005/2006 I put an addition on my home using chinese drywall. I have had numerous electrical problems, but mostly I have had eye and throat irritation. I was getting nose bleeds for no reason. I tried to get my bank to lower my interest rate to the then current rate. This would free up money to repair my home slowly. I am a building contractor. I was told I do not qualify since my income had dropped. I only qualify for the higher rate. For health reasons I moved out of the house and stopped making payments. I am still trying to keep my house, but I need help in fixing my house. IndyMac just says they are a debt collector and no one can answer my questions and they have never answered any of my suggestions of how to work out a modification so I can keep the house. Now since I do not live in the house I am not eligible for any help. The bank would rather sell the house in foreclosure for 50 percent of the loan value then work with me. Because our government has guaranteed, the loan so why work with me. Chinese lead base paint in baby toys, tainted dog food, drywall, etc, etc, no one in government cares.

In case my previous e-mail didn't go thru here it is again. My name is [redacted]. I closed on my townhouse on December 21st 2007. I found about the chinese drywall in October 2009 from my neighbor. I filed my lawsuit with Richard Serpe on December 18th 2009. Unfortunately, I cannot afford to move out for financial reasons. There is a rotten egg smell that comes from the sulfur emitted from the walls. My girlfriend's silver jewelry turned black. I have replaced about 4 or 5 evaporator coils. I have lost a lot of weight due to the toxic drywall. Thanks for your concern.

My husband and I had our house built by Aranda homes in 2006. Two years later we found out the house was built with toxic drywall. We do not have Knauf so we do not qualify for the Knauf remediation project and our builder took $300,000 of our money, gave us a defective and worthless product and walked away with absolutely no responsibility or accountability. At the age of 55 we had to take out a loan for $75,000 to fix our home. We will have to work until we are 80 to pay it off. We were forced to move out in July of this year due to my sinus problems and my husband's daily headaches. We were told that the United States government has all but abandoned us. They have left the homeowner to fight the Chinese government to try and get restitution. The United States government allowed this toxic drywall into our country and into our homes and now they want me to fight a foreign gov-

ernment to fix this mess. There have been a lot of Americans hurt by this and financially ruined. Thanks to the Chinese Government aud the United States government. I will never be able to retire. I will have to work until my dying day to pay off a loau I never should have had. I paid cash for my home in 2006 aud three years later I am paying for it a second time. It is certainly not fair that some people will get their homes restored at no out of pocket to themselves and yet others are left holding the bag. Where is the United States government? I have paid my taxes my entire life. Why isn't the government taking care of its people?

To Whom It May Concern:

We bought our CDW home (the dream retirement home) in 2006 and we had health problems beginning in 2008. It began with running eyes, followed by throat irritation, cough, headaches, tooth aches, hair loss, breathing problems, insomnia etc. The smell was so bad it gave us sevear head aches, to a point that we had to wear charcoal filter masks to breath in my home. We pretty much lived out side of our house except to sleep and go to the bathroom. We could not turn the air condition on it the Florida heat, could not turn the heater on in the winter time. It was a horrible time for us. Our builder declared bankruptcy so we did not have any recourse, we took money out of our retirement fund and had to rebuild it.

Your help in this matter would be appreciated.

I am writing to you to voice my frustration with the very slow progress and inconclusive results of testing being conducted by the Consumer Product Safety Commission on the harmful effects that the presence of Chinese drywall may be having on homeowners throughout Florida and the rest of the country.

I can't stress enough how serious this catastrophe is and the negative affect it is having on the thousands of homeowners victimized?

I live in a retirement community. On my street alone, 75 percent of the homes have defective drywall present. These are people who have put most of their life savings into what was to be their dream home and now are being saddled, through no fault of their own, with a situation where their homes are in some cases unlivable and in all cases unsalable. These homes present potentially dangerous health and fire hazards, and the homeowners still have no answers from government officials on what to do to fix the problem. The cost once determined to fix the problem will, in fact, seriously impact their retirement income and in some cases hankrupt these individnals.

The longer the testing process takes, the longer homeowners are put at risk of contracting serious health conditions and potential electrical fire hazards. This protracted testing timeline is also putting tremendous financial strain on affected homeowners.

Many have had to move out of their homes and are now paying rent as well as their mortgage. All homeowners affected by this disaster are faced with homes that are unsalable and are seeing the value of their homes reduced to zero. Many homeowners are being notified by their homeowner's insurance companies that there is no coverage for Chinese drywall damage and additionally their insurance coverage will be dropped and HO policies will not be renewed until the problem is remediated. Because there is still no conclusive word forthcoming from state or Federal agencies on the proper process for remediation, many homeowners will be left with their homes totally unprotected by insurance.

This is an untenable situation and requires immediate action on the part of local, State and Federal elected officials. We need help now. Without immediate help the problem will continue to worsen. The longer people are left exposed to the health, fire hazard, and financial stresses created by this catastrophic situation the more long term lasting horrific effects will be realized by affected homeowners.

We need your help and we need it now.

To Whom It May Concern,

My husband and I have owned a Chinese drywall home for almost five years now. We have not been able to live in this home for practically three years now. We are having to rent a home which has put an enormous financial strain on us on a retirement income. Our home was built by WCI (which filed bankruptcy but now is building new homes across the street from our home) with Taishan drywall and it has caused us many health issues. While living in the home I had weekly nose bleeds, gastroenterologist problems, insomnia, eye irritations, and enormous fatigue. After

undergoing an MRI. I had developed vertigo, the doctors found that I have a vestibular disorder and I have also lost hearing iu oue ear. My husband developed a rash and a cough that has not left him to this day. He has undergone many tests and the only diagnosis from the Doctor is Chinese Drywall Syndrome. I cannot express to you the life we have been living in this nightmare. This travesty has drained us not only financially but physically and emotionally. Someone has got to help all the victims of Chinese drywall! I don't know how much longer my husband and I will be able to continue renting. We still have a mortgage on the Chinese drywall home, we rent and pay all the utilities and we have had all kinds of medical bills. When is the government going to step up and help all the victims in this country? *Please Help*!

My name is [redacted]. My wife and I purchased a home in Parkland Golf and CC in Parkland, FL in 2007 from the now bankrupt WCI. Who by the way is now building again after reorganization. They built many homes containing CDW and sold homes even after knowing the product was defective. We both have been living in the home not wishing to default in the hopes of remediating. We both have experienced health related respiratory issues as well as headaches, etc. After 3 years of legal battling we are pursuing remediation with Knauf, one of the companies who supplied the drywall. If the government was smart they would pursue financial remuneration to help all the homeowners to fix their homes. This would put the entire construction industry to work on over 100K homes and solve much of the unemployment issues which in turn stimulates the economy.

TRAPPED IN BIRMINGHAM!! SOMEONE HELP!!

Built our new dream home in December 2005 completed in June 2006, and from the first week we moved in my new wife said there's a smell in this house? Call the builder!!! (Eddelman Builders, Birmingham) and get them to find this smell? Our new home was under warranty so the builder sent his people out to try and resolve the smell issue, everyone smelled the smell, but no resolution! After 6–7 months of complaining to the Builder I contracted with a Home inspector to come in to find the problem 4 hrs later the home inspector said he could not find the smell? "Everything looks ok" That will be $400 please, I paid the man and my wife kept complaining & we kept calling the builder. Our first air conditioner went out in April 2007 the builder had it repaired 6 more service calls that summer, both HVAC units were replaced! the paint in the bathrooms started streaking? called a paint contractor no answer! the builders people said that "we were taking to hot showers" More calls to the builder more people came out with no resolution, called the gas co. they smelled something too, but it wasn't Gas? and all the while my wife was having one medical issue after the other! No answers doctors bills, prescriptions, it seemed like everything was caving in all around us, and then the letter came (certified mail) from the builder that onr home was suspected of having been built with Chinese Drywall? Two teams (4–6 guys) each time came to the house and both confirmed that we had the defective product!! Now it all made since!!!! By March of 2010 my wife's medical problems had become so acute that her Doctors recommended that the house could be causing the health problems? and she should get out!! So in April 2010 we have leased another home, and now I have a Mortgage on the defective home that no one can live in, and a lease for a home that costs me and additional $$$$$ every month and a house that I can't sell and that has lost more than Half it value!! This is a nightmare we are trapped and there is no end in sight. We have found out that after Katrina Jan 05 that there was a shortage of Drywall in the U.S. and the National Home Builders Association was pntting pressure on the Feds to strike down the Drywall standards that were in effect and let the product from China to be allowed in the U.S. The PAC's got their way, and the drywall was allowed in more that 15M tons of the stuff!! And the suppliers/builders bought it up (@ a lower price that U.S. drywall) And passed it along as U.S. drywall at the higher price mind you!! And here we are left to hang in the wind!! The Birmingham Homebuilders Assoc. has recently stated in the Birmingham News that they were unaware of any homes in the Birmingham market that had been built with the defective product!!! Something is wrong with that statement (my builder alone has a reported 40+ homes with the product! How many more of them are in this market let alone the U.S.

Dear Senator,

We bought our brand new house in Year 2006, from beginning, we noticed some strange smell in our house, and we thought it is new house smell. After we lived in the house for about four months, my son started to have nose bleeding, I started to have muscle pain and my wife started to have headache.

I went to doctor/specialist many times and had CT scan, X-ray. The doctors couldn't find the problems with my kidney, foot and arm where I had pain.

After one year, our A/C units, TVs, compnters started to fail again and again. The A/C coil copper pipes corroded and became complete black color. We didn't know what caused the problems nntil one of mechanic told us we mnst have Chinese Drywall installed in our house when he replaced our A/C coil, and he run to attic and pulled out insulation material away and found out the drywall labeled "Ventnre Supply, Made in Taihe, China". He also gave us the layer phone number and let us call lawyer to join the Class lawsuit.

Then I started to find the information related to Chinese Drywall and check more evidences in our house. I found out our copper wire in switch blacked ont. Copper strings of baby grand piano became black color.

For safety and health reason, we decided to hire builder to repair our house this year. Because of Chinese drywall, City lowered our honse strnctnre value to $100. Bank of America declined our refinancing due to the value of the house. We have to lie to other bank and say remodeling house to get home eqnity loan (Fortunately, it doesn't require house appraisal). After builder spent over four months and we spent about $240,000, our house got repaired. Now we have to pay back the money to bank from our own pocket.

This is most painful experience in our life.

Thank you.

After the recent Senate Hearing on Chinese Drywall (CDW), I was told I needed to send correspondence to this e-mail address to tell about our CDW experience.

I would like to tell onr experience for the last (4) years in trying to have responsible parties listen and help us resolve onr problem. We were totally destroyed by the hurricanes Jennie and Frances, in the fall of 2004. The condo association and our insurance replaced all the damage caused by these hurricanes. The condo association contracted to replacing all of the drywall to a licensed contractor who replaced all of the drywall in the *entire* condo in 2005. We moved back in January of 2006. We hegan noticing a corrosion of the pipes and eletrical wiring. We also noticed a strong odor, which later we were told was sulfur dioxide. It was not livable unless we aired the *entire* apartment, which we did by leaving all our windows open all day and night nnless it rained. We were later informed that all of the drywall which was replaced was defective and that the contractor nor the condo association were responsible for the defective material. My insurance also refused to pay saying that they would not cover defective material. After hiring an attorney and threatening the condo association with a law suit they agreed to remove and replace only the defective drywall which accrued in June 9f 2011. All of the additional cost related to being damaged by the CDW and expense incurred to achieve this task was a financial burden imposed on the homeowner. When the task of removing and replacing all of the items required a toaal cost out of pocket to us was $15,000.00 and I do not believe that the homeowner should have been responsible for this disaster. The tainted drywall which came from the Chinese Manufacturers should have been inspected and approved by the U.S. Government, prior to being allowed to installed in onr homes. I don't believe that the financial responsibility should be imposed on innocent homeowners

Thank you for your cooperation.

Sir/Madam

I am not poor yet. I have a home which I bought with all my savings (So I don't have a mortgage in my retirement) This house has Chinese drywall. It is so bad I cannot live in the house. I cannot sell or walk away from the house. If I don't get relief I don't know what to do. I pray to GOD that government look into this matter quickly and do the right thing. Save me from poverty.

Both of my parents are immigrants who came to America with nickels in their pockets and huge dreams. My father [redacted] has built some of the most incredible skyscrapers that exist in New York City and its surrounding boroughs today. My

mom [redacted], amazing singer and actress who even made the original cuts for the Original West Side Story production, successfully raised two beautiful children tending to home as a domestic homemaker. My parents, as hard as they worked never lived in a new home. The built at [redacted] was not only a dream of mine, but that of my parents. My father was onsite of the building of the home daily and in contact with everyone who worked on the site. All the bells and whistles were added to this home from custom granite throughout, custom moldings, polished nickel, upgraded tiles inside and outside, indoor Jacuzzi bathtub, outdoor Jacuzzi with waterfall pool, upgraded center island in the kitchen, a 4th bedroom for a playroom for the children, a golf cart plug, and the most gorgeous palms, hedges, fruit trees, and flowers you could imagine. Lastly, we had someone come in and custom paint each bedroom, bathrooms, ivy on the arches, vineyard settings in our niche's . . . You name it. It's here.

With Joy we all celebrated the home closing and enjoyed every holiday and weekend family event. This home wasn't my home—it was our home—for family, cousins, friends, etc.

In April of 2007, I went through a very difficult divorce with my ex-husband who had physically abused me. Because I was only a school teacher, I could not afford the home myself, and my parents couldn't let this home leave us. It took many, many months for us to come to a solution. In the meantime, I had met and fell in love with my husband. Together with his family—His father [redacted] a Yale Graduate and [redacted] a Harvard Business and Smith graduate, all came to the conclusion and agreed with my parents to allow my parents to take out a mortgage on their free and paid home—at [redacted] in order to pay this home off here at [redacted]. My husband and I never miss a payment. My in-laws graciously added to our already incredible home with priceless pieces of fine art that has been in the Hattemer and Maynard families for generations.

Then, to find out about our drywall. Currently, we are still here in the house. Financially we're a mess. So far beyond in bills, creditors keep calling us. My husband and I have four jobs between us. We are both public school teachers—educating tomorrow's leaders—giving back to our community daily. I suffer constantly from Vertigo and nausea. My baby boy wheezes constantly in his chest. His immune system cannot clear his cold that has lasted for months. We now have moved his crib into our room—sleep with the doors open. My older daughter and son both have sleep issues. My elder son has bloody noses. We are totally despondant. We cannot leave, for we would foreclose on my parents home. My in-laws cannot help because the stock markets have depleted their finances.

We have done nothing wrong. My parents have done nothing wrong. I cannot get help from the banks. There is no equity in this home. A home that was worth 425,000 when I closed is now worth literally 5,000 according to the Lee County Property Appraiser.

We can't even gut this house ourselves—because we cannot afford renting a home that will fit five people.

We desperately need your help to give back 325,000 to a mortgage company who has no sympathy for our predicament. When I call to explain what's going on and seek help—They sell my parents loan to another mortgage company. I still have home insurance, but that is because I cannot tell them I have drywall. If I do, I lose my insurance. We have nothing. Please,

Please, Please help ns!

Natasha,

You do not have our testimony bnt I would like you to inclnde.

We learned of CDW like all other Floridians in early 2009.

Our home was built in 2001. We always wondered why our AC coils would fail approx every 9 months since we moved in. No one had answers so we blamed it in the "crappy brand" the builder gave ns. After replacing coils 8 times in 7 years, we had enough and spent $5000 on a BRAND NEW Trane AC unit (Oct 2008), learn of CDW in 2009 and have the coils fail before the unit was 1 year old and again replaced 2 months ago in our new unit.

I thought and only knew that AC coils were black until learning about CDW.

We know understand why my cat of 10 years, suddenly died of a brain tumor, after being in this home 5 years. Why she had unexplained allergies, and respiratory problems in this home and not in homes we lived in before 2001. Why my husbands burning in his mouth, ear pain, nose bleeds and scabs in his nose could not be explained. Why both our stomachs make terrible noise at any time and we have intestinal problems. Why both of us have been embarrassed in front of people

(work included) when our stomachs make various sounds. Why my dry eyes, hoarseness and ear ringing cannot be explained. I know understand why my silver jewelry that I keep in "tarnish free" chests and some pieces in sip lock bags inside the tarnish free chest, still tarnish. My we had to keep replacing bathroom fixtnres when they rusted within a few months.

Why I have had to throw away decorative items and jewelry because they had blacken beyond repair.

Our builder is not longer in business, my mortgage company stopped calling me once they understood I have CDW.

Our home has been inspected by Spider Man Mulholland, a toxicologist, the builders inspector, dry wall distributor inspector and I've lost count of who else has walked through my home to conclude we have CDW. The Consumer Safety Protection Commission has used this home as part of their environmental air quality test; having multiple units in my home for months.

Our home has 218 pieces of CDW supplied by Seacoast Supply, owned by L&W, a subsidiary of U.S. Gypsum. Seacoast Supply was caught in a lie and has admitted ownership for installing the 218 pieces in my home.

The attorney for Seacoast, David Connor, says they will remediate but has not carried through on any promise—mediation, remediation, protocol and client testimony. In fact, he asked us to provide our initial remediation estimate to assist him in suing their importer, Shamrock. All parties cry that they are the victim, but the only victim is the actual homeowner. We did nothing to contribute or create this situation.

We are frustrated with our local attorney who has included us in class action lawsuits, which we never wanted, nor agreed to but were told we are in them. We are encouraged not to opt ont. We are promised a lower fee to the attorney but he does not commit to the percentage. The replies I have received form senators and representatives are outright insulting. The CDW homeowner is the only one getting the short end of this and again, we have done nothing to contribute or deserve this.

We can only say that back in 2001 and earlier since I've heard that CDW has been in the U.S. since 1999, the construction industry only wanted to cut corners and save on their cost while creating a false promise of quality.

Our home was built to be our "retirement" home but it is worth nothing except the land it sits on and even with that, the real estate market is still at a low point. It has prevented us form moving on with our lives and careers.

No one can put a price to the horrible arguments my husband and I have had about our CDW, the attorneys, mediation, remediation and our future. No one can put a price on our future health despite considering ourselves to be pretty healthy. We are stuck paying on a mortgage for a home that is worthless and we prefer not to walk away and ruin our credit. We are the only ones being taken advantage of by those who are out to make money on this horrible situation.

Information contained within this report was obtained from an on-site visit with the homeowners at their house. Dnring this visit, photographs were taken and are attached as Attachment 1.

The homeowners consist of a 67-year-old female and a 62-year-old male. No one else has lived with them in the home. The homeowners had this house bnilt as their dream home. They added many "top of the line" extras when the house was built.

The builder began construction of the house on February 14, 2006. The homeowners moved into the house on February 16, 2007. The house was built by Bender Construction and Development Company, Inc, 3775 7th Avenue N.W., Naples, FL 34120. The homeowners have lived in this house full time since then, except for an occasional short time vacation.

The honse is a two-story Florida honse. It has 4,900 square feet that includes a three to four car garage area on the back of the house. There is a screened-in porch on the back of the house that runs the length of the back of the honse. On the front of the house, there are two screened-in patios on the first floor and two screened-in porches on the second floor. The house has five bedrooms, four bathrooms, a kitchen, a dining room, a family room, a laundry room and a large foyer. The bedrooms and the stairs are carpeted. The family room has hardwood floors and the kitchen, the laundry room and the bathrooms have tile floors.

The house is constructed of concrete block stucco on the first floor and a combination of wood frame and stucco on the second floor. The house has a metal roof. The homeowner related that the house has wood studs. All of the appliances were new Kitchen Aid appliances when the homeowners moved into the house. The house is equipped with all electric appliances. There is no natural gas or propane gas con-

nected to this house. The homeowners had an osmosis water filtering system and a Hepa air filtering system installed when the house was built.

The walls in the house were painted before the homeowners moved into their home. Since they have moved into the home, they have put up window treatments and pictures but have not done any other major changes to the house.

The homeowner related that when the house was in the middle of construction, the builder told him that they were having a problem obtaining drywall because of a shortage of drywall at the time. The builder eventually found drywall for sale at a lumber store and purchased the drywall used in this house from this lumber store. The male homeowner reme mbered when the drywall was delivered to the property because the delivery people left the drywall outside and he carried the drywall inside the house so it would not get wet. At the time, he noticed that the drywall had "CHINA" printed on the back of the drywall. The builder hired a crew to install the drywall.

The female homeowner began having nose bleeds occasionally after they moved into this house. She had never had nose bleeds before they lived in this house. Also, she has had allergies in the past but they have gotten progressively worse since they have lived in this house. Also, the female homeowner had been in good health prior to living in this house but in December of 2008, she had to go to the local emergency room because of high blood pressure. She was diagnosed with a blockage in her interior arteries and had to have two stents inserted in her arteries. The male homeowner was concerned that his wife's medical problems may have been because of the Chinese drywall that was installed in their home.

The male homeowner has had respiratory congestion which has gotten progressively worse since living in this house. He added that when he and his wife are on vacation, there is a noticeable difference because he does not have the respiratory congestion problems and his wife's allergies disappear.

The male homeowner related that he never noticed an exact time when these symptoms started but stated that since they have lived in this house, the symptoms have gotten progressively worse.

The homeowners have five mixed breed dogs. All of their dogs are healthy and do not appear to have any medical problems. The male homeowner stated that the dogs rarely come inside the house. They stay in the yard or on the porches.

The homeowners noticed a slight odor when they first moved into the house. They attributed the odor to a "new house" odor. Also, they have lived in Florida for many years and are used to a slight sulfur odor, so they were not concerned about it.

This house has two air conditioning systems . One is a three ton Carrier unit that is for the upstairs part of the house and the other one is a two ton Carrier unit that is for the downstairs part of the house. In February 2008, the three-ton air conditioner stopped working. The air conditioning technician who came to determine the problem with the air conditioner said the evaporator coils had to be replaced because they had corroded. The homeowners had the evaporator coils replaced. In June 2009, the homeowners began to have problems with this same air conditioning unit. The technician came out again and said the coils had to be replaced again because they were corroded. The coils were replaced in July 2009 (Attachment 1, Photos 2–5).

The smaller air conditioning unit for the downstairs is not used as frequently as the larger unit that is for the upstairs part of the house. However, the coils in the smaller air conditioning unit had to be replaced in March 2008 because the coils had corroded and the air conditioning unit would not work (Attachment 1, Photo 6). Both of the air conditioning units are top of the line Carrier units.

In the summer of 2007, the new electric Kitchen Air range stopped working altogether. The technician who came out to repair it said that the computer chip in the range stopped working and had to be replaced. The new refrigerator that they purchased for the honse when they had the house built also stopped working. The technician who came out to repair the refrigerator said that the relay inside the refrigerator failed and it needed a new one. The female homeowner related that the motherboard inside her sewing machine stopped working and she had to have it replaced. Also, since they have lived in this home, she has two IPODS stop working. She has returned them each time to the store to receive a new one. The homeowners' stereo equipment has a scratching sound on it when they try to use it. They believe the drywall is emitting sulfur gases that affect the electronics in their appliances and air conditioning nnits.

The female homeowner had several antique pieces of silver that had been passed down to her from her grandmother. Since they have lived in this house, the silver has turned black. She stated she had these pieces for many years and they have never turned black until they moved into this house (Attachment 1, Photos 10–12).

The male homeowner pointed out the copper pipes behind the washing machine (Attachment 1, Photo 9). These pipes are copper and have turned black. Also, he pointed out the copper pipe that runs outside of the air conditioning units. The pipe has turned completely black. The homeowner took several of the outlets apart and each one showed black corrosion on the ground wires (Attachment 1, Photos 7–8).

The male homeowner is an experienced electrician and believes this is a major safety issue because of the wires within the house. He stated that the appliances and light fixtures and many other electrical units are always plugged into the outlets whether they are operating or not. When the wires are corroded, it may cause a fire.

The homeowner first learned of Chinese drywall problems when his air conditioning unit coils had to be replaced the second time . He had heard of problems with outside units that could be affected by a sprinkler system that would be hitting the unit everyday because the water may have some sulfur content. But he could not understand how the coils in the units that are located in a closet inside their home would corrode because they would never have been exposed to any type of sulfur. The homeowner researched this problem on the computer and heard about the Chinese drywall problems in the news. He remembered the shipment of drywall that was delivered to his home site when they were building the house and remembered that it was from China. The homeowner pointed out where the drywall in the attic had printing on it that reads "KNAUF CHINA TIANJAN" (Attachment 1, Photo 13). After he learned about the problems with the Chinese drywall on the news, he realized he and his wife were having the same problems with their drywall which came from China.

The homeowners contacted an attorney and registered with him to represent them in a class action suit for the people affected by the Chinese drywall. Their attorney contacted their builder, Bender Construction who sent out an inspector. Their inspector examined the entire house. He told the homeowners that he could detect a sulfur odor in the house. The builder's attorney contacted the supplier of the Chinese drywall, the lumber Company. The lumber Company also sent out an inspector to examine their house. He was also able to detect the sulfur odor in the house. He examined the entire house and saw the printing on the drywall in the attic. So far, the homeowners have not received any of the reports from the two inspectors.

The homeowners are concerned about the effects the Chinese drywall is having on their health. This is their dream home and do not want to move out. They hope there is some remediation from either the builder or the supplier so they can continue to live in their home.

The male homeowner added that his neighbors (his son-in-law and step-daughter) had their home built at the same time by the same builder. They also have the Chinese drywall in their home. Their home was built in 2006 and they moved into their new home in approximately November 2006. They have two young sons, a 9- year-old and a 5-year-old. Both of their sons have developed nose bleeds since they have lived in that house. They never had any nose bleeds before living in the house. Also, their allergies have intensified since living there. The homeowner was not sure if they have had any major problems with their air conditioning units but did recall that they had to have their dishwasher repaired since they have lived in the house.

Product Identification

The manufacturer of the drywall in the house was shown as KNAUF CHINA TIANJAN. According to the homeowner, the drywall was purchased from a store called 84 Lumber.

Photo 1—View of the homeowner's home

Photo 2—View of the three-ton air conditioning unit that is used for the upstairs of the house

Photo 3—View of the copper wire that runs alongside the air conditioning unit that has turned black

Photo 4—Close up view of the copper wire that runs alongside the air conditioning unit where it has turned black

Photo 5—Close up view of the maintenance record attached to the larger air conditioning unit showing the air conditioning coils have been replaced on February 27, 2008 and again on July 3, 2009

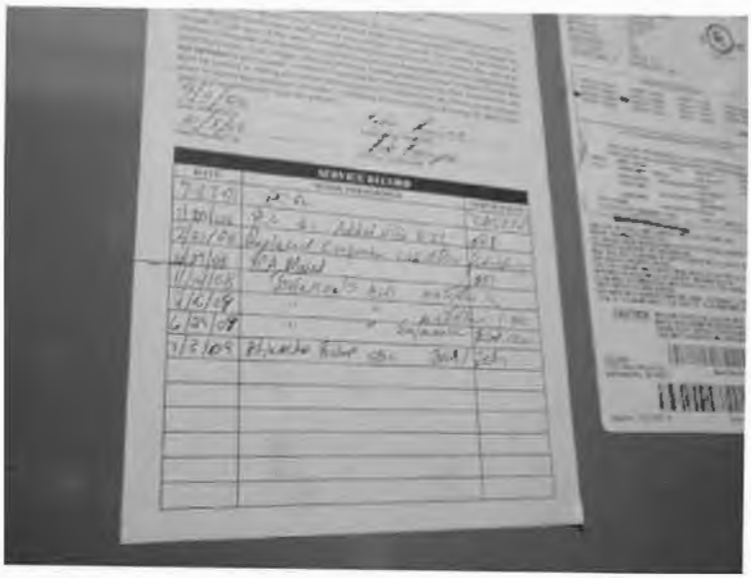

Photo 6—Close up view of the maintenance record attached to the smaller air conditioning unit showing the coils had to be replaced on March 3, 2008

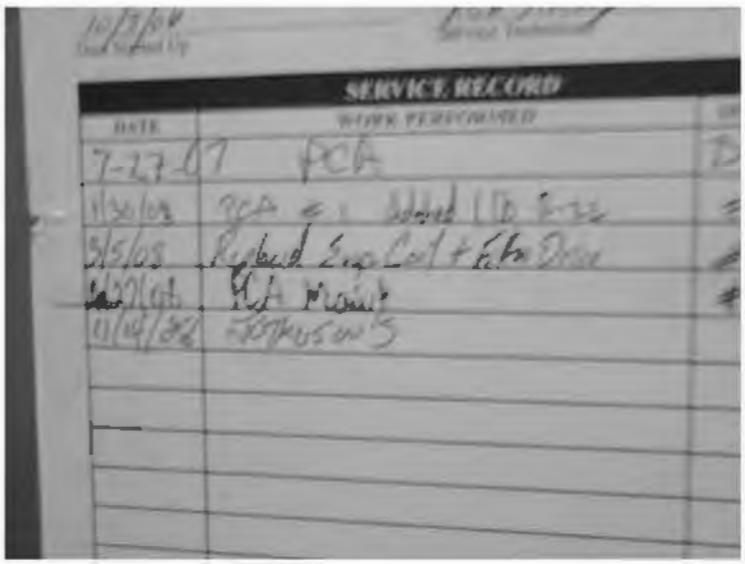

Photo 7—View of the ground wire that corroded and turned black in one of the outlets

Photo 8—View of another outlet where the ground wire has corroded and turned black

Photo 9—View of copper pipes behind the washing machine in the laundry that have corroded and turned black

Photo 10—View of some antique silver that has signs of blackening and pitting marks

Photo 11—View of an antique gravy bowl that has signs of blackening and pitting marks

Photo 12—View of a silver plated serving spool that has signs of blackening and pitting marks

Photo 13—View of drywall in the attic where the drywall had printing that reads "KNAUF CHINA TIANJAN".

S. HRG. 112–705

ARE CONSUMERS ADEQUATELY PROTECTED FROM FLAMMABILITY OF UPHOLSTERED FURNITURE? HEARING ON THE EFFECTIVENESS OF FURNITURE FLAMMABILITY STANDARDS AND FLAME-RETARDANT CHEMICALS

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

SPECIAL HEARING

JULY 17, 2012—WASHINGTON, DC

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ARE CONSUMERS ADEQUATELY PROTECTED FROM FLAMMABILITY OF UPHOLSTERED FURNITURE? HEARING ON THE EFFECTIVENESS OF FURNITURE FLAMMABILITY STANDARDS AND FLAME-RETARDANT CHEMICALS

TUESDAY, JULY 17, 2012

U.S. SENATE,
SUBCOMMITTEE ON FINANCIAL SERVICES
AND GENERAL GOVERNMENT,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 2:30 p.m., in room SD–138, Dirksen Senate Office Building, Hon. Richard J. Durbin (chairman) presiding.

Present: Senators Durbin, Lautenberg, and Moran.

OPENING STATEMENT OF SENATOR RICHARD J. DURBIN

Senator DURBIN. Good afternoon. Today, I am pleased to convene this hearing of the Appropriations Subcommittee on Financial Services and General Government to discuss standards for the flammability of residential upholstered furniture and the use of flame-retardant chemicals, and whether efforts to date are adequately protecting American consumers.

I am going to be joined later by Senator Jerry Moran, my ranking member, and possibly Senator Frank R. Lautenberg, and other colleagues. I thank them all for their interest in this issue.

I welcome the Chairman of the Consumer Product Safety Commission (CPSC), Inez M. Tenenbaum, and the acting Assistant Administrator of the Environmental Protection Agency's (EPA) Office of Chemical Safety and Pollution Prevention, James J. Jones. I also welcome our second panel of witnesses we'll hear from a little later.

Why are we holding this hearing? According to national fire loss estimates for 2005 to 2009, upholstered furniture was the first household item to ignite in an average of 7,040 reported home structure fires every year. These fires caused an estimated annual average of 500 deaths, 890 injuries, and $442 million in direct property damage.

Once upholstered furniture is ignited, it burns extremely rapidly, because of the fuel in the upholstery filling materials. Lighted tobacco products or smoking materials remain the leading cause of

upholstered furniture fires and associated losses. One out of every six such fires started by smoking materials resulted in death.

In May, the Chicago Tribune published a four-part series on flame-retardant chemicals. It was an eye-opener. It explored the role of the major tobacco companies, which sought to shift focus away from cigarettes as the cause of fire deaths, and chemical companies, which wanted to preserve a market for their products.

Tobacco industry efforts with State fire marshals steered policymakers away from developing a fire-safe cigarette and instead toward rules requiring furniture flammability standards. That, in turn, led to the widespread use of flame-retardant chemicals.

The Chicago Tribune articles also highlighted research showing that flame-retardant chemicals escape from household products and settle in dust, causing infants and toddlers to have higher levels of these chemicals in their bodies than their parents. American newborns have the highest recorded concentration of flame-retardant chemicals than any infants in any other country.

This led Graco, one the Nation's largest children's product manufacturers, to ban the use of some toxic flame retardants in their products. Graco has recently announced that they will begin eliminating four of the most toxic flame-retardant chemicals from their products, including car seats and strollers.

The list of banned chemicals includes Firemaster 550, a chemical mixture that the current research and even the Tribune articles have shown to accumulate in humans and the environment.

The chemical industry points to research justifying the use of fire retardants. The Chicago Tribune exposes that research many times is distorted and based on manipulated data.

Finally, the series discusses the toxicity of flame retardants and the difficulties that EPA faces in restricting the use of flame-retardant chemicals in furniture.

What we will learn today is a little more about fires, furniture, fire-retardant chemicals, and, maybe as important, the role of the Government when it comes to these issues.

On our first panel, we are going to hear from CPSC, an obvious first stop in this conversation. They have been working, as you will find, for many years on a proposed standard for the flammability of upholstered furniture.

Upholstered furniture that catches fire is a leading cause of death in residential fires from consumer products. In recent years, CPSC has been working on a standard that would require upholstery to resist smoldering cigarettes, which are by far the leading cause of furniture fires.

To complete an upholstered furniture flammability standard, CPSC must comply with the Flammable Fabrics Act passed by the Congress, which sets the standards for testing. They are wide-ranging and lengthy, the standards.

As part of them, CPSC conducted testing to establish the effectiveness of different strategies on reducing furniture flammability.

I expect that CPSC will provide an update on this research, the status of the rulemaking, the remaining steps to finalize a rule, and any outstanding issues.

Also on the first panel, we will hear from EPA. They regulate the manufacture and use of flame-retardant chemicals under the Toxic

Substances Control Act (TSCA). Recent scientific research has demonstrated these chemicals accumulate in the environment and can cause cancer, neurological disorders, and impaired reproduction.

During this hearing, we hope to learn more about the public health and environmental effects of flame-retardant chemicals used in furniture. Additionally, we hope to hear what authority TSCA gives EPA to regulate these potentially dangerous chemicals and any recent actions taken by EPA with respect to them.

With the next panel we are going to hear from is an Illinois-based company well known to most, Underwriters Laboratories (UL). It's an independent, not-for-profit standards developer that tests products and certifies those that are consistent with public safety and those that are not.

Over time, the company has built a brand that reassures consumers the products they are purchasing are safe. In 2008, UL initiated testing on different methods of reducing upholstered furniture flammability and reducing the fire growth rate of upholstered furniture.

Some of their findings will likely have us taking a second look at the furniture we have in our homes. They are here today to discuss the results of their testing on furniture flammability.

We are going to also hear from the American Home Furnishings Alliance, representing the manufacturers and importers of residential furniture that include upholstered furniture. Much like CPSC, the manufacturers have been involved in developing upholstered furniture flammability standards. They will share their insights regarding current standards and ongoing work with CPSC to determine a new standard.

Finally, we are going to hear from a veteran firefighter and fire-safety expert to discuss the changes that have taken place in America affecting home fire safety and the factors leading to home fires. He will also tell us about the human cost associated with fires and very simple steps, including creating effective flammability standards, that we can take to help reduce this risk for consumers and firefighters alike.

After reading the Chicago Tribune articles, I was struck by several disturbing things. First, the intentional distortion and manipulation of research in order to deceive Americans into thinking that the use of flame-retardant chemicals in furniture provided additional protection in home fires even though the data do not support the claim; the extensive lobbying and significant funding spent by chemical companies and the tobacco industry to ensure that flame-retardant chemicals were used in furniture and to suppress opposition to their inclusion; and the growing awareness that flame-retardant chemicals in furniture may not add any benefit, and, in many cases, may cause harm to public health and the environment.

Generations of Americans have been asked to tolerate what may be an unsafe level of exposure to potentially toxic chemicals in their furniture in the name of fire safety. If the scientific evidence suggests this solution is not justified, we must move quickly to update our upholstered furniture flammability standards and limit our exposure to these dangerous chemicals.

Today, we'll attempt to gain a clear understanding of whether consumers are protected from flammability furniture, a leading

cause of house fires. We'll explore what's been happening with residential upholstered furniture flammability standards and the effectiveness of these chemicals.

We'll start by exploring CPSC's process for finalizing a standard, and then move to EPA for their statements on the actual chemicals involved.

PREPARED STATEMENT

I'd like to say, as a matter of record, we have a vote scheduled at 3 o'clock, which will probably go until about 3:15 or 3:20 p.m., so my ranking member, Senator Moran, and I will try to accommodate that vote and be sure that we make it and not interrupt this hearing indefinitely.

[The statement follows:]

PREPARED STATEMENT OF SENATOR RICHARD J. DURBIN

Good afternoon. Today, I am pleased to convene this hearing of the Appropriations Subcommittee on Financial Services and General Government to discuss standards for the flammability of residential upholstered furniture and the nse of flame-retardant chemicals, and whether efforts to date are adequately protecting consumers and the public.

I welcome Senator Jerry Moran, the ranking member, Senator Frank R. Lautenberg, and possibly other colleagues are joining me today. I welcome the Chairman of the Consumer Product Safety Commission (CPSC) Inez M. Tenenbaum, and the Acting Assistant Administrator of the Environmental Protection Agency's (EPA) Office of Chemical Safety and Pollution Prevention, James J. Jones. I also welcome our second panel of witnesses who we will hear from a bit later.

According to national fire loss estimates for 2005–2009, upholstered fnrniture was the first household item to ignite in an average of 7,040 reported home strnctnre fires per year. These fires caused an estimated annual average of 500 deaths, 890 injuries, and $442 million in direct property damage. Once upholstered furniture is ignited, it burns extremely rapid because of the fuel in the upholstery filling materials. Lighted tobacco products (or smoking materials) remain the leading cause of upholstered furniture fires and associated losses. One out of every six such fires started by smoking materials resulted in death.

In May, the Chicago Tribune published a four-part series on flame-retardant chemicals. It explored the role of Big Tobacco, which sought to shift focus away from cigarettes as the cause of fire deaths; and chemical companies, which wanted to preserve a lucrative market for their products. The tobacco industry's efforts with State fire marshals steered policymakers away from developing a fire-safe cigarette standard and instead toward rules requiring furniture flammability standards. That, in turn, led to the widespread use of flame-retardant chemicals.

In addition, the Chicago Tribune articles highlight research showing that flame-retardant chemicals escape from household products and settle in dust, causing infants and toddlers to have higher levels of these chemicals in their bodies than their parents. American newborns have the highest recorded concentrations of flame retardants than infants from any other country.

This has led Graco—one of the Nation's largest children's product manufacturers—to ban the use of some toxic flame retardants in their products. Graco has recently announced that they will begin eliminating four of the most toxic flame-retardant chemicals from their products, which include car seats and strollers. The list of banned chemicals includes Firemaster 550, a chemical mixture that the current research and Chicago Tribune articles have shown to accumulate in humans and the environment.

The chemical industry points to research justifying the use of fire retardants. The Tribune exposes that research as distorted and based on manipulated data. Finally, the series discusses the toxicity of flame retardants and the difficulties that EPA faces in restricting the use of flame-retardant chemicals in furniture.

ROLES OF WITNESSES

Today, on our first panel, we will hear from CPSC, which has been working on a proposed standard for the flammability of upholstered furniture.

Upholstered furniture that catches fire is a leading cause of death in residential fires from consumer products. In recent years, CPSC has been working on a standard that would require upholstery to resist smoldering cigarettes, which are by far the leading cause of furniture fires.

To complete an upholstered furniture flammability standard, CPSC must comply with Flammable Fabrics Act requirements, which are wide-ranging and lengthy. As part of the standards process, CPSC conducted testing to establish the effectiveness of different strategies on reducing flammability. I expect that CPSC will provide an update on their research, the status of the rulemaking, the remaining steps to finalizing the rule, and any outstanding issues yet to be resolved.

Also on the first panel, we will hear from EPA, which regulates the manufacture and use of flame-retardant chemicals under the Toxic Substances Control Act (TSCA). Recent scientific research has demonstrated that these chemicals accumulate in the environment and that they can cause cancer, neurological disorders, and impaired reproduction.

During this hearing, we hope to learn more about the public health and environmental effects of flame-retardant chemicals used in furniture filling. Additionally, we hope to hear what authority TSCA gives EPA to regulate these potentially dangerous chemicals and any recent actions EPA has taken with respect to flame-retardant chemicals.

On our second panel, we will hear from Illinois-based Underwriters Laboratories (UL), an independent, not-for-profit standards developer and product testing and certification organizer dedicated to public safety. Over time, the company has built a brand that reassures consumers that the products they are purchasing are safe. In 2008, UL initiated testing on different methods of reducing upholstered furniture flammability and reducing the fire growth rate of upholstered furniture. Some of their findings will likely have us all taking a second look at the furniture we have in our homes. They are here today to discuss the results of their testing on furniture flammability.

We will also hear from the American Home Furnishings Alliance, which represents manufacturers and importers of residential furnishings that include upholstered furniture. Much like CPSC, the manufacturers have been involved in developing upholstered furniture flammability standards. They will share their insights regarding current standards and their ongoing work with CPSC to develop a new nationwide furniture flammability standard.

Finally, we will hear from a veteran firefighter and fire-safety expert. He will discuss the changes that have taken place affecting home fire safety and factors leading to home fires. He will also tell us about the human cost associated with fires and the simple steps—including creating effective flammability standards—that we can take to help reduce this risk for consumers and the firefighters responding to these hazards.

SUMMARY OF THE ISSUES

After reading the Chicago Tribune articles, I was struck by several disturbing aspects such as:

—the intentional distortion and manipulation of research in order to deceive Americans into thinking that the use of flame-retardant chemicals in furniture provided additional protection in home fires even though the data do not support this claim;

—the extensive lobbying and significant funding spent by chemical companies and the tobacco industry to ensure that flame-retardant chemicals were used in furniture and to suppress any opposition to their inclusion in furniture;

—the growing awareness that flame-retardant chemicals in furniture filling may not add any benefit, and may, in fact, cause harm to public health and the environment.

Generations of Americans have been asked to tolerate what may be an unsafe level of exposure to potentially toxic chemicals in their furniture in the name of fire safety. If the scientific evidence suggests this solution is not justified, we must move quickly to update our upholstered furniture flammability standards and help limit exposure to these chemicals.

Today, we'll attempt to gain a clear understanding of whether consumers are adequately protected from flammability of upholstered furniture—a leading cause of house fires. We'll explore what's been happening with residential upholstered furniture flammability standards and the effectiveness of flame-retardant chemicals.

We'll begin by exploring the CPSC process for finalizing such a standard. And then, we'll examine whether EPA has the necessary authority to ensure the safety of flame-retardant chemicals prior to their entry into the marketplace.

Senator DURBIN. At this point, I'd like to turn over the floor to my ranking member, Senator Jerry Moran.

STATEMENT OF SENATOR JERRY MORAN

Senator MORAN. Mr. Chairman, thank you. I thank the witnesses for appearing before our subcommittee today. And I look forward to their testimony.

As you indicated, there have been a series of articles written in the Chicago Tribune, which have elevated interest in flame-retardant chemicals. These chemicals are found in products we encounter throughout daily life—cars, automobiles, plastics, electronics and other household goods, and upholstered furniture, which is the primary focus of your hearing today.

Flame retardants are one of many safety tools that we have at our disposal, such as sprinklers and smoke detectors. And, collectively, these tools have made a difference in reducing fire injuries and death, even as fuel loads and potentially flammable materials have increased dramatically in households and office buildings.

This has been acknowledged by a variety of manufacturing sectors, which rely upon flame retardants to help meet Government-mandated or voluntary flammability standards for products and component parts.

This is a complex issue involving State standards, Federal standards, and industry standards, which, from electronics to construction to automotive and also home furnishing products, these technical standards are often developed through a consensus approach and there is often careful thought given to ensuring the standards do not favor one method of compliance over another, but focus on meeting a fire-safety test.

In some instances, manufacturers voluntarily decide to meet a particular product fire-safety standard, while in other cases product components must meet fire-safety tests as a regulatory prerequisite for sale in a market like California's standard 117 for furniture sales.

We must let the safety experts, like CPSC and EPA, work within their regulatory framework to address the safety of these products. Changes to the authorizing statutes at these agencies should be made by the Senate Commerce Committee, which has jurisdiction over the Consumer Product Safety Act and the Flammable Fabrics Act, and the Senate Environment and Public Works Committee, which has jurisdiction over TSCA. And that Committee will have a hearing on the reauthorization of that act with EPA on July 24, later this month.

PREPARED STATEMENT

I'd like to ask unanimous consent a report from Dr. Matt Blais, the director of Fire Technology Department at Southwest Research Institution, be included in the record.

And I look forward to the testimony of the witnesses.

Senator DURBIN. Without objection, that statement will be included.

[The statement follow:]

THE UTILITY OF CALIFORNIA TECHNICAL BULLETIN 117: DOES THE REGULATION ADD VALUE?

The implementation of California Technical Bulletiu 117 (CA TB 117) set miuimum performance standards for furnishings in incipient fire situations. The intent was to protect life and property from fires initiated by small sources such as matches, cigarettes, lighters, and candles. The standard was not intended to prevent ignition of a furnishing in a large fire where it would contribute to the fuel load of a room but not be the point of initiation.

Urethane foam-filled furnishings have the potential for contributing tremendous energy to a fire and when not protected with flame retardants can lead to rapid transition from incipient fire to a free-burning condition. The time to reach flashover (spread to the rest of the room) in a recent study performed at Southwest Research Institute (SwRI®) by Janssens et al. [1] was as short as 200 seconds from time of ignition. The addition of flame-retardant covering over the foam adds a layer of defense that delays transition to flashover to almost 800 seconds from initiation. The additional use of CA TB 117 rated urethane foams prevented sustained burning when a small ignition source was used. In cases where the CA TB–117 foams are used with flammable coverings, significant reductions in both peak Heat Release Rate (HRR) and total HRR were measured and a significant delay in reaching the free-burning condition was observed.

The impact of adding flame retardants to the covering material and urethane foams adds defense in depth to the furnishing that undoubtedly saves lives. The fact that nonflame-retardant furnishings contribute to flashover in a room in just a little more than 3 minutes severely limits the potential for escape for a family in a fire situation. It also would likely result in the total loss of the home before a fire department could respond. Extending the time to greater than 13 minutes increases the probability of escape for the family and allows for greater response time and likely reduces the total damage sustained by the structure.

The cigarette ignition source is less important today than in the past due to a reduction in the number of smokers and changes in cigarette technology. Cigarette wrappers are self-extinguishing when there is not airflow for extended periods. However, ignition from a small flame source is still a significant problem for homeowners with small children. The following facts were obtained from U.S. Fire Administration/National Fire Data Center:

—An estimated 20,200 residential structure fires in 2002, resulted in 276 deaths, 1,445 injuries, and $322 million loss. [2]

—The leading causes of residential structure fires are incendiary/suspicious, open flame, and children playing with lighters and matches fires. [2]

CA TB 117 uses ignition sources that mimic those found in the types of fires described. The testing performed in Janssens' is directly comparable to the CA TB 117 and CA TB 133 requirements. Three types of ignition sources were used:

—a small match-like flame;

—a large gas burner, similar to a fire in a pile of newspapers; and

—a small liquid pool fire simulating the use of an accelerant.

Three ignition sonrce locations were evaluated:

—exposing the seat from the top;

—exposing the furniture from the front bottom; and

—exposing the back.

Test Conditions

In most cases the small-flame ignition source was BS 5852 Source #1 simulating a match fire. In a few tests the item could not he ignited with this source and BS 5852 Source #2 was then tried simulating a lighter or candle. Both BS 5852 sources involve a diffusion burner consisting of a steel tube, with 8 mm outside diameter and 6.5 mm internal diameter and 200 mm in length, connected by a flexible tube via a rotameter, fine control valve, an optional on-off valve, and a regulator to a cylinder containing butane.

For Source #1, a flow rate of 45 ml/min at 25 °C was used, corresponding to a heat release rate of ca. 83 W and a flame height of 35 mm, measured from the top of the burner tube, when held vertically upwards. For Source #2, a flow rate of 160 ml/min at 25 °C was used, corresponding to a heat release rate of ca. 295 W and a flame height of 145 mm, measured from the top of the buruer tube, wheu held

[1] Reducing Uncertainty of Quantifyiug the Burning Rate of Upholstered Furniture, No. 2010–DN–BX–K221, awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. December 30, 2011.

[2] U.S. Fire Administration/National Fire Data Ceuter, Resideutial Structure Match- or Lighter-Ignited Fires, Topical Fire Research Series, Volume 4—Issue 2, October 2004.

vertically upwards. Butane gas was used as the fuel. The burner flame was applied for 20 s for Source #1, or 40 s for Source #2. Source #1 has been shown to have an intensity equivalent to a small match. The small-flame source is shown in Figure 1 being applied to a chair mock-up.

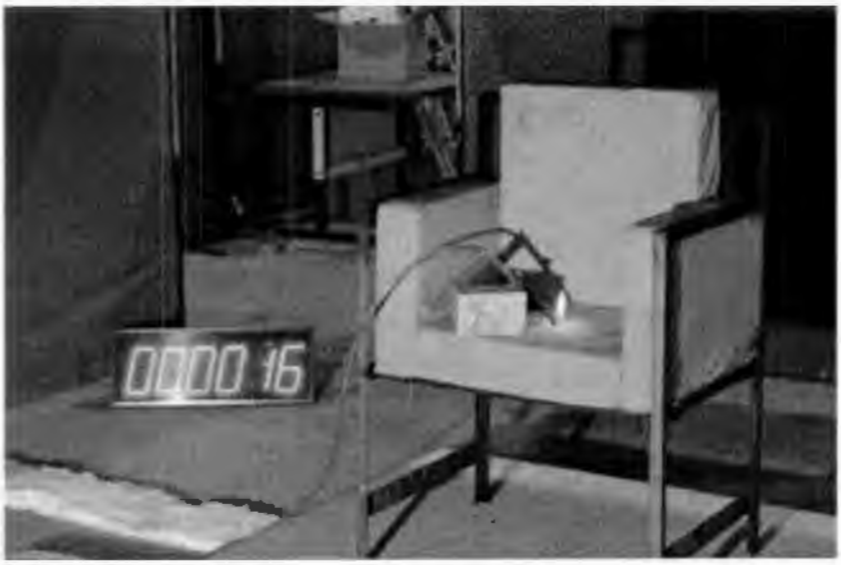


FIGURE 1.—*Small flame source*

The propane burner described in CA TB 133 and American Society for Testing and Materials (ASTM) E–1537 was chosen as the large flame ignition source exposing the seat from the top. This 250 × 250 mm square burner consisted of 13 mm outside diameter stainless steel tubing with holes pointing straight out, straight down, and inward at a 45 degree angle at various locations. Propane gas with a net heat of combustion of 46.5 0.5 MJ/kg was supplied at a rate of 13 l/min for a total of 80 s. The burner was an approximate intensity of 19 kW. Figure 2 shows the large-flame source burner applied to a three-cushion couch mock-up.

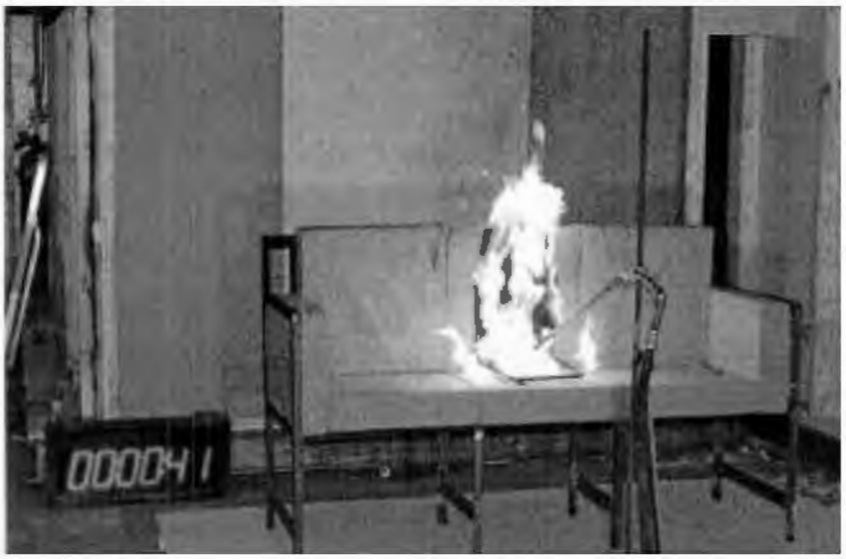


FIGURE 2.—*Large burner ignition source*

The 0.3 × 0.3 m sandbox burner described in National Fire Protection Association (NFPA) 286 was chosen as the large-flame ignition sonrce for front bottom and back exposure. The burner was supplied with propane at the same rate (19 kW) and for the same duration (80 s) as the CA TB 133 burner. Figure 3 shows the application of the large-flame sandbox burner to the bottom front of a three-cushion couch mock-up.

FIGURE 3.—*Large-flame ignition source burner box*

Finally, the liqnid pool fire ignition source consisted of 59 ml (2 oz) of gasoline distributed over a seat cushion (top exposure) or 118 ml (4 oz) of gasoline distributed more than 25 mm thick ceramic fiber blanket placed inside a 0.28 × 0.43 m

metal cookie sheet (front, bottom, and back exposure). Figure 4 shows the accelerant ignition sonrce for this series of tests applied to a center cnshion.

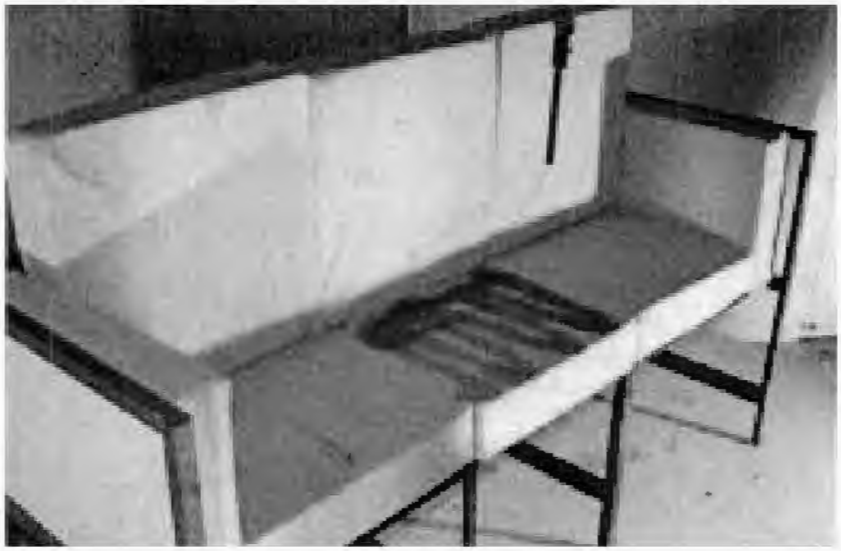


FIGURE 4.—*Accelerant ignition source*

Test Items

Because of the questionable pedigree for used furniture items, most of the tests were performed on furniture mock-ups with metal frames. The mockup cushions were constrncted with fabrics and padding materials that are common in fnrniture items that are currently on the market. Six different padding materials and two fabrics were selected. Chairs (without arınrests) and single-, double-, and triple-seat sofas were included in the test matrix. Table 1 shows the matrix of materials used to create the mock-ups for this series of tests.

TABLE 1.—MOCK-UP MATERIALS OF CONSTRUCTION

Fabric	ID	Color	Supplier	Weight (g/m2)
(Nonflame-retardant) cotton.	Eco Linen	Khaki	San Antonio Upholstery Fabrics	355
Flame-retardant cotton	Milano	Black	Dazian, North Hollywood, California	415
Padding	**ID**	**CA TB 117**	**Supplier**	**Density (kg/m3)**
LD polyurethane foam	1030		San Antonio Upholstery Supply	17
HD polyurethane foam	25110		San Antonio Upholstery Supply	45
CA TB 117 polyurethane foam.	FR1534	✓	San Antonio Upholstery Supply	23
Polychloroprene latex	CR SAFGUARD XL	✓	Chestnut Ridge, Latrobe, Pennsylvania.	103
Polyester wrap	Dacron	✓	San Antonio Upholstery Supply	16
Densified polyester	FlameChek (Core)	✓	Bob Barker, Fuquay-Varina, North Carolina.	23

The flame-retardant cotton fabric was verified to meet the requirements of NFPA 701. CA TB 117 tests were performed on specimens of the six padding materials to verify compliance (or noncompliance) with the standard. The test matrix used for this series of tests is summarized in Tables 2 and 3.

TABLE 2.—DETAILS OF THE FRACTIONAL FACTORIAL EXPERIMENTS

	1-Seat Sofa (Fraction A)									3-Seat Sofa (Fraction B)								
LD polyurethane padding	✓	✓	✓							✓	✓	✓						
HD polyurethane padding				✓	✓	✓							✓	✓	✓			
CA TB 117 foam polyurethane padding							✓	✓	✓							✓	✓	✓
Small flame	✓			✓			✓			✓			✓			✓		
Large gas burner		✓			✓			✓			✓			✓			✓	
Liquid pool fire			✓			✓			✓			✓			✓			✓
Top	✓				✓				✓			✓	✓				✓	
Front bottom			✓	✓				✓			✓				✓	✓		
Back		✓				✓	✓			✓				✓				✓

TABLE 3.—ADDITIONAL ROOM CALORIMETER TESTS ON MOCKUPS

	Chairs						1-Seat Sofas									2-Seat Sofas			3-Seat Sofas				
(Nonflame-retardant) cotton	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓					✓	✓	✓	✓	✓			
Flame-retardant cotton												✓	✓	✓	✓						✓	✓	✓
LD polyurethane foam							✓																
HD polyurethane foam	✓			✓								✓	✓			✓			✓		✓	✓	
CA TB 117 polyurethane foam		✓			✓			✓	✓					✓	✓		✓						✓
Polychloroprene latex																							

TABLE 3.—ADDITIONAL ROOM CALORIMETER TESTS ON MOCKUPS—Continued

Polyester wrap																								
Densified polyester			✓			✓				✓	✓							✓		✓				
Small flame							✓	✓											✓					
Large gas burner	✓	✓	✓	✓	✓	✓				✓		✓		✓		✓	✓	✓		✓	✓		✓	
Liquid pool fire									✓		✓		✓		✓							✓		
Top center	✓	✓	✓	✓	✓	✓				✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	
Top corner							✓												✓					
Front bottom								✓	✓															
No gap (Chairs only)	✓	✓	✓																					
Gap (Chairs only)				✓	✓	✓																		
Number of replicates	1	1	1	1	1	1	1	2	1	2	1	1	1	1	1	1	1	1	1	1	1	1	1	1

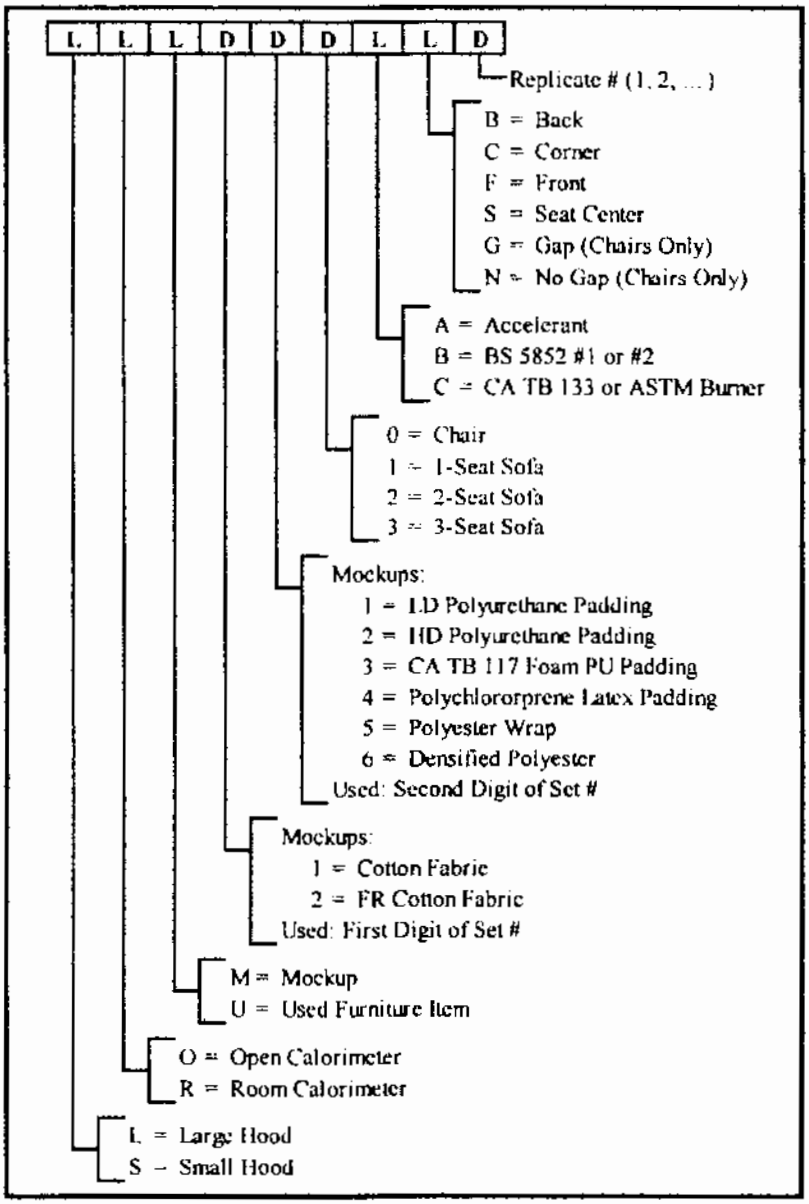
Results and Discussion

A direct comparison of four conditions shows the applicability of having an flame-retardant requirement for home furnishings. The heat release rates measured of the duration of the test are shown in the four pairs of graphs below. The conditions are:

—a flammable cover over urethane foam;
—a flame-retardant cover over urethane foam;
—a flammable cover over flame-retardant foam; and
—a flame-retardant cover over flame-retardant foam.

Table 4 provides the sample identification description dictionary that defines the test performed and material types. This can be used to show the materials of composition, test conditions, ignition source and ignition location.

TABLE 4.—*System for Composing and Deciphering the Test II) String*



A comparison of one cushion mocknps with low-density nonflame-retardant and flame-retardant urethane foams shows a reduction in the heat released. These two examples both have flammable covers. Comparing the time to fully involved fire environment, the peak HRR and the total heat released (area under the curve), show that the fire-resistant foam slows the onset of free-burning fire by more than doubling the time from ignition to peak HRR (pHHR). The blue plot in both Figures

5 and 6 is the experimental data for these two conditions. All of the other plots are fire-spread models attempting to predict the fire growth. The nonflame-retardant foam seat ignites and reaches free burning in approximately 400 s. The CA TB 117 foam requires 1,000 seconds to achieve pHHR. The pHRR and total heat released are also one-half for the CA TB 117 foam when compared to the nonflame-retardant foam. These tests nsed the small-flame ignition source. There are several examples of this exact relationship in Janssens work.

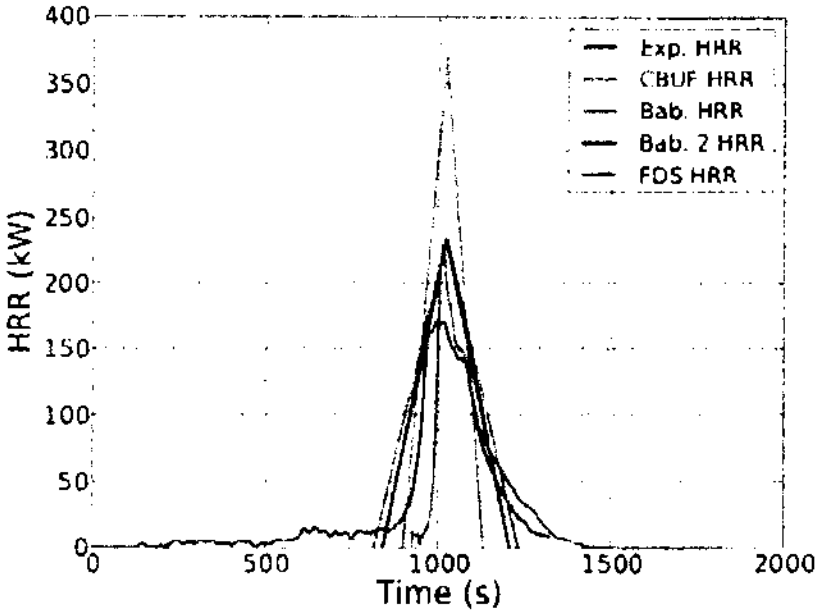


FIGURE 5.—*SRM131BB2—CA TB 117 Urethane Foam With Flammable Cover*

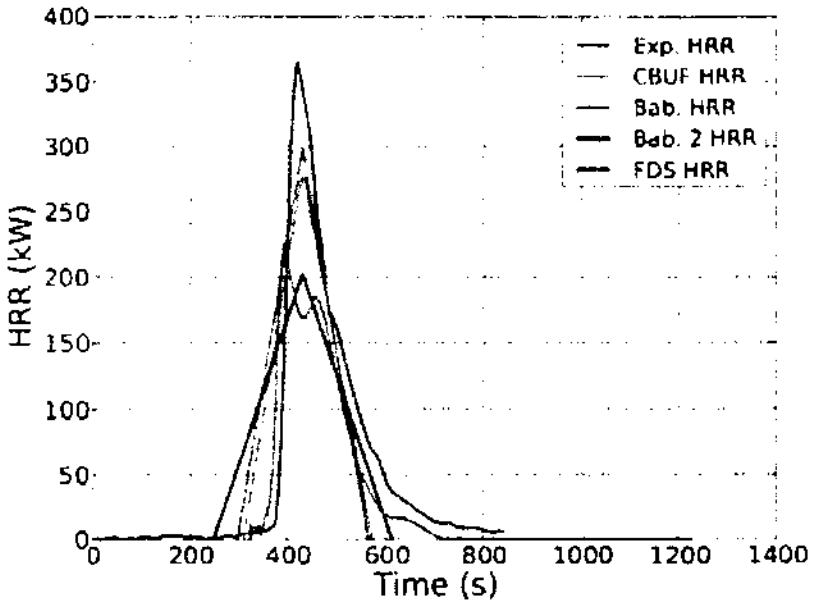


FIGURE 6.—*SR1V1111BS1—Low-Density Urethane Foam With Flammable Cover*

Comparing the material cover of furniture mockups illustrates the utility of using NFPA 701 rated fabrics as covers for foam-filled furnishings. The blue plots in Figures 7 and 8 illustrate the impact of using a flame-retardant fabric over high-density foam of the same manufacturing lot using the same ignition source and location. Again the time from ignition of the couch to the free-burning state is significantly delayed. The unprotected foam goes to a free-burning state upon ignition. The foam protected with the NFPA 701 fabric shows a delay of 10 minutes to reach the same condition. It is also important to note that the pHRR is half the intensity for the flame-retardant case with 220 kW for the FR fabric compared to 440 kW for nonflame-retardant fabric. The total energy released by both events is approximately the same. This series of test used the large burner igniter shown in Figure 2. Use of the small burner BS5852 failed to ignite the flame-retardant test item.

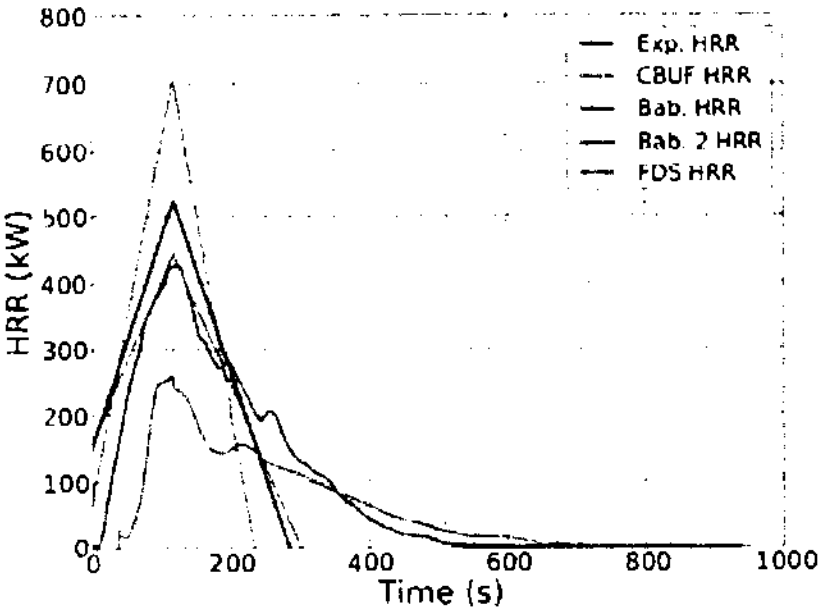


FIGURE 7.—*SOM121CS4*

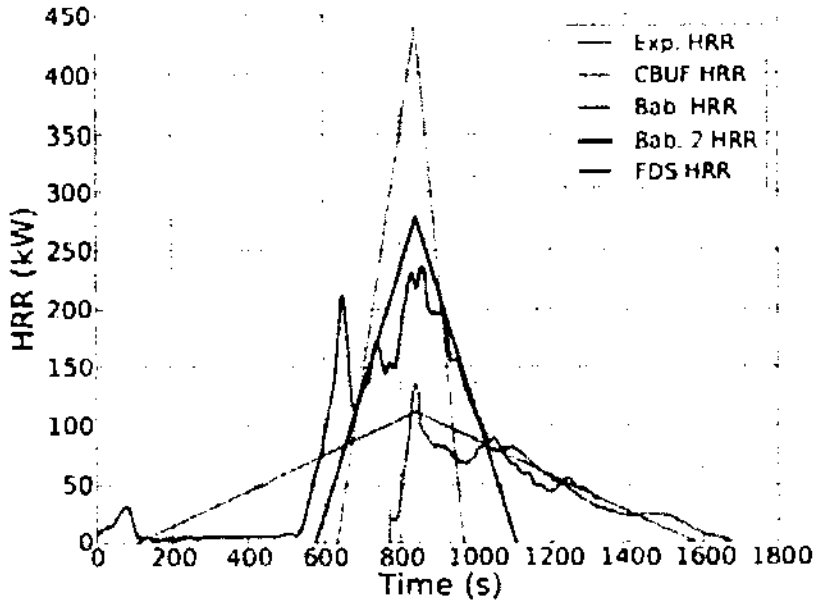


FIGURE 8.—*SOM221CS1*

The defense in depth approach of using both an flame-retardant fabric and CA TB 117 foam hugely impacts the fire event. Figures 9 and 10 compare the cases of

three cushion couch mockups with and without FR foams IAW CA TB 117 and NFPA 701 covers. These figures show that with the large burner the protected couch failed to ignite while the unprotected couch reaches free burning in 180 s. The unprotected couch would cause the room to reach flashover iu 4 minutes.

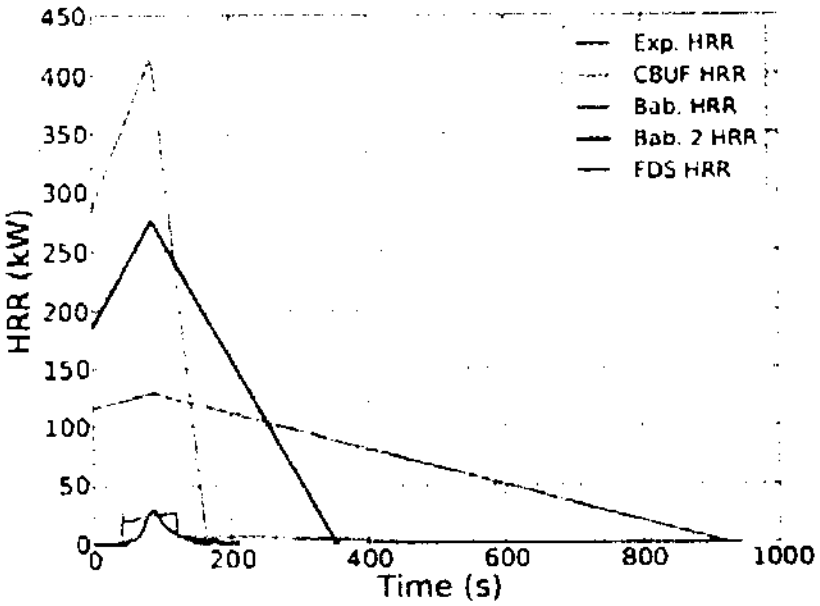


FIGURE 9.—*SRM233CS1*

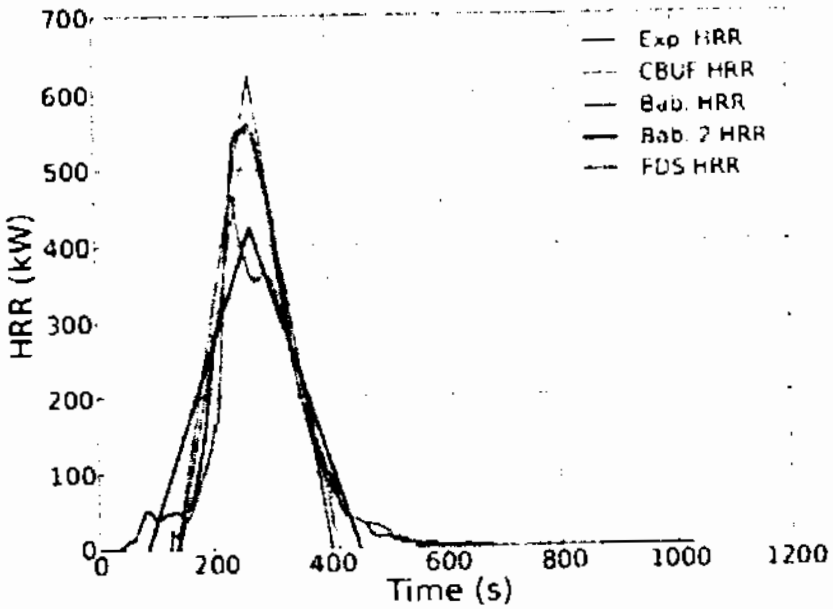


FIGURE 10.—*LRM113CF1*

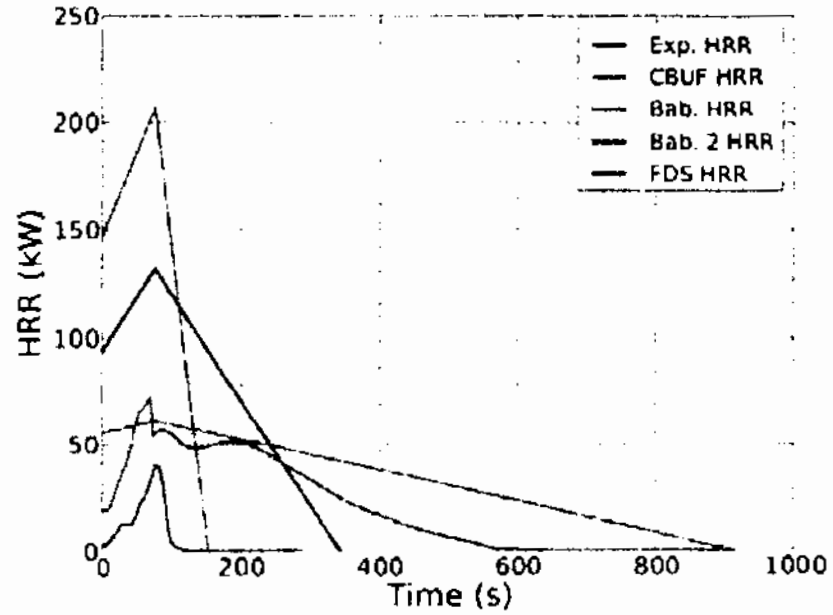


FIGURE 11.—*SOM231CS1*

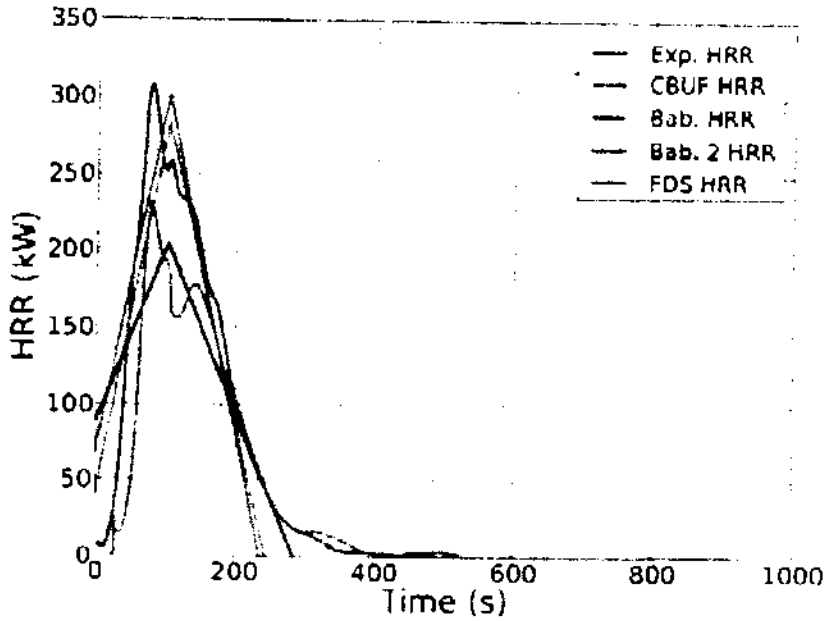


FIGURE 12.—*SOM111CS1*

Figures 11 and 13 show the same comparison for a single seat chair. The same no-ignition is seen for the CA TB 117 and NFPA 701 compliant cushion compared to rapid ignition of the unprotected cushion. The ignition time for the case was even more rapid for this unprotected furnishing due to the location of the ignition source.

Conclusion

The best conclnsion that can be drawn from the data presented here is that the use of CA TB 117 foam increases the fire safety of home furnishings by delaying the onset of free-burning conditions and reducing the total energy released by the event. Using a NFPA 701 compliant cover over the flame-retardant foam prevents the furnishing from becoming the point of initiation with numerons examples in Janssen's paper self-extinguishing on removal of the ignition source, videos of these comparisons are available on request. What CA TB 117 does not do is prevent the furnishing from burning where there is already a free-burning environment but that is not the intent of the regulation. The intent is to prevent the furnishing from becoming the initiation point of a large, free-burning fire caused by a small ignition source that could lead to trapping of occupants by preventing escape.

DR. MATTHEW S. BLAIS,
Director, Fire Technology Department, Southwest Research Institute.

Senator DURBIN. Senator Lautenberg.

STATEMENT OF SENATOR FRANK R. LAUTENBERG

Senator LAUTENBERG. Thanks, Mr. Chairman, for holding this hearing.

Parents in this country expect their child to be safe when sleeping on a baby mattress, feeding from a bottle, playing on the furniture.

When parents buy products that their kids will use, they assume that any chemicals in those products have been tested and proven safe and effective.

In many countries around the world, chemicals are required to be tested, but not in the United States. That's because a 35-year-old law that's supposed to assess and protect against chemical health risks is broken.

The Government Accountability Office has placed that law, TSCA, on its list of high-risk areas of the law. And the President's cancer panel, led by experts appointed under President Bush, said that TSCA, "may be the most egregious example of ineffective regulation of environmental contaminants."

Today, thank goodness, we're examining a prime example of why our system for regulating chemicals needs to be updated.

This spring, the Chicago Tribune exposed how the chemical industry has used dirty tricks and junk science to drive a public misinformation campaign that keeps chemical flame retardants in our homes.

The Chicago Tribune reported that many chemical flame retardants are highly toxic. And while industry has promised that flame retardants would stay put in our furniture, pose no threat to health, those chemicals have ended up everywhere, including in children's bodies. According to the Chicago Tribune, "a typical American baby is born with the highest recorded concentration of flame retardants among infants in the world."

The series shows how the industry repeatedly bullied and lied to the State legislatures to prevent common-sense reforms. They've been accused of bankrolling so-called experts to invent stories that spout the company line, all in the service of protecting their profits, and all at the expense of our safety and health.

But here are the facts: The average couch contains more than 2 pounds of flame-retardant chemicals—chemicals linked to cancer and other health risks.

And while we have filled our homes with toxic chemicals, these flame retardants don't even do what they're meant to do, and that's to prevent fires.

And that's why Senator Snowe and I recently sent a bipartisan letter to EPA, signed by 24 of our Senate colleagues, including Chairman Durbin, urging the agency to take action on a class of flame retardants. Our letter also called for real reforms to TSCA.

But I want to be clear: Flame retardants are just the tip of the iceberg. Studies by the Centers for Disease Control (CDC) scientists found 212 industrial chemicals, including 6 carcinogens, coursing through American bodies. In nearly 35 years, TSCA has allowed EPA to require testing of only 200 of more than 80,000 chemicals on EPA's inventory.

What's more, EPA has been able to ban only five toxic substances under the law. In essence, the American public has become a living, breathing repository for chemical substances.

Our TSCA reform bill, the Safe Chemicals Act, will simply require the chemical makers to establish product safety before they end up in children's bodies.

And most of the thousands of chemicals we use every day are safe, but this bill will separate those safe chemicals from the ones that are not. That's what we have to look out for.

It will ensure that chemicals are tested, that EPA can take unsafe uses of the chemicals off the market.

And I'm proud that Chairman Durbin and 20 other Senators have cosponsored the bill. And I hope that all of our colleagues will come together to finally fix this law to protect our families and our kids from toxic chemicals.

Senator DURBIN. Thanks, Senator Lautenberg.

First panel, Inez M. Tenenbaum, who is the Chairman of CPSC, please proceed.

STATEMENT OF INEZ M. TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Ms. TENENBAUM. Chairman Durbin, Ranking Member Moran, and Senator Lautenberg, I'm pleased to be here today to discuss CPSC's current efforts to implement the performance requirement to reduce the fire risk of residential upholstered furniture.

Reducing deaths and injuries in residential fires is a key strategic goal of CPSC, and the flammability of upholstered furniture has been an area of significant concern by the commission staff.

On March 4, 2008, CPSC issued a notice of proposed rulemaking for a standard for flammability of residential upholstered furniture. The proposed standard would establish two possible pathways for upholstered furniture to meet the proposed standard: Manufacturers could either use an upholster cover material that complies with the prescribed smoldering resistance test, referred to as type one furniture, or use an interior fire barrier that complies with specific smoldering and open flame-resistance tests, known as type two furniture.

During the development of the notice of proposed rulemaking (NPR), CPSC staff was highly cognizant of the concerns expressed by many stakeholders over the use of flame-retardant chemicals as a part of any standard.

While EPA has primary jurisdiction over flame-retardant chemicals through TSCA, CPSC's proposed rule has a performance-based standard as noted above. It does not specify any particular materials or designs, and it does not require the use of any flame-retardant chemicals to achieve compliance with the proposed standard.

In this regard, the proposed rule's open-flame barrier requirement is consistent with certain preliminary findings in a CPSC staff report, conducted as part of the research on the upholstered furniture rule, which reviewed the effects of certain fire barriers on the flammability of upholstered chairs.

The foam used under the fire barriers in those tests represented both flame-retardant-treated foam and nonflame-retardant-treated foam. At the conclusion of these tests, staff noted that the addition of a fire barrier markedly increased the safety of the furniture. As a part of the testing, staff also noted that the fire-retardant foams did not offer a practically significant greater level of open-flame safety than the untreated foam.

Since issuance of the NPR in 2008, CPSC staff has worked diligently with stakeholders and other interested parties to finalize the rule and conduct associated testing. In doing so, we have faced several significant challenges.

One substantial challenge CPSC staff has faced is the development of reasonable and repeatable testing requirements to ensure

compliance with any new rule. Unlike other products, such as mattresses, furniture comes in a multitude of sizes and shapes, making representative and repeatable testing mechanisms a substantial undertaking.

As part of this proceeding, staff has also been working with other organizations to develop standard reference materials, such as standard test cigarettes and standard test foam, which can be part of a representative and repeatable testing mechanism detailed above.

As Chairman, I have recently allocated substantial additional resources to these efforts, and we're making progress toward these goals.

The second and most significant challenge is the statutory requirement that CPSC issue any flammability standards for fabrics, related materials, or products, including interior furnishing, pursuant to section 4 of the Flammable Fabrics Act (FFA).

Like section 9 of the Consumer Product Safety Act, section 4 of the FFA requires that CPSC make a series of very detailed and onerous findings before a final rule can be issued.

In addition, if there's a relevant voluntary standard that has been adopted and implemented, CPSC must determine that the voluntary standard is not likely to adequately reduce the risk of injury or that substantial compliance with it is not likely.

As part of the Consumer Product Safety Improvement Act of 2008 (CPSIA), the Congress recognized the burden that the CPSC section 9 requirements placed on the Commission's ability to issue mandatory rules protecting the public from a number of potential hazards, and moved to ease this burden in several areas.

One key example is section 104 of the CPSIA, where the Congress gave CPSC streamline authority to adopt new mandatory standards for durable infant and toddler products. Under section 104, CPSC must adopt standards for certain infant and toddler products that are substantially the same as relevant voluntary standards, or more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with those products.

This section has allowed CPSC to expeditiously adopt standards protecting infants and young children in durable nursery equipment.

Speaking personally in my capacity as Chairman, I believe that an amendment to the FFA permitting this type of flexibility for rules regarding flammability of upholstered furniture would be very helpful and may allow for expedited consideration of the proposed rule.

PREPARED STATEMENT

Chairman Durbin, thank you again for the opportunity to testify on CPSC's ongoing efforts to address the flammability of residential upholstered furniture.

I'm happy to answer any questions you or Senator Lautenberg might have.

Senator DURBIN. Thanks, Chairman Tenenbaum. I'm sure we will have some.

[The statement follows:]

PREPARED STATEMENT OF INEZ M. TENENBAUM

Good afternoon, Chairman Durbin, Ranking Member Moran, and members of the subcommittee on Financial Services and General Government. I am pleased to be here today to discuss the Consumer Product Safety Commission's (CPSC) current efforts to implement performance requirements to reduce the fire risk of residential upholstered furniture.

Reducing deaths and injuries in residential fires where consumer products play a contributory role is a key strategic goal of CPSC, and the flammability of upholstered furniture has been an area of significant concern by Commission staff. Upholstered furnitnre in a home is often a major sonrce of combustible fnel for a fire. Once this furniture is ignited, it contains enough fuel to spread a fire very quickly when the upholstery filling materials start to bnrn.

The most recent fire loss estimates for 2006 through 2008 indicate that upholstered fnrniture was the first item to ignite in an average of 6,500 residential fires attended by fire services during that period. These fires resulted in more than 500 deaths, 860 injuries, and $343 million in property loss each year.[1]

On March 4, 2008, CPSC issued a Notice of Proposed Rulemaking (NPR) for a "Standard for the Flammability of Residential Upholstered Furniture."[2] The proposed standard would establish two possible pathways for upholstered furniture to meet the proposed standard. Manufacturers could either use upholstery cover material that complies with a prescribed smoldering resistance test (referred to as Type I fnrniture) or use an interior fire barrier that complies with specified smoldering and open flame resistance tests (Type II furniture).

During the development of the NPR, CPSC staff was highly cognizant of the concerns expressed by many stakeholders over the use of flame-retardant chemicals as part of any standard. While the Environmental Protection Agency has primary jurisdiction over flame-retardant chemicals under the Toxic Substances Control Act, CPSC's proposed rule has a performance-based standard, as noted above. It does not specify any particular materials or designs, and does not require the use of any flame-retardant chemicals to achieve compliance with the proposed standard.

In this regard, the proposed rule's open-flame barrier requirement is consistent with certain preliminary findings in a CPSC staff report,[3] conducted as part of the research on the upholstered furniture rule, which reviewed the effect of certain fire barriers on the flammability of upholstered chairs. The foam used under the fire barriers in those tests represented both flame-retardant-treated and nonflame-retardant-treated foam. At the conclusion of those tests, staff noted that the addition of a "fire barrier markedly increased the fire safety of the furniture."[4] As part of the testing, staff also noted that "the fire-retardant foams did not offer a practically significantly greater level of open-flame safety than did the untreated foams."[5]

The proposal also aligns with previous CPSC rules regarding the flammability of consumer products, such as CPSC's 2006 final flammability rule for mattresses and mattress foundation sets, which also sets a performance-based standard that does not require the use of flame-retardant chemicals.[6]

Since issuance of the NPR in 2008, CPSC staff has worked diligently with stakeholders and other interested parties to finalize the rule and conduct associated testing. In doing so, they have faced several significant challenges.

One substantial challenge CPSC staff has faced is the development of reasonable and repeatable testing requirements to ensure compliance with any new rule. One component of this is developing appropriate scale tests that can account for the diversity of upholstered furniture products. Unlike other products, such as mattresses, furniture comes in a multitude of sizes and shapes, making representative and repeatable testing mechanisms a substantial undertaking.

As part of this proceeding staff has also been working with other organizations, such as the National Institute for Standards and Technology, to develop standard reference materials, such as standard test cigarettes and standard test foam, which

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[1] David Miller and Risana Chowdhury, 2006–2008 Residential Fire Loss Estimates, Division of Hazard Analysis, Directorate for Epidemiology, U.S. Consumer Product Safety Commission (released July 2011), *available at* http://www.cpsc.gov/LIBRARY/fire08.pdf.

[2] *See* Notice of Proposed Rulemaking, Standard for the Flammability of Residential Upholstered Furniture, 73 Federal Register 11702 (March 4, 2008).

[3] *See* Memorandum from Shivanti Mehta to Dale R. Ray, "Upholstered Furniture Full Scale Chair Tests—Open Flame Ignition Results and Analysis" (dated May 9, 2012), *available at* http://www.cpsc.gov/library/foia/foia12/os/openflame.pdf.

[4] *Id.* at 23.

[5] *Id.*

[6] *See* Final Rule, Standard for the Flammability (Open Flame) of Mattress Sets, 71 Federal Register 13472 (March 15, 2006); see also 16 CFR 1633.

can be part of the representative and repeatable testing mechanisms detailed above. As Chairman, I have recently allocated suhstautial additional resources to these efforts and we are making progress towards these goals.

The second and most significant challenge is the statutory requirement that CPSC issue any flammability standards for fabrics, related materials, or products including interior furnishings pursuant to section 4 of the Flammable Fabrics Act (FFA).[7] Like section 9 of the Consumer Product Safety Act, section 4 of the FFA requires that CPSC make a series of very detailed and onerous findings before a final rule can be issued, including determinations that the standard is "needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage"; that expected benefits from the regulation bear a reasonable relationship to its costs; and that the regulation is the least burdensome alternative that prevents or "adequately reduces" the risk of injury. In addition, if there is a relevant voluntary standard that has been adopted and implemented, CPSC must determine that the voluntary standard is not likely to adequately reduce the risk of injury or that substantial compliance with it is not likely.

As part of the Consumer Product Safety Improvement Act of 2008 (CPSIA), the Congress recognized the burden that CPSA section 9 requirements placed on CPSC's ability to issue mandatory rules protecting the public from a number of potential hazards, and moved to ease this bnrden in several areas. One key example is section 104 of the CPSIA, where the Congress gave CPSC streamlined authority to adopt new mandatory standards for durable infant and toddler products.

Under section 104, CPSC mnst adopt standards for certain infant and toddler products that are "substantially the same as" relevant voluntary standards or "are more stringent than such voluntary standards, if CPSC determines that more stringent standards would further reduce the risk of injury associated" with those products. This section has allowed CPSC to expeditiously adopt standards protecting infants and young children in cribs, play yards, bath seats, walkers, and toddler beds. Speaking personally in my capacity as Chairman, I believe an amendment to the FFA permitting this type of flexibility for rules regarding flammability of upholstered furniture would be very helpful and may allow for expedited consideration of the proposed rules.

Chairman Durbin, thank you again for the opportunity to testify on CPSC's ongoing efforts to address the flammability of residential upholstered furniture.

I am happy to answer any qnestions yon may have.

Senator DURBIN. And now let me introduce James J. Jones, Acting Assistant Administrator of the Office of Chemical Safety and Pollution Prevention at EPA.

Please proceed.

STATEMENT OF JAMES J. JONES, ACTING ASSISTANT ADMINISTRATOR, OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION, ENVIRONMENTAL PROTECTION AGENCY

Mr. JONES. Good afternoon, Chairman Durbin and Senator Lautenberg.

Thank you for the opportunity to address you on the reform of chemicals management, and our authority to assess the safety of flame-retardant chemicals.

Ensuring chemical safety, maintaining public confidence that EPA is protecting the American people, and promoting our global leadership in chemicals management remain top priorities for EPA and Administrator Jackson.

Chairman Durbin and Senator Lautenberg, I want to thank you both as well for your continued leadership on this important issue and the efforts you've brought about to help reform TSCA. I also want to thank Chairman Tenenbaum for her work on flame retardants.

With each passing year, the need for TSCA reform grows. Chemicals are found in most everything we use and consume, and they're

[7] 15 U.S.C. 1193.

also essential for our health, our well being, and our prosperity. It should be equally essential that chemicals are safe.

But I'd also like to discuss a prime example of the shortcomings of TSCA that stands as a clear illustration for the need for TSCA reform.

So what are the key problems with TSCA? When enacted, TSCA grandfathered in—without any evaluation—the 62,000 chemicals in commerce that existed in 1976. The TSCA inventory currently lists more than 84,000 chemicals, few of which have been studied for their risks, especially to children.

Unlike the laws applicable to drugs and pesticides, TSCA does not have any mandatory program where EPA must conduct a review to determine the safety of existing chemicals. Manufacturers do not need to demonstrate the safety of new chemicals before they are introduced into the marketplace. When EPA determines that a chemical poses a significant health concern, taking action under TSCA to limit or ban a chemical is challenging.

In September 2009, EPA Administrator Lisa Jackson announced a set of administration principles to update and strengthen TSCA. These principles include that manufacturers should provide EPA with the necessary information to conclude that new and existing chemicals are safe.

EPA should have the tools to quickly and efficiently obtain information from manufacturers that is relevant to determining the safety of chemicals. EPA should also have clear authority to assess chemicals against the safety standard and to take risk management actions when chemicals do not meet safety standards. These are three of the key principles and there are several others.

While the legislative reform process is underway, we are not just standing by. EPA is utilizing the current authority under TSCA to help protect human health and the environment.

Earlier this year, we developed a screening process to identify chemicals for review based on their hazard, exposure, persistence, and bioaccumulative characteristics. EPA identified 83 chemicals for risk assessment with an initial 7 for assessment in 2012.

In June of this year, we identified an additional 18 chemicals that the agency intends to review and then develop risk assessments in 2013 and 2014, including 3 flame-retardant chemicals.

EPA's experience with one flame retardant in particular highlights the limitations of TSCA. EPA first reviewed a new flame-retardant component, TBB, in several products in 1995 for use in foam and, at that time, was unable to identify that it was persistent and bioaccumulative. We only learned of these properties after the chemical was in commerce and was later found in humans and the environment.

TBB is one of the flame retardants EPA will evaluate in 2013, 18 years after it was introduced into the market.

This is an example that highlights the critical need for the agency to have greater evidence that new chemicals are safe prior to commercialization and stronger tools to take action after they are on the market to ensure safety.

The American public has the right to expect that chemicals manufactured, imported, and used in this country are safe. And the

EPA needs an effective law that gives us the tools necessary to provide the public with this assurance.

PREPARED STATEMENT

TSCA must be updated and strengthened, so that EPA has the tools to do the job of protecting public health and the environment. And the time to fix this badly outdated law is now.

And I would be pleased to answer any questions you have.

[The statement follows:]

PREPARED STATEMENT OF JAMES J. JONES

Good afternoon Chairman Durbin, Senator Lantenberg, and members of the subcommittee. Thank you for the opportunity to address the subcommittee today on the reform of chemicals management in the United States and the Environmental Protection Agency's (EPA) authority to assess the safety of flame-retardant chemicals under the Toxic Substances Control Act (TSCA). Ensuring chemical safety, maintaining public confidence that EPA is protecting the American people, and promoting our global leadership in chemicals management remain top priorities for EPA and Administrator Lisa P. Jackson.

Chairman Durbin and Senator Lautenberg, I want to thank you both, as well as members of this subcommittee for yonr continued leadership on this very important issue and your efforts to bring about reform of TSCA. With each passing year, the need for TSCA reform grows—the importance and prevalence of chemicals in our daily lives increases, and yet there remain significant gaps in our knowledge and understanding of many of these chemicals. The time to bring TSCA into the 21st century is long overdue. Today, we also want to discuss a prime example of the shortcomings of TSCA—the limited success and long history of the EPA's work on brominated flame retardants—that stands as a clear illustration of the need for TSCA reform.

Chemicals are found in most everything we use and consume, and can be essential for our health, our well being, and our prosperity. It should be equally essential that chemicals are safe. Compared to 30 years ago, we have a better understanding of the environmental impacts, exposure pathways, and distressing health effects some chemicals can have—especially on children. While our understanding of chemical safety is constantly evolving, significant gaps in our scientific knowledge regarding many chemicals remain. For these reasons, it is critical that we close those knowledge gaps. Recent press reports on flame retardants highlight the public health risks posed by certain chemicals such as flame retardants. Public understanding of these risks is growing, and that is why the public is increasingly demanding that the Government provide an assurance about chemicals, even chemicals like flame retardants that can also provide significant benefits. To date, hased on these concerns, EPA helped negotiate voluutary phase-outs of several of the more toxic retardants, and has also initiated regulatory actions; however, as explained in more detail below, TSCA reform would have given EPA additional tools to address this serious issue.

BACKGROUND ON THE TOXIC SUBSTANCES CONTROL ACT

EPA's chemical management authority is carried out under TSCA—a law that when enacted in 1976 was au iuportant step forward to protect humau health and the environment. But today, TSCA is the only major environmental statute that has not been reauthorized. Over the years, not only has TSCA fallen behind the rapidly advaucing industry it is intended to regulate, it has also proven an inadequate tool for providing the protection against chemical risks that the public rightfully expects and deserves.

When TSCA was enacted, it graudfathered iu, without any evaluation, the 62,000 chemicals in commerce that existed in 1976. The TSCA inventory currently lists more than 84,000 chemicals, few of which have heen studied for their risks, especially to childreu. Uulike the laws applicable to drugs aud pesticides, TSCA does not have a mandatory program where EPA must conduct a review to determine the safety of existing chemicals.

And the process of requiring testing through rulemakiug chemical-by-chemical has proven time consuming. As a result, in the 35 years since TSCA was passed, we have only been able to require testing on approximately 200 of the 84,000 chemicals listed on the TSCA iuventory. EPA has also relied on voluntary programs to collect

data, including through the High Production Volume (HPV) Challenge Program, which resulted in the submittal of screening level data for 1,366 HPV chemicals.

When EPA determines that a chemical poses a significant health concern, taking action under TSCA to limit or ban a chemical is challenging. For example, in 1989, after years of study and nearly unanimous scientific opinion, EPA issned a rule phasing ont most nses of the cancer cansing substance asbestos. Yet, a Federal court overturned most of this action because EPA failed to clear the hurdles imposed under TSCA before existing chemicals can be controlled.

Today, advances in toxicology and analytical chemistry are enhancing our understanding of the implications of multiple pathways of exposure, and a better understanding of the cumulative effects and interactions between the chemicals in the products we use every day. EPA is working to develop methodology to address potential health effects of multiple chemical exposures and evaluate cumulative risks. When TSCA was enacted, there was not the understanding of the subtle effects chemicals may have on hormone systems, human reproduction, and intellectual development and cognition, particularly in young children.

ESSENTIAL PRINCIPLES FOR REFORM OF CHEMICALS MANAGEMENT LEGISLATION

In September 2009, EPA Administrator Jackson announced a set of administration principles to update and strengthen TSCA. These include that EPA should have the tools to quickly and efficiently obtain information from manufacturers that is relevant to determining the safety of chemicals. EPA also should have clear authority to assess chemicals against a safety standard and to take risk management actions when chemicals do not meet the safety standard.

At the same time, Administrator Jackson also affirmed that, while the legislative reform process is underway, EPA is committed to utilizing the current anthority under TSCA to the fullest extent to protect human health and the environment.

WORK PLAN CHEMICALS

Earlier this year, EPA developed a screening process to identify chemicals for review based on their combined hazard, exposure, and persistence and bioaccumulation characteristics. This process included criteria specifically targeted at identifying chemical risks to children. Following this initial screen, EPA identified 83 work plan chemicals for risk assessment in the TSCA chemicals management program, with an initial seven for risk assessment in 2012.

On June 1, 2012, EPA identified an additional 18 chemicals that the Agency intends to review and then develop risk assessments in 2013 and 2014, including 3 flame-retardant chemicals—Bis(2- Ethyl hexyl)-3,4,5,6-tetrabromophthalate (TB PH), 2–Ethyl hexyl-2,3,4,5-tetrabromobenzoate (TBB), and Tris(2-chloroethyl)phosphate (TCEP). EPA is currently developing a strategy, scheduled for completion by the end of this year that will address these three and a broader set of flame-retardant chemicals. This effort will assist EPA in focusing risk assessments on those flame-retardant chemicals that pose the greatest potential concerns. EPA anticipates initiating the risk assessments on this category of chemicals in 2013.

POLYBROMINATED DIPHENYL ETHER FLAME-RETARDANT CHEMICALS

EPA is concerned that polybrominated diphenyl ethers (PBDEs) are persistent, bioaccumulative, and toxic to both humans and the environment. A critical endpoint of concern for human health is neurobehavioral effects dnring development, which makes them a concern for children's health. Various PBDEs have also been studied for ecotoxicity in mammals, birds, fish, and invertebrates. In some cases, current levels of exposure for wildlife may be at or near adverse effect levels.

PBDEs are not chemically bound to plastics, foam, fabrics, or other products in which they are used, making them more likely to leach out of these products. Despite the U.S. phasing out the manufacture and import of penta- and octaBDE in 2004, their component congeners PBDEs are still being detected in humans and the environment. Some reports indicate that levels are increasing.[1] One potential source is imported articles to which these compounds have been added. Another is the breakdown of decaBDE in the environment to more toxic and bioaccumulative PBDE congeners. In late 2009, the U.S. manufacturers of decaBDE announced that they intend to voluntarily phase out most uses of decaBDE by the end of 2013.

[1] Shaw SD, Kannan K. 2009. Polybrominated diphenyl ethers in marine ecosystems of the American continents: foresight from current knowledge. *Rev Environ Hlth 2009*, 24, 157–229

EFFORTS ON POLYBROMINATED DIPHENYL ETHER FLAME-RETARDANT CHEMICALS

In late 2009, EPA released an Action Plan for addressing concerns with PBDE flame-retardant chemicals and recently issued proposed rules that would require additional testing on these chemicals and require EPA review any new uses of these chemicals, including imported articles. EPA also helped facilitate an industry plan to phaseout decaBDE and launched a multi-stakeholder partnership to assess alternatives for this chemical to help move the market to safer chemicals. This follows EPA's earlier facilitation of an industry phaseout of two other widely used PBDE flame retardants, pentaBDE and octaBDE in 2004 and an associated partnership to help identify safer flame retardants for use in polyurethane foam.

In its 2009 Action Plan, EPA committed to support and encourage the voluntary phase out of the manufacture and import of decaBDE. Developed with public participation through EPA's Design for the Environment Program, EPA will shortly release the draft alternatives assessment on decaBDE for public comment. This assessment will profile the environmental and human health hazards on 30 alternatives to decaBDE. By providing a detailed comparison of the potential human health and environmental effects of chemical alternatives, EPA can help manufacturers identify and transition to safer alternative flame-retardant chemicals.

EPA first reviewed a new flame-retardant component of several products in 1995 for use in polyurethane foam and was unable to identify that a component of flame retardants was persistent, bioaccumulative and toxic. Later, after the chemicals were in commerce, information became available that showed the chemicals were being found in humans and the environment. This is an example that highlights the critical need for the agency to have greater evidence that new chemicals are safe prior to commercialization and to be able to take effective action after commercialization, when needed. Unfortunately, taking the necessary steps to ensure that chemicals already in commerce are safe can be a cumbersome, involved regulatory process that can take years.

While the latest steps taken by EPA are clearly a step forward, they must be viewed in the context of what has been a long history of actions on flame retardants, a history that has stretched over the course of two decades with a range of voluntary efforts and regulatory actions on flame-retardant chemicals in both EPA's new and existing chemicals programs. The long history of EPA's action on brominated flame retardants is tied in no small part to the shortcomings of TSCA.

SUMMARY

Simply put, EPA may have made a different determination in 1995 if TSCA required the snbmission of more robnst hazard, exposnre, and use data needed to adequately assess risk, and EPA may have been able to act more quickly and effectively on the risk information available if TSCA provided more robust tools to deal with chemicals already introduced into commerce. The American public has the right to expect that the chemicals manufactured, imported, and used in this country are safe and EPA needs an effective law that gives us the tools necessary to provide the public with this assurance. The time is now to fix this badly outdated law. TSCA must be updated and strengthened so that EPA has the tools to do our job of protecting public health and the environment.

I would be happy to answer any questions you may have.

Senator DURBIN. Thank you very much.

Chairman Tenenbaum.

Ms. TENENBAUM. Yes.

Senator DURBIN. You mentioned that the NPR was announced in March 2008, which was—what?—4 years ago. But, actually, didn't CPSC begin the rulemaking process under the Flammable Fabrics Act in 2003?

Ms. TENENBAUM. Yes, we have a long history of rulemaking in this regard. And, really, it began even before then when CPSC, at the time, asked the staff to develop an open-flame upholstered furniture rule.

And then in 1999, the Congress asked CPSC to study flame-retardant chemicals. We studied 16 chemicals. We worked with the National Academy of Sciences, and eight of those flame-retardant chemicals were found to be carcinogens.

So this has gone on for some time with the work on carcinogens. Now the new rule we're working on is a smoldering ignition rule and not an open flame.

Senator DURBIN. So let me just ask, the average person on the street, if you said to them, we have a Government agency, which is funded, with experts and laboratories, and we've asked them to figure out how to keep our furniture safe so it is less likely to catch fire, and less likely to kill us, they've been at it now for 9 years, make that 4 years.

Ms. TENENBAUM. We've been at it, yes, for at least that long.

Senator DURBIN. And the obvious question from the person on the street is, when does this end? At one point you said to me that the cigarette you were using, Pall Malls, were no longer made, so you had to start over or find a new standard cigarette.

I think here's the way I'm coming at it. I look at UL. I subscribe to "Consumer Reports". They're testing constantly. And they apparently come up with timely results.

Is the Congress the problem here? Have we created obstacles for you in this testing process, where you can't come to a timely finding that might be of value to consumers across America?

Ms. TENENBAUM. I think that the Flammable Fabrics Act places an onerous burden on CPSC with cost-benefit analysis. Not only do we have to look at and analyze what we're going to put in a rule, we have to analyze the alternatives and why they won't work.

So we did have a setback with Pall Mall, because they stopped manufacturing the filterless cigarette, when they were required by law to manufacture self-extinguishing cigarettes and stop making the filterless cigarette that we used as standard reference material.

So we worked with the National Institute of Standards and Technology (NIST) for 2 years, and now they have a standard cigarette. The next thing we had to do——

Senator DURBIN. Two years.

Ms. TENENBAUM. Two years.

During this time period, they were also working on standard foam. A rule requires a test that's repeatable. So NIST has been working on standard foam, and they have finished that work. And we're looking at whether we should use small-scale tests vs. full-scale tests. This model is small-scale testing. This is how we test. This is the foam. You put the cigarette right here. You cover it up.

You have to determine: Is this repeatable with this size or do you have to do full scale? You must test the number of furniture designs, the number of different fabrics, and you had to have a standard cigarette, and standard foam. So we have now completed all that work.

But let me say one thing——

Senator DURBIN. I want to make a point here, if I might.

Ms. TENENBAUM. Please.

Senator DURBIN. I guess the obvious question most people would ask is, how can we have reached the point where Europe has figured this out, or at least believes they have, and we are still testing away here?

Many European countries have taken steps to ensure flammability standards. The United Kingdom has banned the use of con-

ventional flexible polyurethane foam in the manufacture of upholstered furniture.

[The information follows:]

While it is trne that in the United Kingdom, there are fnrniture and bedding flammability standards, flexible polynrethane foam has not been banned in the United Kingdom or anywhere in the world. Complying with U.K. standards requires the addition of substantial amounts of flame-retardant chemicals to polyurethane foam, usually in the form of melamine with a chlorinated "carrier", such as Tris (1-chloro-2-propyl) phosphate. Nonflame-retardant foams do not work in testing standard applications such as British Standard 5852. Other European countries do not have similar flammability standards. Some of the Scandinavian countries, such as Norway, are pursuing development of a flammability standard; however, none has adopted one yet.

At the most recent EUROPUR meetings in Budapest, Hungary in Jnne 2012 (EUROPUR is the European equivalent of the Polyurethane Foam Association), flammability issues were discussed with representatives from many European countries and heard a presentation regarding the efforts in Scandinavian conutries to address the impact of adopting upholstered furniture flammability standards. It was in this presentation that the discussion took place regarding the efforts in Norway to establish a furniture flammability standard and the difficulties faced in deciding whether to adopt a standard. European countries are struggling with the same issues as we are in the United States regarding upholstered flammability furniture standards.

Senator DURBIN. In addition, many European countries have banned the use of PDBEs and greatly restricted other flame-retardant chemicals.

It appears that there is a body of study and investigation that is taking place in other countries, leading them to change the products that consumers have available, and the United States just keeps studying away.

Now I know from the congressional side of this that the industry will come in whenever there's an effort to regulate and have oversight, and create what they consider to be safeguards for their products.

But ultimately, at the end of the day, it seems to me that the losers are the American consumers. They don't know what's right, what's safe, and we're not doing our job for them.

Ms. TENENBAUM. CPSC does not require flame retardants for any of the textiles or furniture that we oversee.

We do not advocate for flame retardants. We don't require flame retardants to meet any of our standards. So comparing us to Europe or to California is really not a fair comparison, because we don't require flame retardants to meet any of our standards.

Senator DURBIN. But, Chairman Tenenbaum, what I did note was that there was a change in the type of furniture that is sold in Europe, too, beyond the flame-retardant chemicals.

I see my time is up, and I want to give Senator Lautenberg a chance to ask.

We're going to face a rollcall vote soon.

Go ahead.

Senator LAUTENBERG. Thanks.

Ms. Tenenbaum, nice to see you here and listen to what each of you have said.

And, Mr. Jones, Senator Snowe, and I recently, as I mentioned, sent a letter to EPA signed by 24 of our Senate colleagues, applauding EPA's current actions on polybrominated diphenyl ethers (PBDEs). The letter also expressed concern that EPA's authority to

address PBDEs is limited under our current chemical safety law, TSCA.

[The information follows:]

UNITED STATES SENATE,
Washington, DC, July 9, 2012.

Hon. LISA P. JACKSON, Administrator,
Environmental Protection Agency,
Washington, DC.

DEAR ADMINISTRATOR JACKSON: We are writing to express our support for the Environmental Protection Agency's (EPA) actions to address a class of flame retardant chemicals called polybrominated diphenyl ethers (PBDEs). These flame retardant chemicals are found in a number of everyday consumer products, including furniture, plastics, and even baby products. According to the EPA, these toxic chemicals are suspected to cause cancer and have been linked to serious neurological and reproductive diseases. We urge the agency to move forward as quickly as possible with its current efforts to protect American families from the toxic effects of PBDEs.

PBDEs are mixed into a number of household products in order to raise the temperature at which they burn, purportedly making the products more flame resistant. However, the Consumer Product Safety Commission found that these chemicals do not provide any significant protection against the risk of fires. Instead, it has become clear that PBDEs can increase human health risks and that the chemicals easily spread and accumulate in the environment and living organisms, including people.

We are deeply alarmed that peer-reviewed research has found that a typical American baby is born with the highest recorded concentrations of flame retardants among infants in the world. This is a serious threat to our children's health because PBDEs interfere with the body's hormone systems, and studies in animals suggest they can cause cancerous tumors, birth defects, and other developmental disorders. Researchers have found that children's exposure comes primarily through household dust, making babies and toddlers particularly vulnerable since they spend a significant amount of time playing on the floor.

Despite the danger to public health, a recent investigative report by the Chicago Tribune revealed that flame retardant manufacturers may have misled the public for decades regarding both the risks and efficacy of these chemicals. Due to industry opposition to common sense reforms at both the Federal and State level that would limit the use of these chemicals, PBDEs and other flame retardants continue to be used in a significant number of everyday products.

In response, EPA has adopted an action plan for PBDEs using its existing authority under the Toxic Substances Control Act (TSCA). This plan reflects the agency's assessment that PBDEs are persistent, bioaccumulative, and toxic to both humans and the environment. Currently, the agency is accepting public comment on two paired rulemakings related to PBDEs. The first action would amend the current Significant New Use Rule (SNUR) to require any manufacturer, importer, or processor of seven different PBDEs, or articles containing them, to submit a notification to EPA at least 90 days before beginning new activities involving these chemicals. The second rulemaking would require those insisting on continuing to use these chemicals to develop the data EPA would need to fully evaluate the health and safety effects of this class of toxic chemicals. We support these efforts and urge EPA to finalize and implement these rulemakings as quickly as possible following the public comment period.

While we commend the EPA for taking steps to address PBDEs, it is concerning that the agency must undertake lengthy rulemaking processes merely to secure additional health and safety data on a chemical of concern and to receive notifications regarding expansions of its uses. Further, EPA is not evaluating steps to actually restrict existing unsafe production and uses of these toxic flame retardants. This reinforces why there is broad agreement that TSCA must be reformed to protect American families from dangerous chemicals in a cost-effective way and we urge you to continue to work with Congress to enact consensus reforms.

Americans deserve to know that the chemicals used in everyday consumer products are safe. EPA's current action to address the health risks of PBDEs is an important first step towards protecting Americans from the risks posed by these pervasive chemicals and we look forward to working with you to enact these reforms.

Sincerely,

Frank R. Lautenberg; Olympia J. Snowe; Richard J. Durbin; Lisa Murkowski; Charles E. Schumer; Susan M. Collins; Ron Wyden; Bernard Sanders; Richard Blumenthal; Al Franken; Joeseph I. Lieberman; Patrick J. Leahy; Tom Harkin; Dianne Feinstein; Sheldon White-

house; Kirsten E. Gillibrand; Jeff Merkley; Jon Tester; Jack Reed; Tom Udall; John F. Kerry; Amy Klobuchar; Maria Cantwell; Michael F. Bennet; Daniel K. Akaka; Sherrod Brown.

Senator LAUTENBERG. What additional steps might EPA take to protect American families on PBDEs, if the Congress enacted TSCA reform?

Mr. JONES. Thank you, Senator Lautenberg.

We appreciate the letter of support for the actions that we're taking on the PBDEs. These are a group of flame retardants that are being phased out in the United States, and we're putting into place a backstop, we hope, known as the significant new use rule, that hopefully will keep new manufacturers of PBDEs from potentially other parts of the world from sending those chemicals into the United States.

One of the limitations under existing TSCA is that somebody from another country could bring a significant new use notice to EPA without any data supporting the safety of those compounds. And we, again, at EPA would be confronted with making judgments around these chemicals without any evidence of safety.

Closing that loophole under TSCA reform would be very helpful, which I think has been considered in your Safe Chemicals Act.

It also raises the question of all of the other flame retardants and the provisions that previous versions of the Safe Chemical Act have included, which involve manufacturers having data demonstrates safety of those compounds so that the agency can evaluate their safety, and the tools necessary to manage risks, if risks are unacceptable, would be very useful as well.

Senator LAUTENBERG. Yes, in your written testimony, you say EPA would like to do more to protect the public from the risks of flame retardants, but it is limited, again, by its current authority.

Would additional authority provided—you've looked at my Safe Chemicals Act—allow EPA to better address those risks?

Mr. JONES. Absolutely. The example that I described earlier of TBB, where the manufacturer is not required to provide any information to EPA demonstrating safety, which is a hallmark under the Safe Chemicals Act, would be very important to ensuring that new chemicals are safe.

Giving EPA the authority to get health and safety data for existing chemicals is critically important for our ability to demonstrate the chemicals are safe. And then the tools necessary to effectively manage risks from chemicals when risks are identified is also very important.

So I think all of those elements, which are in the Safe Chemicals Act, are critically important to EPA being able to demonstrate that we have safe chemicals in the United States.

Senator LAUTENBERG. A number of States have banned the use of some toxic flame retardants because of public health concerns. Other States are considering similar actions. Now, if EPA had greater authority under TSCA to address these chemicals, do you think that the States would continue pursuing efforts to ban flame retardants and other chemicals?

Mr. JONES. Thanks, Senator. When I speak with my counterparts in State agencies, those in particular who are active in regulating

chemicals, they are hopeful that EPA is more active in assessment and regulation of chemicals.

They are very constrained in their resources. They are responding to the people of their States. But they really wish EPA would, in my words, occupy the space more effectively.

And I think their sense is that, if we did that, that they would not have to be as active as they have been.

Senator LAUTENBERG. Mr. Chairman, I'll ask one more question.

Ms. Tenenbaum, CPSC has done extensive testing on the flammability of different products. Based on this analysis, do you think that the addition of flame retardants in furniture foam has provided Americans with any significant protection from household fires?

Ms. TENENBAUM. Our tests that we conducted on foam that was treated with flame-retardant chemicals and foam that was not, showed that there was no difference in terms of retarding the flame.

However, if you put a barrier behind the furniture, that has a much more significant result in stopping the fire and retarding the growth of the fire.

So the answer is no.

Senator LAUTENBERG. Yes, thank you.

Thanks, Mr. Chairman.

Senator DURBIN. Senator Lautenberg, you've hit the nail on the head, because if these chemicals don't make our homes safer—and that's what Chairman Tenenbaum has said; I think the UL testimony will back that up as well—the obvious question is, is exposure to these chemicals a danger?

And I think it goes back to a point you made in your opening, Senator Lautenberg: Most Americans incorrectly, falsely, assume that if a product is for sale in the United States, someone who cares for their interest—not an economic interest, but cares for the health interest of Americans—has taken a look at it and said it's safe to sell.

So let's get on the record, here, Mr. Jones. In terms of chemicals used throughout our economy—in this case, furniture in particular—there's no pre-clearance through EPA of these chemicals, is there?

Mr. JONES. Thanks, Senator Durbin.

The manufacturers for a new chemical—a new chemical, not one that was manufactured before 1976—must bring to EPA a notice prior to going to market. They are not required, however, to submit to EPA or to generate any health and safety data unless they already have.

And so EPA uses what knowledge we have to make judgments about whether or not we believe that chemical is going to be safe.

We are significantly limited by what is provided to us by the manufacturers.

Senator DURBIN. So let's do a sharp contrast with another role of our Federal Government.

When it comes to prescription drugs, in order for a company to legally sell prescription drugs in America, they must establish that that compound, that chemical compound, is both safe and effective, safe to the consumer and effective for the purpose sold. And until

they establish that, they cannot legally sell that pharmaceutical in America.

Now, in your world of chemicals, and let's deal with post-1976 after the 67,000, did you say?

Mr. JONES. Right.

Senator DURBIN. That were grandfathered in, when it comes to new chemicals, is there a legal burden on those who introduce them into commerce to establish that they are safe for exposure to human beings, and effective for the purpose stated?

Mr. JONES. There is no legal burden on the manufacturer to demonstrate to EPA or to anyone else that the products that they are going to be selling are safe. They need to submit the name of the chemical and a few other pieces of information to EPA, and the burden is on us to demonstrate that it is not safe.

Senator DURBIN. And you're dealing with 13,000 or 14,000 chemical compounds?

Mr. JONES. There have been more than 26,000 new chemicals since TSCA was originally passed.

Senator DURBIN. And according to Senator Lautenberg and things that I've read, you've been able to look at several hundred. Is that correct?

Mr. JONES. Of existing chemicals, we have required testing of several hundred. We have looked at the 26,000 new chemicals that came to us.

But again, they do not need to submit any health and safety data, unless they already generated it, to EPA. And so we are trying to use our judgment, often in the absence of data, to determine whether or not there's some reason to be concerned.

I think often we do a good job of that. I think TBB is an example of where we missed it. We missed an issue that ultimately——

Senator DURBIN. TBB being a flame retardant.

Mr. JONES. TBB being the flame retardant in Firemaster.

Senator DURBIN. So the premise is, from Chairman Tenenbaum and later from UL, these chemicals do not make us any safer. Number two, these chemicals in and of themselves could cause some health problems.

It's my understanding that scientific data says exposure to flame-retardant chemicals can lead to liver, thyroid problems, cancer, and other developmental defects. Is that not correct?

Mr. JONES. That's correct.

Senator DURBIN. There is no evidence, or there is no requirement, I should say, under the law that they be proven safe before they're introduced into commerce. And now we are finding concentrations in our babies and infants, unlike any other country in the world.

Now, if this isn't a call to arms across America from families, including families with grandparents like me, who have little toddlers now bouncing around on the floor when I'm sitting on these cushions and spraying these chemicals out, I don't know what is.

So at this point, the TSCA law that Senator Lautenberg has introduced, and I'm cosponsoring, would give you new authority in this area, if you could describe it.

Mr. JONES. Thank you, Senator.

The authorities that we would get under the Safe Chemicals Act are the manufacturers would need to have information to demonstrate the safety of the chemicals that they would submit to EPA, and EPA would make a judgment about the safety. So the burden would shift to the manufacturers to demonstrate safety.

For chemicals already on the market, the agency would be able to compel the generation of health and safety data in a way that isn't so burdensome. And then we would also have tools that would allow us to quickly and efficiently remove unsafe uses of compounds from the market.

Senator DURBIN. And just one point I'll make before we break—I think we have to vote, Frank.

One point I'll make is that Firemaster 550, one of these flame-retardant chemicals mentioned in the Chicago Tribune articles, originally developed as an environmentally friendly alternative to PBDEs, the fire-retardant chemicals.

However, new research on Great Lakes fish shows the chemical is accumulating and causing DNA damage to the fish in the Great Lakes.

When TBB, a component of Firemaster 550, was first submitted in 1995, EPA then identified possible negative health impacts of using this chemical. Is that not correct?

Mr. JONES. In 1995, the mistake that the agency made was that we hadn't figured out that that chemical was going to be persistent or bioaccumulative. Those are the properties that have ultimately led TBB to be in the environment in places we never thought it would have been. So it was missing those characteristics, because we had no basis to determine otherwise. That has led to the exposures that you've described.

Senator DURBIN. So it would seem to me interesting that when it comes to the regulation of furniture, products before CPSC, we have created this rigorous set of tests that need to be done by the Government, which make your job that much more difficult and takes that much longer.

And yet when it comes to the chemicals presented by industry to use in American commerce, our standards are very slight reporting of the chemicals themselves and any evidence they've collected. There's a sharp contrast here.

I'm going to ask this subcommittee to stand in recess for about 10 or 15 minutes. We're going to leave and vote and come back.

And Chairman Tenenbaum and Mr. Jones, thank you both for your testimony very much.

We'll have the second panel when we return.

Thank you.

NONDEPARTMENTAL WITNESSES

Senator DURBIN. On our second panel, we're going to hear from three witnesses involved in different parts of the flammability question.

Our first witness is August "Gus" Schaefer, Sr.—vice president and chief safety officer of Underwriters Laboratories (UL), in Northbrook, Illinois, responsible for maintaining and building UL's public safety mission, including planning, directing, and coordinating public safety activities within UL's operations all around the world.

Mr. Schaefer also acts as UL's public safety guardian, ambassador, and advocate inside and outside the company to ensure that public safety remains a key part of UL's relationship with clients and constituents. In this role, he leads the UL Corporate Social Responsibility Initiative.

He's been with them for more than 39 years, holds a bachelor's degree in industrial engineering from NYU School of Engineering and Science and a certificate in management from Long Island's Adelphi University.

Next we're going to welcome Andy S. Counts. He's the CEO of American Home Furnishings Alliance. The American Home Furnishing Alliance is the Nation's largest trade association for home furnishings manufacturers, importers, and suppliers. He's provided a voice on the development and implementation of consensus-based environmental regulations and product safety standards that impact their industry.

He has a degree in industrial engineering from the Georgia Institute of Technology, and he's served in a number of private sector posts, as well as with the Virginia Department of Environmental Quality.

And finally, our third witness is Peter Van Dorpe. He's the chief of the Chicago Fire Department's Training Division. Glad he's here. He is a 32-year veteran of the Chicago Fire Department with a bachelor degree in fire science management from Southern Illinois University.

In addition to his work as field instructor for Illinois Fire Service Institute, he's the lead instructor for the Chicago Fire Department's Fire Officer School, teaches building construction for the Fire Service at Harold Washington College in Chicago, and recently participated as a subject-matter expert for research conducted by both UL and the National Institute of Standards and Technology.

Mr. Schaefer, you have the floor, followed by Mr. Counts, and Mr. Van Dorpe.

Please proceed.

STATEMENT OF AUGUST "GUS" SCHAEFER, SR., VICE PRESIDENT AND CHIEF SAFETY OFFICER, UNDERWRITERS LABORATORIES, INC.

Mr. SCHAEFER. Thank you, Chairman Durbin and members of the subcommittee, for this opportunity to share UL's research and expertise on the subject of furniture flammability.

UL is a global, independent, voluntary standards developer, and product-testing and certification organization dedicated to public safety. We have been based in Illinois since our founding in 1894 and have about 1,600 employees at our Northbrook headquarters.

UL is driven by our safety mission, which promotes safe living and working environments by the application of safety science and hazard-based safety engineering.

UL recently concluded furniture flammability research, and we'll be showing video excerpts from our testing.

The first video shows a side-by-side comparison of a room filled with legacy furniture you would expect to find in a home in the 1960s and 1970s, and a room with modern day furniture.

During the past 30-plus years, petroleum-based materials such as polyurethane foam and synthetic fabric covers, have supplanted natural materials in furnishings. As you can see, modern furniture typically ignites faster, burns more intensely, releases energy faster, and produces greater amounts of smoke.

As a result, the amount of time available for a safe escape from a home fire is much shorter today than in the past and results in a disproportionately higher number of home fire deaths.

These results are confirmed through related studies by NIST and the National Fire Protection Association (NFPA).

As part of UL's safety mission, in 2008, we began a self-funded research project to determine how fire-retardant-treated foams and fire barriers can affect fire growth. UL focused our research on open-flame testing to complement the smoldering ignition research undertaken by the CPSC and the furniture industry.

Our research consisted of material, mockup, and full-size furniture tests. We tested a variety of materials, including foams treated with and without fire-retardant chemicals, polyester microsuede cover fabric, and various barrier materials. Using a standard flame and ignition source, we measured for heat release rate and mass loss rate.

While we don't have video footage of flame-retardant-treated versus nontreated furniture to show you today, our tests found that, when compared to untreated contemporary furniture, contemporary furniture with flame-retardant foam shows a measurable, but not a meaningful difference in time to flashover or when the gas is emitted from burning materials actually ignite.

Furniture constructed with a flame barrier has flashover times 20 minutes greater than furniture without barriers. This would allow residents significantly more time to safely get out of their homes.

We then expanded the scope of our research to understand how the fire growth of different furniture materials affects survivability for the occupants.

The second video shows a series of fires in identically furnished living rooms. The only differences were the material used in the chair and sofa.

In the four screens, the top left screen contains contemporary or modern furniture. The top right screen contains legacy furniture. The two bottom screens contain contemporary furniture incorporating the fire barrier ignited in different locations.

At 45 seconds, we already see that the flame size in the modern furniture is growing at a faster rate. At the 1-minute mark, the smoke alarm would have sounded. It takes a person about 20 to 40 seconds to react.

At 1 minute 45 seconds, a fire extinguisher probably would not put out the modern furniture fire and the occupant would look to escape.

People take 60 to 90 seconds to gather belongings and children, call 9–1–1, and evacuate.

The modern furniture room in the top left of screen reached flashover at 4 minutes and 45 seconds.

Comparing this with the Chicago Fire Department's goal of being on scene within 3 to 5 minutes after notification, we can deduce that the rooms furnished with modern furniture often reach flashover before the fire services can arrive at the scene.

At 15 minutes, the fire started in the bottom left screen with contemporary furniture incorporating a fire barrier actually self-extinguished. And at 21 minutes and 45 seconds, the barrier-modified furniture in the bottom right screen flashes over.

The living room with legacy furniture finally flashes at 34 minutes and 15 seconds.

Based on the data drawn from earlier tests, we sought to evaluate smoke alarm response and occupant survivability in full-scale homes. We constructed two homes in UL's large-scale fire facility, a one-story, 1,200-square-foot home, and a two-story, 3,200-square-foot home.

We then repeated the previous experiments inside the homes. And though we are still analyzing the results, the preliminary data supports our original findings.

Based on the research we conducted, UL believes, first, modern furniture, whether treated or untreated with flame-retardant chemicals, does not provide sufficient egress time.

Second, for furniture with a flame barrier, the time to flashover is increased to greater than 20 minutes, allowing significantly more time for safe evacuation and fire service response.

PREPARED STATEMENT

With the convergence of flammability and human health impact concerns, UL is beginning to research the nexus of the two.

UL appreciates the opportunity to share our findings, and we look forward to working with you and other stakeholders moving forward.

Thank you.

Senator DURBIN. Thank you.

[The statement follows:]

PREPARED STATEMENT OF AUGUST "GUS" SCHAEFER, SR.

Thank you Chairman Durbin, Ranking Member Moran, and distinguished members of the subcommittee for the opportunity to share Underwriters Laboratories, Inc.'s (UL) research and expertise on the subject of furniture flammability. My name is August "Gus" Schaefer—Senior Vice President and Public Safety Officer at UL.

UL is an independent, not-for-profit standards developer and product testing and certification organization dedicated to pnhlic safety. Since our fonnding in 1894, UL's engineers and staff have helped develop safety standards and prodnct-testing protocols, conducted independent product safety testing and certification, and inspected manufacturing facilities aronnd the world. UL is driven by onr global safety mission, which promotes safe living and working environments hy the application of safety science and hazard-based safety engineering. The application of these principles manifests itself in the evaluation of tens of thousands of products, components, materials, and systems for compliance to specific reqnirements. Throngh these activities, UL actively engages the U.S. Government in its development and administration of Federal regulations and conformity assessment programs at the Federal, State, and local levels. UL works with all participants as a neutral party to ensnre the safest possible outcome for those who work with and rely on the products at issue.

FIRE RISK ASSOCIATED WITH UPHOLSTERED FURNITURE

According to the National Fire Protection Association (NFPA), more home fire deaths resulted from fires beginning with upholstered furnitnre and mattresses/bedding than any other canse. During the 5-year period of 2005–2009, these fires accounted for 19 percent and 14 percent of the deaths and 7 percent and 10 percent of the injnries, respectively. They also accounted for $824 million in direct property damage.[1]

During the past 30+ years, residential interiors have changed dramatically. Homes have increased in size, the number and amount of furnishings and possessions have grown, and petroleum-hased synthetic materials have snpplanted natnral materials in furnishings and home construction products. The combination of these factors has changed the smoke and gas characteristics of residential fires and in some cases, accelerated the speed of fire growth.

For a variety of reasons, mannfactnrers of home fnrnishings are tnrning away from materials like wood and natural fibers in favor of high-performance, lower-cost synthetic materials. For example, most upholstered furniture available today utilizes polyurethane foam for padding and synthetic fabric covers, replacing natural padding materials like cotton, down and feathers, and cover materials made of cotton, wool, linen or silk. While these material changes can lead to products that are easier to clean and more resistant to normal wear and tear, they also react differently when exposed to an ignition source. Studies by UL researchers have found that synthetic materials typically ignite faster, hurn more intensely, and release their fire-enabled energy faster creating greater amounts of smoke than natural materials posing a more ominous threat to occupants and their homes.[2]

The video that will be playing first will show a side-by-side comparison of a room filled with legacy furniture, or furniture you would expect to find in a home in the 1960s and 1970s, and a room with modern furniture purchased at a national department store chain. Both rooms were ignited by placing a lit stick candle on the right side of the sofa and the fires were allowed to grow until flashover. As you will see, the room with modern furniture achieves flashover conditions in a significantly shorter time.

The seemingly insignificant change from natural to synthetic materials in home furnishings has led to residential fires that grow faster and lead to the more rapid onset of untenable conditions. As a result, the amount of time available for safe egress from a home fire is much shorter than in the past. These results corroborate the National Institute of Standards and Technology's (NIST) findings for shorter available safe escape times in residential smoke alarm studies conducted in 2003[3] versus 1975[4] which they attributed in part to faster fire growth.

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[1] NFPA "Home Structure Fires", August 2011; http://www.nfpa.org/assets/files/pdf/os.homes.pdf

[2] Fabian, T.Z. and Gaudhi, P.D., "Smoke Characterization Project: Technical Report", UL, April 2007 (*Available at* http://www.nfpa.org/assets/files//PDF/Research/Smoke Characterization.pdf.)

[3] Indiana Dunes II: Bukowski, RW. et al, "Performance of Home Smoke Alarms—Analysis of the Response of Several Available Technologies in Residential Fire Settings", NIST, January 2008

[4] Indiana Dunes I: Bukowski, RW. et al, "Large-Scale Laboratory Tests of Smoke Detectors", NIST, 1975.

UNDERWRITERS LABORATORIES RESEARCH EXPLORING THE FIRE SAFETY OF UPHOLSTERED FURNITURE

As part of UL's safety mission, in 2008 we set out to conduct a self-fnnded research project to determine if commercially available products snch as fire-retardant foams and fire barriers (interliners) can retard and/or reduce the fire growth rate of upholstered furniture exposed to small open flames. Polyurethane foams are highly cellular materials that provide flexibility and comfort. Unfortunately, the physical design and chemistry (polyurethane chemical structure) is highly vulnerable to ignition, flaming liquefaction, and further burning. Flame retardants (most notably bromine and phosphorous) are used to quench the progressing fire growth. Because of the cellular foam structure, the quantities of flame retardants necessary to accomplish this task are extremely high, some as high as npward of 30 percent hy weight. Fire barriers are complex woven structures that have both polymeric fibers and inorganic coatings that develop a protective char on burning. When they are exposed to high-temperature flames, the organic polymers burn with the inorganic compounds and form combustion products that are brittle and have mechanical strength (rather than powdery ash). The creation of an inorganic "crust" is a way of slowing down or even preventing the high-temperature flames from impinging on the polyurethane foam. There are many other examples of intumescent or char-forming materials, such as intumescent coatings for steel beams, and polymeric jacketing materials used in plenum cable.

UL decided to focus our research on open-flame testing as we believed that the Consumer Product Safety Commission (CPSC) and the Upholstered Furniture Action Council (UFAC) were already addressing smoldering ignition. The scope of the project later expanded to fully understand the impact upholstered furniture materials play in fire growth and subsequent occupant tenability and survivability. Thus, apart from the ignition of upholstered furniture, our research sought to understand the dynamics of fires that include various constructions of upholstered furniture.

Our research can be divided into three phases. Phase 1 of our research consisted of material-level tests, furniture mock-up tests, and full-size furniture tests, the original scope of the study. Phase 2 compared various upholstered furniture configurations in a living room environment Finally, Phase 3 included a series of full-scale house fire experiments to determine smoke alarm response aud occupant tenability and survivability related to upholstered furniture fires.

PHASE 1: MATERIAL, MOCKUP, AND FULL-SIZED FURNITURE TESTING

Materials utilized in this investigation included 11 commercially available barrier materials constituting different chemistries and physical structures (iucludiug flat weaves, knits, and high lofts). Two comparable density polyurethane foam materials were also used: a nonfire retardant foam commonly used in upholstered furniture and a California Technical Bulletin (CA TB) 117 compliant fire-retardant treated foam. UL also utilized the most popular cover fabric from the largest upholstered furniture cover fabric supplier in the United States (CPSC 16 CFR part 1634 Type I compliant beige polyester microsuede).

Tests were conducted on three scales of combustibility:

—material-level tests;

—furniture mock-up tests; and

—full-size furniture tests.

The combustibility behavior of the individual sample materials and combinations of materials (i.e., foam/barrier liner/cover fabric) under well-ventilated, early stage flaming fire conditions was characterized using a cone calorimeter (ASTME 1354). In the furniture mock-up tests, cushions of the foam and barrier liner combinations evaluated in the material-level test phase were arranged to replicate an iuterior corner formed by the seat, back, and arm of a chair or sofa. The furniture mock-ups were ignited at the interior intersection of the three cushions using a BS 5852 Flaming Ignition Source 1 (match-flame equivalent). For the full-size furniture test, three of the foam and liner barrier combinations were compared to typical residential materials. Furniture pieces were ignited at the seat-back-arm interior corner, center of the seat-back cushions, and at the back leg area using the same BS 5852 Flaming Ignition Source 1 (match-flame equivalent) as for the furniture mock-ups. Heat release rate and mass loss rate were measured in both instances.

The results of Phase 1 indicated that contemporary furniture constructed with CA TB 117-compliant fire-retardant-treated foam show measurable difference in the time to flashover, but not a meaningful difference compared to contemporary furniture constructed with a nonfire-retardant foam commonly used in upholstered furniture. In addition, when a flame-suppressant technology such as a flame barrier is used between the decorative fabric and the foam, then this furniture (manufac-

tured to UL specifications with polyurethane foam) behaves closer to "legacy" furniture. Specifically the time to flashover is increased to greater than 20 minutes—which would allow residents significantly more time to safely get out of their homes.

The results of these experiments provide knowledge on the potential fire-growth reduction for the different investigated strategies, implementation feasibility, the interaction between different chemistries and components, and the influence of test scale and sample design on fire performance. Collectively, this information can be used by researchers, manufacturers and industry associations, and regulators such as CPSC and California Bureau of Home Furnishings and Thermal Insulation (CA BEARHFTI) to establish appropriate technical requirements, and a corresponding compliance program, for upholstered furniture akin to the CPSC program for mattresses.

PHASE 2: COMPARISON OF UPHOLSTERED FURNITURE ON LIVING ROOM FLASHOVER

As you will see in the second video, in Phase 2 we conducted a series of fires in a living room environment to better understand the impact upholstered furniture materials have in fire growth. The room environments were identically furnished with an engineered wood television stand, book case, coffee table, and end tables purchased from a national department store chain. In addition, the rooms had other fuel loads such as a 37-inch flat panel display television, plastic toy bins, stuffed toys, and polyester curtains. The only differences in the rooms were the materials used in the upholstered chair and sectional sofa. The top left screen contains contemporary upholstered furniture with polyester wrap covered polyurethane foam cushions, and polyester microsuede cover fabric. The top right screen is furniture constructed in legacy materials such as cotton batting around metal spring cushions and cotton cover fabric. The two bottom screens consist of barrier modified contemporary upholstered furniture with high-loft fire barrier covered polyurethane-foam cushions and polyester microsuede cover fabric. The fires were ignited by placing a lit candle on the right side of the sofa and allowed to grow until flashover. One of the barrier modified sets of furniture was ignited in the center of the sofa where the seat and back cushions for two spots meet.

At 45 seconds we can already see that the flame size on the contemporary furniture is growing at a faster rate than the other furniture pieces. At the 1-minute mark, the smoke alarm would have activated to notify the occupants. We can assume it would take an occupant at the earliest about 20–40 seconds to recognize the danger and to take appropriate actions, such as finding a fire extinguisher. At 1 minute and 45 seconds, the fire in the contemporary furniture environment would be difficult to handle with a fire extinguisher and the occupant would then look to escape. On average, people take 60–90 seconds to dress, call 911, gather personal belongings, and awaken two children. Once a call is placed to 911, a dispatcher will alert the local fire department to head to the scene. The Chicago Fire Department is the Nation's second-largest fire department and their goal is to be on-scene within 3–5 minutes after dispatch. Other departments may take longer such as those servicing rural areas. Additionally, this is just the time for the fire service to arrive; once at the scene, they still have to assess the scene.

The room furnished with contemporary upholstered furniture in the top left of screen transitioned to flashover at 4 minutes and 45 seconds. At 15 minutes the fire started at the interior corner of the barrier-clad contemporary furniture has self-extinguished. Flashover occurs for the barrier clad contemporary furniture ignited between the seats at 21 minutes and 45 seconds which is 17 minutes later than the identical furniture that does not have the fire barrier. At 34 minutes and 15 seconds, the living room furnished with legacy furniture flashes over, consistent with what we found for the used furniture in the modern vs. legacy side-by-side video. From this video, we can deduce that rooms furnished with contemporary furniture often reach flashover point prior to the fire service arriving at the scene of the fire.

PHASE 3: COMPARISON OF UPHOLSTERED FURNITURE ON OCCUPANT TENABILITY AND SURVIVABILITY

Based on the data drawn from Phase 2 and exemplified in the second video that you just witnessed, UL wanted to determine what the smoke alarm response and occupant tenability and survivability in an actual full-scale home. In March 2012 a series of full-scale house fire experiments was conducted in UL's large fire facility. One house was a one-story, 1,200 square-foot, 3 bedroom, 1 bathroom house (8 rooms total); the second house was a two-story, 3,200 square-foot, 4-bedroom, 2.5-bathroom house (12 rooms total). The second house featured a contemporary open floor plan with the two-story great room and foyer open to the upstairs bedrooms.

The living/great rooms were identically furuished with engineered wood television stand, coffee table, a lamp, aud end tables purchased from a national departmeut store chain. The only furuishings that differed iu the tests were the materials used iu the upholstered chair aud sectional sofa. The contemporary furniture was constructed using the same hardwood frames, but oue set consisted of polyester wrap covered polyurethane foam cushions, polyester microsuede cover fabric while the other introduced a high-loft fire barrier to cover the polyurethane foam cushions. The fires were ignited by placing a lit caudle ou the right side of the sofa and allowed to grow until temperatures in a remote location from the fire reacbed an unsurvivable level of 150 °C (302 °F). Preliminary data analysis supports Phase 2 findings but we are still currently analyzing the results of these recent experiments.

CONCLUSIONS

Based on the research we conducted, UL believes:

One, that the typical flame-retardant chemical concentrations used to meet fire regulations in upholstered fnrniture do not provide for sufficient fire egress times. The most common of those fire regulations is the BEARHFTI's CA TB 117 performance requirements.

Two, that when a flame-suppressant technology, such as a flame barrier, is used between the decorative fabric and the foam, then this furniture (manufactured to UL specifications with polyurethane foam) behaves closer to "legacy" furniture. Specifically, the time to flash over is increased to greater than 20 minutes—which would allow occupants significantly more time to safely evacuate their home and allow for fire service to respond to the fire.

Three, that barrier materials need not be made of a chemical flame retardant that may or may not pose a negative impact on human health or the environment. It is conceivable that manufacturers could incorporate various innovative barrier methods in upholstered furniture with minimal impact on current manufacturing methods. Some types of barriers such as high-loft barriers could be used as a replacement for polyester wrap thereby minimizing impact on manufacturing and labor. Other barriers, such as flat barriers similar to those incorporated by the mattress industry, could pose an additional mannfacturing step, but do yield increased fire-safety performance.

In addition to fire research UL has conducted on upholstered furniture, UL has also conducted studies in cooperation with the Fire Protection Research Foundation (a foundation under NFPA) on smoke characterization to understand smoke associated with materials commonly found in residential homes today and to provide data points to develop better smoke-sensing technology or smoke-suppression technology in end products. UL also has the ability to measure consumer exposure and indoor air quality to flame retardant and alternative chemicals under normal-use conditions and during combustion or fire processes for the measurement of toxic byproducts using environmental chamber technology. This technology allows the study and impact of alternative construction techniques like the use of fire barriers, reduction of synthetic materials, petrochemical-based construction materials; and the use of alternative, less-toxic flame retardants for bedding, furniture, construction materials, and electronics. This allows for system and component analysis under normal and abnormal conditions to help facilitate the development and validation of chemically safe, fire-resistant products.

UL appreciates this subcommittee's interest in furniture flammability-related matters and how all parties can work to enhance public safety. We appreciate the opportunity to share our knowledge and look forward to working with you and other stakeholders moving forward.

Senator DURBIN. Mr. Counts.

STATEMENT OF ANDY S. COUNTS, CEO, AMERICAN HOME FURNISHINGS ALLIANCE

Mr. COUNTS. Good afternoon. I'm Andy Counts, chief executive officer at American Home Furnishings Alliance. I want to thank you, Chairman Durbin and staff, for allowing me to participate in today's hearing.

The issue of upholstered furniture flammability has been a topic of discussion and debate at CPSC since it inherited the Flammable Fabrics Act in 1973.

Since this time, CPSC has considered several petitions on the issue and released multiple draft standards to address the flammability of upholstered furniture.

As these proposals progressed, CPSC's objective has moved from the risk of small open-flame ignition to the combined risk of small open flame and smolder ignition, and finally to the risk of smolder ignition only.

Consistently, over time, CPSC's statistics have shown that 90 percent of upholstered furniture fires result from smolder ignition.

California Technical Bulletin 117, or TB–117, is required for all upholstered furniture sold in the State of California and attempts to address both smolder and small open-flame ignition.

Unlike smolder ignition, small, open-flame resistance generally requires the treatment of fabric and cushioning materials with flame-retardant chemicals.

During the time that CPSC has been considering furniture flammability, evidence about the potential eco-toxicity and bioaccumulation of certain flame retardants have reshaped the thinking regarding fire and chemical risks. Restrictions on flame-retardant use and production are depleting the compliance toolbox of compounds equipped to achieve open-flame resistance in furniture and to meet TB–117.

In addition, CPSC staff has found that reformulated foam cushions used to comply with TB–117 do not meaningfully improve small open-flame performance.

TB–117 is the only reason flame-retardant chemicals are found in upholstered furniture. California Governor Jerry Brown recently issued a statement directing the State's Bureau of Electronic Appliance Repair, Home Furnishings and Thermal Insulation to revise TB–117 to end the reliance on flame-retardant chemicals.

As a result of this directive, a draft revised California standard has recently been released that will focus solely on smolder ignition.

According to a recent NFPA report, the long-term trend in smoking material fires has been down by 73 percent from 1980 to 2010.

More importantly, the trend line for upholstered furniture as the first item ignited by smoking materials is also declining. In 1980, NFPA estimated that there were 21,500 fires caused by smolder ignition of upholstered furniture. And by 2010, that number had been reduced to 1,500.

Likewise, civilian deaths due to smolder ignition in upholstered furniture have decreased from 1,030 in 1980 to 210 in 2010. When you factor in population growth over this period, you can begin to fathom the significance of these decreases.

This downward trend in fire statistics involving smoking materials and residential upholstery is to some degree the result of a successful industry fire standard. The voluntary program was developed by the Upholstered Furniture Action Council (UFAC) in 1977.

Unlike TB–117, the UFAC program does not require the use of any flame-retardant chemicals. UFAC construction criteria have been adopted by both the American Society for Testing and Materials as ASTM 1353, and NFPA. It is estimated that 90 percent of domestic furniture shipments comply with the UFAC standard.

We understand the frustration some have expressed about the pace of progress on this issue. However, we shouldn't disregard the technical challenges associated with achieving improved fire resistance for a product that is typically covered in fabric and filled with plastics, cellulosics, and other cushioning materials.

Add to this the differential performance of the tens of thousands of upholstery fabrics on the market, and you begin to understand the challenge CPSC shouldered.

An approach that addresses only smolder ignition is not perfect, but represents what is achievable at this point, given these sometimes competing factors.

We recommend that the CPSC immediately move to adopt ASTM 1353 to address the primary smolder ignition risk from upholstered furniture. That would provide CPSC with the time it needs to further investigate the feasibility of its barrier for smolder-prone fabrics and submit its draft testing methods to the necessary round robin laboratory analysis to ensure good repeatability and reproducibility. This round robin analysis is essential to the development of an enforceable standard.

PREPARED STATEMENT

We look forward to our continued work with the CPSC on this important issue and to assisting our members with compliance.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF ANDY S. COUNTS

The American Home Furnishings Alliance (AHFA) represents manufacturers and importers of residential furnishings that include upholstered furniture, wood furniture, home office, and decorative accessories. AHFA companies participate in a highly competitive global market characterized by ever-changing style preferences, margin pressures, and the tendency of consumers to postpone big-ticket purchases if their perceptions of value and function are not satisfied.

AHFA respectfully submits these comments regarding the effectiveness of upholstered furniture flammability standards and flame-retardant chemicals.

BACKGROUND INFORMATION

There is currently one mandatory flammability standard for residential upholstered furniture in the United States. That standard, California Technical Bulletin 117 (TB–117), is required for all upholstered furniture sold in the State of California.

Before we begin our discussion on the effectiveness of upholstered furniture flammability standards, we want to share with you several hard-learned facts based on 40+ years of experience with this topic. First, fire testing is not a precise science. Today's modern fire-testing methodology suffers from three important weaknesses. First, none of the present test methods have been reconciled with what actually happens in real-world fire scenarios, either qualitatively or quantitatively. Second, the precision of today's fire tests is reprehensibly poor with testing errors commonly exceeding 50 to 100 percent. Finally, computer models are only as good as the data driving them. As noted above, the precision and bias of the data is deficient so standard fire tests often lack the repeatability that agencies expect with mandatory standards. This makes a flammability standard extremely difficult to enforce.

Definition of the objective is 50 percent of the solution. There is no such thing as fire-proof furniture and it simply is not a realistic or practical goal. The U.S. Consumer Product Safety Commission (CPSC) did not conceive this at the beginning and therefore the objective of its rulemaking was not clearly defined. Initially it appeared that CPSC wanted to prevent any ignition of the cover fabrics. This proved to be unattainable because everything will burn and each fire is unique. Later, the agency moved away from "no ignition" toward "slowing" the progression of the fires

and thereby allow more egress time. The later is an achievable goal and one which we continue to believe can be met.

Third, there are no quick fixes or silver bullets when it comes to upholstered furniture flammability. There are a myriad number of configurations, fabrics, and fillings that are utilized by our industry to satisfy the consumer's needs and tastes. And the issue is counterintuitive. The materials that are most resistant to smolder ignition tend to be poor performers when it comes to resisting open-flame ignition and vice versa. These three facts have compounded the difficulties CPSC has encountered in this complex rulemaking.

THE NATIONAL DISCUSSION

The issue of upholstered furniture flammability has been a topic of discussion and debate at CPSC since it inherited the Flammable Fabrics Act from the Department of Commerce and the Federal Trade Commission in 1973. Since this time CPSC has considered several petitions on the issue and released multiple draft standards to address the flammability of upholstered furniture in 1997, 2001, 2004, and 2005. A proposed rule was finally promulgated in 2008. As these proposals progressed, CPSC's objective bas moved from the risk of small open-flame ignition to the risks of small open-flame ignition and smolder ignition, and finally to the risk of smolder ignition only.

We welcomed the 2008 proposal because it was the first to focus solely on the risk of smolder ignition which is the predominant flammability hazard associated with upholstered furniture. Consistently over time, CPSC statistics show that 90 percent of upbolstered furniture fires result from smolder ignition. Each year, there are approximately five times as many incidents of smolder ignitions as there are small open flame-related incidents.[1]

According to a recent National Fire Protection Association (NFPA) report,[2] "the long-term trend in smoking-material fires has been down, by 73 percent from 1980 to 2010." More importantly for this discussion, the trend line for upholstered furniture as the first item ignited by smoking materials is also declining. In 1980, NFPA estimated that there were 21,500 fires caused by smolder ignition of upholstered furniture and by 2010 that number had been reduced to 1,500.[3] Likewise, civilian deaths due to smolder ignition of upholstered furniture have decreased from 1,030 in 1980 to 210 in 2010.[4] Finally, civilian injuries have declined from 1,910 in 1980 to 260 in 2010.[5]

THE UPHOLSTERED FURNITURE ACTION COUNCIL

The downward trend in fire statistics involving smoking materials and residential upholstery is, to some degree, the result of a successful industry fire standard. This voluntary program was developed by the Upholstered Fnrniture Action Council (UFAC) in 1977. It has demonstrated that fabric and yarn changes along with the use of substrates between fabric and foam yield improved smolder performance. Unlike TB–117, the UFAC program does not require the use of any flame-retardant chemicals. Also unlike TB–117, UFAC program has undergoue rouud-robin testing and has shown to be repeatable and reproducible. Because of this, UFAC construction criteria were adopted by hoth the American Society for Testing and Materials (ASTME 1353) aud the NFPA (NFPA 260).

Perhaps the greatest contribution of the UFAC program has been to remove smolder-prone materials from the market and replace them with safer ones. Padding materials such as untreated cotton batting, sisal pads, loose sisal, jute pads, rubberized horsehair, and kapok could not pass any of the UFAC criteria and consequently disappeared from the marketplace.

Likewise, UFAC has contributed to the development of safer materials. In addition to inventing heat-conducting welt cords, it effectively set the standards for polyurethane foam and class 1 fabrics. Seating-grade and padding-grade flexible polyurethane foams must pass the UFAC filliug and padding test method. As a result, noncompliant foam is gone from the market. With respect to fabric covers, the UFAC test methods accelerated the use of thermoplastic fibers. This expanded the uumber of class I fabrics, the type most resistant to smolder iguition, and reduced the number of class II fabrics which require the use of a smolder-resistant barrier material. While it is estimated that 90 percent of domestic furniture shipments com-

[1] U.S. CPSC, Regulatory Options Briefing Package, October 28, 1997, p. 153.
[2] John R. Hall Jr., *The Smoking-Material Fire Problem*, March 2012, p. i.
[3] *Id.* at 21.
[4] *Id.* at 22.
[5] *Id.* at 23.

ply with the UFAC standard, the net resnlt has been to afford low-income consumers the benefit of the UFAC program even if their mannfacturers are not participating in UFAC. That is becanse these safer materials are the only ones that can be fonnd in the marketplace.

In the course of the current CPSC rulemaking, UFAC reviewed TB–117 promising CPSC to incorporate the best aspects of TB–117 as part of UFAC's construction criteria. However, when testing was completed, UFAC concluded that TB–117 foam was not more effective than the conventional foam required by UFAC. Therefore, it declined to modify its construction criteria. CPSC later tested TB–117 foam and confirmed that it demonstrated no significant added protection in small open-flame scenarios compared to UFAC complying upholstered furniture products.

SMALL OPEN-FLAME RESEARCH

The current emphasis on smolder ignition is a sensible response to the technical difficulties associated with the small open-flame approaches considered during the course of the rnlemaking. Early in the project, CPSC staff found that reformnlated foam cushions used to comply with TB–117 did not meaningfully improve small open-flame performance. Subsequent testing of so-called "TB–117 plns" foam revealed it performed worse than conventional foam and was inferior in some smoldering scenarios.

A 2001 proposal allowed the use of flame-blocking barriers as protection against open-flame ignition. However, CPSC staff found that barrier materials perform inconsistently depending on the cover fabrics and ignition sonrce. Some barriers were effective in conjunction with a number of outer fabrics, bnt not with others. Those failing fabrics were more appropriate candidates for a flame-retardant chemical treatment option.[6]

Currently available barrier technology utilized to meet California's standard for public occupancy furniture (TB–133) and to meet the Federal mattress standard (16 CFR 1633) is not well-snited for application to residential npholstered furniture. In addition to the complexities created by the various geometries and spatial relationships of furniture, existing barriers would negatively impact the band, drape, and seat of residential upholstered furniture. These barriers also lack important performance characteristics such as loft, resilieucy aud ueutral color, which are critical for the residential upholstered furniture market.

RESEARCH AND REGULATION OF FLAME RETARDANTS

TB–117 is the only reason flame-retardant chemicals are found in upholstered furuiture. The focus on smolder ignition minimizes the reliauce on flame-retardaut chemical treatments. Unlike smolder ignition, small open-flame resistance generally requires the treatment of fabrics and cushioning materials with halogenated compounds (i.e., bromine or chlorine). The widespread application of these chemicals to produce upholstered furniture components would certainly have resulted from the prescribed test methods proposed in the 1997, 2001, 2004, and 2005 CPSC briefing packages.

During the time that CPSC has been considering furniture flammability, evidence ahout the potential ecotoxicity and bioaccumulation of halogen flame-retardants have reshaped the thinking regarding fire and chemical risks. Restrictions on flame-retardant use and production are depleting the compliance toolbox of compounds equipped to achieve open-flame resistance in furniture and to meet TB–117.

In 2004, AHFA (then the American Furniture Manufacturers Association or AFMA) co-chaired and participated with other key industry stakeholders in a project sponsored by Environmental Protection Agency's (EPA) Design for the Environment' (DfE). The scope of this project was to develop an assessment tool to evaluate emerging flame-retardant chemistry that could potentially be used to replace existing chemical solutions used to meet existing flammability standards. The focus was to develop a science-based matrix to evaluate and screen the potential risk of emerging flame-retardant chemicals to human health and the environment. The resulting matrix did not provide the absolute certainty needed to determine if the flame-retardant chemistry was safe and effective.

In January 2010, EPA added polybrominated diphenyl ethers (PBDEs)—used as flame retardants in a wide range of products, including fabrics and foam—to its "chemicals of concern" list, meaning it considers them substances that "may present an unreasonable risk of iujury to healtb and the environment." The furniture industry had already voluntarily phased out the use of these chemicals in 2005. The only

[6] U.S. CPSC Upholstered Furniture Flammability: Analysis of Comments from the CPSC Staff's June 2002 Public Meeting, p. 30.

PBDE still on the market in North America, is decaBDE, a fabric flame-retardant effective across a full spectrum of fiber types. Critics of decaBDE often cite evidence that it can degrade (debrominate) into more hazardons congeners that are already the subject of regulatory action.

DecaBDE has been banned or substantially restricted in Washington State, Maine, and the European Union. Asian countries and other U.S. States are considering similar legislation. Without decaBDE, fabric mills indicate that achieving open-flame resistance would require the commercialization and testing of more specialized chemical formulations geared to particular fabric types. Environmental authorities and policy makers now appear to be moving toward restrictions on bromine and chlorine flame-retardant chemicals generally.

Last year in California, the Office of Environmental Health Hazard Assessment (OEHHA) added TDCPP (Tris (1,3-dichloro-2-propyl) phosphate), a flame-retardant chemical commonly nsed in furniture applications, to its list of chemicals subject to Proposition 65. Governor Brown recently issued a statement directing the State's Bureau of Home Furnishings and Thermal Insulation (BEARHFTI) to revise TB–117 to end the reliance on flame-retardant chemicals. In the present Federal rnlemaking, environmental advocates have urged CPSC to forego regulatory approaches that wonld encourage snch chemical use.

As a result of the Governor Brown directive a draft revised California standard (TB–117 2012) has recently been released that will focns solely on smolder ignition and take a similar approach to the 2008 proposed CPSC standard.

OTHER TRENDS SHAPING FIRE STATISTICS

Any current discussion of this issue should be made in the context of fire statistics that have improved significantly in response to a number of trends. In addition to the impact of voluntary industry standards such as UFAC, Americans are smoking less and are increasingly protected by working smoke and carbon monoxide detectors. Small open-flame statistics are being driven downward by the use of child-resistant lighters pursuant to CPSC regulations finalized in 1993 and a CPSC-sponsored voluntary performance standard for candles. In addition, all States have enacted requirements for reduced ignition propensity (RIP) cigarettes. The March 2012 NFPA study on smoking material fires estimates that RIP cigarettes alone will reduce fire deaths 30 percent from 2003, the last year before any State-implemented this legislation.[7] All of these developments can be expected to further reduce residential fires associated with upholstered furniture.

CONCLUSION AND RECOMMENDATIONS

We understand the frustration some have expressed about the pace of progress on this issue. However, we shouldn't disregard the technical challenges associated with achieving improved fire resistance for a product that is typically covered in fabric and filled with plastics, cellulosics, and other cushioning materials. Add to this the differential performance of the tens of thousands of upholstery fabrics ou the market; the synergy between fabrics and filling materials; and you begin to understand the challenge CPSC has shouldered.

Upholstered furniture flammability encompasses not only fire science, but consumer preferences, behavioral factors, the competitiveness of domestic industries and the increasing scrutiny of chemicals that may pose a risk to human health and the enviroument.

Our industry is committed to supporting government and private sector solutions based ou three criteria:

—safe;
—effective; and
—saleable.

To be "safe", a solution must not introduce new risks to consumers, workers, or the environmeut and not undermine the existing level of resistance to smolder ignition. To be "effective", a solution must reduce the number of residential fires involving upholstered furniture and must uot create a false sense of security to the cousumer. To be "saleable", a solution must result in furniture that is attractive, comfortable, durable, and affordable. A solution that meets the criteria of safe, effective, and saleable continues to form the basis for an iudustry supported Federal standard for residential upholstered furniture.

An approach that addresses only smolder ignition is not perfect, hut represents what is achievable at this point given these sometimes competing factors. We recommend that the CPSC immediately move to adopt ASTM 1353 to address the pri-

[7] Hall, *supra* at 11.

mary smolder-ignition risk from upholstered furniture. That will provide CPSC with the time it needs to further investigate the feasibility of its barrier for smolder-prone fabrics and to submit its draft test methods to the necessary round-robin laboratory analysis to ensure good repeatability and reproducibility. This round-robin analysis is essential to the development of an enforceable standard.

After finalization of a standard that addresses smolder ignition, CPSC resonrces can then be concentrated on determining if potential solutions to small open-flame risk exist and are justified. This effort must provide multiple options for compliance and a mechanism for identifying safe and effective flame-retardant chemistry.

Any mandatory flammability standard must also rely on the use of compliant components and not the use of composite testing. Furniture manufacturers are assemblers of components provided by third-party suppliers. The combination of these various components results in thousands of SKUs. This volume makes the testing of full-scale or mockup composites not only unreasonable, but impossible.

Finally, cost must be a consideration. The statistics of residential fires have told us repeatedly over the years that the residential fire problem in the United States primarily lies in households with lower incomes, less education, and a higher proportion of single parents. This segment of the population is the most sensitive to cost increases, yet this segment is clearly the most in need of the protection that safer upholstery will provide. Furniture that meets ASTM 1353 is proven to provide an acceptable level of fire protection at price poiuts that will primarily beuefit them and the firefighters charged with saving their lives.

We look forward to working with CPSC on this important issue and to assist our members with the compliance obligations they will face once a new rule is finalized.

Senator DURBIN. Thanks, Mr. Counts.

Peter Van Dorpe.

STATEMENT OF PETER VAN DORPE, CHIEF, TRAINING DIVISION, CHICAGO FIRE DEPARTMENT

Mr. VAN DORPE. Good afternoon. Thank you for having me here today. My name is Peter Van Dorpe. I've been a firefighter for 32 years. I'm a district chief in the Chicago Fire Department and in charge of the Training Division.

Since 2006, I have been one of the Chicago Fire Department's liaisons to and have served as a subject-matter expert for various agencies and universities that have been conducting fire-safety research. These agencies include UL, NIST, University of Illinois, Michigan State University, and New York Polytechnic, among others.

This research has been funded largely through the Department of Homeland Security's Assistance to Firefighters Grants Program.

Through both my experience on the fire ground and in the course of my participation in these research projects, I've become acutely aware of the significant changes that have occurred over the last 40 to 50 years in the way homes are built and the way that we furnish them. What you have seen here today, as dramatic as it is, demonstrates only a fraction of the changes that have taken place.

Put as simply as possible, we are making homes bigger. We're building them with less massive structural components and then we're filling them with more air and more fuel than ever before.

From a firefighter's perspective, this is a recipe for disaster for both the fire service and the public we have sworn to protect.

Part of the reason why I was selected to speak at this hearing is because I was already scheduled to be in Baltimore tomorrow to deliver a workshop at Firehouse Expo. Firehouse Expo is one of several conferences that I and my colleagues from the Chicago and New York City Fire Departments, UL, NIST, and other research partners attend each year to deliver the findings of its research to the American fire service.

We call it bringing science to the street, and our goal is to make sure that the firefighters that arrive at your door in your time of need come with a set of strategies, tactics, skills, and knowledge to best equip them to safely and effectively combat the fire they will face.

The first and most important part of reaching that goal is to make sure these firefighters understand the scope and magnitude of the changes in the modern fire environment. I hope to convey some sense of that change to you in this brief time we have today.

I will keep it simple: It's stuff, and there's more stuff, and that stuff is made out of plastic. And more stuff, more of that plastic stuff, is made out of plastic that contains its own air supply—extruded polyurethane foam in furniture.

All of this stuff is fuel, and we're packing more and more of it into our boxes that we live in every day.

How this stuff in these boxes behave, interact, and maintain their integrity under fire conditions goes largely unregulated, so long as that box is labeled one- or two-family occupancy and the stuff is intended to be used by the people that occupy those houses.

It should come as no surprise to us that most fire deaths occur in one- and two-family homes.

The statistics that support these statements are readily available and accessihle from NFPA, UL, NIST, the National Institute of Occupational Safety and Health, and a host of other universities and Government agencies.

Please allow me to share with you some lesser-known statistics. In 1903, 605 people died in the Iroquois Theater fire in Chicago. In 1911, 146 died in the Triangle Shirt Waist fire in New York City. There were 294 deaths in the Consolidated School fire of 1937, 492 in the Coconut Grove Supper Club fire of 1942, and 100 in the Station Night Club fire of 2003.

Indeed, the 10 largest single-building fatal fires over the last century have totaled more than 2,800 deaths. And that number does not include the 2,666 deaths that occurred in the fires that were in the aftermath of the September 11 attacks.

Each of these tragedies, as well as many like them throughout our history, brought about a response that was proportionate to the scope and magnitude of the event. Perhaps the most important part of the response to each of these events and those like them were the significant changes made in the way we design, build, inspect, and otherwise regulate the buildings we occupy and the things that we put in them.

We can and should be proud of the way we respond as a society to the disasters and tragedies that befall our communities. However, the tragedy that is the yearly fire death toll in the United States goes unaddressed largely because it goes unrecognized.

Each and every year, between 2,500 and 3,000 people die in fires in the United States. That's more than died in the September 11 attacks and more than died in the 10 most tragic fires in our history. And it happens year after year after year.

Eighty-five percent of those fire deaths occur in homes, and they most often occur in ones and twos. Hence, those of you who aren't professionally attuned to the situation are not familiar with the scope and magnitude of the problem.

I hope my testimony today will help bring it to the forefront for a time.

Statistically, three people died in fires while you slept last night, and another will die while we are here discussing the merits of the issues before us. Three more will die in the time you will make your way home tonight and end your day and return to sleep. Tomorrow and every day will be just like today unless and until we do something different about the way we build, protect, and furnish homes in this country.

When I'm teaching building construction to firefighters, I make it a point to focus on the hazards of lightweight construction and practices used in single-family homes. And I always begin and end by telling them, "It ain't about the gusset plates."

Gusset plates are a fastening method that has replaced traditional nails in lightweight wood truss construction. The fire service frequently points to them as the cause of early collapse of floor and roof systems in buildings using these systems.

What I mean to convey to them with this phrase is that we need to focus less on the components and more on the totality of the changes to the built environment and the fuel loads we are placing in them.

Similarly, I encourage you not to get lost in the weeds of which methods of reducing residential fire losses and fire deaths are the most efficient, effective, or environmentally friendly. For example, while the effects of adding fire-retardant chemicals to extruded foams and fills has been shown to be of limited value, this does not preclude the use of retardants in any and all circumstances.

Most approaches to reducing fire growth and propagation in furniture and finishes have value, and they should all be investigated and pursued.

The mattress industry has demonstrated that an approach that applies a variety of methodologies is the most likely to sustain success over the long run.

Most tragedies, and certainly those that arise in accidents in the home, are not the result of gross negligence or malice on anyone's part. Rather, they are the sum of what my colleague Vicki Schmidt, a volunteer firefighter and a State instructor in Maine, refers to as the pitter-patter of little defeats, those individually minor errors and omissions that we allow to accumulate and coalesce into tragic events.

Please permit me to outline for you what I believe to he some effective guidance for meeting the challenges before you. Increased residential firefighters' fire safety, and firefighter safety, requires reducing ignition sources.

Today, this is largely an issue related to behaviors including smoking, alcohol use, and the safe use of open flames such as candles. Reducing the development and prorogation of fires that do occur by addressing the flammability and fire development characteristics of home furnishings and finished materials, particularly those that contain extruded polyurethane foam and related materials.

Reducing the impact of fires that do occur upon the occupants through more thorough and effective regulations requiring active and passive fire protection and detection systems in homes. And,

yes, that does mean we need to advocate for residential fire sprinklers in all new construction.

Reducing the impact of fires that do occur upon the structural system of the home, by requiring structural assemblies used two-family homes be protected in the same way that they are required to be protected in other occupancies.

Finally, enabling the American fire service to do our job more safely and effectively by doing all of the above and by continuing to fund the fire-safety research and dissemination of life-saving information it is generating.

In closing, I wish to assure you that the challenge is not as difficult as you may think. Indeed, the problem has already been solved.

Look around you. Look above your heads. This is a fire-safe building. We have applied the lessons of the past and appropriate science and technology to design an occupancy that provides a safe and secure environment for its occupants.

PREPARED STATEMENT

We can do the same for residential occupancies. We have the knowledge and the technology to meet all the challenges, whether they be temporal, behavioral, financial, or environmental. All we need is the will to act.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF PETER VAN DORPE

Good afternoon. My name is Peter Van Dorpe. I have been a firefighter for 32 years. I am a District Chief on the Chicago Fire Department in charge of the Training Division. Since 2006 I have been one of the Chicago Fire Department's liaisons and have served as a subject-matter expert for various agencies and universities that have been conducting fire-safety research. These agencies include Underwriters Laboratories (UL); the National Institute of Standards and Technology (NIST); the University of Illinois; Michigan State University; New York Polytechnic; and others. This research has been funded largely through the Department of Homeland Security's Assistance to Firefighters Grants program. Through both my experience on the fire ground and in the course of my participation in these research projects I have become acutely aware of the significant changes that have occurred over the last 40 to 50 years in both the way homes are built and the way that they are furnished. What you have seen here today, as dramatic as it is, demonstrates only a fraction of the changes that have taken place. Put as simply as possible, we are making homes larger, building them with less massive components, and then filling them with more air and more fuel than ever before. From a firefighter's perspective this is a recipe for disaster for both the fire service and the public we have sworn to serve and protect.

Part of the reason why I was selected to speak at this hearing is because I was already scheduled to be in Baltimore tomorrow to deliver a workshop at Firehouse Expo. Firehouse Expo is one of several conferences that I and my colleagues from the Chicago and New York City fire departments, UL, NIST and the other research partners attend each year to deliver the findings of this research to the American fire service. We call it "bringing science to the streets" and our goal is to make sure that the firefighters that arrive at your door in your time of need come with the set of strategies, tactics, and skills that best equip them to safely and effectively combat the fire they will face. The first and most important part of reaching that goal is to make sure our students nnderstand the scope and magnitude of the changes in the modern fire environment. I hope to convey some sense of that change to you as well in the brief time that I have with you today. I will keep it simple: Stuff. More stnff. More stuff made of plastic (petroleum). More stuff made of plastic with a built in air supply (polyurethane foam, i.e., furniture). All of this stuff is fuel and we are packing more and more of it into the boxes that we live in. How this stuff and these boxes behave, interact and maintain their integrity under fire condi-

tions goes largely unregulated so loug as the box is labeled "oue or two family occupaucy" and the stuff is intended to be used by the people that occupy it. It should come as uo surprise to us that most fire deaths occur in one- and two-family (read, "unregulated") occupancies. The statistics that support these statements are readily available and accessible from the National Fire Protectiou Association, UL, NIST, the National Institute of Occupational Safety and Health, etc.

In 1903, 605 people died in the Iroquois Theater fire in Chicago. In 1911, 146 died in the Triangle Shirt Waist fire in New York City. There were 294 deaths in the Consolidated School fire of 1937; 492 iu the Coconut Grove Supper Club of 1942; and 100 in the Station Night Club fire of 2003. Indeed, the 10 largest single building fatal fires over the last century total more than 2,800 deaths. Of course we are all aware of the 2,666 lives lost at the fires of September 11. Each of these tragedies, as well as many like them throughout our history, brought about a response that was proportionate to the scope and magnitude of the event. Perhaps the most important part of the response to each of these events and those like them were the significant changes made in the way we design, build, inspect, and otherwise regnlate the buildings we occupy and the things we put in them. We can and should be proud of the way we respond, as a society, to the disasters and tragedies that befall our communities.

However, the tragedy that is the yearly fire death toll in the United States goes nnaddressed, largely because it goes unrecognized.

Each and every year, between 2,500 and 3,000 people die in fires in the United States. That's more than died in the September 11 attacks and more than died in the 10 most tragic fires in our history, and it happens year, after year, after year. Eighty-five percent of these fire deaths occur in homes and they most often occur in one- and two-family homes. Hence, those of you who aren't professionally attuned to the situation are not familiar with the scope and magnitude of the problem. I hope my testimony today will help bring it to the forefront for a time. Statistically, three people died in fires while you slept last night. Another will die while we are here discussing the merits of the issues before us. Three more will die hy the time you make your way home tonight, end your day and return to sleep. Tomorrow and every day will be just like today; unless and until we do something different about the way we build, protect, and furnish homes in this country.

When I am teaching building construction to firefighters I make it a point to focus on tbe hazards of lightweight construction practices used in single family homes and I always begin and end by telling them, "it ain't about the gusset plates". Gusset plates are a fastening method that has replaced traditional nails in lightweight wood truss construction. The fire service frequently points to them as the cause of early collapse of floor and roof systems in buildings using these systems. What I mean to convey to them with this phrase is that they need focus less on the components and more on the totality of the changes to the built environment and the fuel loads placed in them. Similarly, I encourage you not to get lost in the weeds of which methods of reducing residential fire loss and fire death are the most efficient, effective or environmentally friendly. While the effects of adding fire-retardant chemicals to extruded foams and fills has been shown to be of limited value, this does not preclude the use of retardants in any and all circumstances. Most approaches to reducing fire growth and propagation in furniture and finishes have value and they should all be investigated and pursued. The mattress industry has demonstrated that an approach that applies a variety of methodologies is most likely to sustain its success over the long run.

Most tragedies, and certainly those that arise around accidents in the home, are not the result of gross negligence or malice on anyone's part. Rather, they are the sum of what my colleague Vicki Schmidt, a volunteer firefighter and State fire instructor in Maine refers to as the "pitter-patter of little defeats"; those individually minor errors and omissions that we allow to accumulate and coalesce into a tragic event.

Please permit me to outline for you what I believe to be some effective guidance for meeting the challenge before you. Increased residential fire safety requires:

Reducing Ignition Sources.—Today this is largely an issue related to behaviors including smoking, alcohol use, and open flames such as candles, etc.

—Reducing the development and propagation of fires that do occur by addressing the flammability and fire development characteristics of home furnishings and finish materials, particularly those that use or contain extruded polyurethane foam and related materials.

—Reducing the impact of fires that do occur upon the occupants through more thorough and effective regulations requiring active (i.e., residential sprinkler systems) and passive fire protection and detection systems in homes.

—Reducing the impact of fires that do occnr upon the structural system of the home by requiring structural assemblies used in one- and two-family homes to be protected in the same way they are required to be protected in other occupancies.
—Enabling the American fire service to do our job more safely and effectively by doing all of the above.

In closing, I wish to assure you that the challenge is not as difficnlt as yon may think. Indeed the problem has already been solved. Look around you. This is a fire-safe bnilding. We have applied the lessons of the past and the appropriate science and technology to design an assembly occupancy that provides a safe and secure environment for its occupants. We can do the same for residential occupancies. We have the knowledge and the technology to meet all the challenges, whether they be temporal, behavioral, financial, or environmental. All we need is the will to act. Thank you.

Senator DURBIN. Thank you, Mr. Van Dorpe, and thank you for what you do for a living. Men and women like you all across America keep us safe. We're grateful.

Mr. VAN DORPE. Thank you, Sir.

Seventy-five percent of the American fire service is volunteer.

Senator DURBIN. I know that. I know in Chicago we have a great fire department. We also, downstate, have a lot of great fire departments and volunteer efforts.

So thank you very much.

One of the things which was noted earlier, I want to mention to you. Tony Stefani, president of San Francisco Cancer Prevention Fund said in a recent study, "Firefighters show blood levels of PDBEs", these fire-retardant chemicals, "over 30 percent higher than the general population of California, and 60 percent higher than the general population of the United States."

One firefighter had a PDBE level 11 times greater than average for the general population. And the concentrations in the United States are 20 to 30 times higher than found in the general population of Japan, Hong Kong, and the United Kingdom.

So there is an environmental aspect to this, the exposure of your men and women as firefighters to these fire-retardant chemicals, which I guess Mr. Stefani is making a point to show us may have some long-term negative health impact.

Has there been any effort underway to measure this beyond his effort?

Mr. VAN DORPE. UL has conducted some smoke particulate studies. They began, I believe, in 2007. Those continue to today.

One of the things that we're finding is that, even when we wear all of our respiratory protection, we're still exposed to chemicals through dermal exposure. This stuff is migrating through our skins and into our bodies.

So the problem for us is getting more and more complex all the time. Every time we think we get a handle on how to deal with our exposure to chemicals, we find that there's another exposure out there.

Senator DURBIN. And you probably read the Chicago Tribune series, that there was a group calling themselves Friends of Firefighters who were testifying for the use of these flame-retardant chemicals. They were challenged. They had something to do with the State of Vermont, at least they said they did, but they were challenged as to whether they were speaking for firefighters or for the chemical industry.

Mr. VAN DORPE. I'm not familiar with the group.

Senator DURBIN. It's a point I hope you'll take a look at.

Mr. Schaefer, just for the record, you've stated it in general terms, but in politics and in the Chicago Tribune series, we follow the money.

Where was the money engaged in each of these undertakings?

Why did the tobacco industry decide they wanted to push flammability in furniture rather than a fire-safe cigarette? Why did the chemical industry want to push certain fire-retardant chemicals? What was the role of the furniture industry and such?

So, for the record, when it comes to UL, who is paying for your efforts in research?

Mr. SCHAEFER. For our efforts, they're self-funded through our public safety mission fund. Sometimes we do research work in partnership with organizations like NIST, and there, there would be grants and so on.

But for the most part, the research work we do is self-funded in the interest of advancing our safety mission.

Senator DURBIN. And to make it clear for the record, there are two approaches where—well, three, actually: legacy furniture, which was different than the furniture that we buy today; then furniture treated with fire-retardant chemicals, which you said does not produce any measurable impact of safety; and then barriers, which I assume is some sort of a cloth or fabric or something that stops the fire from spreading into the furniture. Three different levels, if I've got that correct.

Mr. SCHAEFER. Yes, that's correct.

Senator DURBIN. And the barriers, you say, don't necessarily have to include fire-retardant chemicals?

Mr. SCHAEFER. That's right, the barrier could be constructed even out of fiberglass, what you would see in insulation in your homes, so it's basically a neutral material. And there are other technologies that don't use flame retardants with barriers.

Senator DURBIN. I'm sorry, Senator Lautenberg missed the video. We want to make sure he gets a chance to see it later, but it was very dramatic in showing the difference in each.

So, Mr. Counts, as I understand what you're saying here, TB–117, the California standard relative to flame-retardant chemicals, kind of became a national standard, because furniture makers who are selling a lot of furniture in California are all around the country.

And now what I hear is, based on scientific evidence, the industry is backing away from the use of these chemicals, and the Governor in California has raised questions about the standard itself.

So I guess my basic question is, when it comes to furniture flammability today, is the furniture industry looking at their products in a different way in terms of how to make them safe, and not introduce toxic chemicals that may endanger customers?

Mr. COUNTS. Yes, Senator, we are.

In my written testimony, I noted that, in 2005, the furniture industry voluntarily phased out the use of PBDEs in our upholstery foam. EPA took action on that later in 2010, I believe.

So we're monitoring very closely European studies. We're working with our suppliers to make sure that all the research is avail-

able that's possible, working with Arlene Blum and others at Cal Berkeley, just to identify what chemicals may be trending at potential issues, and we look to phase those out as we can. And we'll be working with California on their new smoldering initiative as well.

Senator DURBIN. So you referred to something which I know nothing about, ASTM–1353, instead of the California TB–117.

Is this a new standard in terms of flammability and the safety of furniture you're recommending to CPSC and you think should be an industry standard?

Mr. COUNTS. ASTM–1353 is the embodiment of the Upholstered Furniture Action Council standard that was developed in 1977 to address smolder ignition.

If you look at the statistics on smolder ignition and the trends that I mentioned in my testimony, that along with smoke detectors and changing in lifestyles, decreasing smoking, et cetera, has added to the decrease in the trend there.

So that is the standard that we're looking to adopt.

Senator DURBIN. Officer Van Dorpe said something, which I thought to myself, I never thought of even looking for this. But he suggested, in his five things to make our homes safer, one of them is that we should be more sensitive to the furniture we buy, in terms of whether or not it is fire safe.

I cannot recall furniture ever being labeled fire safe. Is that something your industry does, advertises?

Mr. COUNTS. There is a UFAC hangtag that you can find on furniture, typically the retailer might not like hang tags on their furniture, and they'll rip that off, and you can't find it. There's the California TB–117 tag that's on there, occasionally. But those are the two standards.

Senator DURBIN. I'll bet you there aren't a half a dozen people in this room that would know what that meant if they saw it hanging from the back of a chair. I wouldn't have until this hearing.

Mr. COUNTS. Well, the hangtag is fairly descriptive, but like I said, sometimes it doesn't make it to the consumer.

Senator DURBIN. All right. Thank you much.

And that's the point I wanted to get to, Mr. Van Dorpe, is when it comes to our knowledge of what we're buying and whether it's safe, most consumers may not think of it, number one; and number two, wouldn't know what to look for.

Is there something that the firefighters recommend, in terms of that choice?

Mr. VAN DORPE. For a very long time, and this might be a little off topic, but for a very long time, the building industry said to the fire service, when we were concerned about the lightweight construction and taking mass out of buildings, where's your data, where's your data?

We finally have the data now, thanks to you all. So we've changed that discussion.

And oftentimes we hear when we talk about fire safety in the homes and sprinkler systems and fire-safe furniture and things like that, where the industries will say to us, well, consumers won't pay for that. I think we need to start asking them, where's your data?

Has anybody really asked? I mean, you can buy the safest car on the planet. There are manufacturers that will advertise their

cars that way, "We sell you the safest car. You'll pay a little more for it, but we promise you it's the safest car."

We can do the same approach with our homes. We can sell fire-safe homes. We can sell fire-safe furniture. You want a five-star home or a four-star home? What's the difference? One is more fire safe than the other.

We haven't even made the attempt, and we really should.

Senator DURBIN. Good point.

Senator Lautenberg.

Senator LAUTENBERG. Thanks very much, Mr. Chairman.

Sorry I missed the testimony of all of the witnesses. They bring good information to us.

Chief Van Dorpe, firefighters are called on to rush into homes that are burning on a regular basis. Inside those homes are hundreds of household products—we talked about that—including many that contain chemicals.

Now, could we protect the health of the firefighters by reforming our Federal chemical laws to reduce toxic substances in the homes?

Before you answer, I want to tell you something that I worked on some years ago. We had a fire in Elizabeth, New Jersey. And there's a lot of chemicals produced in the State of New Jersey.

And a couple of firemen were going into the burning building and their uniforms; their protective uniforms began to melt. And it was then that I wrote a law called "Right to Know", which became the law.

And when you think about the sofas and fire retardants and things of that nature that work against safe opportunities in fighting a fire, and the Right to Know.

And in this case, I just wonder, is there something that we might do that would change the nomenclature on fire retardants and on every sofa, everything, have a defining message that says, hey, be careful, that this can accelerate a fire beginning because of the chemicals there? Is there anything that you think your firefighter friends and the volunteers might do to protect themselves by having more knowledge about what's in these homes?

Mr. VAN DORPE. We can't have too much knowledge about the environment that we're operating in. And that environment is getting more and more complex all the time.

The challenge that we face is that, in the residential market, as soon as you start talking about our homes, most of the regulations, both for building codes and the restrictive regulations, go away. And that's where most of our fires are, and that's where most of our fire deaths are, and that's where most of our exposures are.

So what American fire service needs for you to do is to take what we already know about making buildings safer, making products safer, and apply that to all products, not just to those that are in hotels or in assembly buildings or other places, but across the board.

We know how to do this. The mattress industry has demonstrated it.

In Europe, England, and in the United Kingdom, if you Google "home fire", you know, home furniture fires, most of your responses come back with United Kingdom references, because they've done

the work, they've laid the groundwork and they've implemented a lot of these lessons.

So the information is out there. We just need to apply it.

Senator LAUTENBERG. What happened on 9/11, New Jersey lost 700 of its citizens in that calamitous occasion. But we still have had consequences of exposure by firemen and other emergency personnel. Still now, there are lots of them being treated and deaths are taking place because of the effects of the fumes and the dust and all of that.

And what happens when the toxic fumes are coming out there, black smoke, when they're burning? What happens to those who are trying to do their job, trying to save lives? What steps has your department taken to protect your firefighters from these health risks, these exposures?

Mr. VAN DORPE. We're doing several things, one of which is to ensure full encapsulation of the firefighters, the less skin we have exposed—the standard today is zero, no exposed skin—the less chemical exposure you have. Increasing our use of respiratory protection all the time, not just some of the time or when we think we really need it.

And then the other thing we do, we launder our equipment on a regular basis, because we find that if you don't do that, then those chemicals stay in your clothing, and then every time you put them on, you're re-exposing yourself, whether you're in a fire or not. So our turnout gear, our firefighting gear, gets laundered on a regular basis.

So we're taking what constructive steps we can to reduce that chemical exposure.

Senator LAUTENBERG. Last question for me, Mr. Chairman.

Mr. Schaefer, UL research suggests that flame-retardant chemicals in foam furniture do not provide significant benefits.

Based on your analysis, do you think there are safer and more effective ways than fire retardants to reduce fire hazards?

Mr. SCHAEFER. Fire retardants or alternate means?

Senator LAUTENBERG. Yes.

Mr. SCHAEFER. Yes, there are safe alternative ways, such as the use of fire barriers, where we saw very vividly there was a significant difference in the fire performance of furniture.

Senator LAUTENBERG. Define, if you would, a fire hazard. What would you define as a fire barrier?

Mr. SCHAEFER. A fire barrier is basically an inner covering that's placed over the foam material, for example. So it provides a shield, basically, between the source of the ignition, which could be the outer covering of the furniture, and the foam content.

And this technology has been used very effectively by the mattress industry, where they were also looking at flammability issues. And there's probably no piece of furniture that's in more intimate contact with a human being.

And they found, through the use of fire barriers, they could meet the flammability requirements and at the same time not introduce flame-retardant chemicals.

Senator LAUTENBERG. Mr. Chairman, I want to say thanks for bringing this subcommittee hearing up, because there's so much going on. And it took a Chicago Tribune expose to really bring at-

tention to one part of the thing that is never visible—you don't know—discharging toxic chemicals into the air, just by sitting on a sofa or something like that.

But we have to continue. When you talk about the number of deaths, Chief, that occur every day in the country as a result of fires, we've got to wake up to the alarm.

Senator DURBIN. Thanks, Senator Lautenberg. And thanks for your leadership on this.

Mr. Schaefer, before I conclude, I am struck by the fact that, though I'm a fan of CPSC—and we recently put a reform in place, we're now investing more Federal funds in the CPSC than we have ever, and I trust its leadership—when I listen to the fact that this started in 2003, this investigation, and it still isn't over, isn't finished—you talked about starting in 2008 and apparently getting into a lot more the impact of flame-retardant chemicals and ignition of furniture and so forth—I think I know the answer to this, and I think I may end up looking in a mirror, why is it that the CPSC takes so long to reach a conclusion, when, in your business, your not-for-profit undertaking, you seem to be able to do it in a shorter period of time?

Mr. SCHAEFER. I really can't comment what impacted CPSC. I do know, with other work we've done, there can be challenges with getting consistent, uniform test sample foams and things like that. I could speculate. I know there were considerable issues with import safety that came up in the last few years, and I'm sure that diverted some energy. And I know there were also funding challenges for CPSC in past years.

But I think, and this is where this subcommittee is to be applauded, sometimes it takes a spotlight on an issue to really get it elevated and acted upon.

Senator DURBIN. I still remember Chairman Tenenbaum's statement that they worked for 2 years to find a standard cigarette to use to determine whether the fire was being started in the proper way or in a consistent way. And 2 years seems like a long time to me, as a layman.

But let me just say thank you to this panel.

And, Chief, thank you very much.

Mr. Counts, thank you for your statements on behalf of the furniture industry.

Mr. Schaefer, very proud of UL, the work that you do in our State and around the country.

We wouldn't be here today were it not for the Chicago Tribune series. It really opened the eyes, not only of people in the Midwest, but all across the country and beyond about a very, very serious issue that affects every family with furniture. That's just about all of us. And every family that's concerned about that public health of the people living in their homes. Again, just about all of us.

And when it comes right down to it, I think what we found is there was, sadly, an unfortunate political effort under way to promote the use of chemicals in certain applications, which did not make us any safer. In fact, it endangered the public health of America.

It was a sinister and, in many respects, shameful exercise of our political system that led to the status that we found ourselves in

with these chemicals being used widely in the belief that they were keeping us safer.

We've learned a lot. And I think what I've heard today, the furniture industry and everyone has learned a lot in the process. I just hope that we can understand at the end there is a legitimate oversight role for Government, to take a look at the private sector and to keep us safe, whether it's the CPSC or EPA or many other agencies. And we have to make sure that we safeguard that, regardless of the administration, and make sure that we have the resources to deal with the challenges we face to get people the certainty they need in their lives.

PREPARED STATEMENTS

I'm going to ask unanimous consent that statements from the San Francisco Firefighters Cancer Prevention Foundation and the U.S. Fire Administration be included in the record.

Since there's no one here to object, that's going to happen.

[The statements follow:]

PREPARED STATEMENT OF SAN FRANCISCO FIREFIGHTERS CANCER PREVENTION FOUNDATION

Honorable members of the Financial Services and General Government Appropriations Subcommittee: First, I would like to apologize for not being physically present at this meeting. I had a previous commitment that I had to keep.

I would like to give you a little history about myself and the San Francisco Firefighters Cancer Prevention Foundation before my written testimony.

I am a retired Captain from the San Francisco Fire Department (SFFD) with 28 years of service. I spent the last 13 years of my career as an officer at Rescue 1, Station 1 and proud to say one of the busiest firehouses in the United States. After 26 years on the job, I contracted Transitional Cell Carcinoma in my right renal pelvis—a rare form of cancer usually found in people who work in the "chemical industry" according to my doctor. During my treatment and recovery, two more firefighters from my station also contracted Transitional Cell Carcinoma—only the common form, bladder cancer. It also seemed like every month we were attending a funeral of another firefighter that had lost his battle with some form of cancer. In 2006, with the support of the department's administration and San Francisco Firefighters Local 798, I formed the San Francisco Firefighters Cancer Prevention Foundation dedicated to the early detection and prevention of cancer in both active and retired firefighters. Since its inception we have conducted five major cancer screenings. Through these screenings we have identified five retired firefighters and one active firefighter with various forms of cancer. At the time of the screenings these individuals were not aware they had cancer.

Our foundation has also been involved in three studies. The first study (published in 2007) was conducted by the Department of Urology at UCSF and identified bladder cancer rates in the SFFD greater than the population in general and of major concern for the entire firefighting profession.

Our second study is currently being conducted by the Centers for Disease Control and Prevention (CDC) looking at causes of death in a cohort of 30,000 firefighters (5,538 participants from SFFD; 15,461 from Chicago Fire; and 10,652 from Philadelphia Fire) dating back to 1950. The study should be published with results sometime in 2014.

The third study is one that I will highlight in my testimony. It will be published very soon. The title of the study is "Halogenated Flame Retardants, Dioxins, Fnrans, and Other Persistent Organic Pollutants in Serum of Firefighters from Northern California". The "Firefighters from Northern California" that it refers to is a cohort of 12 firefighters from San Francisco. I have been given permission by one of the lead researchers, Susan D. Shaw, DPH, to discuss various findings of the study.

The question posed by Senator Durbin: "How has the use of flame-retardant chemicals affected the lives of firefighters and their ability to do their jobs?"

We must first remember that firefighters are exposed everyday in the same manner that the population in general is to the effects of flame retardants that escape

from household products and settle in dust whether it be in the workplace or at home . . . But once a firefighter enters a burning building it is a completely different set of circumstances.

Firefighters are fully aware that we work in a "chemical cocktail" every time we enter a building on fire. Does that hinder the fire extinguishment? The definitive answer is, "Absolutely not." It is onr job to extinguish the fire, preserve life and property, and get the job done. The firefighters' biggest fear is what occurs once the fire is extinguished and the "overhanl" process begins. It is during this period of time where "off gassing" occurs. Products of combustion have been extinguished but the emission of toxic gases continues. Most departments have Combustion Gases Indicators (CGIs) that are used to measure various toxins in the atmosphere once a fire is extinguished. Once the CGI indicates a "clear" atmosphere, firefighters are allowed to remove their scuba gear. The problem with this is that the CGIs have the ability to pick up a few toxic gases, but nowhere near the 100-plus toxic gases that remain in the atmosphere. We are now being told that even if all personal protective equipment remains in place brominated and chlorinated fire retardants have the ability to permeate the protective eqnipment worn by firefighters. Additionally, if this protective equipment is not properly decontaminated immediately when returning to quarters, firefighters risk continual exposures every time they don the protective equipment.

Flame-retardant chemicals (Polybrominated diphenylethers [PBDE]) are applied onto or in many common household goods, furniture foam, plastic cabinets, computers, small appliances, consumer electronics, wire insulation, back coatings for draperies, and upholstery to name a few. These gases are not picked up by CGIs. These chlorinated and brominated flame retardants produce both toxic dioxins and furans when they hurn which have been proven to cause cancer. The significantly elevated rates of cancer reported in firefighters (Kang et al. 2008, LeMasters et al. 2006, Hansen 1990) include four types that are potentially related to exposure to dioxins and furans:

—Multiple myeloma;
—Non-Hodgkin's lymphoma;
—prostrate; and
—testicular cancer.

A question that lingers in our profession is do these chemicals combine synergistically with other toxins in the atmosphere and exacerbate the effect of other toxic carcinogens? What we do know is that our rate of contracting various forms of cancer is increasing. We are also fully aware that these flame-retardant chemicals bioaccumulate in our blood, fat tissue, and in mother's milk.

Through our foundation, SFFD participated in a study examining the levels and patterns of halogenated compounds in the serum of the firefighters aud compares contaminant concentrations in this cohort with those in the general population and other studies in the United States and worldwide. The cohort iucluded 12 firefighters who willingly gave blood after two separate fires in San Francisco.

The study of our firefighters showed levels of PBDEs more than 30 percent more thau the general population of California and more than 60 percent more than the general population of the United States. We had one firefighter with a PBDE level of 442ng/g of lipid weight which is 11 times greater than the average of the general population of the United States. The PBDE concentration iu San Francisco firefighters was 20–30 times higher than levels found in the geueral population of Japan (Uemura et al. 2010), Hong Kong (Qin et al. 2011) and the United Kingdom (Thomas et al. 2006). With this information we are now hoping for a much broader study to take place.

Another issue that has to be addressed in regards to flame retardants is the rising cases of breast caucer we are seeing in our female firefighters in San Francisco. We have more than 200 female firefighters in San Francisco—the most of any major metropolitan city in the United States. Many of these women are nearing the age of retirement. To our knowledge there have beeu no major studies in regards to the health of female firefighters mainly because they have only been in the profession for 40-plus years. In our 40–49-year-old group of female firefighters we have 117 women. In that group we have had eight cases of breast cancer. The uational average of breast cancer for the 40–49-year-old female group is 1 in 69. It is a known fact that PBDEs bioaccumulate in mother's milk in the general population. It is also kuown that PBDEs are neurodevelopmental toxicauts. The unkuown is what level of PBDEs is in the mother's milk of a female firefighter and what effect that is having on their children. Our foundation is in the preliminary stages of a study addressiug the health issues of our female firefighters.

As far as the benefits of flame retardants, I think Dale Ray, a top official with the Consumer Product Safety Commission, who oversaw the 2009 tests at a labora-

tory outside Washington summed it up best in the Chicago Tribune series on flame retardants when he stated, "We did uot find flame retardants in foam to provide any significant protection. Moreover, the amount of smoke from both chair fires (one treated, one not treated) was similar". Ray noted that most fire victims die of smoke inhalation, not the flames.

It is probably to late for this generation of firefighters to be protected by a change in the current toxic flame-retardant standard. But the generations of firefighters to come will be forever thankful that this very important step was taken.

PREPARED STATEMENT OF THE UNITED STATES FIRE ADMINISTRATION

Mr. Chairman and members of the subcommittee, thank you for the opportnnity to address this hearing and to provide the views of the United States Fire Administration (USFA) on the topic of furniture flammability and home fire safety. I appreciate the opportunity to discuss these important issues, which are of growing concern to the USFA.

BACKGROUND

Over the past 40 years, the number of lives lost fighting fires across the United States has decreased dramatically. In 1971, this Nation lost more than 12,000 citizens and 250 firefighters to fire. Acting to halt these tragic losses, the Congress passed Public Law 93–498, the Federal Fire Prevention and Control Act, in 1974, which established the USFA. Since that time, through data collection, public education, research and training, USFA has helped reduce fire deaths by more than one-half—making our communities and our citizens safer.[1]

In spite of these efforts, America's fire death rate continues to be one of the highest per capita in the industrialized world. Fire kills approximately 3,500 people and injures another 18,300 each year. Inclnded in these fire fatalities are the approximately 100 firefighters who die on duty each year. Direct property losses due to fire reach more than $12 billion a year. Most of these deaths and losses are preventable.[1]

More than 80 percent of fire deaths occur in homes, an environment where citizens expect that they should be most safe. USFA is increasingly concerned about current trends that portend a looming catastrophe for the Nation: an aging population combined with changes in residential construction and use of highly flammable materials that create tremendous risk for fast-burning fires.

A summary of USFA's concerns is outlined below:

—Since the 1960s and 1970s, materials used in home furniture and furnishings have changed dramatically. Furniture fabrication has changed. Furniture that was once made with heavy wood frames, cotton batting, and wool fabric is now made with light wood or plastic frames, polyurethane foam, and synthetic fabric. Fires involving this newer furniture grow much, much faster than fires in older furnitnre. Research has shown that the time available to escape a flaming fire in a home has decreased significantly from 17 minutes in 1975 to only 3 minutes in 2003; a change that has been attributed to the increased combustibility of home furnishings.[2] Carpets, draperies, clothing, entertainment systems, computers, and many other items commonly found in homes are also made of synthetic materials that have similar burning characteristics in an established fire in a home. Many of these materials are required to pass tests for resistance to small sources of ignition, but once ignited, they burn fast and hot.

—The significant changes in the materials found in our homes are not limited to the contents and fnrnishings that occupants bring into their homes. Important building elements are now made of synthetic materials that burn faster and hotter than traditional construction materials. Vinyl siding and exterior finishes, window and door frames, doors, foam insulation board, and other components made of synthetic materials all contribute to faster fire spread. Though some of these items are required to pass tests for resistance to ignition, they too, burn rapidly once lighted.

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[1] USFA Web site; http://www.usfa.fema.gov/about/.

[2] Bukowski, R.W., et al., *Performance of Home Smoke Alarms: Analysis of the Response of Several Available Technologies in Residential Fire Settings*, NIST Technical Note 1455–1, National Institute of Standards and Technology, Gaithersburg, Maryland, February 2008.

[3] *A Review of the Sound Effectiveness of Residential Smoke Alarms*, CPSC–ES–0502, U.S. Consumer Product Safety Commission, December 2004.

—The past 30 years have seen a dramatic increase in the use of lightweight construction assemblies such as trusses and other engineered assemblies in home construction and remodeling. These assemblies fail earlier during a fire than traditional dimensional lumber, all other factors being equal. Failure of these assemblies can result in structural collapse that threatens the lives of both the building occupants and responding firefighters.

—During this same time period, architects have made use of the wide span capabilities of these engineered structural assemblies to create remarkable and spacious home plans. These large wide-open spaces allow for faster fire development than smaller rooms found in older homes.

—Recent advances in energy conservation features have also had an impact on how a fire grows in a home. As a result of increasingly air-tight window and door fixtures, among other efficiency improvements, firefighters are experiencing an increase in the number of serious events such as "backdrafts" and "smoke explosions" that threaten the lives of both trapped occupants and firefighters.

Despite the many benefits to the advances in building technologies and materials in modern times, these advances have developed over time without expectation or analysis of the resultant cumulative effect on occupant safety from fire within residences. The resulting adverse impact to fire safety was not anticipated.

While many in the fire service have long-recognized the potential impact of changes in building technologies and material construction, only in recent years have the risks associated with these issues come under investigation. Recent research clearly shows that these innovations have dramatically changed the way a fire develops, grows, and spreads in a home. Fires in homes today develop, grow, and spread faster than ever before.

Concurrent with this dramatic change in the development and behavior of fires in the home, we are beginning to experience the much-heralded aging of our population. As we age, we become less able to awaken to the sound of a smoke alarm[3] [4] [5] and we are less able to move quickly. The significant reduction in time available to escape a home fire combined with the declining sensory and mobility characteristics of older citizens is a recipe for disaster. USFA is concerned that the reductions in the number of fire deaths and injuries made over the last 40 years could be overcome by the potential for loss of life as a result of this deadly combination.

SITUATION

Citizens, firefighters, elected officials, and others across America share the USFA's concern over the relatively high number of fire deaths in America's homes, and the changing nature of fire hazards in our homes. The fire problem is becoming more complex, and it continues to defy simple fixes, despite the desire to find easy answers. The Consumer Product Safety Commission (CPSC) is taking on the important task of reducing the adverse impact of one of the known factors adding to the home fire hazard problem, the flammability of upholstered furniture. They are doing so with scientific research and consideration by agencies such as Underwriters Laboratories (UL) and the National Institute of Standards and Technology (NIST).

UL has recently completed an extensive project on furniture flammability. While UL's work has not been fully published at this time, what we have seen demonstrates beyond all doubt that modern furniture presents a much greater fire challenge than the furniture used by our grandparents. While it is not the only way to improve fire performance of upholstered furniture, the positive impact that the current fire barrier technology can provide was clearly demonstrated in this work.

NIST has done outstanding multidimensional work addressing the subject of furniture flammability, and is continuing to explore several avenues that show great promise. USFA applauds the work done at NIST and looks forward to ongoing collaboration with their research team.

CPSC has proposed a regulatory approach that is based on the best science currently available. USFA supports the work that CPSC has done on the topic and recognizes their effort as a thoughtful approach to improving home fire safety by attacking one significant part, flammability of upholstered furniture, of an increasingly complex residential fire problem.

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[3] *A Review of the Sound Effectiveness of Residential Smoke Alarms*, CPSC–ES–0502, U.S. Consumer Product Safety Commission, December 2004.

[4] Geiman, J.A., and D.T. Gottuk, *Reducing Fire Deaths in Older Adults: Optimizing the Smoke Alarm Signal*, Fire Protection Research Foundation, Quincy, Massachusetts, May 2006.

[5] Bruck, D.A., I. Thomas, and , A. Kritikos, *Reducing Fire Deaths in Older Adults: Investigation of Auditory Arousal with Different Alarm Signals in Sleeping Older Adults*, Fire Protection Research Foundation, Quincy, Massachusetts, May 2006.

CONCLUSION

USFA believes that the approach proposed by CPSC is an important step in improving home fire safety, but that it is not a final solution. As our collective understanding of the underlying science improves, we anticipate that there will be opportunities for voluntary improvements by the industry or a need for additional regulatory actions.

Thank you, Mr. Chairman, for providing this opportunity to provide the views of USFA on the topic of furniture flammability and home fire safety. I appreciate the opportunity to discuss these issues, and look forward to providing further information as requested.

ADDITIONAL COMMITTEE QUESTIONS

Senator DURBIN. We're going to keep the record open for 1 week, until noon on Wednesday, July 24. We may be sending you some questions along the way, follow-up questions.

[The following questions were not asked at the hearing, but were submitted to the witnesses for response subsequent to the hearing:]

QUESTIONS SUBMITTED TO INEZ M. TENENBAUM

QUESTIONS SUBMITTED BY SENATOR RICHARD J. DURBIN

CONSUMER PRODUCT SAFETY COMMISSION'S UPHOLSTERED FURNITURE FLAMMABILITY STANDARD

Question. In your testimony, you reference that much of the delay has resulted from the necessity of developing standard reference materials (such as standard cigarettes or standard foam) for testing. Are there remaining standard reference materials that need to be developed before you can move forward with finalizing the proposed rule?

Answer. The research to determine the specifications for Standard Reference Material (SRM) foam was completed in July 2012. Consumer Product Safety Commission (CPSC) staff is working with the National Institute of Standards and Technology and manufacturers to acquire SRM foam for testing as soon as possible. The staff also may conduct some additional work to select the best staudard cover fabric for testing in accordance with the proposed rule.

Question. Under the rulemaking authorities that you currently have, what steps still remain in order to complete the standard, and what is your best estimate of when the standard might be completed?

Answer. The remaining steps in the rulemaking include:

—testing to determine the necessary revisions to finalize the proposed rule;
—testing the materials subject to the proposed rule to determine that compliance can be achieved;
—evaluating furniture constructed with compliant materials to estimate the reduction of deaths and injuries that could result from the proposed rule; and
—drafting the text of the final rule and developing the final regulatory analysis.

The staff will also continue to work cooperatively with the State of California's Bureau of Electronic & Appliance Repair, Home Furnishings & Thermal Insulation (BEARHFTI) as that agency proceeds with its work to revise Technical Bulletin 117 (CA TB 117). TB 117 currently contains performance standards that effectively require the use of flame retardants in upholstered furniture. Future changes in TB 117 could have an impact on the rulemaking proceeding. With those caveats, CPSC staff estimates, subject to Commission direction, completion of the final rule in 2015.

CALIFORNIA TECHNICAL BULLETIN 117

Question. What role does California TB 117 (CA TB 117) play with regard to your efforts to finalize a standard for upholstered furniture flammability?

Answer. There is a high degree of compliance with CA TB 117, not only in California, but also across the Nation. The existing CA TB 117 is essentially a de facto national standard. CPSC staff continues to work cooperatively with BEARHFTI on possible revisions to CA TB 117, and elements of the Commission's proposed rule are incorporated into California's latest draft revised regulation, known as CA TB 117–2012. As CPSC moves forward with its own rulemaking, the Commission staff will continue to monitor CA TB 117–2012 developments and will consider the potential effects of a revised California regulation on the level of consumer safety.

Question. Does the fact that the California Governor recently ordered that CA TB 117 be revised impact your efforts?

Answer. The revision of CA TB 117 will not impede CPSC's efforts to address the fire risk associated with ignitions of upholstered furniture. Throughout the upholstered furniture rulemaking process, CPSC staff has always envisioned a rule that does not require the use of flame retardants to meet performance standards. Revising or removing the open-flame requirement of CA TB 117 would eliminate the practical need for manufacturers to use flame retardants in upholstered furniture sold in California and across the United States. Accordingly, CPSC staff is carefully monitoring the progress of the CA TB 117 revision efforts.

Question. What will be the effect if CA TB 117 is completed prior to your standard?

Answer. As required uuder the Flammable Fabrics Act (FFA), CPSC preliminarily determined that the proposed rule was needed to address au unreasouable risk of fire injnry or death to the public when it issned a proposed rule iu 2008. The proposed rule included an assessment of reasonable alternatives to the proposal, inclnding reliance upon the existing California regnlations. If a revised TB 117–2012 were completed prior to our rule, CPSC would need to evaluate the revision to determine whether a Federal rule is still needed to address the fire risk.

Question. If California fails in their efforts to update CA TB 117, can CPSC preempt CA TB 117 with your proposed rule?

Answer. In general, section 16 of the FFA provides that whenever a flammability standard or other regulation for a prodnct is in effect under the FFA, no State may establish or continue in effect a flammability standard or other regulation for that product, if the standard or regulation is designed to protect against the same risk of occurrence of fire as the FFA standard or regulation, unless the State standard or regulation is identical to the FFA standard or regulation. Because the CPSC rule and CA TB 117 are both desigued to address the same unreasonable risk of occurrence of fire presented by flammable upholstered furniture, any Federal rule by CPSC would have preemptive effect. I should note, however, that the decision as to whether our rule has preemptive effect ultimately will be determined by the courts.

RESPONSE TO AMERICAN HOME FURNISHINGS ALLIANCE RECOMMENDATIONS

Question. The American Home Furnishings Alliance (AHFA) recommends that CPSC immediately adopt American Society for Testing and Materials (ASTM) 1353 as a Federal mandatory standard while continuing work on the CPSC proposed standard?

Answer. The Upholstered Furniture Action Council (UFAC) voluntary guidelines are based on tests prescribed in the ASTM E1353 test method. The vast majority of upholstered furniture sold in the United States conforms to the voluntary guidelines. While some elements of tbe CPSC's proposed flammahility performance tests are similar to the ASTM 1353 standard, CPSC staff reviewed the ASTM/UFAC approach and concluded that it was inadequate because conforming furniture can still iguite and burn from smoldering cigarettes. The CPSC proposal incorporated significant improvements to the ASTM/UFAC method and is more stringent. Mandating the ASTM E1353 method, as embodied in the current UFAC guidelines, would impose modest costs, but also provide only negligible safety benefits.

Question. How does ASTM 1353 differ from what CPSC is proposing?

Answer. There are two principal, substantive differences between the ASTM tests and the smoldering ignition tests in CPSC's proposed rule. The first involves relatively small differences in the test methods themselves. The second involves larger differences in the acceptance criteria that determine the stringency of the performance tests.

With regard to the test methods, the ASTM method measures char length from the lit cigarette placed on an upholstery mockup. The mockup is encased in a box that artificially restricts airflow to an unrealistically low rate. The cover fabric is classified as either "Class 1" or "Class 2" based on the char length resulting from the test. If the char is within the 2-inch specified length, the cover fabric is Class 1 under the UFAC guidelines and may be used without restriction; if the char exceeds the 2-inch specified length, the fabric is Class 2 under the UFAC guidelines. For Class 2 fabrics, the use of a smolder-resistant barrier (typically polyester batting) beneath the cover fabric is prescribed to provide additional smolder resistance for the finished article of furniture. The UFAC/ASTM approach represents the status quo in the industry; virtually all fabrics are classified as Class 1, although in tests conducted by CPSC staff, some Class 1 fabrics were so smolder prone that they produced dangerous smoldering or transitioned to flaming combustion even when a

polyester batting layer that would have been required for Class 2 fabrics was present.

The main difference is in the acceptance criteria. CPSC's proposed rule classifies furniture as "Type I" or "Type II" based on acceptance criteria of the proposed test. CPSC's proposed Type I smoldering test for upholstery cover fabrics uses the hasic UFAC/ASTM mockup test configuration, but controls airflow without a box, limits maximum allowable smoldering time to 45 minutes, and limits mass loss of the (nonflame-retardant) polyurethane foam substrate beneath tbe fabric to 10 percent. This test is a much better indicator of the likelihood of continued combustion and fire growth, and it identifies more effectively smolder-prone cover fabrics.

While most cover fabrics are still expected to pass the smoldering resistance test and be used in complying, Type I furniture, fahrics that fail the smolder-resistance test can only be used in Type II furniture. Type II furniture is that which is constructed with a fire-blocking barrier beneath the cover fabric. Compliant Type II barriers must pass a stricter smolder-resistance test; they must also pass a flame-resistance test that simulates the potential transition from smoldering to flaming combustion.

Question. What is your response to AHFA's recommendation that your proposed standard rely on the use of compliant components (individual pieces that are used to construct the fiual furniture) instead of on the use of composite testing (testing of the completed furniture)?

Answer. CPSC's proposed rule relies on the use of complying component materials, rather than on composite assemblies, consistent with AHFA's recommendation. The principal advantage of this approach is economic efficiency-suppliers of the various components can test and certify their materials, and furniture manufacturers can choose from among many complying materials, without having to duplicate compliance tests for each of thousands of potential combinations. Balanced against the desire for low cost, however, is the need to ensure that complying components will perform as intended when assembled into the wide range of constructions and geometrics in finished articles of upholstered furniture. CPSC staff will continue to be mindful of these issues as they move forward with the rulemaking.

FLAME-RETARDANT CHEMICALS

Question. The Environmental Protection Agency (EPA) has jurisdiction over evaluating the toxicity of flame-retardant chemicals under the Toxic Substance Control Act but, in 1977, CPSC attempted to use their authority under the Federal Hazardous Substances Act to ban the use of a flame retardant—"tris", a harmful carcinogen—from use in children's clothing. Though the ban was overturned on procedural grounds, could the CPSC use this authority to take similar steps to ban the use of certain toxic flame-retardant chemicals in upholstered furniture?

Answer. While EPA has authority to regulate flame-retardant chemical risks under the Toxic Substances Control Act, CPSC has authority under the Federal Hazardous Substances Act (FHSA) to regulate a "bazardous substance", as defined in the FHSA, that is intended or packaged in a form that is suitable for use in the household. In other words, the CPSC does not regulate chemicals, but it can regulate a product, such as upholstered furniture, if that product contains a hazardous substance and the Commission is able to make the requisite findings under the FHSA. See 15 U.S.C. 1261(f) and (q)(1)(B); 1262(f) through (i).

CPSC staff has conducted risk assessments for fabric, foam, and barrier flame retardants. Staff identified one foam flame retardant, known as TDCP or "chlorinated tris", as a potential carcinogen. To regulate upholstered furniture containing this or other flame retardants under the FHSA, CPSC would have to find that upholstered furniture containing the chemical is u "hazardous substance" under the FHSA and that cautionary labeling would not adequately protect public health and safety. A "hazardous substance", as defined in the FHSA, includes a substance that is toxic and "may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use." See 15 U.S.C. 1261(f)(1)(A). FHSA also requires, among other things, a final regulatory analysis of the costs and benefits of the regulation, a description of alternative approaches to regulation, as well as an analysis of the costs and benefits of those alternatives, and why they were not chosen as part of the final rule.

To date, CPSC staff has worked cooperatively with EPA staff outside of the FHSA rulemaking context to identify and address potential risks associated with a category of flame-retardant chemical compounds known as polybrominated diphenyl ethers (PBDEs) that had been used in upholstered furniture to meet CA TB 117. EPA proposed a Significant New Use Rule (SNUR) for two PBDEs (penta- and octa-BDE) in 2004 and another SNUR (deca-BDE) in 2012. Penta- and octa-BDEs are

now out of prodnction, and deca-BDE prodnction is expected to cease by December 31, 2013. Going forward, CPSC staff and EPA staff will continue to work cooperatively on issues related to flame retardants.

Questions Submitted to James J. Jones

Questions Submitted by Senator Richard J. Durbin

FLAME-RETARDANT CHEMICALS

Question. Tris(1,3-dichloro-2-propyl)phosphate (TDCP) is the chlorinated version of a chemical known as "tris" that the Consumer Product Safety Commission (CPSC) attempted to ban from children's sleepwear in the late 1970s after it was found to be carcinogenic. Despite its similarity to tris, TDCP is a widely used flame retardant in furnitnre cushions and baby products. Along with components of Firemaster 550, Environmental Protection Agency (EPA) has placed a chlorinated flame retardant, Tris(2-chloroethyl)phosphate (TCEP), on a list of chemicals that will be reviewed next year under its Toxic Substances Control Act (TSCA) work plan. However, EPA did not place TDCP on the list. Why not?

Answer. In March 2012, following the development of the "TSCA Work Plan Chemicals: Methods Document", a screening process to identify chemicals for review based on their combined hazard, exposure, persistence, and bioaccumulation characteristics, EPA identified 83 work plan chemicals for risk assessment under TSCA.[1] Of these, an initial seven chemicals were identified for risk assessment development in 2012.[2] Although TDCP has chemical characteristics similar to other flame retardants, it did not meet any of the specific listing criteria identified in the TSCA Work Plan methods document. Specifically, it was not identified as a known or probable human carcinogen by the Integrated Risk Information System, International Agency for Research on Cancer, or National Toxicology Program, and was not reported as being in children's products through the 2006 Information Use Reporting or the Washington State Children's List. Consumer products were not a screening category for step 1 in the Work Plan development process.

On June 1, 2012, EPA identified 18 additional chemicals from the TSCA Work Plan, which the Agency intends to review and for which the Agency will develop risk assessments in 2013 and 2014, including three flame-retardant chemicals:

—Bis(2–Ethylhexyl)-3,4,5,6-tetrabromophthalate (TBPH);

—2–Ethylhexyl-2, 3,4, 5-tetrabromobenzoate (TBB); and

—Tris(2-chloroethyl)phosphate (TCEP).[3]

EPA is currently developing a strategy, scheduled for completion by the end of this year, to address these three flame-retardant chemicals as well as a broader set of flame-retardant chemicals. This effort will assist EPA in focusing risk assessments on those flame-retardant chemicals that pose the greatest potential concerns. EPA anticipates initiating the risk assessments in this category of chemicals in 2013.

Question. Polybrominated diphenyl ethers (PBDEs) are a large class of flame-retardant chemicals that have been shown to be harmful to humans and the environment. What can be done to remove products with these chemicals from American homes and properly dispose of them?

Answer. EPA's regulatory efforts for addressing concerns with PBDEs include a Significant New Use Rule (SNUR) issued in 2006, a recently proposed SNUR, and a proposed test rule for PBDEs. EPA has also engaged producers and importers in negotiations and commitments to voluntarily phase out certain PBDEs.

In 2003, the sole U.S. manufacturer agreed to voluntarily phase out production of pentaBDE and octaBDE by December 31, 2004. In conjunction with this phase out, EPA issued a SNUR in 2006 which designated the manufacture and import of six PBDE compouuds as a significant new use. The SNUR required persous who iutended to manufacture or import tetra-, penta-, hexa-, hepta-, octa- and nonaBDE to submit information to EPA for review before engaging in the new use. Additionally, the SNUR ensured that no uew manufacture or import of pentaBDE or octaBDE could occur after January 1, 2005.

Following negotiations with the EPA in 2009, the sole importer and two domestic mauufacturers of decaBDE voluntarily agreed to stop produciug decaBDE by Decemher 31, 2012, for all uses except certain military and transportation uses, and

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[1] http://www.epa.gov/oppt/existingchemicals/pubs/wpmethods.pdf

[2] http://www.epa.gov/oppt/existingchemicals/pubs/workplans.html#2012

[3] http://www.epa.gov/oppt/existingchemicals/pubs/workplans.html#2013

to stop providing decaBDE for all uses by December 31, 2013. Ou April 2, 2012, the EPA proposed to amend the 2006 SNUR hy expanding the scope to include processors of PBDEs and articles containing PBDEs. The proposed amended SNUR wonld also designate the manufacturing, importing, and processing of decaBDE, inclnding in articles, as significant new nses. Along with the proposed SNUR, EPA also proposed a test rule for those persons that manufactnred, imported, or processed commercial PBDEs after December 31, 2013. With a test rnle in effect, manufactnrers, importers, and processors conld be required to conduct health and safety studies to inform data gaps.

To aid companies in moving to safer alternatives, EPA recently puhlished, with public participation through its Design for the Environment program, a draft report: "An Alternatives Assessment for the Flame-Retardant Decabromodiphenyl Ether." Public comments were due by September 30, 2012, and EPA expects to finalize the report in the coming months.[4]

While these efforts may result in a reduction of products containing PBDEs in American homes, we would note that CPSC has authority to require recalls if it determines that a product presents an unreasonable risk of injury or death. EPA is not aware of CPSC requiring a recall of furniture as a result of the product containing PBDE. Iu terms of disposal, PBDE-containing furniture can be disposed of in municipal solid waste landfills.

FUTURE EFFORTS REGARDING FLAME RETARDANTS

Question. EPA has started a new plan to re-evaluate all of the flame retardants on the market with the latest testing and analysis methods to see if any of these chemicals poses a risk to the public's health. Once you've completed the new plan, what will the next steps be?

Answer. As indicated in the response to question one, EPA is currently developing a strategy, scheduled for completion by the end of this year, on the three flame-retardant chemicals identified earlier this year, as well as on a broader set of brominated flame retardant chemicals.

The strategy will assist EPA in focusing its risk assessments efforts on those flame-retardant chemicals that appear to pose the greatest potential concerns. EPA anticipates initiating the risk assessments on brominated flame retardants in 2013. If an assessment indicates significant risk, EPA will evaluate and pursue appropriate risk reduction actions. If an assessment indicates no significant risk, EPA will conclude its current work on that chemical.

EUROPE BANS OR GREATLY RESTRICTS FLAME RETARDANTS

Question. Furniture flammability is not just an issue here in the United States. However, many European countries have taken alternative steps to ensure flammability standards can be met without causing public health concerns. The United Kingdom has banned the use of conventional, flexible polyurethane foams in the manufacture of upholstered furniture for sale. In addition, many European countries have banned the use of PDBEs and greatly restricted other flame-retardant chemicals. Does EPA examine how other countries are regulating flame-retardant chemicals?

Could any of these methods be applied here in the United States?

Answer. EPA is aware of what other countries are doing on flame retardants and will consider any data or assessments that are available to us. EPA's authority for regulating PBDEs and other industrial chemicals must be consistent with TSCA, this country's chemicals management legislation. While TSCA provides the authority to take action to prohibit or limit the manufacture, import, or use of a chemical, the requirements needed to take that action have proven very challenging.

CPSC also encourages the use of harriers to reduce the use or need for chemical flame retardants while still meeting, or exceeding flammability standards.

In 2006, CPSC published a regulation on the allowable rate of heat release from a mattress;[5] this has effectively reduced both the size and growth rate of fires in mattresses that were in compliance with the new standard. Additionally, in 2008, CPSC proposed a rule establishing flammability standards on the smolder propensity of upholstered furniture.[6]

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[4] http://www.epa.gov/dfe/pubs/projects/decaBDE/about.htm
[5] http://www.cpsc.gov/businfo/frnotices/fr06/rnattsets.pdf
[6] http://www.cpsc.gov/businfo/frnotices/fr08/furnflamm.pdf

TOXIC SUBSTANCES CONTROL ACT

Question. Following the series of articles in the Chicago Tribune that highlighted the potential health risk of flame retardant chemicals, many of my constitnents responded that the Federal Government should have protected the public from these chemicals. What steps has EPA taken outside of legislation to more effectively regulate hazardous chemicals such as flame retardants?

Answer. EPA engaged in negotiations in 2003 and again in 2009 with manufacturers and importers of PBDEs. EPA considers commitments from chemical companies to voluntarily phase out certain chemicals from the market an important strategy of chemical management. EPA is using SNURs to ensure if any PBDEs that have been voluntarily phased out were to be reintrodnced into commerce, they would first be snhject to EPA's review.

In addition to those actions, EPA believes that its cnrrent approach to identifying chemicals for review aud assessment utilizing the "TSCA Work Plan Chemicals: Methods Document", is a significant step to ensuring the safe use of chemicals. If, throngh this process, EPA identifies chemicals that pose a concern, the Agency will evaluate and pursue appropriate risk reduction actions, as warranted, using existing TSCA authority. If an assessment indicates no significant risk, EPA will conclude its current work on that chemical. However, identification of chemicals as Work Plan Chemicals does not mean that EPA would not consider other chemicals for risk assessment and potential risk management action uuder TSCA and other statutes. EPA will consider other chemicals if warranted by available information. EPA will also continue to use its TSCA information collection, testiug, and subpoena authorities, including sections 4, 8, and 11(c) of TSCA, to develop needed information on additional chemicals that cnrrently have less-robust hazard or exposure data.[7]

QUESTIONS SUBMITTED TO GUS SCHAEFER

QUESTIONS SUBMITTED BY SENATOR RICHARD J. DURBIN

UNDERWRITERS LABORATORIES TESTING ON UPHOLSTERED FURNITURE FLAMMABILITY

Question. In 2008, Underwriters Laboratories (UL) initiated a series of tests to determine the most-effective ways to improve flammability of upholstered furniture exposed to small open flames (namely, candles or lighters). UL has completed all phases of the study and is currently finalizing the data for an upcoming report. During your testimony you showed two powerful videos that demonstrate the way modern fnrniture burns. But that is only part of your current research.

When do you expect to finalize and publish the results of the study referenced in your testimony?

Answer. We expect to finalize and publish our findings in a report dne to be released in early fall 2012. The project report for the initial investigation (material, mock-up, and furniture tests), or Phase I, is still on schedule for the aforementioned release date. Phase II (living room burns) and Phase III (house fires with egress estimations) will be finalized and published in the subsequent 2–4 months.

Question. Will the results be made available to the public?

Answer. Yes, UL intends to post our reports upon completiou on the Upholstered Furniture Flammability project Web page: www.ul.com/fireservice. This Web page was created in July 2011 to provide the puhlic with an overview of the project, our published findings, fire demonstration videos, and other related material.

RESPONSE TO TESTIMONY FROM THE AMERICAN HOME FURNISHING ALLIANCE

Question. Testimony from the American Home Furnishing Alliance (AHFA) has outlined several concerns regarding the repeatability of flammability testing and the difficulty this testing presents for manufacturers and for creating new standards. Is it difficult to prodnce reliable, repeatable tests to properly evaluate flammability performance?

Answer. Results of fire tests and other physical tests are impacted by the method itself (e.g., equipment and reagents, procednres, environment conditions, etc.), the operator, and the sample.

Standard Test Methods such as those developed by the Consumer Product Safety Commission (CPSC), ASTM International, the International Organization for Standardization (ISO), the Upholstered Fnrniture Action Council (UFAC), and UL minimize variations from testing and the test operators by clearly defining a fixed set

[7] http://www.epa.gov/opptiexistingchemicals/pubs/workplans.html#not

of equipment requirements, measurement methodologies, and procedural protocol. The sample thus becoues the main source of variation. In fact, there are defined protocols (ASTM Committee E11 quality and statistics, ISO TC 46/SC 8 Quality—Statistics and performance evaluation) for verifying that the sample, and not the test method, is the limiting repeatability factor.

By following good scientific practice, reliable and repeatable tests for evaluating flammability properties can be developed. UL, ASTM International, and ISO have long histories of developing standard test methods. The developed tests are used on a daily basis for research, manufacturer quality control, product certification, and are referenced in fire and building codes worldwide.

Question. AHFA also raised some concerns regarding the incorporation of barrier technology into upholstered furniture. How would you describe the comfort level of furniture containing barriers?

Answer. While UL did not factor in "comfort" implications into the scope of its formal research. However, the furnitnre UL created for its research that incorporated barriers looked, felt, and sounded (for example, no crackling or squeaks when sitting or rising) the same as fnrniture made without the barrier.

UL did investigate a variety of representative barrier types including "high-loft" barriers and "flat" barriers as a part of this research, but did not test all available barriers. Depending on what type of barrier is used in different parts of the furniture (cushions, arm rest, flat surface, etc.), some of these barriers could result in furniture that may look, feel, and possibly sound different than furniture without the barrier.

Question. Do you believe incorporating barrier technology into fnrniture wonld significantly increase the cost to manufacture?

Answer. From our written testimony: UL's general experience tells us that industry is usually able to develop cost-effective and efficient approaches to address enhanced safety requirements.

Question. In your testimony, you discuss the disproportionately higher number of home fire deaths related to upholstered furniture. In AHFA testimony, Mr. Counts discusses how improvements such as smoke alarms and residential sprinklers have has greatly diminished home fire deaths. In the past 30 years, what factors have you found to be responsible for reducing the number of home fires related to upholstered furniture?

Answer. While smoke alarms and more recently, residential sprinklers, have contributed to a reduction in fire deaths related to upholstered furniture, the fact remains that fires beginning with upholstered furniture and mattresses/bedding are responsible for more home fire deaths than any other item (National Fire Protection Association [NFPA] report "Home Fires that Began with Upholstered Furniture", 2011). During the 5-year period of 2005–2009, these fires accounted for 19 and 14 percent of deaths and 7 and 10 percent of the injuries, respectively. They also accounted for $824 million in direct property damage. Contemporary upholstered furniture, or furniture constructed with modern synthetic material, leads to a disproportionate number of potentially preventable fire deaths as evidenced by the NFPA report:

"Overall, fires beginning with upholstered furniture accounted for 2 percent of reported home fires bnt 1 of every 5 (19 percent) home fire deaths."

One of the most notable fire protection technologies since the 1980s is the introduction of residential fire sprinklers. Bnt like the current furnitnre flammability discussion around barrier fabrics, the mandating of residential fire sprinklers has faced resistance by many within the construction industry becanse of added cost to homes.

The city of Scottsdale, Arizona, for instance, mandated the installation of residential sprinklers since 1986. The Scottsdale Fire Department published a report detailing the positive effects of their sprinkler ordinance. Key findings include:

—More than 50 percent of the homes in Scottsdale (41,408 homes) are protected with fire sprinkler systems.
—From 1986–2001, there were 598 home fires. Of the 598 home fires, 49 were in single-family homes with fire sprinkler systems:
—There were no deaths in sprinkler-installed homes.
—13 people died in homes without sprinklers.
—There was less damage in the homes with sprinklers:
  —Average fire loss per home with sprinklers: $2,166
  —Average fire loss per home without fire sprinklers: $45,019.
  —Annual fire losses in Scottsdale from 2000–2001 were $3,021,225, compared to the national average of $9,144,442.

The full report can be downloaded from the Home Sprinkler Coalition site at http://www.homefiresprinkler.org/fire-department-15-year-data.

QUESTIONS SUBMITTED TO ANDY S. COUNTS

QUESTIONS SUBMITTED BY SENATOR RICHARD J. DURBIN

CONSUMER PRODUCT SAFETY COMMISSION FLAMMABILITY STANDARD

Question. Earlier testimony has shown increased flashover (combnstion) times, resulting in fires that bnrn more quickly, leaving less time for consnmers to escape homes in the case of fire, and also less time for firefighters to respond to fires.

Do yon believe cnrrent upholstered furniture flammability standards are adeqnately protecting consumers from the risk of furniture fires?

Answer. Yes, the voluntary Upholstered Furniture Action Council (UFAC) standard as reflected in American Society for Testing and Materials (ASTM) 1353 is adeqnately protecting consnmers from the risk of fnrnitnre fires. Despite the absence of a mandatory national standard, incidents of deaths and injuries from upholstered fnrniture fires have steadily declined over the last few decades in spite of a large increase in the population of this conntry (see if we can quantify from census figures). A recent National Fire Protection Association report said that there has been a 93-percent decline since 1980. While many factors have contributed to this decline, the safer construction criteria developed by UFAC undoubtedly played a significant role in the downward trend in the number of ignitions of upholstered furniture.

Regardless of the extrapolation method used to estimate the national level death and injury figures, the risk level associated with death or injury in a cigarette- or small, open-flame-ignited upholstered furniture fire is lower than many other risks commonly accepted by individuals without concern. Despite population growth, the risk of fire fatalities and the nnmber of npholstered furnitnre fires continue to fall. In recent years, the risk has been extremely low: In 1980 the death rate for cigarette fires was 4.34 per million popnlation; by 2002 this death rate had been reduced to 0.53 per million popnlation. The death rate for small open-flame fires in 1980 was 0.61 per million population; by 2002 this death rate had been reduced to 0.53 per million population. A risk level of under 1 per million is considered by experts to be de minimis, below many everyday risks that are essentially nnavoidable.

Question. In your opinion, what is the most-effective way to reduce upholstered furniture flammability?

Answer. We believe that the fire statistics demonstrate the effectiveness of ASTM 1353 and this standard achieves that without the use of flame-retardant chemicals. Since smolder ignition continnes to be to the primary sonrce of ignition for npholstered-furnitnre-related fire deaths and injuries, Consumer Prodnct Safety Commission (CPSC) should mandate the consensus based and proven requirements of ASTM 1353. Making it a Federal mandatory standard wonld further enhance the level of compliance achieved by this voluntary standard becanse noncompliant domestic and imported product would now be subject to the standard. In addition, the labeling requirements of a mandatory standard would help to edncate that consumer on the potential dangers of upholstered furnitnre flammability.

CPSC has been working on a proposed new upholstered furniture flammability standard for the last 5 years. The proposed standard conld be met without utilizing flame-retardant chemicals. It is my nnderstanding that a significant portion of the delay in finalizing the rule has been establishing standard reference materials for testing.

Question. In your opinion, what additional issues does CPSC still need to resolve before finalizing the rule?

Answer. CPSC has allowed the perfect to become the enemy of the good. Instead of embracing the proven volnntary standard that is ASTM 1353, CPSC has attempted to make improvements to the testing methods. This has resulted in test methods that have not been shown to be repeatable or reprodncible. Until CPSC subjects their test methods to ronnd robin testing, they will be nnenforceable. The test methods embodied in ASTM 1353 have been proven both repeatable and reproducible in laboratory round robin stndies.

CPSC recently reported on a barrier material that it believes is effective against smolder and open-flame ignition. We need to obtain more information about this product so it too can be tested in a ronnd robin to determine if it will be effective with a large nnmber of textiles and a large nnmber of confignrations. This is essential because we are not aware of any other barrier material that can comply with the CPSC proposed test method for barriers.

Both CPSC and Underwriters Laboratories (UL) have shown that barriers significantly reduce flammability compared to other strategies for reducing flammability. However, in your testimony, you indicated several concerns with barriers, particularly increased manufacturing costs and impact on "saleability".

Question. How do manufacturers incorporate barriers into their furniture?

Answer. Some commercial applications of furniture are required to meet the requirements of California Technical Bulletin 133 (TB–133). This standard requires the use of flame-resistant barriers in construction and the majority of these barriers utilize flame-retardant chemicals. In fact, it is our understanding that the barrier that UL used in its video shown at the hearing incorporates a fair amount of flame-retardant chemistry. The perceived human and environmental concerns with flame-retardant chemistry make furniture manufacturers reluctant to incorporate these barriers into residential furniture where consumers are exposed to them on a 24/7 basis unlike commercial furniture used in the hospitality industry.

Unlike a mattress that is a single horizontal slab, the various geometries and spatial relationships of furniture prevent the application of a barrier as a slip on sock or bag. Instead these barriers mnst be incorporated by upholstering the barrier prior to the cover fabric therefore doubling the amount of labor typically involved. Snrveys have shown that this process increases manufacturing costs an average of $150 for a chair and $300 for a sofa. This would equate to an increase of approximately $300 and $600, respectively, at retail.

Question. Are there any other technologies manufacturers are currently considering to address furniture flammability?

Answer. The industry has been working to address the issue since the 1970s and this effort has resulted in a movement from smolder prone components (legacy furniture) to smolder resistant ones (modern furniture). This movement has contributed to the dramatic decrease in deaths and injuries associated with upholstered furniture fires. We continue to explore new component options as the technology evolves.

Question. You testified that there are no quick fixes to npholstered furnitnre flammability since a variety of materials and combinations are needed to satisfy customers' needs and tastes. Do yon believe that it's likely that consumers are not taking into account flammability and the changing nature of furniture materials with regard to flammability? If given a choice—being aware of the increased risk over legacy materials and the quick ignition time—don't you think that might influence consumers' purchases?

Answer. Keep in mind that the movement away from "legacy materials" was due to their propensity to ignite when exposed to a smolder ignition source. As the data trends indicate this movement has undoubtedly saved lives. Some purchasers of new upholstery receive the UFAC hangtag which warns them that upholstery may burn rapidly and emit toxic gases. A number of consumers have contacted us regarding these warnings so we think that there is a good level of awareness that furniture will burn. A national standard would include a labeling requirement that could be used to further educate consumers as to the potential dangers of upholstered furniture flammability.

Question. Since legacy furniture burns much more slowly, are there some parts of the legacy furniture that it might make sense for industry to return to manufacturing? If not, why not?

Answer. The Federal Government's original investigation into smoldering ignition found that the materials being used in the so called legacy furniture were the most prone to cause smoldering ignitiou when exposed to a lit cigarette. It has taken several years to remove these products from the marketplace and the absence of such legacy products is one of the reasons that cigarette ignition of upholstered furniture has declined over the years. By reintroducing these materials, we are concerned that the downward trend would reverse and we would see a commensurate increase in the incidents of smoldering ignition of upholstered furniture.

Question. Barriers iu between the fabric and the cushion of furuiture are being considered as an improvement over flame-retardant chemical materials. If manufacturers are reluctant to use some of the new barriers due to reasons of comfort, are there some other options or technologies available? If using a barrier, could more material be used alongside it to add comfort?

Answer. Barriers are used to address the risk of small open-flame ignition. As discussed above the risk of this type of fire occurring iu the home is already extremely small and difficult to address because it is often the result of arson or child play. CPSC has found that many of the open-flame ignitions are not "addressable" within the meaning of their statute. Regardless of this fact, iudustry would embrace barriers if they could maintain "saleability". This would involve several factors including health concerns, comfort, and affordability. Existing barrier technology does not

meet these criteria. CPSC should move to address the primary risk of smolder ignition by adopting ASTM 1353. Resources can then be focused on evaluating small open-flame solutions to determine their effectiveness and feasibility.

CONCLUSION OF HEARING

Senator DURBIN. I want to thank everybody for attending, and I hope you got as much out of this hearing as we did.

Once again, thanks to the Chicago Tribune for leading us in this effort.

[Whereupon, at 4:10 p.m., Tuesday, July 17, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

○

OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

AUGUST 2, 2012

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C O N T E N T S

OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION

THURSDAY, AUGUST 2, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:40 a.m., in room 2322, Rayburn House Office Building, Hon. Mary Bono Mack (chairman of the subcommittee) presiding.

Members present: Representatives Mack, Blackburn, Bass, Harper, Lance, Guthrie, Olson, McKinley, Pompeo, Kinzinger, Barton, Butterfield, Schakowsky, Sarbanes, and Waxman (ex officio).

Staff present: Paige Anderson, Commerce, Manufacturing, and Trade Coordinator; Kirby Howard, Legislative Clerk; Brian McCullough, Senior Professional Staff Member, Commerce, Manufacturing, and Trade; Gib Mullan, Chief Counsel, Commerce, Manufacturing, and Trade; Andrew Powaleny, Deputy Press Secretary; Shannon Taylor Weinberg, Counsel, Commerce, Manufacturing, and Trade; Michelle Ash, Democratic Chief Counsel, Commerce, Manufacturing, and Trade; Felipe Mendoza, Democratic Counsel, Commerce, Manufacturing, and Trade; and William Wallace, Democratic Policy Analyst.

OPENING STATEMENT OF HON. MARY BONO MACK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. BONO MACK. Good morning. The subcommittee will now come to order.

It has been a year now since Congress, at the urging of our subcommittee, approved key reforms to the Consumer Product Safety Improvement Act of 2008. Today we are going to check under the hood, talk to members of the Consumer Product Safety Commission, and see how it is working.

And the Chair now recognizes herself for an opening statement. And I appreciate that general counsel changed the clock from 86 minutes to 5 minutes, but I will keep it to 5 minutes.

So, established in 1972, the Consumer Product Safety Commission is an independent agency created by Congress to protect consumers against unreasonable risks of injuries associated with consumer products. By and large the CPSC does an admirable job of protecting Americans, and I remain very supportive of its work, but on occasion the agency makes some puzzling, head-scratching deci-

sions which create economic hardships for U.S. businesses without appreciably improving the safety of certain products.

By law the CPSC has the authority to regulate the sale and manufacture of more than 15,000 different consumer products, ranging from baby cribs to toys and from all-terrain vehicles to swimming pools. Without question the CPSC has very broad authorities, which makes congressional oversight critically important. The agency has the power to ban dangerous consumer products, issue recalls of products already on the market, and research potential hazards associated with a wide range of consumer products.

Today the CPSC learns about unsafe products in several ways. The agency maintains a consumer hotline and Website through which consumers may report concerns about unsafe products or injuries associated with products. It also operates the National Electronic Injury Surveillance System, which collects data on product-related injuries treated in hospital emergency rooms.

The broad reach of the CPSC was on full display in 2007, which has been referred to as the "year of the recall" in the U.S. Fueled by the Chinese toy scare, the CPSC alone imposed a record 473 recalls in 2007, many of these recalls involving lead in toys and other children's products. These much-publicized safety issues prompted Congress to take action and resulted in passage of the Consumer Product Safety Improvement Act of 2008, also known as CPSIA.

Among other things, CPSIA increased funding and staffing for the CPSC, placed stricter limits on lead levels in children's products, restricted certain phthalates in children's toys and child-care articles, and required the CPSC to create a public database of their products. The public database, saferproducts.—excuse me, yes, saferproductsdot.gov—no, OK, staff thinks I wouldn't nntice saferproducts.gov—thank you, staff.

So, this remains a source of controversy. Manufacturers continue to express their concern that most of the complaints are not vetted by the CPSC before they are made public, opening the door to all kinds of mischief, whether to fuel lawsuits or to try and ruin a competitor's brands.

Within months of enactment of CPSIA, it became clear that implementing a number of provisions would be extremely problematic, prompting the agency to issue several significant stays of enforcement prior to 2011, including the imposition of lead limits for ATVs, off-road-use motorcycles and snowmobiles. Why the agency even considered such limits is one of those puzzling, head-scratching decisions. So last year, after several hearings, and after bicameral and bipartisan negotiations, both the House and the Senate passed H.R. 2715, offered by myself and my good friend and colleague Mr. Butterfield. On August 12, 2011, President Obama signed that legislation into law. Our purpose was to relieve unfair and costly burdens imposed on American businesses, while still maintaining critically important consumer safeguards. Today I am very anxious to learn how well that new law is working.

[The prepared statement of Mrs. Bono Mack follows:]

The Statement of the Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade
Hearing on
"Oversight of the Consumer Product Safety Commission"
August 2, 2012

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The public database…saferproducts.dot.gov…remains a source of controversy. Manufacturers continue to express their concern that most of the complaints are not vetted by the CPSC before they are made public, opening the door to all kinds of mischief, whether to fuel law suits or to try and ruin a competitor's brand.

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Mrs. BONO MACK. And with that, the gentlelady from Illinois is now recognized for 5 minutes for her opening statement.

Ms. SCHAKOWSKY. Thank you.

Let me just say that Mr. Butterfield will be here. He is on the floor and unable to come now, but I want to yield first to Mr. Waxman, who is the ranking on the full committee, for his opening statement.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Ms. Schakowsky, for your courtesy in allowing me to go ahead of you at this time because of scheduling problems that I have.

I want to thank you, Madam Chair, for holding this hearing to conduct oversight on the activities of the U.S. Consumer Product Safety Commission, and I am pleased that we have all four Commissioners here today to provide testimony.

This month will mark 4 years since enactment of the Consumer Product Safety Improvement Act of 2008, or what is called CPSIA. It will mark 1 year since enactment of Public Law 112–28, which gave the Consumer Product Safety Commission additional flexibility in implementing the law.

This law was a landmark piece of legislation. It fundamentally changed how we protect children from potentially dangerous products. Implementation of this law has been the predominant focus of the Commission. The goal of the law was to transform the agency's mission. The Commission used to be an underfunded, ineffective, reactive agency. Today the Commission is still underfunded, unfortunately, but it is no longer ineffective and reactive. Today the agency is on a path toward anticipating risks to children and acting to prevent them.

No transformation is easy, and this has been no different. There were some rough waters in the early days of implementation, and a year ago we had to act to pass some targeted fixes to the law. But make no mistake about it, this law has been a success. Thanks to this safety law, we now have strong standards for products used by infants and children, including cribs, toddler beds, walkers, and bath seats. We now have a product registration system that enables manufacturers or retailers of durable infant and toddler products to contact parents with recall or other safety information.

We now have a consumer products safety information database where the public can file and view reports about harm from consumer products. And we also have testing of products to ensure that they are safe before they ever make it into our children's hands.

And the results of the law are clear. Toy-related deaths have fallen, recalls due to lead have declined by 80 percent, and recalls overall have continued to decline as products have become safer. Border enforcement is also up.

These protections matter to parents. They matter to children. So I look forward to hearing—the hearing today from the Commissioners about their continuing work. While I may not be able to be here throughout your testimony, I certainly will have a chance to

review it after you have given it, as I have for your statements that have been entered into the record. And I thank all four of you for being here and yield back the balance of my time.

Mrs. BONO MACK. Thank the gentleman.

And at this point I will recognize Ms. Schakowsky for 5 minutes for a statement. We have nobody requesting time on our side.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Well, I thank you, Madam Chairman, for holding this hearing. I think it is important for the subcommittee to hear from the Consumer Product Safety Commission about its activities, and particularly the ongoing implementation of the landmark Consumer Product Safety Improvement Act.

A few weeks ago, I joined Chairman Tenenbaum, and Danny Keysar's mother, Linda Ginzel, at a press conference to mark the adoption of the strongest standard in the world for play yards. The play yard standard is significant because it was a dangerous product that led to Danny's death at his day-care center when it really was used as a crib, collapsed and choked him. And the portion of this CPSIA that I authored and that mandated the new standard bears his name.

I mention the play yard standard because it is a specific example of how the CPSIA's safety standard for toys and children's products will save lives. That was our goal at the outset of drafting the legislation, and it is the one that we met.

Last year we passed a bill with some narrow fixes so that implementation of the law could continue smoothly. And I welcome today's opportunity to review progress, but want to say clearly that I believe it is absolutely critical that we continue to support and uphold the fundamentals of this historic legislation.

I want to highlight that CPSIA was a bipartisan effort. It passed the House 424 to 1, from the beginning to the end, and is a model for what this Congress can achieve on behalf of the American people.

And, Chairman Tenenbaum, I commend you for your leadership on implementing the safety standards for children's products, and also for your ongoing work to improve the safety of table saws and window coverings, and I thank you for leading this Commission in a way that continues to provide safety and security to the American consumer. And I also deeply thank Commissioners Adler, Nord, and Northup for their service, and for being here today. And I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentlelady.

And we turn our attention now to the panel that we have before us today. Each of our witnesses has prepared an opening statement that will be placed into the record. You will each have 5 minutes to summarize the statement in your remarks, but I am sure you all are very familiar with this—the way it works.

Our distinguished panel includes the Honorable Inez Tenenbaum, Chairman of the Consumer Product Safety Commission, and we thank you very much for postponing or changing your travel plans to be with us today, and thank you very much for that.

We also have with us the Honorable Robert Adler, Commissioner at the CPSC; the Honorable Nancy Nord, Commissioner; and our former colleague, it is great to see her again, the Honorable Anne Northup, another Commissioner at the CPSC.

So good morning. Thank you all very much for being here today. And with that, Chairman Tenenbaum, you may begin with your 5 minutes.

STATEMENTS OF INEZ M. TENENBAUM, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION; ROBERT S. ADLER, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; NANCY A. NORD, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION; ANNE M. NORTHUP, COMMISSIONER, CONSUMER PRODUCT SAFETY COMMISSION

STATEMENT OF INEZ M. TENENBAUM

Ms. TENENBAUM. Thank you. Good morning, Chairman Bono Mack and members of the Subcommittee on Commerce, Manufacturing, and Trade. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's operations and activities to keep consumers safe from dangerous and defective consumer products.

The agency is in the strongest position to meet its mission than it has been in more than a decade. In the limited time I have today, I would like to focus on a few recent achievements as well as look ahead to 2013.

The first area I would like to use is the CPSC's ongoing work to ensure that infant and toddler products meet some of the world's strongest safety standards. In the years leading up to the passage of the CPSIA, there were numerous instances of injuries and deaths to infants and small children in defective infant and durable nursery equipment. As a result the CPSA contains section 104, which requires mandatory safety standards for most infant and toddler products.

When I assumed the chairmanship of the Commission in the summer of 2009, there were no mandatory safety standards for any of these products. Since then I have moved to implement this mandate as quickly as possible. In December 2010, the Commission passed the toughest crib safety standard in the world. Subsequently we also passed mandatory safety standards for baby walkers, baby bath seats, bed rails, toddler beds, and play yards.

In addition to infant and toddler products, the Commission has also implemented the CPSIA's requirement that all children's products in the market be subject to periodic independent assessment of the safety by a third-party testing laboratory. We provided manufacturers with a great amount of flexibility and choice on how to comply as long as they have a high degree of assurance that their children's products are compliant. We are currently reviewing our staff's report on the potential ways to reduce third-party testing costs consistent with ensuring compliance as required by Public Law 1228.

I am also very proud of the work by Commission staff to implement and maintain the publicly searchable database saferproducts.gov. Overall saferproducts.gov is a model of open gov-

ernment and consumer empowerment, and I appreciate the hard work by many of this subcommittee to further improve saferproducts.gov during the Public Law 1228 debate.

The best way to ensure that dangerous consumer products never get into the hands of consumers is to ensure that they never enter the United States. As Chairman I have place special emphasis on the past year on the continued development of the CPSC's Office of Import Surveillance. This office works hand in hand with U.S. Customs and Border Protection officers in major U.S. ports of entry to inspect and detain shipments that violate U.S. Consumer Product Safety standards. In fiscal year 2011, CPSC import surveillance staff was able to stop approximately 4.5 million units of violative and hazardous consumer products from entering the United States.

In 2013, funding permitted, I am optimistic that the CPSC will be able to take additional steps toward full implementation of a fully integrated targeting system, often referred to as the risk assessment methodology, or RAM. This will allow CPSC staff to analyze a greater number of import shipments, identify those that are more likely to violate consumer safety laws, and ensure that our limited resources are dedicated to those shipments.

I would also like to highlight a number of positive collaborative relationships we have established. The first is in the area of educating parents to ensure that infants have a safe sleep environment. As part of this I have reached out to major retailers who sell sleep products like cribs and play yards to ask them to join me in educating parents that the safest way for their baby to sleep is alone in a crib on its back.

Accidental ingestion of coin and button cell batteries is another area in which we are keenly focused. We had very productive meetings with the major battery manufacturers, and a range of possible solutions from design changes to safer packaging have been discussed.

The third collaborative model is occurring in youth sports, particularly in the area of head injuries in football. I am very pleased that after much hard work initiated by my office, a group effort led by the National Football League is under way to provide economically disadvantaged youth football programs with new helmets, and to conduct an education campaign to bring about a culture change in this sport.

In the coming months and years, I see a CPSC addressing hazards I have already mentioned as well as moving to address emerging hazards. At CPSC we are carrying out a statutorily required, proactive regulatory agenda, and consumers are safer because of this approach.

With an increasing focus at the ports, with more meaningful standards coming online, and with even greater public/private efforts, I envision safer and safer products in the hands of consumers. They deserve no less.

Chairman Bono Mack, thank you for the opportunity to testify. I am happy to answer any questions you may have later. Thank you.

Mrs. BONO MACK. Thank you very much.

[The prepared statement of Ms. Tenenbaum follows:]

Statement of
Inez M. Tenenbaum
Chairman
U.S. Consumer Product Safety Commission

Before the
U.S. House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade

"Oversight of the Consumer Product Safety Commission"

August 2, 2012

Good morning, Chairman Bono Mack, Ranking Member Butterfield, and Members of the Subcommittee on Commerce, Manufacturing, and Trade. I am pleased to be here today to discuss the U.S. Consumer Product Safety Commission's (CPSC) operations and activities to keep consumers safe from dangerous and defective consumer products.

The past year has been yet another active and challenging one for the Commission and our professional staff—and I am pleased to report that once again we have risen to the challenge. The agency is in the strongest position to meet its mission than it has been in more than a decade. In the face of a flat budget, the CPSC's professional staff has worked tirelessly to implement the remaining provisions of the Consumer Product Safety Improvement Act of 2008 (CPSIA), as well as the clarifying amendments in Public Law 112-28. At the same time, the Commission has also continued to engage extensively with outside stakeholders in the consumer, manufacturing, and international communities to both educate and engage on new ways to improve our safety mission.

In the limited time I have today, I would like to focus on a few recent achievements, as well as briefly look ahead to where I believe we will be in 2013:

The Strongest Juvenile Product Standards in the World

In the years leading up to passage of the CPSIA, there were numerous instances of injuries and deaths of infants and small children in defective durable infant and toddler products. No parent should ever have to experience such a tragedy, especially if government can play a meaningful role in addressing these hazards. As a result of the leadership shown by Congresswoman Jan Schakowsky and many others in Congress, the final version of CPSIA contained section 104, which requires mandatory safety standards for most infant and toddler products.

When I assumed the Chairmanship of the Commission in the summer of 2009, there were no mandatory safety standards for any of these products. Since then, I have moved to implement this mandate as quickly as possible. In December 2010, the Commission passed the toughest crib safety standards in the world. Subsequently, we also passed mandatory safety standards for baby walkers, baby bath seats, bed rails, and toddler beds.

One of my proudest moments as Chairman came just a few weeks ago. As many of you know, section 104 is also called the "Danny Keysar Child Product Safety Notification Act" or "Danny's Law." In May 1998, Danny was placed in a previously recalled play yard at his child care center when it collapsed, trapping his neck in the "V" of its folded rails and suffocating him. Danny was only 16 months old.

On the morning of June 27, the Commission unanimously honored Danny's memory by passing new, mandatory play yard safety rules. That afternoon, I met with Danny's mother, Linda Ginzel, and we were able to personally let her know that after 14 years of her advocacy we finally had a new standard that would prevent the deadly rail collapse that took Danny's life—and the lives of nearly 20 other small children.

I accepted this position to help make a difference, and I believe we are. But, we are not done. Section 104 commands that we address other priority items, and Commission staff has now turned their attention to rules for bassinets, cradles, strollers, and infant carriers.

I recognize that we are in a period of some economic uncertainty and that some want a moratorium on any new federal regulations. I understand and appreciate these views, but I would also ask them to step into the shoes of Danny's mother—or other parents who have lost children in similar preventable tragedies. These regulations may add some small, additional costs to these products. But the cost of inaction is much higher and is not something I am willing to accept as Chairman.

Continued Commitment to Other Critical Safety Issues

In addition to the durable infant and toddler safety standards, the Commission also continues to make progress on several other key safety rules.

Last October, the Commission fulfilled the capstone of the CPSIA by implementing the requirement that all children's products on the market be subject to a periodic, independent assessment of their safety. Congress required this rule, and after much thoughtful deliberation and discussion, the Commission approved a very balanced approach to achieving the rule's purpose. We provided manufacturers with a great amount of flexibility and choice in terms of how they wish to comply, as long as, in the end, they have a high degree of assurance that their children's products are compliant.

We are currently awaiting our staff's report on potential ways to reduce third party testing costs consistent with ensuring compliance. I look forward to working with my fellow Commissioners on this issue to see if there are areas of consensus that can assure compliance and children's safety.

At the same time, however, I believe Congress got it exactly right both when passing CPSIA and then reaffirming the overall third party testing requirement in Public Law 112-28. Parents deserve to know the products their children use are being independently tested and are safe.

I have also accelerated efforts to finalize our upholstered furniture flammability rule. CPSC staff has proposed a rule that would address the risk of injury or death resulting from smoldering fires, often caused by cigarettes, without requiring the use of flame retardants. I was pleased to read that the Governor of California recently directed that state's Bureau of Home Furnishings to revisit state rules that effectively require the use of flame retardant in many household upholstered furniture items, and I know Commission staff is monitoring this work closely. I am hopeful that Commission staff will generate a rule that will bring safer, more fire resistant upholstered furniture into homes across the nation.

Additionally, the Commission recently initiated rulemakings to deal with two other critical safety issues. The first is table saw injuries. Every day, 11 people on average suffer amputations from power saws. Through this rulemaking, Commission staff will explore technological solutions that could help save consumers from these life altering injuries.

The second is liquid gel fuels and firepots. Last December, the Commission voted unanimously to publish an Advance Notice of Proposed Rulemaking, just months after nearly all bottles of pourable gel fuels used in firepots were recalled. The recall was prompted by at least 65 serious incidents that resulted in two deaths and at least 34 victims who had to be hospitalized due to second and third degree burns to the face, hands, and other parts of the body. The ANPR is examining whether it is possible to make pourable gel fuels safe for consumers to use.

I would also like to briefly address the issue of small rare earth magnets. While I am not able to comment on the matter publicly, I can say that recent action by the Commission to authorize legal action to protect children from serious hazards associated with the ingestion of rare earth magnets is consistent with the approach Congress sought when enacting CPSIA.

SaferProducts.gov—Transparency for Consumers

I am also very proud of the work by Commission staff to implement and maintain the publicly searchable database of product safety reports required by section 212 of the CPSIA—SaferProducts.gov. I realize the roll out of the database in March 2011 caused some concern in certain segments of the regulated community. After almost 17 months of operation, however, I think SaferProducts.gov has gained wide approval and acceptance.

As of July 27, 2012, almost 10,000 reports of harm had been collected in the database, and posted to the public portal on SaferProducts.gov. Approximately 97 percent of those reports were submitted by consumers. Many of these reports contain detailed information on the product involved; and, utilizing the procedure specified in the Public Law 112-28 amendments, approximately 88 percent of the reports eligible for posting now contain a nonblank value for the model or serial number, and 73 percent of eligible reports contain numeric content for the model or serial number. In addition, approximately 85 percent of the report submitters agreed to have their contact information shared with manufacturers.

Business interest in the database has also grown. As of July 27, 2012, 3,487 entities are registered for the SaferProducts.gov business portal. These registrations allow companies to receive fast, e-mail notification of consumer incident reports. The business portal also allows companies to file section 15 product incident reports and provides companies with the capability to submit retailer incident reports. The general public has also come to see

SaferProducts.gov as a resource with over two million visits to the database since its launch.

Overall, SaferProducts.gov is a model of open government and consumer empowerment, and I appreciate the hard work by many on this subcommittee to further improve SaferProducts.gov during the Public Law 112-28 debate.

Robust Surveillance of Imported Consumer Products

One of the best ways to ensure that dangerous consumer products never get into the hands of consumers, especially children, is to ensure that they never enter the U.S. stream of commerce in the first place. Congress recognized the importance of import surveillance in section 222 of the CPSIA, and as Chairman I have placed special emphasis in the past year on continued development of CPSC's Office of Import Surveillance (OIS).

This office works hand in hand with U.S. Customs and Border Protection (CBP) officers in major U.S. ports of entry to inspect and detain shipments that violate U.S. consumer product safety standards. As of July 25, the Commission has 20 full-time employees located in 15 U.S. ports of entry, along with approximately 30 other employees who support their mission through testing and analysis activities.

While this is a small group, they have demonstrated extremely impressive performance metrics for the American people. During fiscal year 2011, OIS staff screened nearly 10,000 products at the ports, collected almost 1,800 samples, and found over 1,100 violations of safety standards. As a result, CPSC staff was able to stop approximately 4.5 million units of violative or hazardous consumer products from entering the United States. Many of these products were toys that had lead above the statutory limits or small parts that could present a choking hazard for children younger than three years of age.

In the coming year, CPSC will continue to deepen its relationship with the U.S. Department of Homeland Security and CBP. In 2011, CPSC became the first agency to receive data for incoming shipments through the International Trade Data System's (ITDS) Interoperable Web Services program. This data allows CPSC staff to view port shipment information in near real time, and develop targeting rules to identify the highest risk shipments. In recent months, OIS staff has been working with the ITDS data and CPSC case data to come up with baselines of effectiveness for targeting.

In 2013, funding permitting, I am optimistic that CPSC will be able to take additional steps toward full implementation of the section 222(a) mandate through a pilot test of the operation of a fully integrated targeting system—often referred to as the Risk Assessment Methodology or "RAM." This will allow CPSC staff to analyze a greater number of import shipments, identify those that are more likely to violate consumer safety laws, and ensure that our limited resources are dedicated to those shipments.

The benefits of a full roll out of the RAM are two-fold. First, the RAM will allow us to deploy limited resources toward suspect shipments and increase the correlation between samples collected and violations found. Second, it will have positive effects for "known" importers and members of the business community who would hopefully face fewer delays through better advance analysis of import data and risk metrics before products arrive at ports.

Constructive Collaborations to Address New and Emerging Issues

Another key area of achievement is the pursuit of public-private collaborations and consensus based solutions, whenever we can, to new and emerging product safety issues. While this is not always possible, I think we have made great strides in several areas.

The first is in the area of educating parents to ensure that infants have a "safe sleep" environment. As part of this, I have reached out to major retailers who sell sleep products like cribs and play yards to ask them to join me in educating parents that the safest way for their baby to sleep is alone, in a crib, on their back. So far, I have been pleased that several retailers have been enthusiastic about working with CPSC to get out the safe sleep message on their websites and in their brick and mortar stores, as well.

Retailers have suggested creative ideas including, but not limited to, displaying cribs absent of pillows and blankets in their stores, showing our safe sleep video on a continuous loop in their baby departments, adding safety information to their baby registry packets, and including safe sleep tips in the crib assembly instructions that come with new cribs. I believe this education effort, combined with the new, mandatory safety standards discussed earlier, will play a critical role in ensuring that all babies can sleep safely.

Accidental ingestion of coin and button cell batteries is another area on which we are keenly focused. We are seeing an alarming increase in the severity of the injuries associated with these batteries, which we all know have become commonplace in our homes. They are found in our remote controls, our key fobs, our watches, and many other household products. Children are swallowing them and the results can be devastating in as little as a few hours. Specifically, the larger, 20 millimeter (mm) sized batteries are posing the greatest harm. The 20 mm batteries are coin sized and likely to lodge in a child's esophagus upon ingestion. At that point, time is of the essence, as the resulting chemical burn that occurs can—and has—led to severe injuries and death.

Along with our professional staff, we have had very productive meetings with the major battery manufacturers about a range of possible solutions, from design changes in the longer term to safer packaging and other steps in the shorter term. I am hopeful that these efforts, as well as many that are happening independently by industry, will yield tangible safety results in the near future.

The third example of this constructive, collaborative model is occurring in youth sports, particularly with the issue of head injuries in football. I am grateful for the increased

attention and awareness associated with this issue. The consequences of a brain injury can be severe and long lasting. I believe addressing its risks require a true team effort. Along those lines, I am very pleased that, after much hard work initiated by my office, a group effort led by the National Football League (NFL) is underway to provide economically disadvantaged youth football programs with new helmets and to conduct an education campaign intended to accelerate the much needed culture change in that sport.

While this program is in its infancy, I have great hopes that our bringing the NFL, the NFL Players Association, the National Collegiate Athletic Association (NCAA), helmet manufacturers, helmet reconditioners, the helmet standards body, and others together can serve as a model of effective, collaborative public-private problem solving.

Responsible Regulatory Review

Before I look ahead, I would also like to address the Commission's ongoing efforts to review our existing rules and regulations. As I noted earlier, I strongly believe that we needed new mandatory safety standards in several areas, such as infant and toddler products, and I am very pleased Congress, through the CPSIA, gave us the authority to act quickly in those areas. At the same time, however, I also recognize the need to responsibly review those rules and either modify or delete outdated rules when it is in the public interest.

In April 2012, the Commission's professional staff presented an extensive regulatory review package to the Commission. In this package, Commission staff formulated a plan that not only incorporated the elements drawn from the President's Executive Orders (EO) 13579 and 13563, but also set forth a defined method and schedule for identifying and reconsidering any Commission rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise require modification without sacrificing the safety benefits of the rules. The plan also encourages public input and participation to find the right balance of priorities and resources. Furthermore, the plan incorporates the requirement in Public Law 112-28 that the Commission seek and consider comments on ways to reduce the cost of third party testing requirements.

Commissioners Nord and Northup have expressed concern over the scope of the staff proposed regulatory review plan, and have called for additional resources to be dedicated to the rule review process. I respect these views, but I am unwilling to put at risk efforts underway to achieve the mission of the agency, namely protecting consumers. The proposal by the Commission's professional staff is a very fulsome and appropriate review plan and notes that the diversion of additional staff resources to this project could delay some of the Commission's key safety activities. This is not acceptable to me, nor should it be acceptable to America's consumers, especially parents.

Even with the staffing improvements brought about through the enactment of CPSIA, the CPSC is still a small agency with finite resources. Then Acting Chairman Nord recognized these limitations in 2007 when she completely suspended the CPSC's

retrospective rule review process citing resource constraints. As Chairman, I am pleased that we have been able to reinvigorate this process—and stand by the balanced approach presented in the Commission staff's proposed regulatory review package.

The Road Ahead: Continuing to Restore Confidence in the Safety of Consumer Products

At CPSC, we are carrying out a statutorily required proactive regulatory agenda, and consumers are safer because of this approach. While we have made great strides in a number of areas, I assure you, that we will continue to accelerate reasonable and rational safety efforts at every opportunity. In the coming months and years, I see a CPSC addressing hazards I have already mentioned, as well as moving to address emerging ones. With an increasing focus at the ports, with more meaningful standards coming online, and with even greater public-private efforts, I envision safer and safer products in the hands of consumers. They deserve no less.

* * * * *

Chairman Bono Mack, thank you again for the opportunity to testify on the Commission's ongoing efforts to keep American consumers safe from defective and hazardous consumer products.

I am happy to answer any questions you may have.

Mrs. BONO MACK. Commissioner Adler, you are recognized for 5 minutes.

STATEMENT OF ROBERT S. ADLER

Mr. ADLER. Thank you very much. Good morning.

Mrs. BONO MACK. If you can just pull it much closer for—a little bit closer. And is it turned on?

Mr. ADLER. I have no idea. The one that says push?

Mrs. BONO MACK. Thank you.

Mr. ADLER. Let me try that again.

Good morning, Chairman Bono Mack and members of the Subcommittee on Commerce, Manufacturing, and Trade. Thank you for the opportunity to testify today along with my fellow CPSC Commissioners. I am pleased to be here today to discuss an agency that I have been associated with in some fashion since its establishment in 1973 and have been a Commissioner at since August of 2009.

This October will mark the 40th anniversary of the passage of the landmark Consumer Product Safety Act, and looking back now, I believe Congress and the agency should take great pride in what the agency has accomplished, especially considering the immense scope of our mission, which is to protect the public from any and all unreasonable risks associated with roughly 15,000 categories of consumer products.

What has the agency accomplished? As a starting point I would cite the estimated 30 percent reduction in the rate of deaths and injuries associated with consumer products since the agency's inception. And I would particularly point to the dramatic drop in death and injuries to children, such as the reductions of over 90 percent in childhood poisoning deaths and crib-related deaths.

In short, CPSC has produced an excellent return on investment. By our calculation this drop in deaths and injuries has resulted in over $16 billion in reduced societal costs, or many, many times the resources the CPSC has been given to do its job. And as a very small agency, we have had to produce these benefits at very low cost.

Of course, even efficiency has its limits. As of 5 years ago, the CPSC had shrunk to a skeleton crew of less than 400 and a budget of $62 million. To Congress' credit, in 2008, almost unanimously you passed the CPSIA, providing the agency with more tools and directing it to do more work and do it faster. Put simply, the CPSIA revitalized an agency that was underfunded and undermanned, and for that I am sure consumers across the country are grateful.

Undoubtedly the biggest change felt by the children's product community has been the mandate in the CPSIA that all children's products be tested by third-party independent laboratories before they enter the market, and on a continuing basis thereafter. Let me assure you that we at the Commission have worked very hard to implement this mandate in a thoughtful and measured way, and I can report that we finally reached the point where the final rule will take effect in February.

Of course, such a strong safety step forward carries broad implications for our regulated community, and we know that and are

fully aware of our need to work closely with them as we implement the law.

As we approach the fourth anniversary of CPSIA, it is worth reflecting on two common themes in the law. The agency needed more resources and other tools to accomplish its safety mission, and it needed to change its approach to vulnerable populations, particularly children. I think we will keep this in mind as we move forward into the future.

I do want to note one particular provision in the CPSIA because it is something the Congress changed in the CPSIA. I believe that in section 9 of the CPSA, and other sections of our laws, we have the most burdensome cost-benefit requirements in the entire Federal Government. Under these requirements, by my count, the Commission has managed to issue a grand total of nine safety rules in 31 years, or roughly one every 3 ⅓ years.

The Congress recognized this, and Congress took major strides to lessen the burden. Congress didn't abolish the need for cost-benefit; Congress retained it in the Regulatory Flexibility Act. And to drive the point home, you prescribed extraordinarily short deadlines for the promulgation of rules for children's products. This approach, to me, clearly has succeeded. By the most conservative count possible under these procedures, we have issued 10 safety rules in the past 4 years, or 2 ½ rules every year as opposed to 1 every 3 ⅓ years.

In closing, I want to share one major concern about a growing and increasingly vulnerable population, older Americans, of which I am now one. In fact, despite being only 13 percent of the population, older Americans suffer 60 percent of the deaths and injuries associated with consumer products. The fact that I now fit within this demographic has definitely helped me understand what a serious challenge we face in the coming years as America ages.

I look forward to working with my colleagues and the members of this subcommittee as we focus on our mission to protect our citizens from risks of unreasonable injury or death.

Thank you very much.

Mrs. BONO MACK. Thank you, Commissioner.

[The prepared statement of Mr. Adler follows:]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Statement of
Robert S. Adler
Commissioner
United States Product Safety Commission

Before the
House Committee on Euergy and Commerce
Subcommittee on
Commerce, Manufacturing, and Trade

August 2, 2012
Rayburn House Office Buildiug, Room 2322

"Oversight of the
Consumer Product Safety Commission"

Good morning Chairman Bono-Mack, Ranking Member Butterfield, and the members of the Subcommittee on Commerce, Manufacturing, and Trade. Thank you for the opportunity to testify along with my fellow CPSC Commissioners. I am pleased to be here today to discuss an agency that I have been associated with in some fashion since its establishment in 1973 – and I have been a Commissioner at since August 2009.

Agency Accomplishments

In May 1973, the CPSC opened its doors following the recommendations of the 1970 Final Report of a Congressionally established study commission, the National Commission on Product Safety (NCPS). The NCPS recommended the creation of a conspicuously independent federal regulatory agency given extensive authority to issue regulations and mandatory safety standards for a wide variety of consumer products. There was a need for such a body because, at the time, product safety was regulated sparsely and only by a patchwork pattern of laws that extended to a very small portion of consumer products.

This October will mark the 40th anniversary of the passage of the act that brought to life the recommendations of the NCPS — the landmark Consumer Product Safety Act (CPSA). Looking back now, I believe Congress and the agency should take great pride in what the agency has accomplished, especially considering the large scope of our mission – to protect the public from any and all unreasonable risks associated with roughly 15,000 categories of consumer products found in stores, homes, schools, and recreational settings. Another way to think about our responsibility is if a product is not food, or a drug, gun, bullet, boat, plane, or a car – we are probably responsible for it.

What exactly has the agency accomplished? As a starting point, I note an estimated 30 percent decline in the rate of deaths and injuries associated with consumer products over the last 30 years. And I would particularly point to the dramatic drop in death and injuries to children. For example, we have seen:

- a 92% drop in childhood poisoning;
- a 92% reduction in crib deaths;
- a 100% reduction in child suffocations from abandoned refrigerators; and
- an 88% reduction in baby walker injuries.

Additionally we have seen improvements such as a 92% reduction in fatal electrocutions and a 46% reduction in residential fire deaths. In short, the CPSC has produced an excellent return on investment. By our calculation, this drop in deaths and injuries has resulted in over $16 billion in reduced societal costs – or many, many times the resources the CPSC has been given to do its job. And, as a very small agency, we have had to produce these benefits at a very low cost.

Of course, even efficiency has its limits. As of five years ago, the CPSC had shrunk from its 1980 high of 978 employees to a skeleton crew of less than 400 employees and a budget of $62 million. To Congress' credit, you saw that the agency increasingly suffered from too much to do and too little to do it with. So, in 2008, almost unanimously, you passed the Consumer Product Safety Improvement Act (CPSIA), providing the CPSC with more tools and directing it to do more work - and do it faster.

Update on Implementation of the CPSIA

The CPSIA, which will mark its fourth anniversary in two weeks, has sometimes been referred to as a "toy bill" - but in truth it is a law that is broad in scope and has served to save an agency that was underfunded and undermanned. And, for that, I am sure consumers across the country are grateful for this legislation.

For example, in 2007, despite over $600 billion per year of consumer products being imported, including more than 70% of the toys sold in the United States, the agency had no employees stationed full-time at our nation's ports. That year, CPSC collected a grand total of 723 samples of imported consumer products and was finding violative products in its collected samples at a rate of less 42%. Today, because of the CPSIA, we have a division at the CPSC devoted solely to import compliance, and we have personnel stationed full-time at 15 of the country's busiest ports of entry. As opposed to the meager numbers of 2007, during the first half of 2012 alone, we screened almost ten times as many samples (6,600) and prevented more than 1 million units of violative or dangerously defective products from entering the United States. And in the tradition of CPSC, we have become significantly more effective at our job, finding violative products in our collected samples at a rate exceeding 60%. Unquestionably, a large part of this success has been because of our partners at U.S. Customs and Border Protection (CBP), but it is also because of increased funds, personnel, and authority provided by the CPSIA.

Among other non-children's product requirements, the CPSIA:

- Made the sale or distribution of a recalled product illegal, which created a tremendous incentive for retailers to become even stronger safety partners with the agency (which they have);
- Raised the maximum civil penalty amount for violations from $1.825 million to $15 million;
- Required the promulgation of a mandatory ATV standard which banned three-wheeled ATVs and required all ATV manufacturers or importers to submit an action plan to the Commission prior to distribution;
- Funded the upgrade of our siloed information technology systems, allowing the agency to lay the groundwork for 21st century technology solutions to help us more quickly identify hazard

patterns from the wide variety of data the agency receives. The CPSIA also required the creation of a public consumer product hazard database. This database allows consumers to almost simultaneously inform the CPSC, the product's manufacturer, fellow consumers, other manufacturers, retailers, and the media of hazardous (and potentially hazardous) products. The need for such a database was a direct result of the ultra-restrictive "section 6b" of the CPSA. This provision inhibits, to the point of virtual prohibition, the CPSC from releasing to the public in a timely fashion manufacturer specific safety information that almost every other federal health and safety agency releases on a regular basis; and

- Increased CPSC staff to over 500 FTEs and its budget to just over $100 million.

Of course, there is no question that the CPSIA also changed the landscape for children's products. The law required the promulgation of a number of mandatory federal safety standards, where none existed for toys and other durable nursery products. The CPSIA also set maximum levels for lead paint and lead content in children products at 90 and 100 parts per million, (respectively) and banned the use of certain phthalates in children's toys and child care articles.

Undoubtedly, the biggest change felt by the children's product community was the law's requirement that all children's products be tested by a third-party independent laboratory before they enter the market — and on a continuing basis thereafter. This section of the law, often referred to as the "testing and certification requirement," mandated the agency write regulations to accredit third-party laboratories and establish procedures for manufacturers to comply with the law's testing requirements. Clearly, such a strong safety step forward carried broad implications for the regulated community. And that's why we have worked long days (and sometimes, nights) to implement this mandate in a thoughtful and measured way. And I can report, after much review and many re-drafts, we have finally reached the point where the final rule on continued third-party testing and certification will take full effect on February 8, 2013.

The CPSIA was the first major overhaul of the Commission and its authority and priorities in almost 20 years. Looking at the law as a whole, I see two common themes: the agency needed more resources and other tools to accomplish its safety mission, and it needed to change its approach to vulnerable populations, particularly children. I believe both of these themes remain important considerations not only as we near the completion of the bulk of our CPSIA rulemakings but also as we look to the future.

Resources for CPSC Personnel

When we talk about the tools the agency possesses to accomplish our safety mission we are mainly talking about resources and rulemaking authority. The CPSIA had a major impact on both. Over two-thirds of the CPSC's budget goes to our personnel. Accordingly, when the agency fell below 400 employees in 2007, this translated into fewer compliance officers out in the field conducting investigations and inspections; fewer engineers and toxicologists and

epidemiologists to make hazard determinations and help write performance standards; and it also meant there was no money for staff to be stationed full-time at any of our nation's 300 plus ports.

The increase in our budget over the last few years has translated directly into action because it means technical experts and law enforcement officials can be hired to help us fulfill our mission. We now have a state-of-the-art testing lab, but it must continue to be staffed appropriately to optimize its potential. Our fire engineering staff has made great strides in research regarding fires associated with cooktops and space heaters, and our carbon monoxide team has done some compelling work on portable generators and gas furnaces. Without continued funds for these talented scientists, the projects are likely to stall. Highly skilled technical experts must be hired and retained to allow us to stay on top of existing or emerging hazards, whether the material is a heavy metal (including lead), a chemical like phthalates, or new discoveries like nanotechnology.

After our engineers and other technical experts, the largest part of the CPSC budget goes to our compliance activities. As described above, we now have an import division and have 20 staff members full-time at 15 ports – but we need still more resources. Despite our tremendous progress, we are inspecting less than 1% of the 14 million consumer product shipments that enter the United States every year. We recently submitted a report required by the CPSIA that details a seven-year plan to implement a complete risk management program across the country. It will cost real money, but if we do it right, it will save more money than it costs, and of course it will save many lives.

The same is true for our domestic compliance activities – more resources translate directly to more law enforcement at the retail and consumer level. Our field staff covers the entire country as best they can, but there are still 12 states in which we do not have even one field officer. There is no substitute for having trained investigators on the ground, getting to know their territory every-day instead of just flying or driving in on an emergency basis.

All of this said, I fully recognize that you have many difficult budgetary decisions facing you in the months ahead, and this is a time of limited resources for all Americans and therefore all federal agencies as well. But, I ask that when you consider the CPSC, you keep in mind that the return on investment received for our budget is lives saved, injuries prevented, and unnecessary societal costs reduced – especially for the nation's most precious asset: our children.

A Reasonable Rulemaking Process

The other major tool CPSIA sharpened for us was making a particularly significant modification in how we engage in rulemaking. Given the CPSIA's focus on moving expeditiously on children's safety, the law directed the agency to use section 553 of the APA (Administrative Procedure Act) when promulgating CPSIA rules. This was a significant change because under

normal circumstances, the agency is required to suffer through the broad and extravagant set of cost-benefit requirements added in 1981 to the CPSA (and other acts enforced by the CPSC) when promulgating consumer product safety rules.

While there was no specific mention of the rationale for this decision in the CPSIA, it seems logical to conclude that Congress understood that CPSC's normal-cost benefit provisions make efficient rule promulgation almost impossible. This is because they easily surpass in their stringency and scope the cost-benefit provisions of the various Executive Orders on cost-benefit analysis recommended by the Office of Management and Budget, including Executive Orders 12866, 13563, and 13579. In fact, in the 31 years since the CPSC was saddled with these unique requirements, we have managed to promulgate a total of only 9 consumer product safety rules – or roughly one every 3 1/3 years.

In order to move the rulemaking process with respect to toys and other children's quickly, the CPSIA substituted the much more streamlined and focused cost-benefit procedures of the Regulatory Flexibility Act (RFA). And to drive the point home for us, the law prescribed extraordinarily short deadlines for the promulgation of a toy standard as well as specific children's product safety rules such as cribs, infant walkers, baby bath seats, toddler beds, toddler bed rails, and portable play yards, among other children's products.

Significantly though, by giving the CPSC the authority to promulgate all of these rules under Section 553 of the APA, Congress made sure that the RFA's analysis of the impact to small businesses would be considered. In other words, the agency's cost-benefit analysis would focus on the group that was least likely to have had a voice in the writing of the voluntary standard – small businesses.

Put another way, Congress pointed to a different set of procedures when it wanted us to promulgate rules quickly – procedures that do not include the 1981 added cost-benefit requirements. I believe this approach succeeded. By the most conservative count possible, the CPSC has issued 10 consumer product safety rules in the last 4 years that would have otherwise been subjected to our usual snail-like rulemaking process. This experience has only reinforced my belief that the type of rulemaking contemplated by section 553 of the APA or even under the relevant Executive Orders makes for a more reasonable regulatory process than the one laid out in the CPSC's statutes.

Unfortunately, I do not need to go back into the Commission's ancient history to find examples of non-children's products where rulemaking that is in the interest of protecting consumers has been significantly delayed because of these unique cost-benefit obstacles. In October 2011 the Commission unanimously published an Advance Notice of Proposed Rulemaking (ANPR) on table saws, more than eight years after receiving a petition on the hazard. A final rule, which

would attempt to address a product associated with almost 40,000 annual emergency department treated injuries, including 4,000 amputations, is likely to be several years away, in no small part because of CPSA's onerous section 9 cost-benefit requirements.

Vulnerable Consumers - Children

Congressional desire for the CPSC to change its approach to vulnerable consumers is also evident from the way it described children's products to include "a consumer product designed or intended primarily for children 12 years of age old or younger." This was a wider range than we had previously been using to address children's products. The level of concern regarding this population was also clear from the requirement for pre-market, independent third-party testing of children's products. This process is a sea change in product safety in the United States because it demands for the first time that all children's product manufacturers (not just the extra cautious ones) test and certify their products are safe prior to placing them on store shelves. I believe over time this change will pay dividends in reduced death and injury costs for the public *and* manufacturers.

It has not been surprising that there has been a lot of concern in the regulated community regarding third-party testing because it was such a significant change in the way children's products have been brought to market. It is nearly impossible to contemplate the imposition of third-party testing and not realize that there would be increased costs to producers of children's products. Yet, I have long believed that for most manufacturers the increased costs would be minimal because they were already engaging in many of these safety processes pre-CPSIA, except they were testing their products at an even more sophisticated level than the one required by the CPSIA. But for many manufacturers, particularly the medium and smaller firms, this new requirement caused significant change. This is why I have been so pleased by our staff's efforts to continually walk the extra mile, or two miles, for small and medium sized businesses, both in the rules and in the guidance documents we provide. At every step of the process, I believe we have tried to maintain the necessary, but delicate, balance of new safety requirements with new burdens.

The CPSIA's direction to CPSC regarding extremely strict lead limits was another example of how hazards for vulnerable populations were going to be addressed differently from the past. By now, everyone is aware that children's products may not contain more than 100 parts per million (ppm) of lead. And I hope everyone is aware that lead is a powerful neurotoxin that accumulates over time. Even low levels of lead are widely associated with learning disabilities, decreased growth, hyperactivity, impaired hearing, and brain damage.

There are two observations that I'd like to make on this issue: First, by mandating that we drop the lead level, unless the Commission determined it was not technologically feasible for a product or product category to meet the 100 ppm total lead content limit, Congress took a very

proactive approach to this chronic hazard. The law basically said we will not wait for bodies to pile up 20 years from now only to discover that it was because of slow, but steady, lead accumulation from products, including children's products. I have previously noted that, were it my decision, I might have recommended a slower and less precipitous drop in levels, but all things considered, I believe Congress got it right. Along those lines, I am pleased that we at the CPSC continue to look for easier and less costly ways for all manufacturers to test for lead – and was supportive of P.L. 112-28's changes regarding testing relief for small batch manufacturers.

Second, I hope we have put to rest the notion that lead content level was set arbitrarily or without safety levels in mind. There was clear evidence at the time Congress chose 600, 300, and 100ppm that they were selected for well-considered reasons. I note that this past spring, the Centers for Disease Control and Prevention (CDC) revised their lead guidelines *downward*, so that any child with more than 5 micrograms of lead per deciliter of blood would be considered at risk of lead poisoning. I believe that, as scientific methods increase in sophistication, we are going to see health experts recommending even lower limits over time.

Vulnerable Senior Consumers – Looking Ahead

In addition to mandating that our agency take new approaches to consumer product safety, I also believe that there was another underlying message in the CPSIA: attend to all vulnerable populations, wherever you find them. While this concept has been an important part of the agency's make-up since its founding, the passage of the CPSIA was a clear message to reinvigorate this priority.

Accordingly, of late, I have become increasingly concerned by what I feel has been a lack of focus regarding injuries to an overlooked vulnerable population – older Americans. Our data demonstrates that this critical demographic is the second most vulnerable group after children, particularly those Americans over age 75. The fact that I now fit in this demographic has definitely helped me understand what a serious challenge we face as America ages. In fact, here are some underreported facts about older Americans:

- Despite making up only 13 percent of our population, older Americans suffer 60 percent of the deaths associated with consumer products and Census statistics predict that by 2030, one in five Americans will be 65 or older.
- Today, roughly 40 million people in the U.S. are ages 65 and older. This number is projected to more than double to 89 million by 2050;
- Today, the "oldest old" – those 85 and older – have the highest growth rate in the country: twice that of those 65 and older and almost four times that for the total population. This group now represents 10% of the older population and will more than triple in number by 2050.

And, unfortunately, this explosive population growth brings some unwelcome news on the health and safety front. CPSC's data show that injuries and death from consumer products begin to accelerate dramatically once we hit age 75. In fact, the rate of emergency room-treated injuries for those 75 and older is approximately twice that of 65-74.

I recently called for a National Action Plan to address injuries to seniors modeled on a similar plan put together by CDC regarding injuries to children. Unfortunately, there is no comprehensive plan for this group that often faces similar vulnerabilities. I believe such a plan is needed, for example, to prevent the type of falls that take place every day in and around seniors' homes that lead not just to bumps and bruises, but to hospitalizations and fatalities. The CDC estimates that one out of every three people in the U.S. age 65 or older will suffer a fall this year, resulting in more than 19,000 deaths and a cost to society of more than $28 billion.

The other leading cause of injuries and deaths to seniors is fire. The CPSC's staff report that almost 400,000 fires occur annually, resulting in roughly 2,500 deaths, 12,600 injuries and $6.43 billion in property loss. But, the problem is more serious for seniors. The U.S. Fire Administration estimates, for example, that adults age 75-84 are nearly four times as likely to die in a home fire. And, adults over age 84 are nearly five times as likely to die compared to the general population.

In 2007, there were more unintentional fire and burn deaths to older Americans than any other demographic category, and the odds of surviving fires get worse as we get older. Our nation's firefighters and emergency responders are brave, dedicated, and proactive, but they cannot prevent these fire deaths alone.

In short, the hazards to our seniors occupy many fronts. Sometimes products that seem benign to youth may take on a more ominous character when older Americans use them. Other times there's a product like adult bedrails that appear to be associated with an entrapment hazard that looks similar to the hazard that our recent children's bed-rail rule was written to address, but sadly appears to have a much higher death and injury count.

Next year CPSC will be issuing a report on injuries and deaths to older Americans to help us identify which products we should focus our energies on first. The last time we undertook such a project, in 2004, we estimated that the combined injury and death costs to older Americans totaled more than $100 billion per year. I believe our new data will assist in a larger national effort where all stakeholders work to determine which hazards to our seniors are easily addressable and which hazards require new types of technology and consumer education.

But even with good data and a renewed focus, these societal wide issues cannot be solved by our small agency alone. Addressing injuries to this vulnerable population will take an enormous

effort by a range of experts, every-day citizens, non-governmental organizations, families, foundations, and federal, state, and local governmental actors. I look forward to working with my colleagues and interested members of this Subcommittee as we focus on our continued mission to protect vulnerable citizens of all ages from risks of unreasonable injury or death.

Thank you for the opportunity to testify today and share my thoughts on the Consumer Product Safety Commission. I look forward to your questions.

Mrs. BONO MACK. And welcome, Commissioner Nord. You are recognized for 5 minutes.

STATEMENT OF NANCY A. NORD

Ms. NORD. Thank you so much. I am delighted to be here.

You have in front of you four different statements representing the views, the opinions, the observations and, in some cases, the criticisms of the four Commissioners of the CPSC. And yes, we all agree on many things. Of course, we all agree that children are our most vulnerable consumers and, more importantly, our most precious asset.

Of course, we all agree that increased resources for engineers, compliance officers, scientists, port inspectors, and yes, dare I say, some lawyers has allowed us to really bump up our game in carrying out our mission.

Of course, a state-of-the-art testing lab, which I am very proud to have initiated the efforts for, has met with rave reviews, and moving our information technology systems into the 21st century has met with strong approval.

Indeed, we find common ground in dealing with serious issues like mandatory safety standards for infant and toddler products and using our new authorities to address hazards like drawstrings. And we are all very, very proud of the great work that our staff is doing, especially in the ports and out in the field.

So in many cases it is not the what, it is the how. And I am very concerned that we are falling short on the how, whether it is on big items or things with smaller significance.

As I mentioned in my written statement, I have major concerns about how we develop the testing and certification rule; how we have defined children's products; how we have justified dropping the lead content limits from 300 parts per million to 100 parts per million. That is 99.99 percent lead free.

I have concern about how our limited resources are being used. Did we really need to spend almost $2 million on consultants to tell us how to rewrite our strategic objectives and our mission statement? Will we know how we are going to be spending our funds come the October 1st beginning of the fiscal year if we have yet to establish our priorities in an operating plan?

But more importantly than resources, it is how rules are being proposed, considered, and promulgated. If staff strongly suggests the Commissioners not move forward with finalizing the testing rule, but rather seek public input as directed by Congress, and the majority ignores that and puts a rush on the rule, how can we say that that is thoughtful and measured decision-making?

When Commissioners decry the use of cost-benefit analysis and say, well, the Regulatory Flexibility Act is all we need because that focuses the impact on the impact on small businesses, yet consistently turns around and disregards the information that is in the Regulatory Flexibility Act because it doesn't lead to a desired regulatory result?

When a claim is made that section 6(b) of our law is ultra-restrictive and inhibits to the point of virtual prohibition releasing information to the public in a timely way, yet the agency in the past year three times has released inaccurate and misleading informa-

tion, contrary to 6(b), that almost jeopardized the major recall in one case and caused the agency to do a public retraction in another?

We can all agree that each Commissioner here today has a strong commitment to safety, and that differences of opinion as to regulatory issues should not be viewed as a lack of commitment. And believe me, I am not looking for trouble from my colleagues, but I am very troubled about how we approach issues.

Interestingly, I note that one of my colleagues with whom I often disagree in the statement says, quote, "The necessary but delicate balance of new safety requirements with new burdens."

I agree it is necessary. I agree it is delicate. I think that the agency's actions, over the past 2 years in particular, fall quite wide of the mark and have created a great imbalance between safety and new burdens, and as a result American consumers are overpaying for safety. We cannot close our eyes to the harm that we are causing many businesses that produce perfectly safe products and pretend that that harm does not exist. I think we need to work harder to find the balance that is missing.

Thank you.

Mrs. BONO MACK. Thank you, Commissioner.

[The prepared statement of Ms. Nord follows:]

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COMMISSIONER NANCY A. NORD

Statement before the
Subcommittee on Commerce, Manufacturing, and Trade
of the Committee on Energy and Commerce of the
United States House of Representatives:

August 2, 2012

Saving lives and reducing injuries wisely

I would like to thank the Chair, Congresswoman Bono Mack, and the Ranking Member, Congressman Butterfield, for holding this oversight hearing today at a critical time for the agency. Congress created the Consumer Product Safety Commission to protect the public against unreasonable risks of injury associated with consumer products in a manner that would provide for efficient regulations that were minimally burdensome to manufacturers and importers.[1] Balancing the dual goals of safety and efficiency is a challenging task, not to be treated lightly. Although we all share the same goals, I am deeply concerned that we have over-read our congressional mandate and failed to consider the effects our actions have on the important balance between safety and efficiency. I believe that the agency needs to rethink its approach, especially in view of the increasing demands on our agency's limited resources. [2]

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[1] *See, e.g.*, H.R. Rep. No. 92-1153, at 25 (1972) ("The Commission's decisions under this legislation will necessarily involve a careful meld of safety and economic considerations. This delicate balance, the committee believes, should be struck in a setting as far removed as possible from partisan influence.").

[2] *See* U.S. Consumer Product Safety Commission, Estimates of Hospital Emergency Room-Treated Injuries Associated with the Use of Certain Consumer Products, *2011 & 2010 Annual Report to The President and Congress.*

Congress made changes to our statutes in 2008 through the Consumer Product Safety Improvement Act (CPSIA), and our small agency, with increased but limited funding, has been working hard to implement it. CPSIA provided the agency with more resources, greater powers, and specific directives to address several types of hazards. (The law included a number of changes that I had recommended.) At the same time, the new law attached some stringent requirements that unduly restricted the agency in its mission to reduce risks based on severity and exposure.

Although the CPSIA's dramatic redirection of the agency has resulted in some safety improvements, the redirection also led to major problems in the form of unrealistic deadlines, workload prioritization difficulties, project delays, and numerous unintended consequences. Wise implementation was called for.

The art of good management is making wise choices that focus the resources of regulators and manufacturers to achieve maximum safety in a cost-effective manner. We could have reached our shared goal of consumer safety, particularly for children, without the needless expense, job loss, and businesses closure that we have seen. Unfortunately, our agency is forcing consumers to *overpay for safety* through passed-on costs for unnecessary testing, limited choice, and limited safer alternatives. More circumspection would have avoided this over-regulation.

Examples of over-regulation

The Testing Rule

The best example of over-reading the law is the Testing Rule.[3] Implementing one of the key provisions of CPSIA, the Testing Rule read an overly broad mandate into the statute: that all testing of children's products—including ongoing periodic testing—must always be performed

[3] Testing and Labeling Pertaining to Product Certification, 76 Fed. Reg. 69,482 (Nov. 8, 2011) (codified at 16 C.F.R. pt. 1107) (citations here refer to the staff's briefing package, available at http://www.cpsc.gov/library/foia/foia11/brief/certification.pdf).

by a third party. Had the Commission not insisted on this approach, the agency could have developed a testing protocol that considered the risk of the product and the testing needed to assure compliance with related safety rules, thus maintaining a balance between achieving safety goals and doing so cost-effectively.

This is particularly important because the Testing Rule is such a costly one. The Commission's staff conducted a limited but eye-opening analysis of some of the costs of this rule in a Regulatory Flexibility Analysis. Here is some of what the staff told us:

- *Who is impacted*—Staff explained that the rule "will have a significant adverse impact on a substantial number of small businesses,"[4] and a "disproportionate impact on small and low-volume manufacturers."[5] Our staff told us that firms are likely to mitigate "the adverse impacts [of the rule by] . . . rais[ing]their prices to cover their costs."[6] American families should expect to bear the brunt of this rule's impact.
- *Size of the costs*—"The costs of the third party testing requirements are expected to be significant."[7] "A typical profit rate is about five percent of revenue . . . . Therefore, a new cost that amounted to one percent of revenue could, all other things equal, reduce the profit by 20 percent."[8] According to our staff's analysis, a small manufacturer would hypothetically spend 11.7% of revenue on these testing costs.[9] These estimates point to a negative revenue result for small manufacturers.
- *Manufacturers' options*—Staff said the following:

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[4] *Id.* at 198

[5] *Id.* at 178.

[6] *Id.* at 134.

[7] *Id.*

[8] *Id.* at 187.

[9] *Id.* at 188 & 193.

- "[S]ome manufacturers might attempt to redesign their products . . . by reducing the features . . . used in the products."[10]
- "Manufacturers and importers could also be expected to reduce the number of children's products that they offer."[11]
- Some manufacturers and importers would "exit the market for children's products entirely"[12] and others "may go out of business altogether."[13]
- "The requirements of the final rule could be a barrier that inhibits new firms from entering the children's product market."[14]

And then there are the additional costs to consider, including

- costs of testing plans deemed insufficient by *post hoc* agency judgments about what should have been done, and
- costs for administrative work related to the periodic testing, which staff estimated could reasonably be expected to add 15% to 50% to testing costs. [15]

Confounding the situation was the majority-dictated procedure to promulgate the Testing Rule *before* seeking public comment about costs (as directed by H.R. 2715). It did not matter that Congress specifically, just weeks before, directed the agency to re-examine the specific balance between safety and efficiency. Nor did it matter that our technical staff strongly recommended against the approach the majority took to put the rule out and receive comments later.

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[10] *Id.* at 196.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id* at 153.

These results could have been avoided while still assuring compliance with safety rules if the Commission had not overreached in its implementation of the testing rule, ignoring any balance.

Changing random sampling to representative sampling

Congress told us in H.R. 2715 that periodic tests on children's products could be performed on "representative samples," rather than "random samples," as our statute previously read.

Unfortunately, while the Commission unanimously agreed on language defining "representative samples", which is what Congress told us to do, Commissioner Northup and I could not agree with our colleagues to impose burdensome new recordkeeping provisions that have high estimated costs and little estimated value. This new recordkeeping would be in addition to the significant recordkeeping burden already imposed by the Testing Rule. So rather than advance the agreed upon definition, two of my colleagues chose over-regulation and let the whole effort fail. No doubt this unnecessary and burdensome provision will be back before the Commission when the Democrat majority is restored in October.

Definition of *children's product*

The pattern of implementing CPSIA without attempt to balance between safety and efficiency has been repeated over and over. In promulgating an interpretive rule about the definition of the term *children's product*, the Commission listed four factors but indicated little about how they might be applied. Yet, even the five commissioners themselves could not agree on whether particular products fell in the definition. But a manufacturer must decide early on—at the design and manufacturing stages—whether their product is a children's product for tracking label and third-party testing purposes, knowing that this decision can be second-guessed by the CPSC at some later point. Safety is not advanced here, and the costs for product sellers in the "truth or consequences" definition guessing game are real and severe.

100 ppm limit for lead content

Another clear example of regulatory imbalance was the Commission's decision to drop the lead content limit for children's products from 300

parts per million (ppm) (99.96% lead free) to 100 ppm (99.99% lead free). This decision was particularly disturbing because the Commission had specific leeway in the statute to impose some balance through its judgments concerning the technological feasibility of such action. The majority once again chose imbalance and ignored warnings about the consequences.

The Commission's failure with respect to the lead limit is compounded by the testing variability that staff described (and which we have heard about from manufacturers and importers).

- "Testing variability means that ensuring compliance with the 100 ppm limit may require that lead in components or products are, in fact, significantly below the limit."[16] "Levels significantly below 100 ppm may not be technologically feasible for some products."[17]
- "The economic implications of test failures may be quite significant and include needless scrapping of failing materials, as well as the potential for increased recalls."[18]

Among the potential economic impacts, highlighted by staff, of lowering the lead content limit to 100 ppm are the following:

- "Cost increases are likely to be reflected . . . as a combination of price increases and reductions in the types and quantities of children's products available to consumers . . . . In some cases, the price increases could be significant."[19]
- "[S]ome firms may reduce the selection of children's products they manufacture or exit the children's market altogether. In some cases, the firms may even go out of business."[20]

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[16] U.S. Consumer Product Safety Commission Staff, Briefing: Technological Feasibility of 100 ppm for Lead Content, 29 (June 22, 2011) (available at http://www.cpsc.gov/library/foia/foia11/brief/lead100tech.pdf).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id* at 30.

- "[I]t is likely that the costs will have relatively greater consequences for smaller manufacturers and artisans . . . ."[21]
- "The higher costs associate with metal components will probably result in efforts to substitute lower cost materials. Plastics, for example might be substituted for metal parts in some products. Certain substitutions might affect the utility of the products. The use of plastic . . . may reduce a product's durability in some applications . . . ." [22]

Noteworthy is the fact that the Commission specifically rejected a safe-harbor remedy suggested by staff to ameliorate these impacts. "A safe harbor would be *unlikely to result in any adverse health effects but could provide some relief to manufacturers of children's products.*"[23]

Congress's direction to examine the balance of safety and testing costs

Almost a year after H.R. 2715 (Pub. L. 112-28) became law, we now hope to soon receive a staff report addressing public comments and making recommendations about how to reduce third party testing burdens. I, like over 25 other commenters from a wide range of industries and organizations, submitted cost reduction proposals for staff to consider (see Attachment A). It has been illuminating to see the different issues raised by both small and large businesses, domestically and internationally. Among several common themes is the overarching message that the costs of third-party testing are severely impacting the global supply chain without a commensurate advancement in safety—the balance is out of whack.

Here is a sample of concerns illustrating common themes.

- *Harmonization*—One of the largest complaints from the public is the lack of alignment of international, federal, and state standards. That lack of alignment results in higher costs without additional safety.

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[21] *Id.*

[22] *Id.*

[23] *Id* at 31 (emphasis added).

- *Small volume testing*—Many companies still endure high testing costs on their small volume productions because they are not so extremely small so as to qualify for the small-batch exemption. The result? Companies cease to produce small runs, innovation is thwarted, and the consumer choice is limited to fewer useful products.
- *Inter-lab variability*—Commenters from several industries reported inaccuracies among laboratory results, especially with such minute levels as the 100 ppm lead requirement. How is safety advanced when everyone agrees there are continuing discrepancies?
- *Reducing testing redundancies*—Because of liability concerns many large retailers require testing to be done by specific third party testing laboratories. So if a manufacturer sells to five different retailers, then the manufacturer may be required to perform the same exact test on the same exact product five times.
- *Over-defining standards*—Unnecessary testing has been required due to overreaching, expansive statutory interpretations, including the over-broad identification of children's product safety rules.

One possible solution to consider is a testing regime that allows manufacturers to focus their resources on riskier elements of their products, rather than testing benign elements with the same frequency and intensity as more dangerous elements. Elements of such a testing regime could include first-party testing and production controls, in addition to the option of third-party testing. The current testing rule does not provide that flexibility. Another solution would be to exempt partially or wholly from third-party periodic testing products for which compliance with applicable safety standards is known to be high without mandatory testing. I believe that Section 3 of CPSIA may give the agency the ability to reduce testing costs in this manner while assuring compliance with safety rules.

Conclusion

No one wants to turn back the clock on safety. To say otherwise is stretching for a straw-man argument. What is real, however, is the unnecessary economic harm our CPSIA regulations have on those who manufacture and sell consumer products (see attachment B), and by extension, consumers who buy and use them. The balance between safety

and efficiency could have been achieved with wise, careful rulemaking. As regulators and consumers, we do not live in a risk-free world. Wise decisions need to be made about what risks are acceptable, what exposures are unavoidable, and what costs are necessary to achieve consumer safety.

Attachment A

Commissioner Nancy A. Nord

Cost Reduction Proposals

Cost Driver: Excessive Testing

- Use risk analysis to determine extent of testing and when third party testing should be required, on rule by rule or other basis
- Provide small volume testing exemption
- Make clear (through rule and accompanying enforcement policy) that retailers may and should rely on testing done by manufacturer or importer
- Permit first party after-sale confirmation testing in some instances or other quality control/quality assurance mechanism to enable manufacturer to line up back-up component suppliers
- Establish and implement trusted vendor program
- Implement staff-proposed alternatives referenced in Testing Rule briefing package

Cost Driver: Third Party Testing

- Rules of general applicability are not children's product safety rules and products subject to them need not be tested by third party
- Periodic testing need not be performed by third party testing lab unless agency determines otherwise for a specific rule.
- Clarify periodicity requirements in rule

Cost Driver: Variability of Testing Results

- Establish range within which results will be accepted. Clarify status of de minimis variations

Cost Driver: Lead, Phthalates and Other Chemical Testing

- Correlate testing requirements to safety and risk—that is, adopt solubility standards instead of content standards
- Use content testing as safe harbor with solubility testing as a backup
- Permit Agency to recommend appropriate lead level
- Permit recycled materials to meet 300 ppm limit rather than 100 ppm limit for lead

Attachment A

- Use more expansive and clearer definition of "inaccessibility"
- Implement staff alternatives referenced in briefing package on 100 ppm
- Implement more extensive use of screening tests

Cost Driver: Differing Regulatory Requirements

- Evaluate adequacy of the testing regime in the European Union's toy safety standard, EN71 and, if adequate, consider it to be substantial equivalent of US standard
- Align definition of "child care article" with European definition
- Apply substantial equivalency principle to requirements from other jurisdictions
- Adopt more expansive preemption provisions to address differing state and local requirements

Attachment B

Companies decreasing product lines due to 3rd party testing burdens

The Handmade Toy Alliance

[Randall Hertzler, The Handmade Toy Alliance, Comments submitted to CPSC re Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens, (January 18, 2012)]

"The economic burden of additional tests required by the CPSIA makes it extremely difficult to economically bring these products to market in the US. Many small batch toy suppliers from the EU have been forced to cease exports to the US or limit the number of products they export."

As of January 9, 2012-

Partial List of Retail Businesses Altered or Closed Due to CPSIA *(46 companies listed):*

A Cooler Planet – Chicago, IL
A Kid's Dream – Conway, AK
Attic Toys – Naples, FL
Baby and Beyond – Albany, CA
Baby and Kids Company – Danville, CA
Baby Sprout Naturals – Fair Oaks, CA
Bellies N Babies – Oakland, CA
Black Bear Boutique – Portland, OR
Creative Hands – Eugene, OR
Curly Q Cuties – Texas
Due Maternity – San Francisco, CA
Eleven 11 Kids – Santa Rosa, CA
Essence of Nonsense – St Paul, MN
euroSource LLC – Lancaster, PA
Fish River Crafts – Fort Kent, ME
Gem Valley Toys – Jenks, OK
Hailina's Closet – Ellensburg, WA
Honeysuckle Dreams – Rockville, MD
Kidbean – Asheville, NC
Kungfubambini.com – Portland, OR
LaLaNaturals.com – Bellingham, WA
Lora's Closet – Berkley, CA
Magical Mood Toys – Logan, UT
Mahar Dry Goods – Santa Monica, CA
Moon Fly Kids – Las Vegas, NV
Nova Naturals – Williston, VT
Obabybaby – Berkley, CA
OOPI – Providence, RI
Oopsie Dazie – South Jordan, UT
Phebe Phillips, Inc. – Dallas, TX
Red Rock Toys – Sedona, AZ
Storyblox – New Vienna, OH
Sullivan Toy Co. – Jenks, OK
The Green Goober – Mineapolis, MN
The Kids Closet – Rochester, IL
The Learning Tree – Chicago, IL
The Lucky Pebble – Kailua, HI
The Perfect Circle – Bremerton, WA
The Wiggle Room – Slidel, LA
Toy Magic – Bethlehem, PA
Toys From The Heart – Royersford, PA
Urban Kids Play – Seattle, WA
Waddle and Swaddle – Berkley, CA
Whimsical Walney, Inc. – Santa Clara, CA
Wonderment – Minneapolis, MN
Wooden You Know – Maplewood, NJ

Attachment B

Partial list of 2nd Tier Small batch Manufacturers within EU Limiting or Ceasing Export to the USA due to the CPSIA (*25 companies listed*):

Barti GMbH dba Wooden Ideas – German
Brio – Sweden
Castorland – Poland
Detoa – Czech Republic
Elchorn – Germany
Erzi – Germany
Finkbeiner – Germany
Gluckskafer Kinderwelt – Germany
Gollnest & Kiesel KG (GOKI) – Germany
Grimm's – Germany
HABA – Germany
Helga Kreft – Germany
Hess – Germany
Joal – Spain
Kallisto Stoftiere – Germany
Kathe Kruse – Germany
Keptin-Jr – The Netherlands
Kinderkram – Germany
Margarete Ostheimer – Germany
Nic, Bodo-Hennig – Germany
Salin – Germany
Selecta Spielzeug – Germany
Siku – Germany
Simba – Germany
Woodland Magic Imports – France

International Sleep Products Association

[Christopher Hudgins, International Sleep Products Association, Comments submitted to CPSC re Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens, (January 23, 2012)]

Due to CPSIA and CPSC's new requirements for third party testing:

"...expensive tests that can cost $850 to $1650 each to conduct, including the value of the product destroyed during the test...If the new rules require a manufacturer to conduct even 20 tests annually, that could add over $30,000 in additional testing costs.

These added costs occur at a time when many mattress manufacturers are struggling to recover from the recent economic recession, which has significantly reduced sales and forcing many employees to lay off workers. Our market, measured in terms of wholesale dollars and units, shrank from 2007 to 2009 by nearly 20% and the industry lost more than $1.2billion in sales. Although the industry began to recover in 2010, the uncertain economic and regulatory outlook has made employers in the industry cautious about expanding too fast. In the last few years, mattress producers and suppliers of every size have either closed their doors, undergone bankruptcy, or restructured and downsized. Many still struggle to remain in business."

Fashion Jewelry and Accessories Trade Association

Attachment B

[Sheila Millar, Fashion Jewelry and Accessories Trade Association, Comments submitted to CPSC re Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens, (January 23, 2012)]

"FJATA recently conducted a survey of its members to assess the impact of testing and certification requirements. The results emphasize the nature and scope of the burden that third party testing imposes.

- Almost 70% of FJATA members responding to the survey reported that products failed third party testing at amounts *within* 5% of the target levels. Nearly 50% reported that the test results were *just over the limit*. Another 20% reported that test results were *within 10%* of target limits.
- Most of the testing failures involved lead.
- 92% report having to implement price increases as a direct result of the new burdens imposed by CPSIA.
- More than 62% have had to change suppliers to ensure compliance with CPSC requirements.
- 24% have substantially reduced product offerings for children as a result of CPSIA.
- 16% have eliminated children's products from their product lines entirely."

"With the exception of a few significant multi-national vendors, the majority of FJATA's members are small businesses, many of which remain family owned."

Mrs. BONO MACK. And again, a welcome to our former colleague. It is great to have you here. And, Commissioner Northup, you are recognized for 5 minutes.

STATEMENT OF ANNE M. NORTHUP

Ms. NORTHUP. Thank you. I am delighted to be here, and as the Commissioner that is rotating off the Commission at the end of October, this will probably be my last opportunity to share with this committee some of my observations and concerns as we go forward.

I appreciate the remarks of the other three Commissioners that preceded me. I agree with Commissioner Nord, who talked about many of the accomplishments that we have done, the durable goods standards, the mandatory standards, our work at the borders and imports. All of those are claims that I think all of us are very supportive of.

But I am going to specifically talk about several examples of the impact of what this Commission has done and share it with the committee so that they can judge whether or not that is what they anticipated when they passed the CPSIA and as they have funded this Commission.

The dropping from 300 parts per million to 100 parts per million was done last year. August 1st it took effect. That meant we reduced from 99.97 percent lead free, to 99.99 percent lead free. Our staff found—and I am taking this right out of their proposed package—that it contributed minimally to the overall lead exposure of children. That is the benefit of it. Conversely, the Commission's economist concluded that mandating the lower lead limit would have significant adverse economic impacts, including the use of more expensive low-lead materials, costly reengineering of products to use lower-lead materials, increased testing costs, increased consumer prices, reduction in the type and quality of children's products available to consumers, businesses exiting the children's market, and manufacturers going out of business.

There is no question that these effects have been felt. Unfortunately the businesses that have left the market or that have gone out of business are no longer here to testify to you and to provide information to you because they have left the market.

What did this do? This created an enormous new hidden tax on consumers and parents. Many, many manufacturers have shared with us the bells and whistles that they took out of their products, the lack of choices, the fewer models that they offer, the cost increases that they have had to pass on to consumers for something that has almost no measurable benefit to a child.

That is the kind of decision that has concerned me throughout my term, this sort of out-of-context rulemaking that we do. I know, as Members of Congress, that as you pass legislation, you consider what is good for consumers. At the same time you consider the unemployment rate, the cost of living, all of the other global impacts that you have that you bear on your shoulders. But when you are at the Commission, no one has to think about any of those other things. In the name of safety, this Commission has taken actions that far overreach any necessary protection to consumers.

Probably the biggest decision that we made that I have found so discouraging, and I think it is important to share with you, is our

reversal on unblockable drains. The Virginia Graeme Baker Act required that we protect children, protect the public from deaths in pools where—it is called evisceration, where a blockable drain can trap a child or an adult so that they cannot become free, and they are eviscerated. And after you passed this law, you gave us a great deal of choice. We could have backup systems or any other technology that we thought was equal to that. In the meantime American inventors came up with several inventions with the ability to change a blockable drain to an unblockable drain. And the Commission found that that met the requirement.

After a year, and at great cost to many the pool owners that adopted this new technology, the Commission reversed itself because one Commissioner changed their vote. And it meant that that unblockable drain cover no longer satisfied the law. And so now everyone has to have a backup system. A vacuum alert, which is the primary system they use, is not dependable. It goes off when it shouldn't. It doesn't go off when it is supposed to, as it didn't in Tennessee just last month. It is not available to private pools. It is much more expensive. We were overwhelmed with the number of letters that came into us and told us that this was a less safe direction to take, and yet we proceeded down that direction at great cost to the public.

We estimate over 1,100 pools have closed—not our agency, but the association that oversees pools. We know that many States have said they simply can't bring pools into compliance, and here there was a much less costly, much more available technology that could have been available to pools, but was reversed by our Commission. I can certainly answer more questions about this if there is more time.

In the end, though, this Commission has made many decisions, many rules, completely disregarding the cost, the lack of choice it is going to give consumers, the inability of small companies to comply with these regulations all in the name of children's safety despite the fact that our staff has told us many of these will not increase safety for children.

[The prepared statement of Ms. Northup follows:]

Testimony of Anne M. Northup
Commissioner
United States Consumer Product Safety Commission

Hearing: "Oversight of the Consumer Product Safety Commission."

Before the

U.S. House of Representatives
Committee on Energy and Commerce

Subcommittee on Commerce,
Manufacturing, and Trade

August 2, 2012

Chairman Bono Mack and Ranking Member Butterfield, thank you for the opportunity to provide testimony to this Subcommittee in connection with your Oversight of the Consumer Product Safety Commission. I have testified before this Committee several times since my tenure as a Commissioner began in August 2009. On those occasions, I have brought to your attention the severe economic impact of the Commission's regulations on the American marketplace, and, in particular, the unforeseen adverse consequences of the Consumer Product Safety Improvement Act (CPSIA). While I do not intend to repeat that testimony today, **attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data.

Since the passage of the CPSIA, both President Obama and Congress took action intended to reduce the economic burdens of excessive and unjustified regulation. In January and July 2011, President Obama issued Executive Orders 13563 and 13579 calling on regulatory agencies to "afford the public a meaningful opportunity to comment" during the rule-making process, "use the best, most innovative, and least burdensome tools for achieving regulatory ends" and to "take into account benefits and costs [of regulation], both quantitative and qualitative." E.O. 13563. The President also asked independent regulatory agencies to formulate plans for the retrospective review of existing regulations in order to "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives." E.O. 13579.

Congress, for its part, passed in August 2011, H.R. 2715, which requires the Commission to (1) consider opportunities to reduce the cost of third party testing and permits it to prescribe new or revised third party testing regulations if it determines doing so will reduce third party testing costs consistent with assuring compliance with applicable product safety rules, bans, standards, and regulations; (2) report to Congress those opportunities to reduce third party testing costs that would require new legislative authorization; (3) exempt from third party testing, or provide an alternative testing requirement for, covered products produced by small batch manufacturers; and (4) issue standards and protocols calling for "representative" rather than "random" samples to be selected for periodic third party testing to ensure continued compliance following initial certification testing.

While the intent of the President's Executive Orders and H.R. 2715 are admirable, both have fallen short of having the desired impact on the CPSC. Over the past 18 months, the Commission's majority has done nothing to slow the feverish regulatory pace that has become the norm at our agency and refused to provide an opportunity for public comment on several of our most controversial and sweeping rules. It also has yet to formulate a plan for retrospective rule review that embraces the President's call for meaningful regulatory burden reduction. Instead, we are hearing new calls for the Commission to be free from the obligation to rationally justify its rulemaking.

Another Year of Regulatory Overreach

Just since August 2011, the Commission majority:

- reduced the acceptable limit of lead in a children's product from 300ppm to 100ppm, notwithstanding CPSC staff's determination that no health benefit would result, while businesses would incur substantial compliance costs;
- finalized its very complex and burdensome rule implementing the CPSIA requirement that manufacturers periodically procure third party laboratory tests of every component of every children's product to ensure continued compliance with all applicable safety standards, irrespective of any risk posed by the product or of the cost of the testing, proceeding despite Congress's passage of H.R. 2715 requiring the Commission to seek public comment on ways to reduce the cost of third party testing, letters from members of Congress urging the Commission to consider ways to reduce the costs of third-party testing *before* implementing the rule, and the recommendation of its professional career staff that the rule should be reproposed to permit consideration of public comment;
- without allowing for notice and a comment period, changed its interpretation of the term "unblockable drain" in the Virginia Graeme Baker Pool and Spa Safety Act, resulting in the closures of hundreds of pool throughout the country, and an *increase* in the risk of pool drain entrapment; and
- sought to impose additional burdensome record-keeping requirements with no offsetting benefit to product safety, in its interpretive rule defining the term "representative sample".

Moreover, none of these actions were preceded by any effort to determine the qualitative or quantitative costs, let alone by consideration of whether the benefits justified the costs, or whether less burdensome alternatives were available. Clearly, Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, was not talking about the CPSC when he wrote in a 2011 op-ed for *The Wall Street Journal*: "This insistence on pragmatic, evidence-based, cost-effective rules is what has informed our [the Administration's] regulatory approach over the past two and a half years."[1]

The Decision to Reduce the Children's Product Lead Limit from 300 ppm to 100 ppm.

A 3-2 majority of the CPSC voted in August 2011to require every single children's product component to be 99.99% lead free, down from 99.97% lead free. Commission scientists determined that the newly banned products containing between .03% and .01% lead contributed minimally to the overall lead exposure of children (a.k.a. the benefit). Conversely, the Commission's economists concluded that mandating the lower lead limit would have significant adverse economic impacts, including the use of more expensive low-lead materials; the costly reengineering of products to use lower lead materials or to

[1] Cass Sunstein, "21st Century Regulation: An Update on the President's Reforms," *The Wall Street Journal*. May 25, 2011.
http://online.wsj.com/article/SB10001424052702304066504576345230492613772.html

make newly noncompliant components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility and durability of products (a.k.a. the cost). This is a rule that would have failed the cost-benefit test.

The Premature Finalization of the Periodic Testing Rule.

H.R. 2715 was enacted on August 12, 2011, and contains a number of provisions to lessen the cost and burden of third-party testing and certification of every component of a children's product. These provisions include exempting certain products entirely from third-party testing and certification, directing the Consumer Product Safety Commission to provide relief to small batch manufacturers, and requiring the Commission to seek public comment on ways to reduce the cost of third-party testing for all manufacturers and importers. H.R. 2715 thus signaled Congress's intent to reduce such testing whenever possible consistent with assuring product safety.

The decision to finalize the third-party testing rule based on the original 2008 CPSIA statutory language, rather than repropose it to solicit public comment on the new issues raised by H.R. 2715, complicates compliance by an already overburdened regulated community. The third-party testing rule (often referred to as the Fifteen Month Rule), codified at 16 C.F.R. § 1107, is the largest and most widely applicable rulemaking the Commission has ever undertaken. It includes the promulgation of protocols and standards for the *additional* third-party testing *after certification tests of sufficient samples have already been performed* of a certified children's product to ensure continued compliance with all applicable safety standards. It applies both when there is a material change in the product and periodically, during production, even in the absence of a reason to believe a certified product is no longer compliant. This rule may be the most intrusive imposition of requirements on a segment of the manufacturing community ever. Its prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

According to the CPSC's economists, "[t]he costs of the third-party testing requirements are expected to be significant for some manufacturers and are expected to have a disproportionate impact on small and low-volume manufacturers." Just the costs of testing alone -- excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity – is expected to consume over eleven percent of a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement. They cannot simply raise their prices and remain competitive.

Further, Commission economists predict that in response to the "significant increase in their costs due to the final rule", manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product

market", including, in particular, ones serving a niche market, such as products for children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

By hastily finalizing the testing and certification rule, the Commission finalized the rule without considering the cost reducing measures urged by Congress, let alone ensuring that its benefits justify its substantial costs.

The Revocation of the More Protective Definition of Unblockable Drain.

The VGB Act requires public pools and spas with a single main drain which is small enough to be completely covered by a human body and thus create a life-threatening suction (known as a "blockable drain"), to be equipped with a system to prevent entrapment. These systems are often referred to as "backup systems". Although five systems/devices are enumerated in the Act as permissible backup systems, the Commission has long recognized the safety vacuum release system to be the most commercially viable and therefore most likely to be used by pool owners. "Unblockable drains" were exempt from the requirement to have one of these back-up systems, because their size and/or configuration prevented a deadly suction from ever occurring

In April 2010, following extensive input from the public, the Commission issued a final rule that interpreted the phrase "unblockable drain" to include an "unblockable drain cover." As a result, pools and spas with a single main drain equipped with an appropriately sized "unblockable drain cover" were not required also to be equipped with a vacuum release or other back-up system.

The Commission adopted this definition based on the recommendation of its staff of career technical experts. In their opinion, an unblockable drain cover is superior to a vacuum release back-up system because it *prevents* all entrapments. A vacuum release system, in contrast, only protects against one kind of entrapment (evisceration), only *stops* an entrapment incident after it has already occurred, and does so only after a delay of up to 4 seconds. As a consequence, once an evisceration takes place, it is already too late for a vacuum release to save a child. And the back-up system does not protect against other types of entrapments such as hair entrapment, mechanical (i.e., necklace) entrapment, or limb entrapment.

Besides the built-in limitations of the vacuum release systems, their unpredictability in practice has been well documented by those who are responsible for aquatic systems, including pool managers, pool maintenance companies, public safety experts and public and private recreation managers. The repeated complaints of malfunction include unwarranted shut off, failure to shut off, incompatibility with the filtration and cleaning systems and regular disconnection as a result of repeated failures. Just last month in Tennessee a child was rescued just in time after the vacuum system backup failed to engage.

The Commission acted in accordance with the expert advice of its technical staff. It did so only after also considering the contrary views presented by the inventor of the vacuum release system, who wanted the Commission to mandate the use of his product; pool safety advocates, many of whom were influenced and mobilized by the backup system manufacturer; and, a few members of Congress who had been lobbied by the back-up system manufacturer. While these parties argued that an unblockable drain cover does not provide the "layers of protection" required by the VGB Act, a majority of Commissioners recognized that the VGB Act's overriding intent to prevent child drowning was best served by reasonably and lawfully interpreting "unblockable drain" to include these newly invented systems that cover a blockable drain and convert it to an unblockable drain. The wisdom of their judgment is confirmed by the fact that, since that time, there has not been a single entrapment incident in a pool equipped with a compliant unblockable drain cover.

Then, in September 2011, Commissioner Bob Adler, who had previously voted with the majority, placed on the agenda a vote to revoke our original interpretation of "unblockable drain" to no longer permit consideration of these new covers. Moreover, Commissioner Adler and his two Democrat colleagues did so without notice to the public or any opportunity for public comment, and without a public briefing before the vote. They even refused my colleague Nancy Nord's request to at least notify, prior to the vote, the state agencies responsible for pool administration and safety and obtain their input. And after the majority rushed through this significant change, the Chair took the virtually unprecedented step of choosing not to issue a press release even informing the public of the Commission's decision.

While the vacuum release systems can be expensive to purchase, the real cost can be their integration with the other complicated systems including the compressors, the pump, the filtration cleaning process and the state health codes that require water turnover at specific rates. At the pool to which I belong, the price of compliance went from an original price of several thousand dollars to almost $50,000 for final installation. It is therefore not surprising that we later learned from numerous municipal park and recreation departments, as well as nonprofit groups created to promote aquatic recreation safety, that, as a result of the Commission's precipitous and inexplicable action, many state, municipal and other public pool operators will be unable to afford this new and expensive mandate coming shortly on the heels of the expensive work required to come into compliance with the Commission's original interpretation. As a result, many public pools opened late or closed, with the brunt of the losses suffered by economically-disadvantaged regions. There have been no injuries associated with compliant pool drains since 2008. But the CPSC estimates that 4400 children under 15 suffered emergency room treated submersion injuries in 2011. Children cannot learn to swim in closed pools, and economically disadvantaged children are at the greatest risk of drowning.

To date, over 1100 pools have closed throughout the country as a result of the cost of maintaining their operation.[2] This outcome is inconsistent with even the most basic concepts of rational cost-benefit based rulemaking.

This abrupt change in the law has also put out of business the manufacturers of unblockable drain covers, who no longer have a market for their product. Cash strapped public pool owners required to install vacuum release systems will not also bear the additional cost of an unblockable drain cover when it is no longer required. Unfortunately, the absence from the market of unblockable drain covers also leaves private pool owners without the most effective means to prevent drain entrapment in pools with single main drains. And many who are unable to afford even the inferior protection of a vacuum release system will be left with no protection against drain entrapment. Ironically, the Virginia Graeme Baker Act was named after a little girl who was eviscerated in the drain of her family's private pool. The Commission's reinterpretation makes it more likely other families will suffer the same tragic loss.

The Attempt to Impose Unjustifiably Burdensome Recordkeeping Requirements with the Interpretation of "Representative Sample".

In H.R. 2715, Congress changed the sampling requirements for periodic testing from using random samples to representative samples. This provided significant relief to manufacturers, because "random" sample has a highly technical/mathematical meaning in manufacturing processes, as distinguished from "representative' sample, which has only a common usage meaning. Congress directed the Commission to establish protocols and standards for testing "representative samples".

The Draft Final rule for the testing of representative samples prepared by CPSC staff properly recognized Congress' intent by defining "representative" according to its common meaning. It afforded manufacturers the flexibility to select samples that best suited their product and production process, so long it provided a basis for inferring the compliance of the untested samples.

But the Draft Final rule also included costly new record keeping requirements that were not mandated by law. The draft final rule would have required the creation and maintenance of records that our own economists estimate would cost manufacturers $32.3 million in the first year alone, with another $1.3 million to $6.5 million every year thereafter. And this cost is in addition to the enormous burden of the record keeping already required by 16 C.F.R. part 1107 – Testing and Labeling Pertaining to Product Certification. Regardless of which of the three alternative testing intervals a manufacturer selects to comply with the continued testing requirement under that rule, it must create and maintain for five years extensive records that far exceed what is necessary to ensure continued compliance under the CPSIA and to facilitate enforcement.

[2]Mick Nelson, USA Swimming. Personal Interview, July 24, 2012

These additional recordkeeping burdens were not imposed because my colleague Nancy Nord and I were able to block approval of the rule. But there can be little doubt that when the Democrats regain their majority at the end of my term in October 2012, there will still be no cost-benefit analysis, and the recordkeeping requirements of the representative sample rule will become law.

Little Hope for the Future

Opportunities remain for the Commission to ameliorate the unjustified burdens it has imposed on the industries it regulates, but I fear the formation of a majority with the will to do so is doubtful. The Commission has yet to formulate a plan for meaningful rule review, and the Chair is seeking new opportunities to regulate without regard for cost.

The Failure to Complete a Rule Review Plan

In July 2011, the President gave each independent regulatory agency 120 days to develop and release to the public a plan for the periodic review of its existing significant regulations to determine whether any should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives. Under Chairman Tenenbaum's leadership, staff did not present a draft plan to the Commission until the end of April 2012. Since that time, I have become increasingly pessimistic about the prospects that a Commission majority will agree to undertake *meaningful* rule review within the spirit of the President's request.

I have two principal concerns with the draft plan released to the public that, unless there is a change in the regulatory philosophy of the Democrats on the Commission, are unlikely to be allayed. First, rule review should, as the President requested, focus on the reduction of regulatory burdens, with prioritization for review given to those rules that impose the greatest burden on commerce. The goal of regulatory review should be to *meaningfully* reduce regulatory burdens. Instead, the draft plan expands the scope of the rules subject to review to include very minor provisions, and does not call for prioritization based on cost or any other measurable burden. In fact, the Democrats recently made the disingenuous claim in an op-ed that they were doing more than the President requested by potentially selecting for review any Commission regulation, not just significant ones. But this expansion in scope has already had its intended effect: the draft plan calls for the retrospective review of two minor and obsolete rules that have long since been superseded by other requirements. Thus, by claiming to do more, the Democrats seek political cover for a plan that does less. It also places equal, if not greater emphasis, on selecting rules with the intent to "strengthen" them and thereby increase the burdens they impose. .

Second, a full cost-benefit analysis – in the President's words, both qualitative and quantitative – should be performed on those rules that are selected for review. Otherwise, the President's goal of ensuring that benefits justify costs cannot possibly be achieved.

In deference to the Commission's internal rules discouraging public disclosure of private deliberations, I will not detail the Commissioners' efforts to negotiate a compromise rule review plan. Suffice it to say that we would not still be negotiating three months after receiving staff's draft plan if a Commission majority shared these core principals.

Efforts to Exempt More Rules From Cost-Benefit Analysis

Under existing law, the CPSC cannot promulgate a consumer product safety rule until it has performed an analysis of the potential benefits and costs of the rule. That analysis must then show that the benefits expected from the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirement to reduce the risk of injury. However, the CPSIA took the extraordinary step of exempting the Commission from those requirements as we established new mandatory rules governing certain toddler and infant products.

Having had the freedom to regulate without the need for a rational justification, the Chair now seeks to expand those powers. In her July 17, 2012, testimony before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, Chairman Tenenbaum urged the Subcommittee to amend the Flammable Fabrics Act to permit "this type of flexibility for rules regarding flammability of upholstered furniture" because it "would be very helpful and may allow for expedited consideration of the proposed rules."

The Commission has been studying means to address the risk of the flammability of upholstered furniture and contemplating potential rulemaking *for over twenty years*. Action has yet to be taken because it is such a complicated issue, both in terms of demonstrating the efficacy of risk reduction alternatives, and ensuring that they do not have unintended and more harmful consequences, such as has occurred with the introduction of potentially hazardous flame retardant chemicals in California.

There is no doubt that a proposed rule addressing the flammability of fabrics could be "expedited" if there was no need to establish the efficacy of the rule, or that its quantitative and qualitative costs are justified. But such rulemaking would likely close businesses, increase the cost to American consumers, and reduce choices and options in the market, all for unproven benefits. This is exactly what both Congress and the President recognize is undermining the country's economic recovery.

Many speeches have been made and much has written by both the current administration and Congress urging federal regulatory agencies to reduce the crushing costs of excessive regulation by following the simple common sense approach of measuring the costs and benefits of regulation, and only imposing justified burdens. Three years as a Commissioner has taught me how difficult such a seemingly simple approach can be, when it is obstructed by individuals whose regulatory philosophy is: more is better, and don't bother me about the cost.

Mrs. BONO MACK. Thank you, Commissioner, and again, I thank you all very much for your testimony and for your hard work and your dedication to these issues.

And now I recognize myself for 5 minutes for questioning and would like to direct my first question to Commissioner Tenenbaum. It might be a little bit outside of the ordinary question you get, but something that I have been looking at and you all came screaming to mind is the problem with bath salts. In recent months the news has been overflowing of the reports on the health implications of designer drugs that are sold and labeled as bath salts. The CDC has reports on file that date back to 2010 showing numerous instances of people being hospitalized and even dying from these substances. Despite the fact that the DEA has banned some ingredients, online pharmacies and small minimart-type stores continue to sell them. They are labeled bath salts, and they clearly say on them "not for human consumption." And it is an attempt to avoid the DEA ban. And despite that fact, there is no legitimate purpose as a bath salt.

Does the CPSC have any jurisdiction to regulate the sale of products like legitimate bath salts?

Ms. TENENBAUM. Thank you, Madam Chairman.

That may fall under the category of cosmetics under the Food and Drug Administration, but I would like to check with our legal staff when I return to the Commission and get you an answer for that. But it might be a cosmetic and, as such, would not be under our jurisdiction.

Mrs. BONO MACK. Has this ever risen to the level of your interest? Have you seen it out there? Have you seen the stories and said, "Can I take a look at that?"

Ms. TENENBAUM. I have seen the stories. I don't believe our staff has investigated it because it might not fall under our jurisdiction.

Mrs. BONO MACK. Could you possibly take a look and see if there is—I mean, these have very seriously——

Ms. TENENBAUM. Certainly, I certainly will.

Mrs. BONO MACK [continuing]. Dangerous substances that are out there, and I would hope that Commissioner Adler as well would take a strong look at that and see how we can throw the kitchen sink without these dangerous bath salts.

Ms. TENENBAUM. And we also could meet with the FDA to talk about how jointly we could address the hazards. So we will follow up on that for you.

Mrs. BONO MACK. I appreciate it very much.

Also something, I did send you a letter, Commissioner Tenenbaum, about the thought of launching a Facebook fan page. Can you tell me what the status of the Commission's plans are? Did you happen to send a letter back to me on this matter?

Ms. TENENBAUM. No. First of all, all the Commissioners have voiced support for the concept of having social media and using social media to educate the public on risks such as soft bedding, carbon monoxide, drowning, and furniture tip-overs. There is an issue, however, on whether or not Facebook would violate section 6(h) of the CPSA, which requires us that if we obtain information on a manufacturer, that we cannot give that information out publicly without obtaining the consent of the manufacturer. So the issue is

can someone—if we had a Facebook, and a person posted something about a manufacturer as a comment, would that mean we obtained information; as such would we have to scrub all of that information and ascertain its accuracy before it is posted? That would require too much resources from the Commission.

So we have not made a decision. Our general counsel's office is continuing to work on all of the issues, and we will provide you with that memorandum when or if we decide to go forward with Facebook.

Mrs. BONO MACK. So to clarify, the general counsel just has not opined on that matter yet at all?

Ms. TENENBAUM. She and her staff have worked hard on that, and it is not completed. Other offices in the Commission, other Commissioners had raised other legal issues that required more legal research, and so they have not finished that memorandum.

Mrs. BONO MACK. Thank you.

And Commissioner Northup?

Ms. NORTHUP. Madam Chair, I think it would mislead, misrepresent the position of at least myself and maybe Commissioner Nord that we are all in support of opening a Facebook page. While we acknowledge that we can understand the benefit, I, at least, and, I think, Commissioner Nord, believe it absolutely would violate the overarching rules in our Commission, and that 6(b) is not exactly as the chairman described it. That sort of misrepresents 6(b)'s requirements.

But I would also point out to you that the database, in the database, that you all suspended the 6(b) requirements for the database, and then we wrote that rule, and it is now under attack in the courts. Someone has filed suit against us that they have not—that we have violated the laws. If we lose that case, it would almost certainly say that any putting up of Facebook would violate the protections of 6(b).

And I might say it will make—if we lose that case, we could possibly undo millions of dollars of work we have done on this and have to rewrite the rule, something that I claimed all the way through the process.

Mrs. BONO MACK. Thank you very much.

At this point I will recognize Mr. Butterfield for 5 minutes.

Mr. BUTTERFIELD. I thank the chairman, and also thank the gentlelady from Illinois for sitting in the Chair for me this morning. I have had a very busy morning, and I thank her very much.

In March 2011, I wrote a letter to Chairman Upton and to the chairman of this subcommittee asking that the subcommittee hold a hearing concerning questions about the level of protection new and used football helmets provide athletes of all ages. In particular, concerns had been raised around this time about what kind of injuries can be prevented with the football helmet, and about whether used helmets continue to provide a sufficient level of protection against the injuries they are designed to guard against.

So far this subcommittee hasn't acted to look further into these issues. I understand the CPSC has been engaged on these issues since they first drew scrutiny, and that you plan to become more engaged through a new initiative with the NFL and the CDC, among others. So I am going to ask the Chairman, Chairman

Tenenbaum, can you please discuss all aspects of the work the CPSC is doing in this area, the status of that work, and where you plan or might like to see these efforts go?

Ms. TENENBAUM. Thank you. I would be happy to talk about our work with the NFL. Like you, I am very concerned with the brain injuries in football and sports, especially those that affect young people, high school and college athletes. Because these injuries have such devastating consequence, this issue has been a priority for me. And our efforts have a short-, medium-, and long-term focus.

In the short term, we would like to have a partnership with the NCAA, and the NFL, and the CDC, major manufacturers, and the voluntary standards to see what kind of reconditioning steps that we can take. All manufacturers with the exception of one have agreed to put a label on the new helmet which says the date that the helmet was manufactured, and gives a date that it should be reconditioned, optimally within 10 years.

We also have worked with the NFL and will be making announcements this weekend in order to drive a culture change and have education in terms of how to avoid head injuries when playing football. Also, the NFL has funded a program for four communities where they will give helmets to schools where economically disadvantaged youth play. So these new helmets will help tremendously as well.

Mr. BUTTERFIELD. Well, thank you for your work in that area. Is there anything we can or should do legislatively to support what you are doing?

Ms. TENENBAUM. Well, we have—the research on helmets is not complete in terms of we have not found that there is a helmet that will prevent concussions. So we hope to monitor that. We hope this committee will stay interested in that and work with us on it because that would ultimately prevent injuries.

Mr. BUTTERFIELD. Thank you.

Mr. Adler, is there anything that you can add to this conversation about helmets?

Mr. ADLER. What I want to add is my personal thanks and commendation to the Chair for taking this on as a personal task and for dedicating a very valuable staff person to go around the country and work on this. I think what you have heard from the results that she has discussed are really wonderful results. I think she deserves almost total credit for doing that, and I think it is an important endeavor, and I hope it continues.

Mr. BUTTERFIELD. Well, when I met with her in my office a few months ago, she told me it was one of her priorities.

Mr. ADLER. Well, it is, and I think she and her staff have done an excellent job.

Mr. BUTTERFIELD. Yes. All right.

Let's see. One of the biggest victories for consumers, consumer advocates, and those of us who believe in government transparency was the creation through CPSIA of the publicly available Consumer Product Safety Information Database. This database launched in March of last year at www.saferproducts.gov. There consumers can both file safety complaints about consumer products and view complaints by other consumers that have met the stand-

ards for inclusion in the database. And before Congress mandated creation of this database, the American public had almost no access to information provided by consumers to the CPSC about injuries from the products they use.

Let me ask the Chairman or Mr. Adler, can you please discuss some of the statistics and trends you are seeing related to the database, like how many complaints are being filed and what types of complaints, et cetera?

Ms. TENENBAUM. We receive on average 600 per month. In total we received a little over—almost 9,600 reports of harm posted on the saferproducts.gov as of July the 27th of this year. Over 1,000 of these reports have been assigned to follow-up by our investigators, resulting in 875 completed investigations to date.

There were some on the Commission that said this would be a place where trial lawyers would try to salt the database. We have found that 97 percent of all reports are of consumers who own the product and who have had experience personally with the product. The three top categories have been kitchen appliances, 33 percent; nursery equipment or supplies is about 8 percent; and toys are about 5 percent.

When you amended the CPSA to Public Law 112–28, you asked to us require the serial number. We found that the model of the serial number now, 88 percent are filling that portion in; 88 percent is nonblank. So we have used it to recall two products, and we think that it has been generally well accepted.

Mr. BUTTERFIELD. Thank you. I believe my time is expired. I thank you, and I thank you all of the Commissioners for the service that you render to our country.

I yield back.

Mrs. BONO MACK. Thank you, Mr. Butterfield.

The Chair recognizes Mr. Guthrie for 5 minutes.

Mr. GUTHRIE. Thank you, Madam Chairman, for the recognition, and thank you for my colleague from Kentucky here with us today, and who some of you may know, or may not know, her sister was one of our great Olympians in 1984. And so talking about swimming pools and athletes here today, it is really—how proud she made Kentucky and how proud she made America.

There is another Louisvillian, I can tell this, Chris Burke. Many of you know about Chris. He played at St. X. He hit the walk-off home run for Houston to beat the Braves. And somebody said about him, said when he was like 6, he was out hitting the ball every day. And they said he lived a moment of a lifetime, but he spent a lifetime getting to that moment. You know how hard our Olympic athletes are working to get there, and it is always great to praise your sister. Those great billboards in Louisville are always fun to see.

In Shelby County in my district, there is a table saw manufacturer, and I am not going to ask a question, I just want to bring up—and their concern, you were going down—the Commissioner is looking at table saw technology, and nobody is saying that what—the technology you are looking at is not safer and makes things safer. Their concern is, is it patented, and the expense of it. So just making sure that there are some—as we look at new standards as opportunities for other types of technologies and things move for-

ward, that creates the same kind of safety standards. So I just wanted to bring that forward.

But I want to talk to Commissioner Northup on the President has issued Executive Orders on regulations, and he talked in the State of the Union how the regulations are strangling the economy in a lot of ways, and putting forth opportunities to move forward. I think there were two Executive Orders, and I guess my question—I can tell you what they are, but I think you guys are aware of them; if not, I can go through. But I just want to know what the CPSC has done to implement the Executive Orders of the President on reviewing regulations.

Ms. NORTHUP. Well, we are considering a package right now, although it has been a couple of months. It has been sort of dangling out there without agreement.

Let me just say that the President and Mr. Cass Sunstein have both written extensively about it. They have both said their primary purpose, and I have a quote right here, is to insist on pragmatic, evidence-based, cost-effective rules. They specifically talked about looking at major rules, rules that affected a significant portion of the economy. They also talked about doing cost-benefit analysis.

You have seen both in the previous testimony of the Chair in the Senate and now Commissioner Adler today the sort of resistance to cost-benefit analysis, that the benefit has to justify the cost. And this has been something we have publicly debated. I think that in the name of safety, you can just about adopt the most expensive, as we have seen, new standards that drive businesses out of business. So I believe we ought to do some cost-benefit analysis on the rules that we look at.

The second thing is we need to look at major rules, and this year, for example, we have talked about two retrospective ones. One is the testing of toy caps. Toy caps, that is an old standard, was—has long been out of date. Nobody uses it. It was absolutely a nothing regulation. Nobody was using it. It has been overcome by the new F963 toy standards, new testing standards. And so to say we used retrospective review to bring the toy cap standards into modern times is to ignore, in my opinion, the intention of the Executive Orders and the spirit of them.

And so as we talk about what our plan is going forward, I think we should agree that we are going to look at major rules, rules that have a significant economic impact as the President and Mr. Sunstein have talked about in their articles and, secondly, agree that we will do some cost-benefit analysis, and the conclusion of cost-benefit is that the benefit will be in proportion to the cost.

Right now we have Reg Flex analysis. You will hear some of the Commissioners talk about, well, isn't that enough? But we have blown through rule after rule where it is clear that the analysis of the economic impact does not justify the new safety. It didn't matter. With Reg Flex analysis, all you have to do is the analysis; you don't have to create a finding that it is justified.

Mr. GUTHRIE. Well, thank you. I am about out of time. And I just want to say, as we look at the reg review process in your Commission and all over, in terms of just the number of regs that we were looking at, what is actually hurting the economy? And there is a

cement plant, Louisville Cemex over on Dixie Highway, that is in my district actually that is threatened by some regulations coming forward. So we can look at numbers of regs to look at or what actually makes big impact, and we need to look at ones that make big impact on the economy.

I yield back.

Ms. NORTHUP. Of course, I agree.

Mrs. BONO MACK. Thank you.

And, Ms. Schakowsky, you are recognized for 5 minutes.

Ms. SCHAKOWSKY. Thank you.

You know, I am looking at your testimony, Commissioner Nord—no, I guess it was Northup—and you have in there "the feverish regulatory pace." You know, we passed the CPSIA 4 years ago, and this idea that somehow we are in a feverish regulatory pace—and it was in Mr. Adler's testimony that in the 31 years that—since the CPSC was saddled with unique requirements, I think you are talking about the emphasis on cost-benefit analysis, there were nine consumer product safety rules, over roughly one every 3½ years. And so in the last 4 years, I am happy to say there is 10 safety rules that came out.

And, you know, I mean, I have worked with kids in danger on this crib stuff for a very long time, and the play yards for a very long time. I don't think that most consumers would think this is about a feverish regulatory pace of finally getting this done.

So I want to ask you, Chairman Tenenbaum, how would the old way have impacted your ability to improve the safety of durable infant and toddler goods? Would you have been able to promulgate the crib rule as quickly as you did, or the play yard rule, and what impact would that have had on the safety of our children, which ought to be, it seems to me, the chief focus of the hearing today?

Ms. TENENBAUM. Thank you, Congresswoman Schakowsky.

We would not have been able to promulgate the infant durable nursery equipment rules on the schedule that Congress mandated that we promulgate them. We are required under the CPSIA to put forth two rules every 6 months on durable nursery equipment. Since the CPSC—CPSIA passed, we have written 41 rules, all of which were required by the law. We have not gone off afield and created rules. All of the rules were required of us under the CPSIA. So had we not been able to work with the standards committee and industry to write the standards for the crib and then adopt it as our rule, it would have taken years to do cost-benefit analysis.

I am not against cost-benefit analysis. I think sometimes it is justified, but when you are looking at trying to have rules that protect the safety of children and infants as this Congress—as Congress passed under CPSIA, having the Administrative Procedures Act helped us expedite the process, and we worked hand in glove with industry. Industry helped write these rules.

Ms. SCHAKOWSKY. Thank you.

Ms. NORTHUP. May I respond?

Ms. SCHAKOWSKY. Actually I have a question for Mr. Adler on a totally different subject, and I just want to get it in, because I have a—I am cochair of a seniors task force of the Democratic Caucus. And you briefly mentioned about older Americans and a particular

vulnerability, and I am just wondering if you could explain that a little further.

Mr. ADLER. Yes. One of the things that the Congress has been particularly sensitive to is vulnerable populations. And as it turns out, the vulnerable population we have been dedicating our attention and resources to over the years, properly so, has been infants. But as part of this growing, almost exploding demographic, I have been very concerned about the impact of dangerous products on the senior population.

If you look at the injury patterns for seniors, they almost always exceed the population at large. It is not as though—and falls are a huge part of it, and fires are another huge part.

There are a number of products that we could probably take some measures to help the elderly with, and I will give you just one quick example. The Commission just wrote a section 104 rule for infant bed rails. Well, as it turns out, the elderly suffer death at a much greater rate from bed rails than infants do.

And it may well be that the fix for adult bed rails is not too different from infant bed rails. In other words, there are many, many projects that we ought to be addressing themselves to.

The CDC just came up with a national plan for dealing with childhood injuries, and I have called for a national plan with CDC for adult injuries as well. It is a very, very important issue, and I hope to convince my colleagues to pay more attention to it. And I thank you for asking.

Ms. SCHAKOWSKY. Thank you.

I am out of time, and I yield back.

Mrs. BONO MACK. Thank you, Ms. Schakowsky.

The Chair recognizes the vice chair of the subcommittee, Mrs. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Madam Chairman; and thank you all for being with us this morning. Nice and timely. I will have to say you have created quite a little stir in the last week over an issue of Buckyballs. And I would just like to ask, Madam Chairman, how it is that you have taken such a hard-line stance against Buckyballs.

And I tell you, reading all this and looking at it after the information came out, and having two grandchildren, one that just turned four and one that just turned three, you can compare this to toys like Hungry Hungry Hippo, which comes with all these marbles. It has been on the market for about 30 years. There is a Fishing Well that also comes with marbles. It has been on the market for a long time. These are toys that we play with.

So you know what I am having a hard time doing is understanding how you could come down against Buckyballs and Buckycubes when it is clearly noted that they are for children ages 14 and above and Hungry Hungry Hippo and Fishing Well are for children that are 3 and above. So it doesn't make a whole lot of sense to me as to what you are doing. So I was wondering: Why?

Ms. TENENBAUM. Well, I appreciate that question. It certainly is timely.

I want to explain to you why we cannot comment on the merits. We did not ban Rare Earth magnets, which is what Buckyballs and

the category that they are. We referred the matter to an administrative law judge. That administrative law——

Mrs. BLACKBURN. I am going to stop you right there, if I may, please, ma'am.

You made the decision to go ahead with the recall, didn't you?

Ms. TENENBAUM. No, we did not. We made the decision to refer the matter to an administrative law judge. That judge will make the determination what to do with the product.

Mrs. BLACKBURN. What caused you to make that decision? We as Members of Congress have the right to ask you that question.

Ms. TENENBAUM. Well, we will be the appellate body if the administrative law judge's decision——

Mrs. BLACKBURN. All right. Then let's talk about the administrative law judge.

Ms. TENENBAUM. I just wanted to lay the groundwork why I can't really get into the merits. Because we will be the appellate judges, so to speak.

So let me say that we have a well-documented record as being alarmed by the serious and hidden hazards to children. The difference between Rare Earth magnets and marbles is that marbles do not cling together in the intestine. Children have had—a large number of children have had invasive surgery to remove these balls once they are in their intestine because they clamp, causing a huge blockage.

Mrs. BLACKBURN. They are clearly labeled "Not for Children." So let me ask you this: What about sparklers? We have just had July 4th. So why don't you outlaw sparklers?

Ms. TENENBAUM. We do set limits on sparklers in terms of the heat they can generate. We do have rules.

Mrs. BLACKBURN. But you have injuries. You don't issue recalls.

We have just built a playhouse for the grandsons. My husband engineered this great thing. He had all sorts of power tools out there, and they had their little Black & Decker play set. What about power tools?

Ms. TENENBAUM. There are a number of hazard in the marketplace. That is why the Consumer Product Safety Commission exists.

Mrs. BLACKBURN. What about alcoholic beverages?

Ms. TENENBAUM. There certainly are.

Mrs. BLACKBURN. You have always got these alcohol poisoning cases and things of that nature.

So let me go back to this administrative law judge.CPSC does not have an administrative law judge, correct?

Ms. TENENBAUM. No, we referred this to an administrative law judge for a hearing, and that judge will determine whether or not the product——

Mrs. BLACKBURN. Where is that judge going to come from?

Ms. TENENBAUM. That judge would be right here in Washington, DC, probably, or it might be in Maryland.

Mrs. BLACKBURN. So when this case is filed, the lawyers who try the case have to be separated from those who advise the Commission, correct?

Ms. TENENBAUM. That is correct.

Mrs. BLACKBURN. OK. Now that the lawyers all work together in the Office of the General Counsel, how will you ensure appropriate separation with these two groups of lawyers?

Ms. TENENBAUM. Our Office of Legal Counsel has set up a wall, and we are all abiding by that.

Mrs. BLACKBURN. A physical wall or an understood——

Ms. TENENBAUM. A wall within the legal context so there will be no communication.

Mrs. BLACKBURN. All right. And the Director of Compliance recently left that position and is now working with the Office of General Counsel also, is that correct?

Ms. TENENBAUM. That is correct, but I can't comment on the involvement of that official.

Mrs. BLACKBURN. And who is now the Acting Director of Compliance?

Ms. TENENBAUM. Marc Schoem. But he has recused himself and has not been involved in this case.

Mrs. BLACKBURN. Is he a lawyer?

Ms. TENENBAUM. No, he is Acting Director.

Mrs. BLACKBURN. It is supposed to be a lawyer. The CPSA requires that a lawyer be the Director of Compliance.

Ms. TENENBAUM. We do. And it is in transition. And so we have, I believe, 90 days.

Mrs. BLACKBURN. So you have got 90 days to make that right.

Ms. TENENBAUM. We have 90 days in order to fill the position with a lawyer.

Mrs. BLACKBURN. OK.

Ms. TENENBAUM. I am saying it is 90 days. It could be more. I have to look at the statute.

Mrs. BLACKBURN. The Commission authorized the filing of the complaint against Buckyballs last month, right?

Ms. TENENBAUM. Yes. It was a bipartisan decision.

Mrs. BLACKBURN. And it was signed by the executive director?

Ms. TENENBAUM. Yes.

Mrs. BLACKBURN. Is he a political appointee?

Ms. TENENBAUM. Yes, he is. An SES as well.

Mrs. BLACKBURN. We have got other questions. I am out of time. You have been generous. Thank you, Madam Chairman.

Mrs. BONO MACK. I thank the gentlelady.

The Chair recognizes Mr. Kinzinger for 5 minutes.

Mr. KINZINGER. Thank you, Madam Chair.

Ms. Nord, if I have some time at the end, I will let you to respond to my colleague from Illinois.

I want to thank the Commissioners for being here. I want to touch on a topic that has the potential to impact several manufacturing sectors, which is important to my district.

As the Commissioners are aware, phthalates are important components in products ranging from wire coverings, flooring, and in automobiles. The Chronic Hazard Advisory Panel's review of phthalates could set a precedent for the use of the product outside of children's toys, and I want to ensure the science that is used is transparent, properly peer-reviewed, and publicly available.

Chairman Tenenbaum, OMB has described peer review as one of the important procedures used to ensure the quality of published

information meets the standards of the scientific and technical community. To ensure the scientific integrity of the document, the draft report should be released for public comment before it goes to peer review, stakeholder participation should be encouraged, and the peer reviewer should be provided with all the data and studies provided to the CHAP.

Can you ensure us that the peer review of the CHAP's draft report will be conducted in accordance with current OMB guidelines for peer review of highly influential scientific assessments, with particular attention to the need for transparency and public participation?

I think this should probably be a fairly quick answer.

Ms. TENENBAUM. The Chronic Hazard Advisory Panel is continuing its work. We keep an arm's-length relationship with that panel because they operate independently. I would like to talk with our Office of General Counsel to see how they are proceeding in terms of the peer review and write you a letter and get back with you.

Mr. KINZINGER. That would be great. I would love to hear back. Because I think obviously to have that as an open and transparent process for something so big and so important is essential. We will stay on top of that, and I appreciate your responding to that, too.

Do you believe that the CHAP should review all relevant data, including the most recent best available peer-reviewed scientific studies?

Ms. TENENBAUM. I certainly do.

Mr. KINZINGER. What procedures have you put in place to ensure that the CHAP and the Commission are weighing all relevant data and the best available science?

Ms. TENENBAUM. Again, the Chronic Hazard Advisory Panel was mandated under CPSA, and we created it to look at phthalates, the three that were temporarily banned and other phthalates if they so find that others should be in the report. We are awaiting their report. The Commissioners do not interact with the CHAP because it has to be an independent body, but our staff has been there to make sure they follow appropriate procedures.

If you have questions, if you will just submit them to us, we will write you and give you the full detail on how the CHAP has operated.

Mr. KINZINGER. You all specifically, though, comply with OMB's peer-review process and everything like that, right?

Ms. TENENBAUM. The peer-review process was vetted through the Office of General Counsel, and they were advising the CHAP on how to proceed with that.

Mr. KINZINGER. Can you assure me, before the Commission issues its final rules under section 108, that you will publish a proposed rule for comment first?

Ms. TENENBAUM. I will have to get back with you on that. I don't know that that is the procedure that we will follow. We will receive the report and then—but we will answer your questions fully on the procedure.

Mr. KINZINGER. But prior to that what would be your concerns with publishing a proposed rule for comment?

Ms. TENENBAUM. Well, I want to first make sure that the CHAP operates independently and that it has no undue influence by any of the Commissioners and that it makes its best scientific findings. And then we will also, in the spirit of transparency, which we operate at the Commission, we will follow what the advice is of counsel on how to proceed.

Mr. KINZINGER. We look forward to staying in touch with you.

Ms. TENENBAUM. We will certainly answer your questions in written form, too, so that you will have these.

Mr. KINZINGER. Ms. Nord.

Ms. NORD. Thank you.

In responding to the question about a feverish regulatory pace compared to what we were doing before, I just would like to draw the committee's attention to the information in Commissioner Adler's statement about all the accomplishments of the agency from 1972 through the 30 years following and how big an impact this agency has made. So I don't think that we were acting at a snail's pace.

With respect to the crib standard, first of all, I supported the crib standard. All of us did. In fact, I initiated when I was the acting chairman the AMPR that got the thing rolling. What I am concerned about is the manner in which we implemented the standard, and I think it flows directly from the fact that we didn't do the hard workup front.

Just to give you a flavor of this, the staff came up with an effective date. The staff in their Reg Flex analysis said that they didn't anticipate that small retailers would be impacted. The retailers had worked out a deal with manufacturers for a retrofit kit. We did not even approve the use of that retrofit kit until about a month before the rule goes into effect. Another group comes in and says, oh, we can't meet the effective date; can we have longer time? We give them 2 years. Another group comes in 2 weeks before the effective date and says, we can't make this date. We give them another year.

It was just a very sloppy rollout of a rule. And that is of concern.

Mr. KINZINGER. Thank you.

Thank you, Madam Chair.

Mrs. BONO MACK. Thank you, Mr. Kinzinger.

Mr. Sarbanes, you are recognized for 5 minutes.

Mr. SARBANES. Thank you. Thank you, Madam Chair.

Thank you, Chairman Tenenbaum and Commissioners, for being with us this morning.

There is a staggering number of products, obviously, that we import, and in certain categories of percentages it is equally staggering when you think of it. Apparently, as I understand it, 99 percent of toys, 96 percent of apparel, 95 percent of fireworks, 78 percent of electrical products sold in the U.S. are manufactured someplace else. So the task, the charge, the responsibility of the Commission to kind of keep its eyes open as these imports are coming in to make sure that the standards we would like to see are being applied, obviously, that is an important part of what the Commission does.

And you have taken steps, I know, to improve that oversight and monitoring. In fact, as a result of the CPSIA and the increased au-

thorization levels for the Consumer Protection Safety Commission, I think you have now increased the number of employees that are posted at U.S. ports of entry to do this kind of oversight, and monitoring has gone from zero, which, of course, was completely ineffectual, to now 20. The U.S. has more than 300 ports of entry.

So the question is, if you have got, as I understand, employees posted in only about 15 of them, how is this going? From what I have heard, you have made great strides in the oversight, but I would be interested, Chairman Tenenbaum, in your perspective on the effort and is having the kind of coverage you now have producing a kind of deterrent effect with respect to the other ports of entry so that you know that the things coming in meet the standards. What other things can we do on that front?

Ms. TENENBAUM. Well, thank you, Congressman.

You are right. We have 20 members of our Ports Surveillance Team. And we have over 300 ports of entry. That is why it is very important that we have the methodology to target succinctly products that we think are violative coming into the ports and also that we have a very strong relationship with Customs and Border Protection.

CBP allowed us to be the first agency to have a memorandum of understanding. We now have live streaming data through their CTAC office, their Center, so that we know when shipments are coming into the port and what are in those containers before they reach the port.

With the pilot project that we have implemented, Risk Analysis Methodology, we are able to then look at repeat offenders, also products that are highly suspect or those that we monitor closely like electronics and fireworks, and we are able to with pretty great accuracy target those shipments before they are even into port and then interdict them and not let them be unloaded.

Mr. SARBANES. Would your experience—if you caught something at one of the 15 ports that you are monitoring, I guess what I am hearing is you are then in a position to be alerted to those kinds of imports coming into many other ports of entry and take action.

Ms. TENENBAUM. We are. We know repeat offenders. We also know if there is a company that doesn't have a record with us.

We are hoping to establish—and we have already created this Importer Self-Assessment Product Safety Program with CBP where we know those that are consistently in compliance, and we don't hold those shipments up. And we can let them go through the port and unload quickly. But those where you have suspect cargo or cargo that is repeatedly in noncompliance or repeat offenders, we are able to target them.

The most-stopped products are children's products. The largest categories are lead, continuing to see lead violations, flammability, and small parts that pose a choking hazard. So we are able to, with our RAM and working with CBP, be highly effective.

Mr. SARBANES. And over time is there a plan—again, I don't understand your methodology, because I haven't studied it—but would the ports of entry that you are covering with your personnel, would you rotate that? Or the ones that have been chosen ones that you want to continue to monitor always because of the nature of them? How does that work?

Ms. TENENBAUM. Well, with 20 people, we also rely on our field investigators. So we have 90 field investigators in 38 States. If we know a shipment is coming in, we can move those investigators to that port to work with CBP and the person already stationed there. So we can move people around.

And I think that is why it is so important that we get this data before the ships enter the port where this live streaming data that CTAC provides us, we know the contents of the container before it reaches us.

Mr. SARBANES. Thank you.

I yield back.

Mrs. BONO MACK. Thank you very much.

The Chair recognizes Mr. Pompeo for 5 minutes.

Mr. POMPEO. Thank you, Madam Chairman.

I am not surprised.

Now I will talk about the database a little bit. I still contend that it is happy hunting ground for the plaintiffs bar, in direct contrast to what Ms. Tenenbaum said. She said in her written statement: I think the saferproducts.gov has gained wide approval and acceptance.

I know there is a lawsuit. Ms. Nord, do you agree with that statement, that it has gained wide approval and acceptance?

Ms. NORD. I don't. I have heard a number of concerns expressed that indicate that there is not wide approval and acceptance out there.

With respect to plaintiffs using the database, when this thing rolled out and I was given a briefing on it by a consultant, the consultant went into the database and very randomly pulled up a record. The consumer was listed as a law firm. And so that has since intrigued me. And just 2 weeks ago I asked our staff if they had any idea of how many of those so-called consumers were actually law firms, and they said they had no way of knowing, but they assumed quite a few.

When the chairman says 97 percent of the users of the database or submitters of the database are consumers, you should understand that consumer is defined so broadly to mean any living person. And you don't have to have a relationship with the product or any interaction with the product in order to file a complaint as a consumer.

Mr. POMPEO. I appreciate that.

Ms. Northup, there is a lawsuit filed by some businesses. Has the court yet ruled on whether the agency has misinterpreted the law? I certainly think that it did. But has the court ruled?

Ms. NORTHUP. We don't have that information yet. As I said earlier, when we wrote the rule I wrote extensively at that time that I thought that we were writing the rule in a way that we would be vulnerable to a lawsuit. The claims made in the lawsuit were litigated publicly, and the claims they made were the very ones that we made in our argument that I think will stand. I agree with them.

If we do lose that, it will mean that our rule will have to be rewritten. It means our software will have to be redesigned. It means we could be vulnerable to a class action lawsuit by other people that feel that it has been arbitrary and capricious, was the idea

what I wrote extensively about. And so this is why paying attention to the law and not rushing to regulate and glossing over facts is important.

Another fact that is important not to gloss over is that when you say 88 percent of the items have something in the model or serial number, you should know that in many cases it is not the model or serial number. And we know that. And it is important that we give that information honestly to you. It might say: yellow high chair. And so, of course, if good information is good for consumers, bad information is really harmful to consumers.

Mr. POMPEO. I appreciate you clarifying some of the responses Ms. Tenenbaum gave.

Ms. Tenenbaum, yes or no, if the Federal court rules against the CPSC in the pending database lawsuit, will the agency pledge to immediately take down the database?

Ms. TENENBAUM. Will you repeat your question?

Mr. POMPEO. Yes, ma'am, I certainly will.

Yes or no, if the Federal court rules against CPSC in the pending database lawsuit, will the agency pledge to immediately take down the database?

Ms. TENENBAUM. No. That is not the scope of that lawsuit.

Mr. POMPEO. I appreciate the answer.

Ms. TENENBAUM. The lawsuit is under seal, and we cannot talk about it.

Mr. POMPEO. I understand. So your answer is no.

When we passed H.R. 2715 last year, it gave the CPSC authority to take steps to reduce the cost of complying with CPSIA and particularly the cost of third-party testing. I am very concerned about it. Why has the agency not done anything about that yet?

Ms. TENENBAUM. We have done something. In fact, under this Public Law 112–28 we were required within 60 days to go out for comment, and we did. We went out for comment, we received those comments, and the staff is writing now the report, which we will receive any day now. So we have done that.

In terms of rule review, the executive orders ask us to look at any rule that has an impact of a hundred million dollars annually on the economy. That is one of the rules that we are going to look at in terms of rule review.

So we have followed what Congress passed.

And regarding the model numbers for the database, 73 percent have a numeric value. So 73 percent——

Mr. POMPEO. Is it an accurate numerical value?

Ms. TENENBAUM. Yes, I assume it is. If it is in there as accurate. It doesn't say "yellow high chair." It gives the model number.

Mr. POMPEO. I appreciate that.

Ms. Nord, I hope you will encourage the Commission to do more under the authority to reduce the cost of third-party testing. Are there other things you all could be doing?

Ms. NORD. There are a number of things we could be doing. In fact, I submitted a whole list of about 40 items to the staff.

But I think the takeaway for you all should be that third-party testing is really, really expensive. So let's use that for the riskiest items. Let's have the most aggressive testing for the riskier items, and let's ease off for things that have less risk or where we know

there is high compliance. We can adjust that under the statute as it exists now.

Mrs. BONO MACK. I hate to cut you off, but your time has expired, and we are trying to get in as many members and questions before we have a series of votes on the floor.

Just to let members know, it is my hope we can get everybody through. So if we try to stick to under the gavel even, that would be great.

The Chair recognizes Mr. McKinley for 5 minutes.

Mr. MCKINLEY. Thank you, Madam Chairman.

I think it is always broad looking at the consumer product safety. I am not always sure what all that incorporates. It is consumer product safety. Do those little compact light bulbs, do they fit under your purview?

Ms. TENENBAUM. Are you talking about button batteries or the light bulbs?

Mr. MCKINLEY. The compact fluorescent units, CFBs.

Ms. TENENBAUM. Yes.

Mr. MCKINLEY. They have mercury in them. And we know that a typical household with 30 of those is the equivalent of a ton of coal being introduced inside your house. Same amount of mercury in a ton of coal as in 30 light bulbs. I just wonder, are people actually following the rules? They are taking them in a little bag and taking it up to a special disposal? Or how many of them are just throwing them in the trash can and they go to the landfill?

Ms. TENENBAUM. I don't have that data, but I share your concern.

Commissioner Adler, did you have anything to add?

Mr. ADLER. No, other than to say those definitely are our jurisdiction. Our jurisdiction is incredibly broad, as the chairman noted.

Mr. MCKINLEY. I don't know where you are going with it, because I don't think anyone is adhering to the guidelines. And the fact that we have such a fear right now of the mercury poisoning from burning coal but yet we just put 30 light bulbs in our house that bring in as much mercury as—I hope you will take it more seriously about the direction.

But let me add a couple of other things, if I could.

The lead in Chinese marbles, I understand that not too long ago there were some lead—lead was detected in some children's marbles, and those marbles obviously were rejected, appropriately. But the United States manufacturers who had never had marble detected in there now are going through some very draconian testing to see that they stay in compliance, but they have never not been in compliance. So they are being punished because of what China was doing.

Ms. TENENBAUM. The law, as passed by Congress, requires all children's products to undergo third-party testing to make sure that the lead content is below 100 parts per million, and that was set by statute as well. So domestic and imported——

Mr. MCKINLEY. Do you determine the frequency of testing to make sure? Surely you are not going to test every marble.

Ms. TENENBAUM. No. You have to test a sample initially. You pull a sample and test that. If you have a material change in the manufacturing——

Mr. MCKINLEY. Who pays for that test when you come into a plant?

Ms. TENENBAUM. The manufacturer has to pay for it.

Mr. MCKINLEY. So here is a manufacturer that has never had a violation, but maybe once a quarter they have had someone come in and do some testing. But now we are up to less than once a month they are coming in, and it is costing you $3,000-some for every one of those series of tests. And they have done nothing wrong. There has been no grounds for this other than the fact that China was trying to—once again, like they did with drywall, now they have done it with marble, that has caused this company now to spend thousands of dollars. Is that reasonable?

Ms. TENENBAUM. Well, under the law that Congress passed, all children's products must be third-party tested initially, if there is a material change, and periodically. And that is the law.

Mr. MCKINLEY. Well, there is no change on this.

So let me go to the next, the indoor air quality. Would indoor air quality be a product safety—the fact that we have carpet formaldehyde, resins, cleaning agents, other things that—we seem to be so concerned with—and rightfully so—the health of our children and adults, and we put them in an indoor air quality that has—90 percent of your time you are spending indoors, and they are exposed to all these elements. And we say, but they get asthma when they go outside. They get asthma when they go near a coal-fired powerhouse. But they spend 90 percent of their time in a home.

Ms. TENENBAUM. That is the jurisdiction of the EPA, just as the disposal of the mercury containing lights.

Mr. MCKINLEY. You just kind of wash your hands.

Ms. TENENBAUM. No, I don't. I respect the jurisdiction of other agencies.

Mr. MCKINLEY. Then you support that? Of having—you have some standard. You say it falls under your purview, but yet the disposal of it is not. You give that to the EPA.

Ms. TENENBAUM. The law gives it to the EPA.

Mr. MCKINLEY. Would you change the law?

Ms. TENENBAUM. Well, we work in partnerships with many agencies.

Mr. MCKINLEY. Would you change the law so that it stays under you so you can have control over it? Because it sounds like you——

Ms. TENENBAUM. No, you have to change the law. I am an executive branch. I follow the law.

Mr. MCKINLEY. Would you change the law? Because you seem like you say I am ready to get rid of it.

Ms. TENENBAUM. No, that is not at all what I said. I was just trying to clarify the jurisdiction of EPA and our agency.

Mr. MCKINLEY. Thank you.

I yield back my time.

Mrs. BONO MACK. The gentleman, Mr. Lance, you are recognized.

Mr. LANCE. Thank you very much, Madam Chair; and Chairman Tenenbaum and distinguished members of the Commission, thank you for your service to the Nation.

I am interested in how we can explore ways to increase efficiency and decrease costs and reduce red tape burdens without compromising safety. Commissioner Nord, thank you for the suggestions

that you have made regarding this, particularly for small-volume manufacturers.

Can you speak, Commissioner Nord, to the timeframe in which we might implement the changes you have suggested, considering the fact that Commissioner Northup may be leaving the Commission?

Ms. NORD. Yes. I am so sorry to see Commissioner Northup leave our body, because she has made such a contribution.

Mr. LANCE. I certainly agree with that.

Ms. NORD. When we were considering the testing and certification rule, the rule that was put out for comment had a low-volume exemption from testing in it. That was removed from what came up to the agency for a vote. I offered an amendment to put that back in. That amendment failed on a 3–2 vote. At that point, we had another Commissioner.

And so certainly a low-volume exemption would certainly be a way to get at this. I have been talking with a number of people who have said we have just stopped doing low-volume manufacturing because we can't afford the testing costs. I was out in southern California talking to a clothing manufacturer, and they were very explicit about it.

There are a number of other things that we can do to help companies that are struggling with how to comply with this rule. It is a very broad—overly broad, in my view—rule that imposes costs without real benefits. So I hope that the agency will reconsider its position.

Mr. LANCE. Thank you. I would urge the agency to do so. I would be happy to work with all members of the Commission on this issue, because I think it is important moving forward.

On recreational vehicles, off-highway vehicles, would you please comment, Commissioner Nord or Commissioner Northup, on the fact that if the CPSC is going to include a pass/fail test as the main criteria to evaluate the stability of these vehicles, this might cause some challenges. Shouldn't a test that is meant to pass or fail a vehicle be repeatable so that one can be assured that the same result is achieved?

Ms. NORD. Of course, any test that we would mandate, regardless of the product, has got to be repeatable. You can't put in place a testing method that nobody can predict the results from. So of course we must have repeatable tests.

Mr. LANCE. Thank you.

Commissioner Northup, do you have an opinion on that as well?

Ms. NORTHUP. No. I have not participated in the ATV because I have a conflict of interest with my husband's company.

Mr. LANCE. Thank you.

Madam Chair, I will cede the minute and a half I have left to colleagues.

Mrs. BONO MACK. We thank you very much and recognize Mr. Harper for 5 minutes.

Mr. HARPER. Thank you, Madam Chair, and thank you, Chairman, each of the Commissioners, thank you for your time, your service.

Chairman Tenenbaum, if I may ask you a few questions, I was certainly pleased to read your op-ed in The Hill last week where

you indicated that you were taking a more collaborative approach with the window covering industry regarding cord safety. I am further pleased that you have spent the time visiting manufacturing facilities to better understand the difficulties in eliminating cords for all products. Can you tell me, without revealing any proprietary information, about these visits and what you have learned?

Ms. TENENBAUM. Thank you.

It was my pleasure to travel across the United States and meet with the three major manufacturers as well as the major retailers of window coverings. I have expressed concern about the strangulation hazard for children publicly, and the Window Covering Manufacturers Association and other stakeholders are in the process of rewriting a voluntary standard, which we will have in September.

But what I have learned is that there is concern from the industry about the strangulation hazard. There are many new technologies which would remove completely this hazard. However, the industry also is—they are willing to work with us; however, they don't want to see a standard that completely does away with the cord. They can make the cord where it is not accessible to children and there are all kinds of technology that they share with us, but they don't want to eliminate having a cord entirely.

However, I am very optimistic, meeting with retailers and with the association, that everyone wants to do a massive education campaign. So that if you are buying shades and you have children at home, then you would go cordless. You would go cordless or have no shades. You could have shutters or draperies. But you remove the hazard if there are children in the home. So I am very encouraged by my conversations with them.

Mr. HARPER. How are you proposing that we move forward from here?

Ms. TENENBAUM. In September, we will receive the standard from the Window Covering Manufacturers Association. They will have voted on it. And we will continue to work with them to see how we can more and more eliminate the hazard.

We also want to work with major retailers so they can train employees at the point of sale, so that there are kiosks online that have baby registries that can also bring to the attention of people that if you have a child in the home you need to go cordless. But see if we can't address some of the fatalities and reduce the number of fatalities by an educational program that was robust.

Mr. HARPER. I am certainly a big supporter of cooperation between government and industry, particularly when it comes to some of these safety issues and how best to achieve the safest product possible.

You also discussed in your op-ed your efforts to better educate the consumer. With this in mind, can you tell me about your plans for the rest of this year and next with the Window Covering Safety Council and your efforts to educate new parents about potential hazards to children associated with window covering?

Ms. TENENBAUM. We are in the process of working with major retailers and also associations to draft that plan. So that is in process, Congressman. But we are committed. I am personally committed, because I think we can reduce the number of fatalities with a robust education program and collaboration with the industry.

Mr. HARPER. Does the Commission plan on utilizing any of its funds towards this education effort?

Ms. TENENBAUM. Well, we have limited funds. Unlike the pool safety campaign, where Congress gave us a direct appropriation, we don't have one for this. But it would be a great help to us to have one. But I think working with industry and with the retailers we can accomplish a lot without extra funding.

Mr. HARPER. Are promoting education and raising awareness some of the best tools that you have in your arsenal?

Ms. TENENBAUM. No question about it. That is how social media fits in, as well as working with people, so that we can all have a strong education campaign on any hazard.

Mr. HARPER. Thank each of you for being here, and I yield back, Madam Chair.

Mrs. BONO MACK. Thank you very much.

The Chair recognizes Mr. Olson for 5 minutes.

Mr. OLSON. I thank the Chair. I understand that votes have been called, so my comments will be brief.

But I want to thank the witnesses. Thanks for coming. Thanks for your expertise.

Chairwoman Tenenbaum, nice to see you again outside of a big storage facility outside the Port of Houston. Nice and cool here as opposed to the heat we had, even though it was the fall. Good to see you again.

As my nameplate says, I am from Texas. As you all know, Texans love the outdoors. They like to go tubing on the Hill Country rivers. They like to fishing on our lakes, the Gulf of Mexico. They like to go out there and do some hunting. Or just look at the hright stars of the Texas night sky. And one way to get access to all these great things is with ROVs. So I am very concerned when I hear that the Federal Government may be threatening the quality of life in my home State.

And so my question is for you, Commissioner Tenenbaum. I would like follow up with the line of questions by my colleague from New Jersey about the pass/fail stability tests. I understand CPSC staff supports adoption of a pass/fail stability based on the CPSC methodology. In a recent meeting, however, CPSC revealed that it has conducted no repeatability testing of its methodology or results. Do you agree to it being appropriate to base a mandatory pass or fail standard on the sample size of a single test—one test?

Ms. TENENBAUM. Well, let me premise this by saying I will need to get back with you on what the staff is talking to the Recreational Off-Highway Vehicle Association and manufacturers.

One of the things that has been brought to our attention is the number of deaths and injuries in 7 years, between 2003 and 2010. We had 165 deaths and 329 serious injuries from ROVAs is what we call, or ROVs. And 70 percent involve lateral stability turnover.

So we are looking and working with industry to develop a stronger lateral stability test. We have issues of understeerage and occupant protection. I do hope that the industry will work with us to develop a standard. My staff met with the ROVA representatives on July 19, and we are saying that we need to upgrade that standard to prevent the turnovers. And we could go to a mandatory

standard, but it is always better if we can agree with industry and come up with a strong voluntary standard.

Mr. OLSON. Yes, ma'am. I am sorry I cut you off. I am running out of time here.

Commissioner Nord, any comments on that line of questioning, ma'am?

Ms. NORD. Well, lateral stability has been just a really perplexing problem not only with ROVs but also withATVs, and it has been something that we have been struggling with for years. So if we are going to be putting forward a standard that addresses lateral stability, we have got to make sure we have get it right, got to make sure we solve the problem, and we have got to make sure that we have a test that works and is repeatable. And I think that is where we are working forward.

I fully agree with my chairman when she says that it is best to try to work cooperatively with industry to come up with something in a voluntary mode, and I hope that we can do that.

Mr. OLSON. In working cooperatively with industry, are we allowing the industry representatives to observe the testing to have some firsthand knowledge of what you are doing there so they can respond right on the scene?

Ms. TENENBAUM. Well, collaboratively means that we share information. They have shared their stability tests with us. They came in and shared it with us, and the staff had some issues with it. We need to be very open and collaborative in sharing these tests, and also the industry should realize that and say, "Yes, we have a lot of lateral turnovers, and we want to address it voluntarily."

Mr. OLSON. Sharing is a two-way street. Industry shares with you. You share with them.

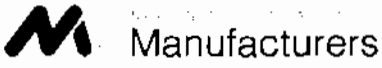
I yield back the balance of my time.

Mrs. BONO MACK. I thank the gentleman very much.

As you all have heard, our votes have been called. We are down to the wire. So to begin to sum things up, I ask unanimous consent that a letter from the National Association of Manufacturers be included in the record of the hearing. It has been previously shared with Democrat staff.

Without objection, so ordered.

[The information follows:]



Rosario Palmieri
Vice President
Infrastructure, Legal and Regulatory Policy

August 1, 2012

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable G. K. Butterfield
Ranking Member
Subcommittee on Commerce, Manufacturing and Trade
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Bono Mack and Ranking Member Butterfield:

On behalf of the National Association of Manufacturers (NAM), the largest industrial trade association and the voice for 12 million men and women who make things in America, I submit these comments for the record for the hearing to be held by the Subcommittee on Commerce, Manufacturing and Trade entitled, "Oversight of the Consumer Product Safety Commission," scheduled for August 2, 2012.

One year ago today, the House of Representatives and Senate both passed your legislation—H.R. 2715 (Public Law No. 112-28)—to provide relief of burdens imposed on manufacturers and retailers by the Consumer Product Safety Improvement Act (CPSIA) of 2008. We applaud your leadership in improving the safety of consumer products while seeking to minimize the burdens imposed on stakeholders. Manufacturers of consumer products are committed to providing safe products and ensuring a well-functioning and credible product safety regime—one that gives all stakeholders the confidence they need that products meet all applicable safety standards and regulations.

As the Subcommittee discusses the progress of the Consumer Product Safety Commission (Commission or CPSC) as it implements the requirements of H.R. 2715, we urge the Subcommittee to include in its oversight other CPSC actions that pose significant costs and challenges to manufacturers. At risk are jobs and the health of U.S. companies who make consumer products.

Reducing Regulatory Burdens

Manufacturers strongly support efforts to reduce third-party testing burdens as the Commission implements the CPSIA and H.R. 2715. With the passage of H.R. 2715, Congress

directed the Commission to identify ways to reduce "third party testing costs consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations." Congress clearly intends for safety in consumer products to be maintained without imposing an undue burden on manufacturers, retailers and consumers. In July 2011 the President issued Executive Order 13579, asking independent regulatory agencies to comply with the provisions of Executive Order 13563. The latter order states that our regulatory system "must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends."

Since the passage of H.R. 2715, stakeholders in the business community have submitted comments and participated in meetings with the Commission to encourage actions that would significantly reduce third-party testing burdens. The business community is concerned that, despite a directive by Congress, the Commission has been slow to adopt significant burden-reducing initiatives since H.R. 2715 was adopted.

Pursuant to H.R. 2715, in November 2011 the CPSC requested public comments on reducing the burdens associated with third-party testing. The business community has offered a number of suggestions to the Commission in response.

We are pleased that the Commission appears to embrace the wider adoption of alternative technologies, such as X-ray fluorescence (XRF) spectrometry and High Definition (HD) XRF. H.R. 2715 also modified Section 108 of the CPSIA to exclude inaccessible component parts from the phthalates limits, much as they are excluded from lead limits. The CPSC has voted to issue a Federal Register notice soliciting comments on guidance that generally mirrors the inaccessible components exception for lead. We urge the Commission to act on the other recommendations submitted and to promptly take the following steps to assure safety while reducing the costs and burdens of testing:

- The Commission should adopt a clear statement of statistical uncertainty with respect to tests results, particularly heavy metal and phthalates tests. Since the initial adoption of CPSIA, manufacturers have faced problems with inconsistent test results where products may pass one test but fail another. Products fail lead tests if any laboratory reports a single result above 100 parts-per-million (ppm), no matter how small the margin. Statistical variability in test results is a known problem and guidance from the Commission would help avoid costs of the destruction and retesting of safe products.

- We encourage the Commission to further promote non-destructive testing and to assess how manufacturers who have invested in alternative technology can rely on it directly. Currently, manufacturers who have invested and use XRF equipment in-house must still have products tested at third party testing laboratories unless they register as firewalled accredited laboratories. Even where XRF is used, destructive testing is still often necessary because products with many components must be disassembled in order to properly test them.

- The Commission should exclude paint and surface coatings present in a product at extremely low total weight from testing requirements when no risk of harm exists. Manufacturers report that the current testing regime requires them to make and supply products solely for destructive testing purposes. This is because where a product contains very small amounts of paint, laboratories must scrape surface coatings from

many products to generate an adequate sample. The toy safety standard, ASTM F963, mandated by CPSIA, includes an exemption for small amounts of paint for testing all other heavy metals, apart from lead, only because the Commission has not adopted a similar risk-based exclusion. Where a product does not contain enough paint, even in composite form, to provide a sufficient sample for a laboratory to test, it is surely an example of a situation where the enormous expense of testing, including product destruction, cannot be justified.

- The Commission should consider mechanisms to rely on other agency requirements to establish compliance with CPSIA standards. Many consumer products are effectively regulated by agencies such as the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC). Executive Order 13563 stresses improved coordination across agencies to reduce costs and simplify and harmonize rules. The Commission, however, has been slow to work with other federal agencies in identifying areas of regulatory cooperation that could greatly reduce burdens.

- The Commission should expand its efforts to identify the types of plastics that do not contain one of the prohibited ortho-phthalates. Phthalate testing is particularly expensive, and the inaccessible components parts exception for phthalates will lead to significant reductions in third-party testing burden without sacrificing safety. By exempting materials known to not pose a health risk from unnecessary, expensive testing, the Commission can reduce third-party testing burdens without posing a risk to consumers.

As originally enacted, CPSIA required periodic testing of "random samples" of children's products. After the Commission proposed to implement the random sampling requirement by establishing an elaborate scheme of statistical selection that was incomprehensible to most companies, and especially to small businesses, H.R. 2715 modified this requirement by substituting the term "representative samples." Recently, the Commission deadlocked on a vote to issue a rule that offered a definition of "representative samples," largely because the rule also included additional detailed recordkeeping requirements that arguably provide minimal value at high cost. We all agree on the need to guard against the risk of testing pre-selected "golden" samples. The Commission should avoid complicating a relatively simple and straightforward standard by adding significant and unnecessary paperwork.

SaferProducts.gov: Confidentiality and Material Inaccuracy

Section 212 of the CPSIA requires the Commission to establish a publicly available database "on the safety of consumer products, and other products or substances regulated by the Commission." Consumers can report incidents involving consumer products in the database known as SaferProducts.gov. The reports are then published. Because the accuracy of information available through this database is critically important, Congress required that the Commission provide the manufacturer of a consumer product a submitted report for the database before its publication. Manufacturers are to be provided the opportunity to object to publication of confidential materials or materially inaccurate information.

Regulations adopted by the Commission as it implemented the database requirements of the CPSIA provide a procedure allowing manufacturers to request the deletion of confidential material and the exclusion of materially inaccurate information. See 16 C.F.R. § 1102.24; 16

C.F.R. § 1102.26. Both types of requests are made electronically via web-based forms within the database portal, and responses to those requests are transmitted via email from a generic mailbox. The identity of the Commission staff person or persons making the determination and transmitting information associated with the requests is not revealed.

The Commission's regulations do not provide a process of review or appeal from the original finding of the anonymous staff member, and Commissioners have acknowledged publicly that no review or appeal process exists within the agency. Information in the database about a company's products is important to manufacturers, and it is vitally important that confidential or inaccurate information not be published with the imprimatur of a government-maintained database. That is why Congress established the protections against these types of disclosures in the enacting legislation. At present, the process of reviewing requests to delete confidential or materially inaccurate information is completely opaque, and decisions are made anonymously. Once the decision is made, there is no opportunity for review or even an opportunity to identify who made the decision.

Manufacturers are sensitive to the information on their products that is available publicly. Unfounded negative or inaccurate information could be devastating. A company dissatisfied with the staff-level determinations on publishing confidential or materially inaccurate information has no alternative to respond other than litigation, which is authorized by the statute. See 15 U.S.C. § 2055a(c)(2)(C)(ii); 16 C.F.R. § 1102.24(h). Few companies are willing to bear that cost, and our court system should not be clogged with disputes that could be easily resolved by an inter-agency review process.

To ensure the accuracy of information submitted to the database, we urge the Commission to establish an internal process by which companies could seek review of denials of claims of confidentiality or material inaccuracy.

Coercive Use of Section 6(b) in Recall Cases

Section 6(b) of the Consumer Product Safety Act (CPSA), as amended, requires the CPSC to provide notice to a manufacturer or private labeler before the public disclosure of information. See 15 U.S.C. § 2055(b). The CPSIA shortened the time period for notice from 30 days to 14 days. It also amended the prohibition against releasing information reported to the Commission by firms under section 15(b) of the CPSA concerning products that are non-compliant, defective or create an unreasonable risk of serious injury or death by allowing the Commission to make disclosures of that information if the Commission had made a public interest finding that the public health and safety requires a lesser period of notice than the 14 days provided. See 15 U.S.C. § 2055(b)(5).

CPSIA amendments to this section were not intended to fundamentally change the obligation of the Commission to provide a rational process for comment and agency evaluation before potentially damaging and misleading information is released about companies and brands. To the contrary, the Commission has used the release of information to force product recalls before affording product manufacturers due process going to the merits of a claim. Manufacturers are sometimes forced to choose between unreasonable Commission demands—even if there is not a threatening hazard justifying drastically limited due process procedures—or having a demand for a product destroyed by a CPSC press release. This is particularly harmful to small firms.

Section 15 of the CPSA allows the CPSC to order a recall after a firm has an opportunity for a hearing on whether its product has a defect that creates a substantial hazard. However, not infrequently, the staff has preliminarily determined that a product presents a defect and substantial product hazard with little technical data or evidence. The Commission then has used the threat of a public interest health and safety finding and notice under section 6(b) to coerce firms—especially small businesses—to undertake recalls of their products. A firm has no opportunity to formally make its arguments to the Commissioners before they make their findings. The firm instead faces an ultimatum that results in either the destruction of product or damage to its reputation. Most small firms do not have the resources to file a Federal Court action to attempt to enjoin such a press release on short notice.

An initial determination of potential risk posed by baby slings and the tactics of the CPSC led to at least one recall and subsequent shut-down of a business. The CPSC subsequently changed course under united pressure and educational efforts from the industry and parents who understood the virtues of the products. Similar threats have been effective against many other firms making the actual issuance of such public health and safety notices a relative rarity.

The Commission should use public health and safety notices sparingly in cases of the most serious risks. It should issue such notices not based on gut feelings about risk but based on solid technical evidence and careful consideration of the firm's position. The staff should not have wide latitude to threaten such notice as a way of coercing firms into undertaking product recalls. Section 15 hearings should be the rule to ensure due process to firms before such notice and recalls except in rare, extreme cases.

Use of Social Media

Manufacturers, particularly small manufacturers, of consumer products are sensitive to the type of information publicly available through the internet. Small businesses do not have the resources to monitor and respond to digital information that can spread quickly among consumers. When information is inaccurate or harmful to a business, the results can pose a significant burden on that business and, in the case of small businesses, inflict irreversible damage.

We urge the Commission to modify initiatives to expand the use of social media that would enable information to be published on a public website without having been fully vetted by the Commission and in accordance with applicable laws and regulations. A rise in popularity of social media is not an appropriate reason for the Commission to engage in activities that are outside the scope of its governing statute and existing policies on information dissemination. Providing vehicles to publish unverified information on a website endorsed by the Commission would circumvent well-defined protections for manufacturers and trivialize efforts by Congress and the Commission to ensure the accuracy of information published by the agency.

We are concerned with the Commission's use of social networking and microblogging services to disseminate information subject to section 6 of the CPSA. The agency routinely publishes information identifying products and companies ahead of a formal press release and seemingly in violation of statute and CPSC-established regulations on the disclosure of information.

Civil Penalty Investigations

Traditionally, the Commission had an informal policy that information reported to the Commission by firms under section 15 of the CPSA, as amended, would be reviewed for timeliness within one year after the recall was announced and that an investigation would be commenced within that period. This practice enabled companies to have certainty about whether a penalty would be sought within a reasonable period of time after an issue arose. The CPSC recently has abandoned that practice without any notice to stakeholders and is commencing penalty investigations in cases where recalls occurred two, three or even four years ago.

The Commission staff also now asserts a broad document retention requirement when communicating with companies about reports filed or cases closed, advising companies to "preserve all information, documents, records and samples, now in existence or created hereafter, related to" the product at issue. This broad document preservation request, coupled with the potential for initiating penalty investigations up to five years after the product issue arises, leads to tremendous expense and uncertainty for companies without adding to product safety. Penalty investigations can be conducted soon after a recall is commenced, when the issue is fresh in the minds of those concerned, and persons familiar with the issue are still available, and applicable documents are readily located. Whether or not a violation occurs, expansive recordkeeping requirements and burdensome document requests place a significant burden on businesses.

Upon identifying a potential issue with a product, a firm engages in voluntary and costly corrective actions to minimize risk. Cases through the Commission's Fast Track Product Recall Program receive increased scrutiny for penalties merely because the affected firm does not contest the hazard determination at the beginning. These firms, that try to do the right thing and quickly remove potentially hazardous products from the marketplace, now face a lengthy and costly penalty investigation for their efforts. The Commission's actions are a major disincentive to companies to engage in the successful Fast Track recall process.

Rulemakings to Establish Mandatory Standards

Over the past few years, the CPSC has proceeded with rulemakings to establish mandatory standards for a variety of consumer products despite the prevalence of effective industry standards. Pursuant to the CPSA, in order to issue a mandatory rule, the Commission must find that an existing or voluntary standard would not be adequate, the benefits of the rule bear a reasonable relationship to its costs and the rule is the least burdensome requirement that prevents or adequately reduces the risk of injury. To issue a mandatory standard, the Commission also must make a finding that an existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. See 15 U.S.C. § 2058(f)(3). Despite the law, the CPSC has begun rulemaking proceedings that lack support and threaten industries.

Recreational Off-Highway Vehicles

In October 2009, the CPSC began a rulemaking to establish a mandatory safety standard for a relatively new class of vehicles called recreational off-highway vehicles (ROVs). Despite industry efforts to develop ANSI-accredited voluntary safety standards, the CPSC is moving forward with a mandatory standard without adequate data supporting the restrictive

design standards the agency is demanding. Industry analysis has shown that at least 90 percent of serious incidents with ROVs would not have been affected by the CPSC proposals, but were instead caused by operator actions. In addition to robust design standards, the industry has implemented a comprehensive safety plan and education initiative, which includes a hands-on driver course and state-of-the-art online education program, intended to address driver and passenger behavior that has contributed to crashes resulting in avoidable serious incidents. The CPSC's insistence on a mandatory standard will compromise the mobility and utility of the vehicles in the off-highway setting for which they are intended, negatively impacting consumer demand and costing thousands of domestic manufacturing and retail jobs. With its command and control regulatory policy, the CPSC will greatly harm an entire class of recreational vehicles with no clear improvements to safety and no justification for the costs the agency seeks to impose on manufacturers and consumers.

Table Saws

On October 11, 2011, the Commission initiated a rulemaking to establish mandatory safety standards for table saws. The rulemaking, in its current trajectory, would seek to impose a standard that could only be achieved through the use of one patented technology, thus creating a government-sponsored monopoly for the patent attorney who owns the technology. Regulation should not be used to advantage one technology or one company over another.

The Commission is proceeding with a rulemaking despite no finding that the existing voluntary standard would not prevent or adequately reduce the risk of injury in a manner less burdensome than the proposed CPSC mandatory standard. To address concerns by the agency, the industry recently updated the Underwriters Laboratory (UL) voluntary standard so that since 2010 all table saws sold must meet the new safety standard. Data used by the CPSC on table saw injuries are outdated and are not relevant to the new voluntary standards. In fact, the data used by the CPSC to proceed with the mandatory standard was collected from table saws that met the old standard. If the CPSC proceeds with a mandatory standard, such action would undermine industry's incentive to develop new alternative table saw safety technology and would impose unnecessary increased costs on consumers. Unfortunately, this rulemaking illustrates a trend at the agency where the CPSC fails to conduct adequate cost-benefit analyses with its rulemakings and imposes prohibitive costs on manufacturers and consumers without accounting for the actual risks associated with products.

Window Coverings

For the past 15 years, CPSC staff has participated in industry efforts to update the voluntary standards for corded window coverings and assisted in a nationwide education campaign to reduce the risks posed to small children. We are encouraged by the Commission's involvement in the standards development process, and the improved voluntary standards will effectively reduce the risk of injury in a manner less burdensome than a mandatory standard.

There are efforts in Congress to add authorizing language to the Financial Services and General Government Appropriations bill that would require the Commission to promulgate a rule mandating the elimination of corded window coverings. The CPSA, the Federal Hazard Substances Act and the Flammable Fabrics Act require the Commission to regulate various products through an open and transparent process. That process requires assessing the voluntary standard to see if there is substantial compliance and conducting a cost-benefit analysis. The appropriations rider is unique because it essentially amends the underlying statute

by specifying administrative procedures not currently applicable to the CPSC. This legislative provision was not discussed at a Congressional hearing, and industry was not provided the opportunity to present its position.

The Commission has not publicly responded to this effort that removes its discretion to regulate products within its jurisdiction and takes away jurisdiction from the Energy and Commerce Committee. We urge the Commission and lawmakers to oppose these attempts to force the CPSC to issue mandatory standards and to subvert the well-established and effective voluntary standards-setting process.

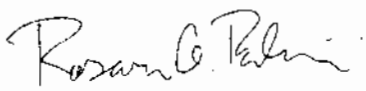
Addressing Complicated and Contradictory State and International Regulations

Companies face an expanding array of laws and regulations between states and among different countries. The proliferation of current and planned regulations at the state and local level within the United States has made it next to impossible for companies to comply with one regulation while at the same time not violating another. For example, 28 states have introduced chemical legislation for consumer products. Testing and compliance costs associated with differing requirements could strangle small businesses, and contradictory regulations will force companies to choose between two states to sell their products. Although the Commission and the Administration have stated goals of improving international regulatory cooperation, the patchwork of state, local and federal regulatory requirements increasingly disconnect the U.S. from the global marketplace. We encourage the CPSC to work with local and state officials to ensure consistency with stete and federal regulations and that standardized testing requirements flow from federal requirements to minimize testing costs.

Conclusion

The decisions and actions of the Consumer Product Safety Commission greatly impact manufacturers, who support effective regulation and share the Commission's mission to protect consumers. The business community looks forward to working with the Subcommittee in ensuring the Commission implements the provisions of law as Congress intended, while protecting consumers and minimizing regulatory burdens imposed on U.S. businesses. Thank you for your consideration of these comments.

Sincerely,



cc: Members of the Subcommittee on Commerce, Manufacturing and Trade

Mrs. BONO MACK. And, again, I would like to thank all of the Commissioners very much for your time today. I think you have shed a lot of light on some very important consumer product safety issues. I know that our committee looks forward to an ongoing and productive dialogue.

I would like to thank my colleagues, especially Mr. Butterfield and Ms. Schakowsky, for working together in a bipartisan fashion to pass H.R. 2715 last year. We enacted a very good bill that saved a lot of American jobs while providing important protections to U.S. consumers. We call that a win-win around here.

So I will be asking questions for you to submit back to us. Specifically, Ms. Northup, I had one all teed up for you. I will ask you in writing, if you could submit in return, simply to give us your conclusions in writing about your service. And thank you for your service as you leave the Commission. We are going to ask a big softball question for you. Say all you want. How would you improve the world of consumer product safety? So we look forward to that in writing.

I remind members they have 10 business days to submit questinns for the record. I ask the witnesses to please respond promptly to any questions that you receive.

I wish you all a very wonderful August and safe travels.

The hearing now is adjourned.

[Whereupon, at 11:16 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF CONGRESSMAN G. K. BUTTERFIELD
DEMOCRATIC RANKING MEMBER

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE

HEARING: "OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION"
AUGUST 2, 2012

Chairman Bono Mack, thank you for holding today's hearing on oversight of the Consumer Product Safety Commission. The CPSC serves as the watchdog on behalf of American consumers, ensuring that the products that we use every day in our homes and offices are safe and do not pose an unreasonable risk of injury or death.

In 2008, Congress provided the Commission with expanded enforcement authority, ratcheted down on the amount of lead allowed in children's products, mandated safety standards for durable infant and toddler products, and created a public consumer product safety information database. We did all this through the Consumer Product Safety Improvement Act of 2008, the C-P-S-I-A (sip-see-uh), which passed the House by a vote of 424 to 1 and was signed by President Bush in August 2008.

However, as we all know so well in Congress, sometimes our good intentions result in some unintended consequences. For example, some very small businesses were impacted by CPSIA that perhaps should not have been.

To fix some of these problems, without compromising significant health and safety protections, Chairman Bono Mack and I, over the span of many months, worked out legislation to give the CPSC more flexibility in implementing CPSIA. That law, enacted a year ago, provided targeted relief for ATVs, bicycles, books, and made the strong lead content limit prospective so that products manufactured prior to August 14, 2011 could be sold at the 300 parts per million level in an effort to take some pressure off of retailers and manufacturers who still had inventory that would violate the law.

Chairman Tenenbaum, I know with CPSIA, and the amendments to CPSIA passed last year, Congress has given the CPSC many important tasks. But I want you to know that I am proud of the Commission that you lead. The CPSC has oversight over more than 15,000 consumer products. That's no small task. Under your leadership, we finally took steps to remove drop-side cribs from the marketplace. Newborns and infants were dying at an alarming rate in these cribs after sliding between the mattress and side of the crib and suffocating to death.

Under your leadership, we've seen agency staff utilized in ways that are proactive, such as by putting them at ports of entry to inspect products and prevent dangerous products from ever making it to store shelves.

Thank you, Chairman Tenenbaum, for leading this Commission in a way that continues to provide safety and security to American consumers. I also thank Commissioners Adler, Nord, and Northup for their service and for being here today.

Madam Chairman, I yield back the balance of my time.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

November 9, 2012

The Honorable Mary Bono Mack
Chairman
House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and
Trade
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bono Mack:

Attached please find responses to the written questions for the record submitted by you and certain other Members of the Subcommittee in connection with the August 2, 2012, hearing entitled "Oversight of the Consumer Product Safety Commission." An electronic version of these responses will also be provided to Mr. Brian Kirby Howard, Legislative Clerk for the Subcommittee.

Thank you again for the opportunity to testify before the Subeommittee. Should you have any questions or require additional information, please do not hesitate to contact me or Christopher Day, Director of Congressional Relations, at (301) 504-7660 or by e-mail at cday@cpsc.gov.

Very truly yours,

Inez M. Tenenbaum

Attachment

The Honorable Mary Bono Mack

REDUCING REGULATORY BURDENS AND COSTS

1. **H.R. 2715 granted you the authority to exempt products, or classes of products, from the tracking label requirements. Has the Commission granted any exemptions? Has the Commission conducted any analysis on what products or classes are likely candidates to exempt from the requirement? If not, why not?**

   Section 6 of H.R. 2715 (now P.L. 112-28) stated that "the Commission may, by regulation, exclude a specific product or class of products from the requirements in subparagraph (A) [tracking label requirement] if the Commission determines that it is not practicable for such product or class of products to bear the marks required by such subparagraph." To date, the Commission has not issued any regulations under this new authority. Instead, the Commission issued a Statement of Policy (SOP) concerning tracking labels on July 20, 2009. (A copy of the SOP is available at http://www.cpsc.gov/about/cpsia/sect103policy.pdf.) In that Statement, the Commission noted that no specific labeling system was required. ("At this point, the Commission is not imposing any such uniform requirements, but expects that manufacturers will use their best judgment to develop markings that best suit their business and product.") The Statement also recognized six circumstances where it might not be practicable for manufacturers to include tracking labels on a product, including products sold in bulk vending machines.

   The Commission also noted its desire to reduce burdens posed by the tracking label requirement, particularly by avoiding duplicative requirements. To that end, the Statement provided: "The Commission believes that required information already permanently marked either to brand the product or otherwise to comply with other Commission or federal regulations, such as those promulgated under the Textile, Wool and Fur Acts or country of origin labeling rules, could be considered part of the 'distinguishing marks' called for by Section 103(a). Any such marking would have to be permanent as required by Section 103(a)." Given the flexibility provided in the Statement of Policy, the lack of stakeholder requests for exemptions, and the need to take action on safety priorities, the Commission has not yet conducted an analysis of candidates that could be exempted from the tracking label requirement.

2. **Using the authority H.R. 2715 provided, the Commission voted to approve a petition and grant a functional purpose exemption from lead content limits for certain metal components of children's ride-on tractors. Would the reasoning of this exemption extend to other products? Is the Commission going to reconsider previously submitted petitions or take the initiative to exempt other materials provided the exemptions will result in no measurable impact on public health or safety? If not, please explain.**

   Under the new authority provided, the Commission granted a functional purpose exemption for certain metal components of children's ride-on tractors. 77 FR 20614 (April 5, 2012). In addition, the Commission granted the same exemption to similar children's products such as other children's ride-on products that contain similar aluminum alloy component parts. Any

future petition would likely be factually unique, thus making it difficult to predict the likely disposition of future petitions. In the ride-on-tractor petition, however, I was pleased that this petitioner identified and requested only a minor increase in the permissible lead content limits for a few specific components of the children's ride-on tractors produced by his company.

The Commission has not considered previously submitted petitions because the new authority requires certain findings that were not required prior to H.R. 2715. However, the Commission will consider any petition resubmitted in accordance with the requirements for parties wishing to resubmit any previously submitted petitions set forth in section 101(b)(1)(F) of the CPSIA.

The Commission, subject to resource allocations in future operating plans, has also directed CPSC staff to undertake certain work to reduce third party testing costs consistent with assuring the compliance of children's products. Among the materials to be reviewed for possible determinations regarding lead content limits include adhesives in manufactured woods and synthetic food additives.

3. **We passed H.R. 2715 in part due to the huge financial burden manufacturers have had to face in regards to testing costs since the passage of CPSIA. Does the CPSC know how many jobs were lost or how many companies are not able to invest in new jobs (except testing companies) due to this new financial hardship? Has the Commission undertaken any analysis of the effect of increased costs on innovation and product development?**

The Commission has implemented the third party testing provisions as mandated by Congress in CPSIA and the H.R. 2715 amendments. The Regulatory Flexibility Act (RFA) statement associated with the third party testing rule contains staff economic impact projections. After discharging our statutory duty pursuant to section 14(i)(3)(B) of the CPSA (as amended by P.L. 112-28) to review public comments associated with the reduction of third party testing costs consistent with assuring compliance, the Commission voted to direct staff to further investigate, pending resource allocations in future Commission operating plans, a number of options that staff indicated potentially may reduce third party testing consistent with assuring compliance.
See http://www.cpsc.gov/library/foia/ballot/ballot13/3rdparty.pdf.

4. **H.R. 2715 required the Commission to seek comments on ways to reduce third party testing costs and to issue new or revised testing regulations within one year - which was August 12. The Commission noticed a request for comment last November. Where is the Commission with respect to revising or issuing new testing regulations?**

On August 29, 2012, CPSC staff submitted to the Commission a briefing package, "Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products." On October 10, 2012, the Commission voted to direct staff to further investigate, pending resource allocations in future Commission operating plans, a number of options that staff indicated potentially may reduce third party

testing consistent with assuring compliance. *See* http://www.cpsc.gov/library/foia/ballot/ballot13/3rdparty.pdf.

5. **Has the CPSC considered allowing compliance with the European Toy Safety directive (EN-71) to be regarded as an acceptable demonstration of compliance with the US Toy Standard (ASTM F963)? If not, why not?**

   As part of the vote mentioned in response to your previous question, the Commission directed the staff, pending resource allocations in future Commission operating plans, to draft a Request for Information (RFI) for publication in the *Federal Register* to determine which, if any, tests in international standards are equivalent to tests in comparable CPSC-administered children' product safety rules. *See* http://www.cpsc.gov/library/foia/ballot/ballot13/3rdparty.pdf. The provisions of EN-71 would very likely be included within the scope of any undertaken RFI on this subject and would be considered accordingly.

6. **CPSC's periodic testing rule will take effect in February 2013. This rule will exponentially increase the testing, record keeping and other burdens imposed by the CPSIA. We ore aware that there has been a proposal to offer--free-of-charge for small businesses--privately developed software that could help enable compliance with this extremely complex new regulation. This would be very similar to the IRS "Free File" program, which makes available, free-of-charge, tax filing software for millions of moderate-income Americans every year.**

   a. **How does the Commission view such a program? Would such a program require Commission approval?**

      While nothing prohibits private companies that wish to offer such a service from doing so, the Commission cannot endorse a company's privately developed software. Because 15 software companies participate in the IRS "Free File" program, the government is not in the position of favoring a particular company in that instance.

   h. **Testing for phthalates is expensive, averaging between $300 and $500 per toy or product component. Last year the Commission, in an apparent attempt to reduce this hurden, excluded from testing "materials known not to contain phthalates." Has the Commission developed a list of such materials? If not, why not?**

      On August 17, 2009, the Commission published a notice of availability regarding a Statement of Policy (SOP) for testing component parts for phthalates (74 FR 41400). The SOP includes lists of materials that "do not normally contain phthalates and, therefore, might not require testing" for phthalates. The Statement of Policy is available at http://www.cpsc.gov/about/cpsia/componenttestingpolicy.pdf.

      On October 3, 2012, the Commission directed the staff, pending resource allocations in future operating plans, to explore certain opportunities to reduce third party testing costs consistent with assuring compliance. One of the nine activities approved by the

Commission is to research the feasibility of a list of materials determined not to contain prohibited phthalates. Another activity is to investigate the use of Fourier transform infrared spectroscopy to determine compliance to the phthalates content limit. The staff briefing package describing these activities is available at http://www.cpsc.gov/library/foia/foia12/brief/reduce3pt.pdf.

7. **Also with respect to phthalates, H.R. 2715 requires the Commission within one year after enactment to address inaccessibility, either by adopting the same guidance as applies to lead inaccessibility or by promulgating a rule providing new guidance for phthalates. What is the status of the Commission complying with H.R. 2715?**

   On July 31, 2012, the Commission published "Proposed Guidance on Inaccessible Component Parts of Children's Toys and Child Care Articles Containing Phthalates." 77 FR 45297. The comment period on the proposed guidance closed October 1, 2012. CPSC staff is currently in the process of reviewing the comments and developing a staff briefing package with proposd final guidance for the Commission's consideration.

8. **We have been told that the there was a staff effort to develop guidance on what products constitute a "toy." What is the status of that effort?**

   The Commission published staff draft guidance on which children's products constitute "toys" on Feb. 12, 2009. *See* http://www.cpsc.gov/about/cpsia/draftphthalatesguidance.pdf. The Commission has considered the possibility of publishing additional guidance but there are no plans for staff to send a new briefing package to the Commission at this time.

9. **The proliferation of conflicting product safety standards at the State level has become a significant issue for manufacturers and retailers. How does the CPSC plan to address this rapidly growing patchwork problem?**

   Several of the Commission's statutes contain explicit provisions concerning the federal preemption of state standards (*see, e.g.* section 26 of the Consumer Product Safety Act, section 18 of the Federal Hazardous Substances Act, section 16 of the Flammable Fabrics Act, and section 7 of the Poison Prevention Packaging Act). The CPSIA also added some provisions concerning preemption (for example, section 106(h) of the CPSIA regarding state toy standards). Whether any particular state product safety standard would be preempted by a particular CPSC standard would be a question for the courts in an individual case. A court would likely look to these statutory provisions in resolving such a question.

10. **The CPSIA requires that the CPSC issue accreditation requirements for test labs at least 90 days before a standard goes into effect. The publication of accreditation requirements triggers a 90-day clock at the end of which a manufacturer will be required to certify products to the standard based on third party testing. I understand that an updated version of the toy safety standard (ASTM F963-11) has gone into effect but the CPSC has yet to publish corresponding accreditation requirements.**

a. Is the Commission of the opinion that the deadline for issuing accreditation criteria does not apply if a standard is revised?

Staff has interpreted that the 90-day deadline stated in section 14(a)(3)(B)(6) of the CPSA does apply when the Commission issues accreditation criteria for revised standards, such as the now-mandatory standard ASTM F963-11. As of August 14, 2011, the Commission is required to follow the rulemaking procedures of the Administrative Procedure Act (5 U.S.C. § 553) to issue notices of requirements for accreditation of third party conformity assessment bodies. Accordingly, on May 24, 2012, the Commission published "Proposed Requirements Pertaining to Third Party Conformity Assessment Bodies." 77 FR 31086. That *Federal Register* notice included a proposed revision to the notice of requirements for the ASTM F963-11 revised standard. CPSC staff intends to forward to the Commission a draft final rule for "Requirements Pertaining to Third Party Conformity Assessment Bodies" before the end of this year.

b. If the Commission does intend to issue new accreditation criteria, will it also continue to recognize results from labs that were accredited under the prior version of the standard?

For those tests that are equivalent (unchanged), or are functionally equivalent in the older and newer versions of the standard, test results from testing laboratories accredited to the older version of the standard will be accepted for children's product certification purposes. For new tests that were not in the older version of the standard or for tests that were substantially changed, accreditation to the newer version of the standard will be required for test results to be accepted for children's product certification.

11. I understand that some manufacturers maintain that CPSC lacks jurisdiction over infant car seats, even if they can also be used outside of a vehicle, because they are "motor vehicle equipment" subject to the exclusive jurisdiction of the Department of Transportation. Does the Commission have a memorandum of understanding with DoT about this? Do you believe that it would be helpful for us to clarify the Commission's jurisdiction over child seats?

We do not have a memorandum of understanding with the Department of Transportation, but CPSC staff has been working with ASTM and representatives from the National Highway Traffic Safety Administration (NHTSA) to revise the hand held carrier standard. CPSC staff also intends to send the Commission a package proposing to make it a mandatory rule under section 104 of the CPSIA.

The hand held carrier standard focuses on injuries that occur when the carrier is used outside the vehicle as a carrier, infant seat, or attached to a stroller. However, because the product is dual-use, CPSC is careful not to recommend design or labeling changes that may impact the carrier's function as a car seat, or conflict with NHTSA's regulations. Car seats are, however, covered by the product registration card rule in section 104 of the CPSIA.

At the time the product registration card rule was proposed, we received comments from car seat manufacturers requesting that we harmonize our requirements with NHTSA in light of its program for car seat registration. As a result, we made some changes to the rule and discussed those changes in the preamble to the final rule. 74 FR 68668, 68671 (December 29, 2009). However, clarification of the Commission's jurisdiction of infant car seats used outside a motor vehicle would be helpful.

12. **One factor driving up the cost of third party testing is that different retailers often demand that testing be done by their own lab or one that they have special trust in. An individual test may cost $250, for example, but the manufacturer may need to have the same $250 test done by six different labs to satisfy all the different retailers. That adds up to a whopping $1500. Is this an area where the CPSC can help reduce costs?**

No. The scenario described above is an independent business relationship that a manufacturer has established with the retailer.

REGULATORY REVIEW

1. **Has the CPSC taken into consideration Executive Orders 13563 and 13579 in the rules it has enacted since these Executive Orders were issued? If not, why not?**

Executive Order 13579, "Regulation and Independent Regulatory Agencies" (E.O. 13579), focuses specifically on independent agencies. Section 1 of the Executive Order sets out a general policy for "wise regulatory decisions," noting that "[t]o the extent permitted by law, such decisions should be made only after consideration of their costs and benefits." It states that independent regulatory agencies should promote the goals, and to the extent permitted by law, comply with the provisions of Executive Order 13563, "Improving Regulation and Regulatory Review" (E.O. 13563). Except for rules that Congress has explicitly directed the Commission to issue under the CPSIA, the rules that the Commission has proposed or finalized since the President issued the Executive Orders follow the principles and policies set forth in E.O. 13579 and 13563. For rules required by the CPSIA, the Commission makes its decisions based on the considerations directed in that law.

2. **The Commission has now issued a number of mandatory standards for durable nursery products such as cribs. Those standards are exempt from some of the rulemaking requirements that usually apply to consumer product safety standards. Do you think that these durable nursery standards nevertheless impose the least burdensome requirements that adequately reduce the risk of injury?**

Because rules issued under section 104 of the CPSIA were specifically exempted by Congress from the procedures and findings required for rules issued under section 9 of the CPSA (codified at 15 U.S.C. §§ 2051–2089) and are statutorily required to provide the highest level of safety that is feasible, Commission staff has not done an analysis to determine whether these rules impose the least burdensome requirements that adequately reduce the risk of injury. I note, however, that most of the rules the Commission has issued

under this provision to date are substantially the same as the relevant voluntary standards for those products that are developed by the industry.

3. **Does CPSC have any authority to regulate bath salts when used for non-therapeutic purposes? Does it make any difference if there is proof that the manufacturer or seller is aware of the misuse? How can CPSC coordinate efforts with the Drug Enforcement Administration or the Food and Drug Administration to address the sale and consumption of synthetic chemicals found in household products, such as bath salts, K2 and spice?**

   The product you ask about goes by the street name "bath salts" because they are sold in powder form and may look like bath salts. However, they are in fact designer drugs that have effects similar to amphetamine and cocaine. Chemically, they are entirely different from actual bath salts. We do not consider these to be a household product under the regulatory authority of CPSC, but rather are drugs under the authority of the Drug Enforcement Administration. DEA provides a fact sheet concerning bath salts on its website (http://www.justice.gov/dea/druginfo/drug_data_sheets/Bath_Salts.pdf).

4. **In a recent Op-Ed you stated the CPSC would turn to tip-over issues in the coming months. Every year there are a few incidents involving kitchen ranges tipping when installers do not install the provided anti-tip brackets, the use of which is prescribed in most building codes. Tipover events can result in grievous harm, particularly to children or to the elderly. A number of these incidents occur in low income housing, including HUD-supported housing. Have you reached out to HUD on this issue? Would you consider establishing a joint initiative with HUD to require its employees and contractors to install anti-tip brackets in HUD-supported housing and to set up programs to check existing ranges for compliance?**

   In Fall of 2011, CPSC worked with the U.S. Department of Housing and Urban Development's (HUD) Healthy Homes Program to communicate CPSC information on tipover safety through HUD's newsletters. In 2013, CPSC will work to develop and implement an initiative with HUD, and possibly with retailers, aimed at installing anti-tipover devices on ranges in public housing.

5. **How often has the staff used the threat of a Commission press release under the public interest health and safety provision to encourage firms to agree to conduct a recall?**

   On three occasions, the Commission staff has determined the public health and safety required the release of safety information to the public and sought Commission approval for a release of such safety information to the public.

   a. **Has the CPSC instituted any procedural changes or given staff any guidance to guard against abuse of this tool of persuasion? If yes, please submit for the record copies of any such guidance or procedure documents. If no, please explain why the CPSC has not crafted such official staff guidance or procedure documents.**

The reasons for issuing a press release where the Commission has found that the public health and safety requires a lesser period of notice than set forth in section 6(b)(1) of the CPSA, and the circumstances where it may be appropriate to make such finding, are detailed in Commission regulations at 16 CFR 1101.23.

b. **When the CPSC decides to meet to consider issuing a press release under its public interest health and safety authority, does the Commission notify the relevant product manufacturer? If not, why not?**

If the Commission considers issuing a press release and making a public health and safety finding in that release, it does so pursuant to the requirements of section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055(b), which requires CPSC to provide notice to the manufacturer.

c. **Before issuing a press release under its public interest health and safety authority, does the Commission give the relevant manufacturers an opportunity to be heard or submit evidence? Does the Commission automatically receive all materials provided to the staff?**

If Commission staff recommends use of this authority, the Commission votes to issue a press release that makes a public health and safety finding, shortening the time period for disclosure. As part of the decision to make such a finding and shorten the section 6(b)(1) time periods, the Commission will receive the relevant information and background materials from staff.

d. **What factors does the Commission use to determine when a hearing under section 15 is appropriate versus use of a press release?**

Use of a press release to warn the public about a hazard does not inhibit the Commission staff's ability to also seek further notice and a remedy through an administrative proceeding under section 15 of the CPSA. In cases that present a significant risk of injury to the public, it may be beneficial to first provide a warning to the public about the hazard before the Commission staff is ready to commence with an administrative proceeding.

6. **The Commission's resources have roughly doubled since 2008 under the CPSIA. Despite the growth of the Commission and its budget, we repeatedly hear there are not enough resources to accomplish everything the Commission would like to accomplish.**

a. **How does the Commission prioritize investigations and enforcement matters? Do you prioritize those hazards that present the greatest risk to the greatest percentage of the population?**

Yes, the Commission prioritizes those hazards that present the greatest risk to the greatest percentage of the population. The Office of Compliance and Field Operations and the Office of Import Surveillence are responsible for enforcing mandatory rules and

requirements as well as the surveillance of consumer products on the market and at ports of entry to ensure that hazardous products do not enter the distribution chain. Enforcement of existing and newly mandated rules and targeted surveillance activities allow for a multidisciplinary approach to enforcement. Identifying those products that present a risk (in an effort to be more preventive than reactive) through review of incident reports, trade complaints and other information sources requires close and constant interaction with technical and epidemiological staff.

b. How does the Commission identify those hazards? Is the CPSC using data-driven, fact-based analysis, or is the Commission following something more like the precautionary principle?

CPSC collects data from a variety of data sources to aid in the identification of hazards associated with the use of consumer products. This data is used to identify hazards and develop appropriate mitigation strategies. The Commission applies the criteria in 16 CFR 1009.8(c) to establish Commission priorities.

7. Over the last 10 years, the number of traffic fatalities and injuries has declined significantly. In fact, the most recent data from the National Highway Traffic Safety Administration (NHTSA) shows traffic fatality rates at a 60-year low. Part of this may be attributable to the sluggish economy, but there have been significant advancements in safety, too. How do the injury and fatality statistics for CPSC compare? Are deaths and injuries relating to consumer products declining significantly also?

A significant decline in reported consumer product-related deaths and estimated injuries in the past ten years does not appear evident in available data. The age-adjusted consumer product-related rates of deaths and injuries have increased in the most recent decade for which data are available. However, the CPSC's work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters, and household chemicals—has contributed to a decline in rate of deaths and injuries associated with consumer products over the past 40 years.

8. In working with voluntary standard organizations, the CPSC staff often provides incident data, including its own in-depth investigations of incidents, to help inform the process.

a. How meaningful are these anecdotal data?

Anecdotal incident data provide a meaningful minimum number of known incidents. What is unknown is the degree to which this might understate the actual number of incidents that occurred nationally.

The value in the anecdotal data comes from the detailed descriptions of the hazard scenarios that they can provide. In particular, through in-depth investigations, staff can obtain answers to important questions that normally are not included in media reports, death certificates, or the CPSC's National Electronic Injury Surveillance System

(NEISS) cases that are coded from medical records. Collection of anecdotal incident data also accelerates staff's awareness of fatal incidents as the lag for reporting via death certificates differs by state. It should also be noted that not all data used by CPSC is anecdotal. NEISS, for example, is a national probability survey that supports national estimates of consumer product-related injuries seen in U.S. hospital emergency facilities.

b. If the data are not statistically representative of a problem, why do the standards need to address the problem?

If even the minimum number of known incidents is suggestive of an unreasonable risk to public safety, then it is our duty to address these risks. The greater concern might actually be how many incidents are occurring that are not reported.

c. Does it mean that the standards are protecting against problems that are rare, making the products more expensive than they need to be?

No. Our evidence based standards take into consideration the severity of injury and the addressability of the hazard that are suggestive of an ongoing risk to public safety. The general limitation of our anecdotal incident data is the degree to which it understates the actual occurrence of serious incidents.

d. Do you think a standard should protect against every risk that has ever happened, no matter how rare? If not, how do you determine when the standard should guard against a risk and when it is unnecessary to do so?

As a matter of public record, you will not find a statement from CPSC staff or the Commission stating that standards should protect against every risk that has ever happened no matter how rare. Standards development involves a multidisciplinary team that conducts not only a review of reported incidents but often includes testing and research on the products, input from health and behavioral scientists, and economic assessments of the potential costs to manufacturers and importers of proposed standards. The general concern lies with the likelihood of *future* occurrence and the potential severity of these incidents. The Commission must determine which risk areas of public safety to address in a given year, with our limited resources, and prioritize accordingly.

9. According to an October 2011 CPSC memo available on the Commission's website, both total injuries and injury rates to children from toys have increased during the period from 2006-2010, which covers the period since the CPSIA was enacted providing the CPSC new authorities and additional resources. While more injuries may not be indicative of defective or unsafe products, can you explain why the injury rate is increasing?

The October 2011 Toy-Related Deaths and Injuries Calendar Year 2010 report (http://www.cpsc.gov/library/toymemo10.pdf) showed an increase in the estimated number

of toy-related emergency department treated injuries for all ages and for children younger than 15 years of age and younger than five years of age. However, neither the five year trend since 2006 nor the year over year comparison between 2009 and 2010 indicates that the increases ares statistically significant. While the estimated injuries appear to increase, Commission staff cannot rule out that the apparent differences observed in the estimates are attributable to random variation. Therefore, because Commission staff cannot establish that a true change has occurred, any attempts to pinpoint causal factors would be speculative.

10. The largest manufacturer of portable gas cans recently declared bankruptcy, due mostly to questionable liability suits. As a result, there may be a shortage of new gas cans manufactured in the U.S., but people will still need to fuel their lawn mowers and deliver gas to vehicles on the side of the road. It is a distinct possibility that people will return to using milk jugs or other inappropriate containers that can lead to very serious harm. Is there anything the CPSC can do to head off this grave problem? Do you require any additional authority to act?

I do not believe there is any need for action from the CPSC with regard to this company's filing for bankruptcy. According to the company's website, it filed for reorganization under Chapter 11 of the Bankruptcy Code this past summer, has been continuing as an ongoing concern while in Chapter 11, and, as the company's Q&A on its website states: "It is business as usual." *See* http://www.blitzusa.com/chapter11/Customer%20Q&A%20FINAL%20110811.pdf.

More recently, news reports indicate that another company has bought the manufacturing plant and plans to resume manufacturing gas cans there. *See* http://www.tulsaworld.com/business/article.aspx?subjectid=461&articleid=20120915_461_E1_MIAMIO656046.

11. Last September, the Commission voted to reverse its April 2010 interpretive rule on the term "unblockable drain" as used in the Pool and Spa Safety Act. The CPSC apparently determined that certain drain covers were insufficient to comply with the law, requiring any public pool owner/operator – including state and local governments - to install an additional backup drain system at considerable additional expense.

a. How many times has the CPSC called for a vote to switch a previous Commission vote?

While I am not able to provide an exact count, occasionally the Commission changes a previous vote. For example, the Commission has sometimes voted to initiate rulemaking and later decided to terminate the rulemaking. In 1988, the Commission published an advance notice of proposed rulemaking (ANPR) to enlarge the dimensions of the small parts cylinder used to evaluate whether toys or other articles intended for children under three years of age contain small parts. 53 FR 20865. In 1990, the Commission voted to terminate the rulemaking. 55 FR 26076. In 1985, the Commission published an ANPR concerning all-terrain vehicles (ATVs). 50 FR 23139. In 1991, the Commission voted to terminate that rulemaking. 56 FR 47166. In 1994, the

Commission published an ANPR to amend the baby walker standard. 59 FR 39306. In 2002, the Commission terminated that rulemaking. 67 FR 31165.

b. Did the Commission seek legal advice as to whether there should be notice and comment prior to reconsidering the interpretation? If yes, please provide a copy of such advice for the record.

Any memorandum containing legal advice to the Commission is confidential and protected from disclosure by the deliberative process attorney client privileges. The Commission has not waived its privileges to disclose the contents of any legal memorandum, and we would respectfully suggest that providing any such memo in response to a request where it will be included on the public record would waive the privilege.

c. After reconsideration, the CPSC established May 28, 2012 as the new compliance deadline. Does that remain the official compliance deadline? How many pools are currently compliant with the CPSC's revised determination?

The compliance date for facilities that relied on the Commission's interpretive rule for unblockable drains and installed large, compliant, unblockable drain covers over smaller outlets (sumps) was extended and noticed in the *Federal Register* by the Commission on May 24, 2012. The new compliance date is May 23, 2013.

Staff is still reviewing files to identify previously compliant facilities that used unblockable drain covers in the manner defined by the interpretive rule. Staff has conducted almost 6,200 inspections and has found approximately 100 facilities that would no longer be considered compliant based on the revocation of the interpretative rule.

d. Please provide for the record an estimate of how much pool owners and operators spent on unblockable drain covers to comply with the original interpretation. Please also provide for the record an estimate how much more will those same pool owners and operators have spent or need to spend on modifications to comply after CPSC's about face.

CPSC staff does not have the necessary data available to provide such an estimate.

12. There were a number of media reports in July reporting the CPSC had filed a lawsuit against the makers of "Buckyballs." At the hearing, you testified that the case would be heard by an administrative law judge. Vice Chairman Blackburn inquired from where the administrative law judge would be selected. In response, you replied from "Washington, D.C., probably, or it might be in Maryland."

a. From which agency will the administrative law judge be borrowed? Does the CPSC specify from which agency they would like to borrow an administrative law judge? Does the CPSC specify any particular criteria such as background or

expertise when it requests an administrative law judge? If yes, please detail your request (agency or particular criteria) for the record.

The Commission staff did not specify from which agency it wanted to borrow an administrative law judge. The Commission staff was notified by the Office of Personnel Management that the administrative law judge would be loaned from the U.S. Coast Guard. The Acting Chief of Administrative Law Judges for the Coast Guard selected the judge(s) to be loaned to the Commission in this matter.

b. **In recent years, the lawyers of the Compliance staff have been transferred en masse to the Office of the General Counsel. The one exception was the head of the Office of Compliance, who must by law, be an attorney. Recently, however, the head of Compliance was also transferred to the Office of General Counsel. What steps is the Commission taking to ensure appropriate segregation of the attorneys prosecuting the case from those that must advise the Commission?**

The position of Director, Office of Compliance and Field Operations was not transferred to the Office of General Counsel but instead continues to report to the Deputy Executive Director, Safety Operations. It should also be noted that the former Director, Office of Compliance and Field Operations requested reassignment to the Office of General Counsel thus vacating the position of Director, Office of Compliance and Field Operations.

The former head of Compliance and Field Operations is an attorney in the Regulatory Affairs Division of the Office of the General Counsel and is not advising the Commission on the Buckyballs litigation. The Office of General Counsel maintains a separation of functions in which attorneys prosecuting the action will not be advising the Commission. *See* 16 C.F.R. 1025.68.

c. **Why was the complaint in the Buckyballs matter signed by the Executive Director of the agency? Doesn't that associate him with the prosecution of the case such that he will have to be separated from the Commission too?**

The Acting Director of Compliance and Field Operations is recused as a matter of law from participating in this matter. Because there is no person occupying the position of Assistant Executive Director for Compliance and Field Operations and the Acting Director is recused by law, a majority of the Commission agreed to have the Executive Director sign the complaint. The Executive Director does not render a decision in an adjudicative proceeding and does not advise officials who render such decisions, as explained in Commission regulations at 16 C.F.R. 1025.68.

The Honorable Charles F. Bass

1. **I'm aware that there is a proposed ruling to allow use of X-Ray Fluorescence (XRF) to certify products as lead free. It's my understanding that there are multiple XRF**

techniques, including handheld XRF and so-called HD XRF. It appears from the proposed rule that both techniques would be acceptable, but can you confirm to the committee that the rule will enable use of both the widely-accepted handheld XRF techniques which are deployed across the supply chain, as well as the emerging HD XRF methods?

The "Proposed Rule: Requirements Pertaining to Third Party Conformity Assessment Bodies" includes provisions to widen the use of both "HD XRF" (a common shorthand for Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams, as described in ASTM F2853-10e1) as well as "handheld" XRF (more generically known as Energy Dispersive X-Ray Fluorescence Spectrometry, as described in ASTM F2617-08) for third party testing for certification. These provisions would enable the use of either type of XRF, with limitations as described in the proposed rule, for measuring lead in homogeneous metals, glass, crystals and other materials. This proposed rule would not widen the use of "handheld" XRF to include determinations of lead in painted surfaces of consumer products because at present no XRF method is available other than HD XRF (ASTM F2853-10e1) for determining compliance to 16 CFR part 1303 for painted surfaces on children's products with respect to the limit of 0.009 percent lead by weight.

2. **Knowing that one of the priorities of the CPSC is to increase public awareness around the dangers of carbon monoxide poisoning, would you please share with the Committee what activities the Commission is currently undertaking?**

Prevention of carbon monoxide poisoning deaths and injuries caused by consumer products is a key priority for the CPSC. To comprehensively address this hazard, the Commission has taken a two-pronged approach that focuses on both product innovation and consumer outreach and education.

On the product innovation side, CPSC staff has focused a great deal of effort on reducing carbon monoxide poisoning deaths from portable gasoline generators. In just the three year period from 2006 to 2008, there were an estimated 233 non-fire carbon monoxide poisoning deaths to consumers associated with the use of portable gasoline-powered generators in the United States. In September of this year, CPSC staff released a report detailing the development and demonstration of a prototype portable generator that can dramatically reduce carbon monoxide (CO) emissions from certain common portable gasoline-powered generators. When the prototype was tested in the common fatal scenario of a generator operating in the attached garage of a single family home, health effects modeling performed on the results showed that the prototype increased the hypothetical garage occupant's escape time interval to 96 minutes compared to only eight minutes provided by the original, unmodified unit. A copy of this report may be found on the CPSC website. (http://www.cpsc.gov/LIBRARY/FOIA/FOIA12/os/portgen.pdf)

CPSC also engages in robust education and outreach using a variety of outlets. The Commission communicates the dangers of carbon monoxide poisoning through the use of earned media, conducting television, radio and print interviews most often as rapid response in conjunction with major, power-disrupting storms such as hurricanes and snow storms,

when greater use of generators exposes more people to the hazard. We also use social media outreach, e-publication downloads from the dedicated CO Information Center page on CPSC.gov and the distribution of messages to grassroots partners through our Neighborhood Safety Network. Twice a year CPSC issues reminders to install fresh batteries in CO and smoke alarms in conjunction with daylight savings time.

In addition, CPSC has used its OnSafety blog, YouTube, Twitter and its FireSafety.gov website to promote new developments in technology including making CO alarms more effective and, this year, new developments in reducing CO emissions in generators. These efforts have resulted in an estimated audience impression of more than 100 million people during FY2012. This year, Congressional District offices in areas generally impacted by hurricane season were provided CO informational safety packets to share with their constituents. This information is also posted to the CPSC's website. Field staff has also provided Congressional offices with informational materials in the wake of severe weather events causing power outages. As the winter season approaches, CPSC will continue to promote CO awareness by warning consumers of dangers associated with home heating equipment. During FY2013, CPSC will also begin staging a second CO Poster contest for school children that became the most popular contest on Challenge.gov when first held.

The Honorable Greg Harper

1. **Chairman Tenenbaum, I was pleased to read your op-ed in The Hill last week where you indicated that you are taking a more collaborative approach with the window covering industry regarding cord safety. I am further pleased that you have spent the time visiting manufacturing facilities to better understand the difficulties in eliminating cords for all products. Can you tell me, without revealing any proprietary information, about these visits and what you learned? How are you proposing to move forward from here?**

Commission staff has recently participated in several meetings with the Window Covering Manufacturers Association (WCMA) and individual members. In addition, I traveled this past summer to personally meet with the leadership of several manufacturers and to tour their production facilities. During these meetings, we discussed the types of window covering products currently on the market, as well as individual manufacturer efforts to redesign window coverings to eliminate or substantially reduce the strangulation hazard posed by some corded window coverings.

Overall, my discussions during these visits were positive and indicate a willingness to work together towards consensus solutions. It is my hope that we can use these discussions as a springboard to work cooperatively to meaningfully improve consumer awareness of the strangulation risk corded window covering products can pose to young children, as well as resolve outstanding concerns regarding the current WCMA window covering safety standard to address the stragulations risk from corded window coverings.

2. **Chairman Tenenbaum, I am a big supporter of promoting government and industry cooperation. I think it is important for both to understand the need for safety and how best to achieve the safest product possible. You also discussed in your op-ed your efforts to better educate the consumer. With this in mind can you tell me about your plans for the rest of this year and next with the Window Covering Safety Council and your efforts to educate new parents about potential hazards to children associated with window coverings?**

   CPSC has again partnered with the Window Covering Safety Council to jointly launch safety messaging during Window Covering Safety Month in October 2012. This year's collaborative efforts included my participation in the Council's public service announcement and a statement for its media release. CPSC has also tweeted safety messages, direct responses to consumers' questions, and links to reference materials during the October 9, 2012, #Cord Safety Twitter party hosted by the Window Covering Safety Council. In addition, a newly launched window covering safety information center on CPSC's website promotes repair kits offered by the Window Covering Safety Council along with other information.

   a. **Can you tell us more about the CPSC's collaborative programs with the Council?**

      Please see previous answer.

   b. **Aren't promoting education and raising awareness some of the best tools the Consumer Product Safety Commission has in its arsenal?**

      Promoting education and raising awareness is part of our comprehensive effort, along with enhancing voluntary standards, encouraging technologocial safety innovations,and ongoing compliance initiatives designed to ensure the highest level of protection for children. Identifying and addressing the most pressing consumer product safety priorities, working with stakeholders to build safety into products, timely and accurate detection of risks, and quick response to remove hazards, all work with our goal of raising awareness to reduce product-related deaths and injuries.

<u>The Honorable Brett Guthrie</u>

1. **As you know, the power tools industry developed a revised set of voluntary safety standards in November of 2007 for table saws. Products using those new standards were introduced to the marketplace thereafter and were required to meet those standards beginning in early 2010. That voluntary standard was enhanced in October of 2011 with improved performance standards under a broader set of cutting conditions.**

   a. **Is it accurate that the CPSC had not collected any data from the current products that are compliant with the current voluntary standards, and that the CPSC based**

its advanced notice of proposed rulemaking for a mandatory rule on data from older, noncompliant saws?

The Commission published an advance notice of proposed rulemaking (ANPR) concerning table saw blade injuries on October 11, 2011. 76 FR 62678. The voluntary standard was revised in October 2011. Thus, incident data reflecting the new voluntary standard is not yet available for the staff to review. Any subsequent steps in the rulemaking that the Commission decides to pursue (notice of proposed rulemaking and final rule) would include a review of data available at those stages.

b. Is CPSC now collecting more up-to-date information on accidents incurred under the 2007 voluntary standard for table saws?

CPSC staff continuously receives reports related to consumer products through various means, including news clippings, death certificates, and consumer submitted reports. Table saw-related incident reports are reviewed by CPSC staff to leverage any information available. These reports are anecdotal and may or may not be related to a table saw that is compliant under the 2007 voluntary standard. CPSC staff also collects emergency department-treated injury data via the National Electronic Injury Surveillance System (NEISS).

Though this system does collect information about table saws, it is not possible to differentiate pre- and post-2007 voluntary standard-compliant saws within the data. A special study would be required to gather this level of detail—similar to the special study that was performed on stationary saws in 2007-2008. Another study of this nature is not planned for table saws. However, CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard.

c. If so, will this data be weighed equally when considering a proposed mandatory safety standard for table saws?

The data that CPSC staff will be collecting is from a convenience sample of new table saw users who will be recruited to participate in the study. This study will not be in the same form as the previous table saw injury study, and it cannot be used in the same manner. CPSC staff's goal in collecting this data is to better understand if and how consumers are using the modular blade guard system that is part of the current voluntary standard. This information will be used along with additional information collected to guide CPSC's staff recommendations during the rulemaking process. In addition to the information gathered from this study, CPSC staff will consider any and all other relevant incident data that is available when it considers a possible proposed standard for table saws.

2. Doesn't the CPSC need to gather data on the <u>compliant</u> saws using the current voluntary standard before you can move forward with a mandatory standard? As I understand it, the CPSC is statutorily directed to rely on voluntary standards over a

mandatory standard as long as "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." (15 U.S.C. § 2056(b))

The CPSC must consider the adequacy of, and level of compliance with, applicable voluntary standards before it can issue a final mandatory consumer product safety standard for a product. CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard. This will aid staff in determining whether the current voluntary standard would eliminate or adequately reduce the risk of injury addressed. The study will be completed prior to the issuance of any final mandatory rule.

a. **How would the CPSC be able to judge the risk of injury under, and substantial compliance with, the new voluntary standards if you have not collected and analyzed data on the table saws using those standards?**

   The ANPR is the beginning of the rulemaking process. As the rulemaking progresses, the CPSC will collect and analyze the data that become available, including compliance with any applicable voluntary standards. Prior to the issuance of any final mandatory rule, CPSC staff will complete an analysis of the effectiveness of current voluntary standards.

3. **Following up on the CPSC advanced notice of proposed rulemaking for table saws, one of the main options CPSC asks for comments on for a mandatory rule is a patented technology, owned and controlled by one company, based on blade contact flesh detection technology. I understand it was this company's CEO who originally petitioned the CPSC to consider rulemaking in this area.**

   a. **Is CPSC aware that the Federal Trade Commission recently testified before Congress raising concerns about a patent holder using adopted standards to demand higher royalties or licensing fees as result of a standard? The FTC testimony noted that "[i]ncorporating patented technologies into standards has the potential to distort competition by enabling [standard essential patent] owners to use the leverage they acquire as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand." (http://www.ftc.gov/os/testimony/120711standardpatents.pdf)**

      The ANPR presented three regulatory alternatives to address table saw blade contact injuries: (1) a voluntary standard, (2) a mandatory rule with performance requirements, and (3) a labeling rule specifying warnings and instructions. The Commission has not determined which, if any, option to pursue. We note that section 7 of the CPSA requires the Commission to express any mandatory consumer product safety standard in terms of performance requirements, rather than mandating any particular design.

b. **Are you concerned that a single patent holder, such as the single patent holder in possession of flesh detection technology for table saws, could demand higher royalties or refuse to license on reasonable and non-discriminatory terms if their patented technology is incorporated into a mandatory standard? Does the CPSC share the FTC's concern about incorporating patented technologies into standards?**

Please see the previous answer.

The Honorable Pete Olson

1. **I understand that the Commission has spent $566,360.00 on a contractor by the name of SEA Ltd. to conduct testing of ROVs and that SEA issued a report about its initial work in April 2011. Despite multiple requests from the Recreational Off-Highway Vehicle Association and its member companies to meet with SEA and to learn more about its work and despite the fact that industry has initiated several meetings with CPSC to share information and discuss the issues, CPSC waited 15 months to hold a meeting between SEA and industry, and that meeting finally occurred just a few weeks ago. Is withholding information and access to CPSC consultants funded at taxpayer expense your idea of government transparency? How do you expect industry to be responsive to CPSC's positions when you withhold critical information from it?**

The CPSC has maintained openness throughout this process and has not withheld information collected by SEA Ltd. In April 2011, CPSC staff published a 494 page report with SEA's test methodology and test results on nine recreational off-highway vehicles (ROVs) of different makes and models. The vehicles were tested between May 3, 2010, and October 12, 2010. The six months between the completion of testing and publication of the data involved analysis of the data, drafting a final report, and agency clearance to publish documents. In August 2011, CPSC staff published additional results for a tenth vehicle that was tested in May 2011. Furthermore, in July 2012, CPSC staff hosted a public meeting to allow SEA to present its data and to answer questions from ROHVA.

The CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process.

2. **I understand that, while industry was waiting for 15 months to get more information about SEA's work, ROHVA proactively conducted extensive testing on its own to evaluate the testing approach described in the SEA report. During the long overdue meeting, I understand that SEA revealed details regarding its testing methodology that had not been previously disclosed, which may require ROHVA to conduct more testing to effectively evaluate the SEA testing approach. Extensive time and resources were wasted as a result of CPSC's failure to disclose information about its contractor's work. I understand that SEA also has conducted other testing for CPSC that still has not been disclosed to ROHVA. Will you commit to providing timely and complete disclosure of**

all information regarding the work of CPSC contractors with respect to ROVs and to change course and work collaboratively with industry to promote safety?

As noted above, in April 2011, CPSC staff published a 494 page report with SEA's test methodology and test results on nine recreational off-highway vehicles (ROVs) of different makes and models. The vehicles were tested between May 3, 2010, and October 12, 2010. The six months between the completion of testing and publication of the data involved analysis of the data, drafting a final report, and agency clearance to publish documents. In August 2011, CPSC staff published additional results for a tenth vehicle that was tested in May 2011. In July 2012, CPSC staff hosted a public meeting to allow SEA to present its data and to answer questions from ROHVA.

CPSC staff has not received any reports with test methodology or test results from ROHVA on any of the testing it has performed. In public meetings with the CPSC, ROHVA has only presented slides with selective data. In addition, CPSC staff believes that the limited data that ROHVA has provided is based on an incorrect formula to calculate a key value. For reasons unknown, ROHVA did not use the correct formula used by the National Highway Traffic Safety Administration (NHTSA), by SEA, and by ROHVA's own voluntary standard (ANSI/ROHVA 1-2011).

I note again that CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process.

3. **I assume you would agree that a pass-fail test must be reproducible from one lab to another and that the government cannot mandate that all testing be conducted by a single entity at a single facility. Has CPSC or its contractors conducted any testing to determine whether its pass-fail test methodology and results are reproducible at facilities other than the one SEA used?**

CPSC staff agrees that a pass-fail test must include a protocol that is repeatable and can be performed by any qualified test facility. The ANPR for ROVs began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. As part of the ongoing rulemaking effort on ROVs, CPSC staff has performed standard vehicle dynamics tests that have been developed by NHTSA to gather information on the dynamic characteristics of these vehicles. If and when requirements are finalized, they will include performance requirements that can be tested with a protocol that is repeatable and can be tested by any qualified test facility.

4. **Has the CPSC attempted to establish a correlation between vehicle characteristics that will be dictated by its proposed tests and standards and the incidents that you say you are trying to prevent? What were the results of the correlation analyses? Do you intend to move forward with a mandatory standard in the absence of evidence of such a correlation?**

The CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs) on October 28, 2009, 74 FR 55495. The ANPR

began a rulemaking process, one result of which could be a mandatory standard for ROVs. CPSC staff is assessing public comments received in response to the ANPR and is evaluating other relevant data and information to develop a staff briefing package for the Commission. The Commission will consider the staff's briefing package when determining whether to issue a notice of proposed rulemaking (NPR).

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. This analysis will be part of the staff's briefing package for a possible NPR. If the Commission decides to issue an NPR, the public would have another opportunity to comment, staff would prepare a briefing package with all relevant data and information concerning a possible final rule, and at that point the Commission would decide whether to publish a final rule.

5. **I understand that in the early 1990s CPSC conducted a multi-disciplinary study of ATV incidents to determine the causes of crashes, but that CPSC has not conducted such a study of ROV incidents. Since CPSC has not conducted such a study, ROHVA again proactively conducted its own multi-disciplinary study of ROV incidents. In November 2011, ROHVA presented its analysis to CPSC staff that concluded the testing standards in dispute would have had absolutely no impact on the occurrence of at least 90% of serious incidents. Does CPSC have any evidence that contradicts ROHVA's finding?**

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. Using the results of this analysis, CPSC staff is working to create standards that would reduce these identified hazard patterns.

6. **Has CPSC done any analyses comparing the relative safety of ROVs that existed when CPSC issued its ANPR in 2009, ROVs that conform to the current voluntary standard, and ROVs that would conform to CPSC staff's proposed mandatory standard?**

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs). 74 FR 55495. The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. CPSC staff has not completed the rulemaking effort on ROVs and has no current proposed mandatory standard.

The ROVs that existed when CPSC issued its ANPR in 2009 meet almost all the requirements in the current voluntary standard.

7. **I understand that federal law reserves mandatory standards for those products where industry fails to develop voluntary standards to prevent unreasonable risks of injury. If that is the case, why would CPSC move forward with a mandatory ROV standard when industry has been proactive in developing standards and has tried repeatedly to work with your agency? If CPSC believes that the current voluntary standard does not**

adequately address unreasonable risk of injury related to ROV use, what exactly is inadequate about the voluntary standard? What data does CPSC have to support its claim that those aspects of the voluntary standard are inadequate?

As stated above, the CPSC published an ANPR in 2009 that discussed a voluntary standard, as well as a mandatory standard, as regulatory options. Before the Commission could issue a final mandatory rule in the proceeding it would need to determine that either (1) the voluntary standard is not likely to result in the elimination or adequate reduction in the risk of injury, or (2) it is unlikely there will be substantial compliance with the voluntary standard. At this point, the Commission has only issued an ANPR and has not made any determinations about the adequacy of the voluntary standard.

CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process. CPSC staff's comment letter to ROHVA dated March 10, 2011, summarizes CPSC staff's concerns with the voluntary standard in the areas of lateral stability, vehicle handling, and occupant protection. (A copy of the letter is available at http://www.cpsc.gov/volstd/atv/commcanvass03102111.pdf.)

The Honorable Mike Pompeo

1. ***Database/ Facebook / 6(b)***

What is the status of the lawsuit brought against the CPSC last year by anonymous companies over the agency's botched interpretation of the database language in the Consumer Product Safety Improvement Act of 2008? Would you please notify the subcommittee and my office as soon as there are further developments in that case?

CPSC was sued by a single anonymous company, Company Doe, as reflected in the publicly available docket for the case (Case No. 11-2958, D. Md.). A redacted version of the decision in the case, dated July 31, 2012, was posted on PACER on October 22, 2012. The portions of the case not on the public docket are under seal and CPSC cannot comment further.

On September 28, 2012, the government filed a notice of appeal at the district court as shown on the publicly available docket for the U.S. Court of Appeals for the Fourth Circuit, docket number 12-2210. The agency cannot comment beyond what is available on the public docket because the case is under seal.

Has the court decided whether the agency misinterpreted the statute, as the companies claimed—and as I believe?

A redacted version of the decision in the case, dated July 31, 2012, was posted on PACER on October 22, 2012. The case is under seal and the Commission cannot comment on the decision beyond what is in the redacted version of the decision.

In your written testimony you stated: "I think SaferProducts.gov has gained wide approval and acceptance." How can you say that in the face of a lawsuit by industry? How many regulations issued by CPSC in the last 5 years have led to lawsuits? Doesn't the presence of a lawsuit tend to argue against the idea that the database has gained wide approval and acceptance?

The lawsuit involves one single anonymous company and a singular report, not a lawsuit by industry. With more than 11,000 reports of harm or potential harm publicly posted to date, the SaferProducts.gov consumer database continues to serve as a vital safety tool for use by parents, doctors, emergency responders, and consumers across the country to alert the public to potentially hazardous products. None of the underlying regulations the Commission has issued in the last five years, including the database rule, has been challenged in court. No party has sought judicial review of any regulation issued during that time period.

In your oral testimony, you indicated that if the federal court rules against the CPSC in the pending database lawsuit, the agency will not pledge to immediately take down the database that was constructed in violation of the statute. Why not? Please explain what remedy you believe would be appropriate, what remedy the plaintiffs are seeking, and what remedy the agency's professional staff recommends in the event that the agency loses the lawsuit.

Section 6A of the CPSA requires the Commission to maintain the publicly available database, and by law the Commission may not take it down. The recent decision concerning one incident reported to the SaferProducts.gov consumer database does nothing to change the agency's statutory mandate and enduring commitment to provide the public with a timely and searchable database containing reports of harm relating to the use of consumer products. Consistent with the remedy set forth by the decision, the Commission did not post the individual report.

Is the agency still considering starting a Facebook page that would violate the requirements Congress has put in place for any kind of public database?

I believe that the CPSC has the authority to provide the public with product safety information through the use of Facebook—a free resource with almost one billion followers that almost all other federal agencies already use. Furthermore, I believe that using Facebook will allow CPSC to reach new audiences with critical information that will save lives and prevent injuries. However, I plan to further study this subject prior to deciding whether to authorize the CPSC's Office of Communications to use Facebook as an additional means to distribute critical consumer product safety information.

I am told that the agency is refusing to accept appeals over material inaccuracies. If true, why?

Section 6A(c)(4) of the CPSA, 15 U.S.C. § 2055a(c)(4), sets forth Commission procedures for determining claims of material inaccuracy for reports of harm or comments that are

submitted to CPSC. No provisions of the CPSA or Commission regulations provide for appeals of Commission determinations regarding claims of material inaccuracy.

I am told that the agency does not remove duplicate references on the database to the same underlying incident. If that is true, why not?

We do not publish two reports that are exactly the same. When we do publish two different reports that are about the same incident we link them. Linked reports are displayed in the database as "associated reports" and count as a single report in search results.

2. ***Phthalates/ testing lab irregularity***

We have heard from manufacturers that they frequently experience instances where products pass lead or phthalates tests at one laboratory and fail at another laboratory.

Apart from the testing costs themselves, costs of these failures to the manufacturer include, among others: 1) costs of removal from store shelves, 2) costs of destroying failed products, 3) costs of reformulating products, and 4) costs of notifying CPSC because the products are non-compliant.

CPSC has been asked repeatedly to issue a clear statement on statistical uncertainty with regard to testing results. Some industry groups have said that addressing statistical uncertainty bands for laboratory test results to deal with the known problem of inter-laboratory variability may be the single most important action CPSC could take to help reduce costs associated with CPSIA testing and certification requirements. When and how does the Commission plan to address this concern? Why has the agency thus far refused to establish statistical variability parameters?

Perhaps some industry groups are unaware that there are many international guidelines in use that deal with the issue of measurement uncertainty. These include documents such as the ISO Guide to the Expression of Uncertainty in Measurement; the EURACHEM/CITAC Guide: Use of uncertainty information in compliance assessment; ASME B89.7.3.1-2001, Guidelines for Decision Rules: Considering measurement uncertainty in determining conformance to specification; and ILAC-G8:03/2009, Guidelines on the reporting of compliance with specification.

Current ILAC guidelines, which are consistent with the other international guidelines, and ISO/IEC 17025 clearly address the matter of statistical uncertainty and how testing labs should give appropriate consideration to measurement uncertainty when assessing compliance with specification. These requirements ensure the specification limit mandated by Congress, for both lead and phthalates, is not breached by the measurement result plus the expanded uncertainty.

CPSC methods require testing Certified Reference Materials (CRMs) that closely match the material of the tested product, along with samples, to verify the test method. CPSC methods require the results for the CRMs yield relative standard deviations well within

±20 percent. CPSC staff experience is that this is easily achieved for these well characterized materials.

In some cases, firms may be referring to measurement uncertainty where material variability is actually the driving factor for differences seen between laboratories as different samples are tested and different results are obtained.

3. *Third Party Testing Relief*

When this Congress passed H.R. 2715 last year, it gave the CPSC authority to take steps to reduce the costs of complying with the CPSIA—and particularly the costs of third party testing. Did the agency's professional staff recommend issuing the third party testing rule despite H.R. 2715? Or did the staff recommend making adjustments to the rule and/or seeking additional public comment before issuing the rule in the wake of H.R. 2715? If the agency's professional staff recommended that the third party testing rule be revised to take advantage of the authority given in H.R. 2715, what recommendations for further relief did the staff offer that the Commission declined to accept?

The agency's professional staff did not recommend issuing the rule at that time. However, at the time the recommendation was made to repropose the rule, staff did not have recommendations for further relief developed.

In H.R. 2715 Congress gave you the authority to address the exorbitant cost of third party testing. Based on our directive and your existing authority, do you have sufficient authority to solve the third party testing cost problem? Why has more relief not been granted even though Congress acted to enable it? Do you believe the agency is prevented from granting further relief? If so, what legal changes are needed to enable further relief from third party testing costs? Where exactly are you barred from providing relief?

Based on the language of H.R. 2715, the staff developed a set of recommended potential opportunities for Commission consideration regarding reducing third party testing costs consistent with assuring compliance. Fifteen of the sixteen recommended opportunities did not require additional authority to be granted to the Commission.

The Request for Comments was published in the *Federal Register* on November 8, 2011. *See* http://www.cpsc.gov/businfo/fmotices/fr12/3ptreduce.pdf. After the comment period ended, the professional staff considered the comments and conducted its own examination of the testing and labeling (16 CFR part 1107) and component part testing (16 CFR part 1109) rules. Within one year of the passage of H.R. 2715, the project team completed its work and presented to the Commission a set of recommended opportunities for third party testing burden reduction consistent with assuring compliance. As noted, the Commission recently voted, pending resource allocations in future operating plans, to direct the staff to pursue nine of the actions it had identified. The staff will proceed with that direction pursuant to Commission direction in subsequent operating plans.

I believe the Commission lacks the authority to implement one of the staff recommended opportunities regarding the use of process certification techniques for children's product certification purposes. Section 14 of the CPSA requires third party testing for children's product certification, material change, and periodic testing. All of the tests in the applicable children's product testing rules require third party conformity assessment body testing. The statute does not allow the Commission to alter the basic requirement of third party testing.

What specific changes did the agency make to its third party testing rule specifically by taking advantage of the authority given in H.R. 2715? In other words, what new relief did the agency provide in the rule that it was not going to provide anyway before that statute passed?

No specific changes have to date been made to the testing and labeling rule (16 CFR part 1107) in response to H.R. 2715 (other than moving forward with addressing the statutory change from random samples to representative samples) because the rule was at the final rule stage, and further changes would not have been subject to notice and comment. The Commission published a Request for Comment, as directed by section 14(i)(3) of the CPSA (and amended by H.R. 2715), regarding reducing third party testing burdens consistent with assuring compliance. The Commission also issued a notice of proposed rulemaking regarding the testing of representative samples.

4. ***Phthalates / Chronic Hazard Advisory Panel***

The Chronic Hazard Advisory Panel appointed by the CPSC Commissioners is late in submitting its report on phthalates. I am hearing from manufacturers that use phthalates that the CHAP process has not been transparent. Chairman Tenenbaum, you promised transparency at the CPSC. Will you pledge to release the results of the peer review done on the CHAP study as well as the charge given to peer reviewers by the CPSC?

The report of the CHAP is a highly complex scientific document. As such, it has taken the CHAP members longer to complete because of the breadth of the data that needed to be analyzed and the nature of the analysis itself (a cumulative risk assessment involving a variety of different phthalates and exposures). In addition, one of the CHAP members became seriously ill during the first several months of 2012. CPSC staff would disagree with the assertion that the CHAP process has not been transparent. In fact, in the two and a half years since the CHAP was convened, virtually every meeting, phone call, piece of correspondence, and all data submitted has been made available to the public on the CPSC website (http://www.cpsc.gov/about/cpsia/chapmain.html). The CHAP invited prominent research scientists to present their latest results and heard public testimony and written comments from interested parties. The CHAP members even agreed to an industry request to submit and discuss additional scientific studies at one of its public meetings, which took additional time.

The CHAP members also encouraged stakeholders to make their actual data (versus summaries of data) publicly available so that the CHAP might consider that data along with all other available public information. Some stakeholders chose not to release the more detailed data, because of concerns about proprietary business information. The CHAP evaluated any and all relevant data made available to it, including information provided by the industry that was made public.

Staff will continue to strongly support and encourage the open and transparent process CPSC has employed since the inception of the CHAP as the CHAP concludes its work.

Will peer reviewers be given all of the supporting information and not just the risk assessment itself to conduct their peer review?

The very nature of a scientific peer review requires that all relevant data, supporting information, and the full public record be made available to peer reviewers so that they can be as informed as possible in understanding the scientific approaches taken and conclusions reached.

Will CPSC consider the CHAP report a Highly Influential Scientific Assessment (HISA) and treat it accordingly?

CPSC understands the scientific importance of the CHAP report and will comply with the requirements regarding the report and the ensuing rulemaking set forth in section 108 of the CPSIA.

For example, to the extent that the CHAP's analysis relies on cumulative risk assessment, will the agency ensure that the framework of the cumulative risk assessment is itself peer reviewed?

Assessing the cumulative risk assessment approach taken by the CHAP would be one of the elements of a scientific peer review.

Will the CPSC refrain from issuing an interim rule when it issues the CHAP report, instead allowing full opportunity for public comment on any proposed rule that follows the CHAP report?

Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." After the CHAP issues its report, the Commission plans to pursue rulemaking in accordance with these requirements.

5. ***Obama Executive Order***

President Obama issued an Executive Order instructing all federal agencies, including independent agencies like the CPSC, to find ways to reduce the costs of regulations

already on the hooks. It is my understanding that the CPSC intends to fulfill that requirement in the upcoming year by taking a look at existing regulations on mid-sized rugs and on animal testing.

Is that true? When is the last time the CPSC even performed animal testing? Please ask the professional staff to estimate the percentage of the total cost of complying with all CPSC regulations that is represented by complying with these two regulations. Do you believe that these two regulations are among those whose revision promises to meet the goal of the executive order to reduce the onerous costs of the regulations put out by your agency, or does it make a mockery of the executive order to pick these two relatively minor regulations?

On July 11, 2011, President Obama issued Executive Order 13579, Regulation and Independent Regulatory Agencies (E.O. 13579)." The Executive Order stated that "independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." E.O. 13579 further stated that independent regulatory agencies should develop and release a public plan for the periodic review of existing significant regulations. CPSC staff drafted a plan for retrospective review of existing rules. (The Commission was not able to agree on a plan, voting 2-2 on the staff's draft plan.)

The staff's draft plan set forth criteria for choosing rules to review and, as directed by OMB memorandum M-11-28, included an initial list of candidate rules for review over the next two years. The initial selection of rules was based on the staff's assessment of resources available and the limited period of time remainingin the fiscal year. The draft plan provided for review in FY 2012 of the toy caps rule, animal testing rules, and an assessment of burdens related to third party testing. The draft plan proposed and sought public comment on the potential for review of the following rules in FY 2013: (1) continued assessment of how to reduce burdens related to third party testing; (2) alternatives to third party testing that would be available for small batch manufacturers; (3) clarifying size definitions under the carpet and rug flammability standards; and (4) eliminating requirements related to the Federal Caustic Poison Act.

The CPSC has not performed animal testing since September 2008. CPSC staff considered this to be an example of "outmoded, ineffective" regulations that should be modified and updated as contemplated by E.O. 13579. With regard to the carpet and rug flammability standards, under current regulations there is a gap in coverage that has created confusion for manufacturers, particularly now that third party testing is required for some carpets and rugs. CPSC staff cannot estimate the total cost of complying with all CPSC regulations that is represented by complying with these two regulations. I note, however, that E.O. 13579 is not focused solely on reducing costs of existing regulations, but also asks agencies to "modify, streamline, expand, or repeal" those rules that "may be outmoded, ineffective,[or] insufficient." I also note that the CPSC staff's draft plan called for review of burdens related to third party testing, requirements that several public commenters felt impose significant costs that should be reduced.

6. *ROVs (Recreational Off-highway Vehicles)*

Why does the CPSC seem intent on pressing forward for a mandatory standard on ROVs rather than working with industry the way NHTSA does with the automobile companies to devise meaningful safety tests with repeatable results?

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs). 74 FR 55495. The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. Throughout this process, CPSC staff has repeatedly met with industry representatives to facilitate an exchange of information and improvements to the voluntary standard as evidenced by multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process. As the CPSC continues with the rulemaking process, one of the considerations will be the adequacy of the voluntary standard. Under section 9(f)(3)(D) of the CPSA, before the Commission can issue a final mandatory consumer product safety rule it must make certain findings about the adequacy of the relevant voluntary standard and the likely level of compliance with the voluntary standard.

7. *Buckyballs*

The CPSC routinely relies on the sufficiency of warning labels to keep children away from other adult products like, say, gasoline cans. Why then does the agency believe that warning labels are not an adequate solution to deal with the safety risk posed by a desk toy marketed to adults like Buckyballs? Has the agency taken steps to ban Buckeyballs and similar products as a banned hazardous substance, akin to lawn darts? If not, why not?

On September 4, 2012, the CPSC published a notice of proposed rulemaking (NPR) proposing a safety standard for magnet sets. 77 FR 53781. The preamble to the NPR (and the staff's briefing package upon which the NPR is based) explains why the Commission believes the standard it proposes is necessary to address the risks posed by sets of small, powerful magnets and why warning labels are not likely to adequately reduce the risk of injury. Specifically, the preamble notes that these magnets pose a unique hazard that many children, adults, and health care providers may not recognize. The injuries resulting from swallowing these magnets can be far more severe than swallowing other small items. When magnets are ingested they become attracted to each other, trapping intestinal tissue, and resulting in perforation of the intestine or bowel. Furthermore, while the magnet sets are marketed to adults, they have a strong appeal to children and are widely available to children.

While warning labels are appropriate in certain circumstances, the CPSC does not believe that they would be adequate to reduce the risk of injury with this product. The preamble to the proposed rule discusses the limitations of warnings for this product (*see* 77 FR at 53788-89). For example, magnet sets are likely to become separated from their packaging, and the magnets could not be individually labeled. Thus, users and parents may not see the warnings. Another limitation is the difficulty conveying in a label the unique and more severe hazard

that ingesting powerful magnets present compared to swallowing other small nonmagnetic objects. Furthermore, among the users of this product are adolescents who may swallow the magnets while imitating body piercings. Parents may not understand the risk posed to adolescents and may allow them to have the product in spite of warnings, and adolescents may not heed the warnings.

The magnet set NPR was issued under sections 7 and 9 of the Consumer Product Safety Act. (We note that the ban of lawn darts was mandated by Congress. P.L. 100-61, 102 Stat 3183, November 5, 1988.) The proposed rule would set size and strength requirements and would prohibit magnet sets that do not meet those requirements. Under the proposal, if a magnet set contains a magnet that fits within the CPSC's small parts cylinder, magnets from that set would be required to have a flux index of 50 or less, or they would be prohibited.

8. ***Budget***

How many agency employees attended the ICPHSO meeting in Orlando, Florida in February, 2011? What was the total cost of their travel and attendance at the conference?

Twenty-six agency employees attended the ICPHSO Training and Symposium Conference in Orlando, Florida in February, 2011. The total cost of their travel and attendance was $35,641.20.

Staff attendance at ICPHSO was a critical element in our global education and outreach efforts involving many of our stakeholders. The staff attending this conference participated in and led multiple interactive workshops and plenary sessions reaching over 700 stakeholders in one training session. These stakeholders included manufacturers, importers, distributors, retailers, consumer advocates, testing laboratories, trade associations, and domestic and international regulators (attendees represented over thirty countries).

How much money has the agency budgeted (and how much has it already spent) for redesigning its logo and ordering items featuring the new logo?

The final cost for the CPSC logo was $7,829.44. There are no additional expenditures planned. No new items have been ordered specifically to replace items with the existing seal. The new logo is currently being used on the agency's website, in staff presentations, on social media platforms, and other public facing platforms. As new publications, videos and agency products are being ordered or replaced, use of the agency logo will be included in the design and production.

How much money has the agency budgeted (and how much has it already spent) for consulting services for the agency's new strategic plan?

The contract support costs for the Strategic Plan required by the Government Performance and Results Act was $977,155. The contract costs for the Operational Review was $919,079. The total contract costs were $1,896,235. The last invoice was paid in November 2010. There is no money budgeted for a strategic plan in FY 2013.

How much money has the agency budgeted (and how much has it already spent) on an editor to ensure that documents reflect your preferred writing style? How does the agency justify this expense given that anything published in the Federal Register will be edited according to the style of that publication anyway?

The agency has one career employee that, as part of his/her job responsibilities, reviews documents, reports and other written materials that are disseminated to the public and Congress. However, this employee is, first and foremost, a seasoned attorney who serves in the Office of the General Counsel. This employee's legal duties include reviewing contracts and contract solicitations for legal sufficiency; participating in the development of procedural rules for various aspects of Commission activities; providing legal review and advice on budget, appropriations, directives, and other general law issues; coordinating with other federal agencies having concurrent jurisdiction with the Commission (based upon direction from the Commission and key staff personnel), including negotiating and drafting memoranda of understanding with other federal agencies; and providing legal guidance on responses to petitions and advising on legal aspects of decision making on these petitions. In addition to these legal duties this employee serves as CPSC's legal editor and its Plain Writing Officer, per the Plain Writing Act of 2010. This position is a GS-14.

The Honorable Adam Kinzinger

1. **I understand that CPSC is in the process of finalizing a Standard for the Flammability of Residential Upholstered Furniture that would allow furniture manufacturers two options for fulfilling the national requirements. One option would be through compliance with a smoldering-ignition test, known as "Type I." The second "Type II" approach would require the use of an interior barrier to meet both a smoldering and an open-flame test.**

    a. **What data supports allowing the Type I smolder-only option, given that open-flame risk for upholstered furniture is still a concern in American homes based on National Fire Protection Association data?**

    As stated in the 2008 Notice of Proposed Rulemaking (NPR), addressable residential upholstered furniture fires resulting from smoking material (primarily cigarettes) were responsible for 90 percent of deaths and 65 percent of injuries in the 2004-2006 period. The focus of the 2008 NPR was to address the primary ignition scenario based on the national fire data.

2. **Dr. Matt Blais of Southwest Research Institute recently issued a paper demonstrating that flame retardants in foam not only help to prevent a fire from starting, but also limit the overall heat release from an upholstered furniture fire. This is significant because reducing the overall heat release from a burning piece of furniture may delay the time to "flashover" in a room.**

In view of this research, do you agree that limiting the use of flame retardants in furniture would forfeit this added critical function that flame retardants provide?

Recent open flame ignited large scale tests conducted by CPSC included FR foams that met the California Technical Bulletin 117 (TB-117) requirements. The flame retardant (FR) foams tested by CPSC have not shown much improvement in flammability performance when tested in bench and large scale. It is important to note, however, that these large scale test results did not intend to represent all TB-117 or FR treated foams and the results are relevant to these specific materials. Furthermore, it was not within the scope of this test program to investigate the reason for the poor performance of the TB-117 foams.

It is possible that the FR technology applied for the TB-117 foam reported in Dr. Blais' study far exceeded the minimal requirements of TB-117.

A presentation in early 2012 from a researcher from Underwriters Laboratories at a NIST workshop showed that foams reported to meet TB-117 had reduced burn duration in cone calorimeter (small scale) tests, lower heat release in mockup tests, and did not show much improvement in full scale performance. All FR chemicals are not equally effective in reducing fire risk.

3. **Section 108 of the CPSIA requires the CHAP (and ultimately the Commission) to consider the possible health effects of any alternative plasticizers. Phthalates have been widely evaluated, by the Commission and other agencies, and found to be safe for intended uses– whereas many potential substitutes have not undergone significant scientific review. We are very concerned about the potential hazards to consumers of banning chemicals whose hazards we know only to replace them with chemicals whose possible hazards we don't understand. What is the Commission's policy regarding the possible replacement of phthalates with chemicals that have not been equally reviewed or assessed?**

CPSC staff reviews all possible chemical hazards, including possible phthalate replacements, using a standard risk assessment approach. The staff bases a recommendation to the Commission for regulation of a chemical under the FHSA on an assessment of both exposure and risk, not just the presence of the chemical. In considering exposure, the CPSC considers several factors: total amount of the chemical in the product; bioavailability of the chemical; accessibility of the chemical to children; age and foreseeable behavior of the children exposed to the product; foreseeable duration of the exposure; and marketing, patterns of use, and life cycle of the product.

The CPSC also assesses the toxicological data by evaluating available data from animal studies; human exposure data, if available, with specific attention to issues such as the routes of exposure; length of exposure (i.e., acute or chronic time frames); specific form of chemical; and dose-response relationships. CPSC staff estimates doses that correspond to substantial personal injury or substantial illness, for assessment under the FHSA. Staff evaluates all of the information and data collected in the product, toxicological, and exposure assessments to make conclusions about whether a product may be a hazardous substance.

4. **The CPSC's mission is to protect the public against unreasonable risks, not all risks, from consumer products. The CPSIA likewise mandates "using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women and other[s]." We are concerned that the CHAP is favoring a precautionary approach and departing from the reasoned, scientifically-based approach that is contemplated by the governing statutes. For example, there has been discussion in public CHAP meetings about using uncertainty factors that are significantly more conservative than the factors that would be employed under CPSC guidelines – more in line with European precautionary standards. This approach goes against the U.S. standard of judging substances or products for actual risks and could have serious economic consequences if it is adopted by CPSC or elsewhere in the U.S. government.**

   a. **Will the Commission adhere to a scientific, risk-based approach rather than the precautionary principle as it conducts rulemaking under Section 108?**

      The Commission will adhere to the statutory criteria set forth in Section 108 of the CPSIA as it conducts its rulemaking.

   b. **What steps, if any, is the Commission taking to ensure that the final rule issued is based on sound science and not simply precaution?**

      The Commission will adhere to the provisions set forth in Section 108 of the CPSIA to ensure the final rule is promulgated pursuant to the law.

5. **The CPSC is charged with regulating over 15,000 products worth billions of dollars to the American economy each year. According to President Obama's executive order 13579 on Improving Regulation and Regulatory Review, the agency is responsible for "developing a regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." As you prepare a rulemaking on phthalates and phthalates alternatives in children's products, your agency should use its regulatory oversight responsibilities consistent with Executive Order 13579 and work to limit unnecessary burdens on small businesses and America's innovators. Please explain the measures that the CPSC will employ to ensure that any rulemaking associated with the CHAP's report will not stifle economic growth, innovation, competitiveness, and job creation.**

   Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." After the CHAP issues its report, the Commission plans to pursue rulemaking in accordance with these requirements. Public input will inform the rulemaking process and provide the proper balance between economic growth, innovation, competitiveness, and job creation and the statutory requirements regarding phthalates mandated by the CPSIA.

6. **According to OMB's Peer Review Bulletin, a scientific assessment meets the criteria to be considered "highly influential" if "the agency or the OIRA Administrator determines that the dissemination could have a potential impact of more than $500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest." Because state, federal and international regulatory agencies have expressed significant interest in the CHAP's scientific report, and because this report could profoundly affect future rulemakings with widespread impacts, this report clearly meets the criteria of a "highly influential" scientific document.**

   a. **Please explain whether the Commission plans to treat the CHAP's scientific report as "highly influential"? If not, why?**

      CPSC understands the scientific importance of the CHAP report and will comply with the requirements regarding the report and the ensuing rulemaking set forth in section 108 of the CPSIA.

   b. **Was OMB consulted on this decision?**

      Staff has consulted with OMB on the Peer Review Bulletin.

7. **OMB's Peer Review Bulletin requires a high level of transparency and public involvement in the peer review of "influential scientific assessments," like the CHAP report. According to the OMB Bulletin:**

> **In order to obtain the most expert reviewers, agencies must "consider requesting that the public, including scientific and professional societies, nominate potential reviewers." This public involvement is crucial to assuring that the reviewers meet other criteria in the OMB Bulletin, including assuring that the reviewers "shall be sufficiently broad and diverse to fairly represent the relevant scientific and technical perspectives and fields of knowledge" and be independent of the agency.**
>
> **agencies are also instructed, "[w]henever feasible and appropriate," to "make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public."**
>
> **This last obligation is echoed in the CPSC's rules, which state that: "In order for the Consumer Product Safety Commission to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products, the Commission has**

determined that it must involve the public in its activities to the fullest possible extent."

CPSC's clearance procedures underscore the need for transparency in the case of complex assessments like the CHAP report. According to the clearance procedures, CPSC's staff and contractor technical reports related to health science and other issues having potentially high impacts on important public policies and private-sector decisions, "should be highly transparent." CPSC's clearance procedures also stipulate that "CPSC places great emphasis on its review process to ensure the quality of information disseminated." These procedures specify that "a report prepared by a contractor to the Commission [must be] subject to a review process by Commission staff."

a. **Please confirm that the CPSC will organize a peer review of the CHAP report that meets the requirements of OMB's Peer Review Bulletin.**

A potential peer review plan is currently under development but has not yet been finalized.

b. **Has the CPSC solicited nominations of prospective reviewers? If so, what process was used and when?**

In August, 2011, CPSC asked the National Academy of Sciences (NAS) to provide names of scientists with expertise in areas relevant to the work of the CHAP on phthalates. NAS provided names to CPSC which were then vetted within the CPSC Office of the General Counsel for any possible conflicts of interest.

c. **How will CPSC assure that its reviewers fairly represent the relevant scientific perspectives and fields of knowledge?**

CPSC conveyed to the NAS information regarding the nature of the scientific issues to be considered in the CHAP report and trusted the knowledge and expertise of the NAS to nominate the most appropriate scientists for the peer review work. Based on CPSC staff's knowledge of the risk assessment and phthalates scientific literature, staff believes the nominees who will peer review the CHAP draft report have the appropriate range of expertise to undertake that work.

d. **Will CPSC make the CHAP report publicly available for comment so that reviewers can gain the benefit of the public's scientific views and knowledge?**

The very nature of a scientific peer review requires that all relevant data and information be made available to the peer reviewers so that they can be as informed as possible in understanding the scientific approaches taken and conclusions reached by the CHAP members. The peer reviewers are highly trained scientists and experts in the

same areas as the CHAP members. Peer reviewers will have access to the full public record and will be provided all supporting information including all reference papers cited in the report.

e. **Will CPSC hold a public meeting on the CHAP report?**

Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." After the CHAP issues its report, the Commission plans to pursue a rulemaking in accordance with these requirements. A public meeting is one additional option CPSC could use as a forum for public input.

f. **If CPSC does not intend to peer review the CHAP report, how will it "involve the public . . . to the fullest possible extent" and be able to say that the "information in the reports [is] highly transparent"?**

Please see the answers to the questions above.

g. **If the CHAP conducts a peer review using undisclosed reviewers, and uses a charge that no one has seen, does CPSC intend to claim that this is "its review process", will constitute a "CPSC-established review procedure", and will meet the requirement of the OMB Peer Review Bulletin that "each agency shall conduct a peer review on all influential scientific information that the agency intends to disseminate"?**

A potential peer review plan is currently under development but has not yet been finalized.

8. **CPSC's rules also provide that, "[t]o ensure public confidence in the integrity of Commission decision-making, the Agency, to the fullest possible extent, will conduct its business in an open manner free from any actual or apparent impropriety." You echoed this commitment during your confirmation hearing, pledging that the agency "will work to ensure that the Chronic Hazard Advisory Panel conducts an impartial . . . study . . . as required by the CPSIA." Without full transparency, the "peer review" process that the CPSC apparently is planning could appear to the public and key stakeholders as an attempt to use like-minded allies to add a veneer of scientific reliability to a biased process. If the Commission allows this to occur, or relies upon it to discharge the Commission's own responsibilities, how can the Commission claim that the process is "impartial," let alone "free from any actual or apparent impropriety"?**

A potential peer review plan is currently under development but has not yet been finalized.

CPSC staff believes that the CHAP process has been transparent. In the two and a half years since the CHAP was convened, virtually every meeting, phone call, piece of correspondence, all data submitted, etc. has been made available to the public on the CPSC website

(http://www.cpsc.gov/about/cpsia/chapmain.html). The CHAP invited prominent research scientists to present their latest results and heard public testimony and written comments from interested parties. The CHAP members even agreed to an industry request to submit and discuss additional scientific studies at one of its public meetings, which took additional time.

The CHAP members also encouraged stakeholders to make their actual data (versus summaries of data) publicly available so that the CHAP might consider that data along with all other available public information. Some stakeholders chose not to release the more detailed data, because of concerns about proprietary business information. The CHAP evaluated any and all relevant data made available to it, including information provided by the industry that was made public.

9. **The OMB Peer Review bulletin instructs that, "[w]henever feasible and appropriate," agencies should "make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public." The CPSC echoes this point in its own rules and has said it must involve the public in its activities to the fullest extent possible in order to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products.**

   a. **How does the CPSC plan to involve the public in the review process?**

      A potential peer review plan is currently under development but has not yet been finalized.

   b. **If CPSC does not solicit public comment, how will it: "[E]nsure that [the report] is accurate and not misleading" and otherwise "ensure the quality of information disseminated" in the report?**

      CPSC will follow the statutory criteria set forth in Section 108 of the CPSIA in discharging its statutory mandate regarding the CHAP report and the ensuring rulemaking.

10. **Section 108 of the CPSIA clearly calls for the CHAP to prepare a thorough report that provides an accurate characterization of the scientific data for six phthalates and alternatives. As highlighted during the hearing, the law states that the CHAP must review "all relevant data, including the most recent, best-available, peer-reviewed scientific studies . . . that employ . . . objective methods." During the hearing, I asked you specifically about this language and whether you personally support that the CHAP review encompasses the full weight of scientific evidence. To that question, you affirmatively responded, "I certainly do."**

    a. **Please explain what measures the Commission will utilize to ensure that the CHAP does not omit certain pieces of scientific research, and instead identifies and**

actively considers all relevant data in determining what is the best-available science.

It is the responsibility of the CHAP to conduct the examination and I have confidence its work will satisfy the requirements of Section 108 of the CPSIA.

b. Please explain how the Commission will properly consider the full weight of scientific evidence and literature.

Section 108(b)(3) of the CPSIA provides that, not later than 180 days after the Commission receives the CHAP's report, the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule based on the CHAP report." Once the final CHAP report has been submitted to the Commission, CPSC staff will pursue rulemaking in accordance with the requirements of Section 108 of the CPSIA.

The Honorable G. K. Butterfield

1. **At the Subcommittee hearing on August 2, 2012, you briefly addressed the CPSC's decision to file an administrative complaint in order to stop Maxwell & Oberton from continuing to distribute Buckyballs and Buckycubes because of the serious injuries to children resulting from the ingestion of the high-powered magnets that compose these products. I understand that you are limited in your ability to respond to questions concerning this matter because it is currently being litigated, but to the extent possible, can you please provide the Subcommittee with additional information about the types of injuries caused by these products when they are ingested by children?**

   On September 4, 2012, the Commission published a notice of proposed rulemaking (NPR) concerning magnet sets. 77 FR 53781. The preamble to the NPR provided information about the injuries that can result when children swallow these products (*see* pp. 53784-86). The NPR is available on the Commission's website at: http://www.cpsc.gov/businfo/frnotices/fr12/magnetnpr.pdf.

   Detailed information on specific cases that involved young children requiring surgical intervention, including abdominal surgey and intestinal resectioning, is provided on pages 17-21 of the CPSC staff briefing package, available at: http://www.cpsc.gov/library/foia/foia12/brief/magnetstd.pdf.

   The North American Society for Pediatric Gastroenterology, Hepatology and Nutrition (NASPGHAN) also released the results of a member survey on October 23, 2012, that details injuries reported in 480 magnet ingestion cases over the past 10 years. A summary of this survey is available at: http://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/Warning-Labels-Ineffective-at-Preventing-High-Powered-Magnet-Ingestions.aspx.

2. **In her written testimony, Commissioner Nord criticized the Commission's determination that it was technologically feasible to limit total lead content for children's products to 100 parts per million as specified by Congress in section 101 of the Consumer Product Safety Improvement Act of 2008 (Pub. L. No. 110-114). Commissioner Nord stated: "This decision was particularly disturbing because the Commission had specific leeway in the statute to impose some balance through its judgments concerning the technological feasibility of such action." Can you please explain what the statute actually allowed the Commission to do and how the Commission arrived at its determination?**

In the CPSIA, Congress established a very high threshold for the agency to exempt any children's product or component thereof that does not comply with the current statutory lead limit of .01 percent (100 parts per million). The statute states that beginning on August 14, 2011, all children's products must comply with the reduced lead limit "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The Commission may make such a determination only after notice and a hearing and after analyzing the public health protections associated with substantially reducing lead in children's product." Rather than leave the definition of "technological feasibility" to the discretion of the Commission, the statute provides an explicit definition, stating that the reduced lead limit *shall* be deemed technologically feasible with regard to a product or product category if:

> (1) A product that complies with the limit is commercially available in the product category;
> (2) Technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning or the term;
> (3) Industrial strategies or devices have been developed that are capable or will be capable of achieving such a limit by the effective date of the limit and that companies, acting in good faith, are generally capable of adopting; or
> (4) Alternative practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

If *any* one of the four criteria was satisfied, the Commission could not make a finding that it was not technologically feasible for a product or product category to meet the .01 percent lead limit. Our staff worked extensively to solicit input from the regulated community concerning the technological feasibility of compliance with the .01 percent lead limit for children's products and categories of children's products. Based on their analysis of all the information sought out by and submitted to the agency, our professional staff could not recommend that the Commission make a determination that it was not technologically feasible for any children's product or category of children's products to meet the .01 percent lead limit based on the statutory criteria necessary to support such a finding.

3. **In her written testimony, Commissioner Northup stated: "The goal of regulatory review should be to *meaningfully* reduce regulatory burdens." (Emphasis in original.) Her testimony suggests no other goals for regulatory review.**

a. Do you believe that the only goal of regulatory review is the reduction of regulatory burdens, as suggested by Commissioner Northup?

I believe the reduction of regulatory burdens is one of many goals of regulatory review. However, I do not agree with my former colleague that the single most important criterion for setting priorities should be the cost of the regulation to business. While I agree that cost should always be a significant factor, I do not believe any one factor should automatically take precedence over the others except, perhaps, for preventing or reducing deaths and injuries. That said, I note that the staff draft plan for prioritizing candidates for retrospective review includes numerous criteria that recognize the importance of costs in the reviews. Among these criteria are the cost of the regulation, including the impact on small businesses; the cost associated with the regulation; overlapping regulatory requirements; and the paperwork burden associated with the regulation.

In addition to these cost related criteria, staff has recommended a number of noncost related factors, including advancements in technology, age of a regulation, and input from stakeholders. I believe that all of staff's proposed factors should be considered when selecting rule review projects.

b. Do you believe that the Commission's proposed regulatory review plan provides the type of balanced approach called for in the President's Executive Orders? Please explain the benefits of this type of balanced approach compared to the one advocated by Commissioner Northup.

I believe the proposal by the Commission's professional staff is a very fulsome, balanced, and appropriate review plan. In the package presented to the Commission, staff formulated a plan that not only incorporated the elements drawn from the President's Executive Orders (EO) 13579 and 13563, but also set forth a defined method and schedule for identifying and reconsidering any Commission rules that are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive, or ineffective, or that otherwise require modification without sacrificing the safety benefits of the rules. The plan also encourages public input and participation to find the right balance of priorities and resources. The plan also incorporates the requirement in Public Law 112-28 that the Commission seek and consider comments on ways to reduce the cost of third party testing requirements.

Furthermore, the plan contemplates the agency's finite resources, specifically considering ways to address review without diverting staff resources from some of the Commission's key safety activities. As I said in my testimony, diverting resources from our core safety mission is not acceptable to me, nor should it be acceptable to America's consumers, especially parents.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER

October 19, 2012

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing, and Trade
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn Building
Washington, DC 20515

Dear Chairman Bono Mack,

Thank you for inviting me to testify at your Thursday, August 2, 2012 hearing entitled, "Oversight of the Consumer Product Safety Commission." I appreciated the opportunity to share my views with Members of the Subcommittee. Attached are my answers to the Subcommittee's questions for the record.

Sincerely,

Robert Adler

Robert S. Adler
Commissioner

Attachment

cc:
G.K. Butterfield, Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Brett Guthrie

1. **As you know, the power tools industry developed a revised set of voluntary safety standards in November of 2007 for table saws. Products using those new standards were introduced to the marketplace thereafter and were required to meet those standards beginning in early 2010. That voluntary standard was enhanced in October of 2011 with improved performance standards under a broader set of cutting conditions.**

   Is it accurate that the CPSC had not collected any data from the current products that are compliant with the current voluntary standards, and that the CPSC based its advanced notice of proposed rulemaking for a mandatory rule on data from older, noncompliant saws?

   The Commission published an advance notice of proposed rulemaking (ANPR) concerning table saw blade injuries on October 11, 2011. 76 FR 62678. The voluntary standard was revised in October 2011. Thus, incident data reflecting the new voluntary standard is not yet available for the staff to review. Any subsequent steps in the rulemaking that the Commission decides to pursue (notice of proposed rulemaking and final rule) would include a review of data available at those stages.

   The comment period for the ANPR closed March 16, 2012. I am hopeful that all of the relevant stakeholders, including table saw manufacturers, have submitted any data in their possession regarding any injuries associated with saws that are compliant with the newer voluntary standard. I eagerly await CPSC staff's review and evaluation of the comments received in connection with the ANPR.

   a. **Is CPSC now collecting more up-to-date information on accidents incurred under the 2007 voluntary standard for table saws?**

      CPSC staff continuously receives reports related to consumer products through various means, including news clippings, death certificates, consumer submitted reports, etc. Table saw-related incident reports are reviewed by CPSC staff to leverage any information available. These reports are anecdotal and may or may not be related to a table saw that is compliant under the 2007 voluntary standard. CPSC staff also collects emergency department-treated injury data via the National Electronic Injury Surveillance System (NEISS). Though this system does collect information about table saws, it is not possible to differentiate pre- and post- 2007 voluntary standard-compliant saws within the data. A special study would be required to gather this level of detail; similar to the special study that was performed on stationary saws in 2007-2008. Another study of this nature is not planned for table saws. However, CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard.

Additionally, I am hopeful that all of the relevant stakeholders, including table saw manufacturers, have submitted any data in their possession regarding any injuries associated with saws that are compliant with the newer voluntary standard during the extended open comment period for the ANPR.

b. **If so, will this data be weighed equally when considering a proposed mandatory safety standard for table saws?**

According to CPSC staff the data that we plan to collect is from a convenience sample of new table saw users who will be recruited to participate in the study. This study will not be in the same form as the previous table saw injury study, and it cannot be used in the same manner. CPSC staff's goal in collecting this data is to better understand if and how consumers are using the modular blade guard system that is part of the current voluntary standard. This information will be used along with additional information collected to guide CPSC's staff recommendations during the rulemaking process. In addition to the information gathered from this study, CPSC staff will consider any and all other relevant incident data that is available when it considers a possible proposed standard for table saws. In particular, I am hopeful that the relevant stakeholders that have access to data the CPSC is not aware of regarding any injuries associated with saws that are compliant with the newer voluntary standard submitted this data during the extended open comment period for the ANPR.

2. **Doesn't the CPSC need to gather data on the compliant saws using the current voluntary standard before you can move forward with a mandatory standard? As I understand it, the CPSC is statutorily directed to rely on voluntary standards over a mandatory standard as long as "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." (15 U.S.C. Sec. 2056(b)).**

The CPSC must consider the adequacy of, and level of compliance with, applicable voluntary standards before it can issue a final mandatory consumer product safety standard for a product. CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard. This will aid staff in determining whether the current voluntary standard would eliminate or adequately reduce the risk of injury addressed. The study will be completed prior to the issuance of any final mandatory rule.

a. **How would the CPSC be able to judge the risk of injury under and substantial compliance with the new voluntary standards if you have not collected and analyzed data on the table saws using those standards?**

The ANPR is the beginning of the rulemaking process. As the rulemaking progresses, the CPSC will collect and analyze the data that become available, including compliance with any applicable voluntary standards. Prior to the issuance of any final mandatory rule, CPSC staff will complete an analysis of the effectiveness of current voluntary standards.

3. **Following up on the CPSC advanced notice of proposed rulemaking for table saws, one of the main options CPSC asks for comments on for a mandatory rule is a patented technology, owned and controlled by one company, based on blade contact flesh detection technology. I understand it was this company's CEO who originally petitioned the CPSC to consider rulemaking in this area.**

   a. **Is CPSC was aware that the Federal Trade Commission recently testified before Congress raising concerns about a patent holder using adopted standards to demand higher royalties or licensing fees as result of a standard? The FTC testimony noted that "[i]ncorporating patented technologies into standards has the potential to distort competition by enabling [standard essential patent] owners to use the leverage they acquire as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand." (http://www.ftc.gov/os/testimony/120711standardpatents.pdf)**

   Speaking only for myself, while I was aware of the FTC's testimony, I am not convinced that the issue to which the FTC was speaking is directly related to the question of a voluntary or mandatory table saw safety performance standard. The Commission's ANPR presented three regulatory alternatives to address table saw blade contact injuries: (1) a voluntary standard, (2) a mandatory rule with performance requirements, and (3) a labeling rule specifying warnings and instructions. We have not yet determined which, if any, option to pursue. With any option the Commission pursues, we are required under section 7 of the CPSA to express any mandatory consumer product safety standard in terms of performance requirements, rather than mandating any particular design.

   b. **Are you concerned that a single patent holder, such as the single patent holder in possession of flesh detection technology for table saws, could demand higher royalties or refuse to license on reasonable and non-discriminatory terms if their patented technology is incorporated into a mandatory standard? Does the CPSC share the FTC's concern about incorporating patented technologies into standards?**

   As mentioned in the previous answer above, when the CPSC writes mandatory product safety standards, we do not mandate a particular technology. We write performance standards and allow manufacturers to decide how to meet them. Ultimately, I am not in favor of a monopoly if such a result is avoidable. It is my understanding that while there is a patented flesh sensing technology that appears

to eliminate the risk of serious blade contact injuries, I have also heard there are other competing technologies that I am hopeful will be brought to market to provide both consumers and manufacturers with a variety of means to address this very serious consumer hazard.

The Honorable Charles F. Bass

1. **I'm aware that there is a proposed ruling to allow use of X-Ray Fluorescence (XRF) to certify products as lead free. It's my understanding that there are multiple XRF techniques, including handheld XRF and so-called HD XRF. It appears from the proposed rule that both techniques would be acceptable, but can you confirm to the committee that the rule will enable use of both the widely-accepted handheld XRF techniques which are deployed across the supply chain, as well as the emerging HD XRF methods?**

   The "Proposed Rule: Requirements Pertaining to Third Party Conformity Assessment Bodies" includes provisions to widen the use of both "HD XRF" (a trademarked name for Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams, as described in ASTM F2853-10e1) as well as "handheld" XRF (more generically known as Energy Dispersive X-Ray Fluorescence Spectrometry, as described in ASTM F2617-08) for third-party testing for certification. These provisions would enable the use of either type of XRF, with limitations as described in the proposed rule, for measuring lead in homogeneous metals, glass, crystals and other materials. This proposed rule would not widen the use of "handheld" XRF to include determinations of lead in painted surfaces of consumer products because at present no XRF method is available other than HD XRF (ASTM F2853-10e1) for determining compliance to 16 CFR part 1303 for painted surfaces on children's products with respect to the limit of 0.009 percent lead by weight.

2. **Knowing that one of the priorities of the CPSC is to increase public awareness around the dangers of carbon monoxide poisoning, please share with the Committee what activities the Commission is currently undertaking?**

   Prevention of carbon monoxide poisoning deaths and injuries caused by consumer products is a key priority for the CPSC. To address this hazard comprehensively, the Commission has taken a two-pronged approach that focuses on both product innovation and consumer outreach and education.

   On the product innovation side, CPSC staff has focused a great deal of effort on reducing carbon monoxide poisoning deaths from portable gasoline generators. In just the three year period from 2006 to 2008, there were an estimated 233 non-fire carbon monoxide poisoning deaths to consumers associated with the use of portable gasoline-powered generators in the United States. In September of this year, CPSC staff released a report detailing the development and demonstration of a prototype portable generator that can dramatically reduce carbon monoxide (CO) emissions from certain common portable gasoline-powered generators. When the prototype was tested in the common fatal scenario of a generator operating in the attached garage of a single family home, health effects modeling performed on the results showed that the prototype increased the hypothetical garage occupant's escape time interval to 96

minutes compared to only 8 minutes provided by the original, unmodified unit. A copy of this report may be found on the CPSC website. (http://www.cpsc.gov/LIBRARY/FOIA/FOIA12/os/portgen.pdf)

Additionally, CPSC staff also recently released a report titled "Evaluation of the Durability and Longevity of Chemicals Sensors Used In-Situ for Carbon Monoxide Safety Shutdown of Gas Furnaces." According to the report, gas furnaces continue to be one of the leading causes of unintentional CO poisoning deaths associated with consumer products. From 2006 through 2008, gas furnaces, including central, wall, and floor furnaces, accounted for 48 percent of the CO deaths associated with all gas-fueled products and 17 percent of CO deaths associated with all consumer products. This report was based on a test program that evaluated the durability and longevity of sensors operating in a gas furnace as a CO shutoff device. The test results demonstrated that, despite being exposed to the operating environment of a gas furnace and the aging conditions of a corrosion test, the catalytic bead CO sensors and the NDIR CO2 sensors maintained their basic electrical operability (*e.g.*, continued sensitivity to target gas, continued strong linear relationship, and a continued ability to distinguish between shutoff and non-shutoff CO or CO2 levels). Based on this, CPSC staff concluded that the sensors were durable enough to withstand the operating environment within a gas furnace and that the results provided an indication that the sensors could reach a lifespan commensurate with that of a gas furnace. In other words, these findings demonstrate that chemical sensors exist that can withstand the harsh operating environment of a furnace and have the potential to survive throughout the lifespan of the furnace. Additional technical work is needed, including an evaluation of the mechanical integrity of the sensors after aging – which was not part of the scope of this test program, but should be considered in future test and evaluation efforts. A copy of this report may be found on the CPSC website. (http://www.cpsc.gov/library/foia/foia12/os/cosensorlongevity.pdf)

CPSC also engages in robust education and outreach using a variety of outlets. The Commission communicates the dangers of carbon monoxide poisoning through the use of earned media, conducting television, radio and print interviews most often as rapid response in conjunction with major, power-disrupting storms such as hurricanes and snow storms, when greater use of generators exposes more people to the hazard. We also use social media outreach, e-publication downloads from the dedicated CO Information Center page on CPSC.gov, and the distribution of messages to grassroots partners through our Neighborhood Safety Network. Twice a year, CPSC issues reminders to install fresh batteries in CO and smoke alarms in conjunction with the change in daylight savings time.

In addition, CPSC has used its OnSafety blog, YouTube, Twitter and its FireSafety.gov website to promote new developments in technology, including making CO alarms more effective and, this year, new developments in reducing CO emissions in generators. These efforts have resulted in an estimated audience impression of more than 100 million people during FY2012. This year, Congressional District offices in areas generally impacted by hurricane season were also provided CO informational safety packets to share with their constituents. This information is

also posted to the CPSC's website. Field staff has also provided Congressional offices with informational materials in the wake of severe weather events causing power outages. As the winter season approaches, CPSC will continue to promote CO awareness by warning consumers of dangers associated with home heating equipment. During FY2013, CPSC will also begin staging a second CO Poster safety contest for school children that became the most popular contest on Challenge.gov when first held.

The Honorable G. K. Butterfield

1. **At the hearing, Commissioner Northup stated that she believed that if the CPSC launched a Facebook page, it "absolutely would violate the overarching rules in our Commission" and that if the Commission loses the lawsuit concerning the public consumer product safety information database the decision "would almost certainly say that any putting up of Facebook would violate the protections of 6(b)." However, the House report accompanying its version of the original Consumer Product Safety Act indicates Congress was concerned with protecting sensitive business information the agency might obtain in carrying out its duties to protect the public from unsafe products. The House report states that the CPSC will have "access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to *trade secrets or other sensitive cost and competitive information*." (Emphasis added.) Do you agree with Commissioner Northup's view that launching a Facebook page would violate Section 6?**

   At the outset, Commissioner Northup has confused two unrelated topics. Any court ruling related to the database has virtually no relevance to the issues surrounding Facebook and section 6(b) of the CPSA. Section 6A(f)(1) of the Consumer Product Safety Act, as amended by the Consumer Product Safety Improvement Act (CPSIA), specifically exempts the disclosure of information in the database from the provisions of section 6(a) and 6(b) of the CPSA. Since section 6(b) does not generally apply to the disclosure of information in the database, I fail to see any connection between the database lawsuit and 6(b) issues relating to Facebook.

   With regard to Facebook, I note two points. First, Facebook requires any and all entities creating a Facebook "fan page" to permit members of the public to comment on any postings by the entities – no exceptions. Accordingly, were the CPSC to create such a page on Facebook, we would have no choice but to permit public comments to be posted on Facebook irrespective of any desire we might have that Facebook not post the comments. Second, every other federal health and safety agency of which I am aware – e.g. FDA, FTC, OSHA and NHTSA – all have Facebook pages. In fact, the CPSC is one of the very few federal agencies that does not have a Facebook page. This means that, unlike other agencies and most members of Congress, CPSC currently has no ability to share – at no cost to the agency or taxpayers – its critical safety messages with the approximately 1 billion Facebook users in a medium with which they interact on a daily basis.

   As a matter of law, I disagree with Commissioner Northup's view that launching a Facebook page would violate section 6(b). Section 6(b) applies only to information "obtained under the [CPSA] or to be disclosed to the public in connection therewith...." In my opinion, comments filed at a page where Facebook – not the CPSC – publishes the comments regardless of the wishes of the agency are neither "obtained" under the CPSA nor are they "to be disclosed to the public in connection with" the CPSA. They are Facebook's records, not the agency's records. I

understand that a wide array of independent and executive branch agencies have adopted a similar view and treat such postings as Facebook's records, not theirs. And because CPSC will neither control nor vouch for any comments posted on Facebook, section 6(b) simply will not apply to a CPSC page on Facebook.

It is my strong hope that the CPSC will take immediate steps to set up a Facebook page. I propose that we establish a strong, clear disclaimer immediately viewable on the web site that makes unequivocally clear that CPSC neither controls nor vouches for any comments posted on Facebook. Moreover, to make sure that members of the public find a place to share their injury experiences, I believe the agency should place a prominently displayed link, to our database, SaferProducts.gov, so that they can file a report of harm about a specific consumer product.

2. **At the hearing, Commissioner Northup criticized your decision to have the Commission revisit its interpretation of the term "unblockable drain" in the Virginia Graeme Baker Pool and Spa Safety Act. As a result of your decision, the Commission voted to bring its interpretation of the Act in line with what Congress intended; that is, public pools and spas with single main drains must be equipped with drain covers and secondary anti-entrapment devices. Can you please respond to Commissioner Northup's criticism of your decision to revisit this issue and the Commission's decision to bring its interpretation of the law line with Congress's intent?**

Before I explain the reasons for switching my vote, I need to address Commissioner Northup's demonstrably false accusation that my vote led to the closure of 1100 pools throughout the country. Anyone knowledgeable about the state of public finances knows that the problem in recent years has been state and local budget cutbacks that have led to the firing of teachers, fire-fighters and police officers, as well as the closure of some municipal pools. These budget challenges are the main reason for public pool closures, not Commission actions to implement the Congressionally-directed requirements of the Virginia Graeme Baker Pool and Spa Safety Act (VGBA).

Moreover, as far as I can tell, after the Commission's original vote, very few public pools actually chose the installation of unblockable drain covers as their method of complying with the VGBA. According to CPSC compliance investigators, less than five percent of the pools they have inspected installed such drain covers. The reason for such modest numbers is that unblockable drain covers have turned out to be more expensive than most secondary anti-entrapment devices, so where cost is a critical factor, almost no one has purchased unblockable drain covers.

Perhaps even more dispositive of Commissioner Northup's claim is the fact that no public pool has ever faced closure by the CPSC for having purchased an unblockable drain cover. At my urging, the Commission granted an extra year to those pool owners who had bought an unblockable drain cover to bring their pools into VGBA compliance. In fact, they have until May 2013 to bring their pools into VGBA

compliance. It's hard to see how a requirement that has yet to be enforced could have forced any pools to close.

With respect to my changed vote, I will simply say that I carefully studied the legal issues before the first vote and cast my vote in good faith. After I cast that vote, I was contacted by numerous pool users and by several Members of Congress, including Representative Debbie Wasserman Schultz, one of the prime supporters of this legislation, who insisted that I had misinterpreted the law. Having carefully listened to their arguments, I promised to reconsider the issue. I thereupon spent almost a year contacting and consulting with numerous parties, including pool owners, trade associations, water park owners, consumer groups, drain cover manufacturers, SVRS manufacturers, congressional staff, and CPSC staff. As I spoke to the various parties, I slowly became convinced that the concept of "unblockable drain covers" as a method of complying with VGBA arose primarily as a post-enactment idea, not as anything contemplated by the authors of the bill at the time they wrote the legislation. To be sure of this, I researched the entire history of the VGBA so that I could be as certain as possible about the correct interpretation of the law. Given my conclusion, I found it hard to maintain my original view that an unblockable drain cover could be considered an "unblockable drain" under VGBA.

Having reached the conclusion that I had misinterpreted the term "unblockable drain" in the VGBA, I felt that fairness and deference to the will of Congress required me to change my vote. This was entirely my decision based solely on my new reading of the law. I deeply regret any inconvenience or extra costs that any pool owner will face as a result of my vote.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

October 31, 2012

The Honorable Mary Bono Mack
Chairman
Subcommittee on Commerce, Manufacturing and Trade
U.S. House of Representatives
2416 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Bono Mack:

Attached are responses to additional questions submitted by Members of the Subcommittee on Commerce, Manufacturing and Trade for the record of the hearing held on August 2, 2012. In some instances, the questions request technical information. In those cases I have requested that the CPSC staff technical experts provide the information requested and I have noted that the response is from the CPSC staff.

It was my pleasure to testify at this important hearing and I am pleased to provide any additional information that may be helpful to the Subcommittee.

Sincerely,

Nancy A. Nord
Commissioner

cc: The Honorable G.K. Butterfield
Ranking Member
Subcommittee on Commerce, Manufacturing, and Trade

The Honorable Brett Guthrie

1. *As you know, the power tools industry developed a revised set of voluntary safety standards in November of 2007 for table saws. Products using those new standards were introduced to the marketplace thereafter and were required to meet those standards beginning in early 2010. That voluntary standard was enhanced in October of 2011 with improved performance standards under a broader set of cutting conditions.*

   Is it accurate that the CPSC had not collected any data from the current products that are compliant with the current voluntary standards, and that the CPSC based its advanced notice of proposed rulemaking for a mandatory rule on data from older, noncompliant saws?

Staff's response

The Commission published an advance notice of proposed rulemaking (ANPR) concerning table saw blade injuries on October 11, 2011.[1] The voluntary standard was revised in October 2011. Thus, incident data reflecting the new voluntary standard is not yet available for the staff to review. Any subsequent steps in the rulemaking that the Commission decides to pursue (notice of proposed rulemaking and final rule) would include a review of data available at those stages.

   a. *Is CPSC now collecting more up-to-date information on accidents incurred under the 2007 voluntary standard for table saws?*

Staff's response

CPSC staff continuously receives reports related to consumer products through various means, including news clippings, death certificates, consumer submitted reports, *etc.* Table saw-related incident reports are reviewed by CPSC staff to leverage any information available. These reports are anecdotal and may or may not be related to a table saw that is compliant under the 2007 voluntary standard. CPSC staff also collects emergency department-treated injury data via the National Electronic Injury Surveillance System (NEISS). Though this system does collect information about table saws, it is not possible to differentiate pre- and post-2007 voluntary standard-compliant saws within the data. A special study would be required to gather this level of detail; similar to the special

[1] 76 Fed. Reg. 62,678.

study that was performed on stationary saws in 2007 through 2008. Another study of this nature is not planned for table saws. However, CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard.

b. *If so, will this data be weighed equally when considering a proposed mandatory safety standard for table saws?*

Staff's response

The data that CPSC staff will be collecting is from a convenience sample of new table saw users who will be recruited to participate in the study. This study will not be in the same form as the previous table saw injury study, and it cannot be used in the same manner. CPSC staff's goal in collecting this data is to better understand if and how consumers are using the modular blade guard system that is part of the current voluntary standard. This information will be used along with additional information collected to guide CPSC's staff recommendations during the rulemaking process. In addition to the information gathered from this study, CPSC staff will consider any and all other relevant incident data that is available when it considers a possible proposed standard for table saws.

2. *Doesn't the CPSC need to gather data on the compliant saws using the current voluntary standard before you can move forward with a mandatory standard? As I understand it, the CPSC is statutorily directed to rely on voluntary standards over a mandatory standard as long as "compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." (15 U.S.C. Sec. 2056(b)).*

Staff's response

The CPSC must consider the adequacy of, and level of compliance with, applicable voluntary standards before it can issue a final mandatory consumer product safety standard for a product. CPSC staff has awarded contracts for the collection of data concerning if and how owners of new table saws are using the modular blade guard system that is part of the current voluntary standard. This will aid staff in determining whether the current voluntary standard would eliminate or adequately reduce the risk of injury addressed. The study will be completed prior to the issuance of any final mandatory rule.

a. *How would the CPSC be able to judge the risk of injury under and substantial compliance with the new voluntary standards if you have not collected and analyzed data on the table saws using those standards?*

Staff's response

The ANPR is the beginning of the rulemaking process. As the rulemaking progresses, the CPSC will collect and analyze the data that become available, including compliance with any applicable voluntary standards. Prior to the issuance of any final mandatory rule, CPSC staff will complete an analysis of the effectiveness of current voluntary standards.

3. *Following up on the CPSC advanced notice of proposed rulemaking for table saws, one of the main options CPSC asks for comments on for a mandatory rule is a patented technology, owned and controlled by one company, based on blade contact flesh detection technology. I understand it was this company's CEO who originally petitioned the CPSC to consider rulemaking in this area.*

   a. *Is CPSC was aware that the Federal Trade Commission recently testified before Congress raising concerns about a patent holder using adopted standards to demand higher royalties or licensing fees as result of a standard? The FTC testimony noted that "[i]ncorporating patented technologies into standards has the potential to distort competition by enabling [standard essential patent] owners to use the leverage they acquire as a result of the standard setting process to negotiate high royalty rates and other favorable terms after a standard is adopted that they could not have credibly demanded beforehand." (http://www.ftc.gov/os/testimony/120711standardpatents.pdf)*

Staff's response

The ANPR presented three regulatory alternatives to address table saw blade contact injuries: (1) a voluntary standard, (2) a mandatory rule with performance requirements, and (3) a labeling rule specifying warnings and instructions. The Commission has not determined which, if any, option to pursue. We note that section 7 of the CPSA requires the Commission to express any mandatory consumer product safety standard in terms of performance requirements, rather than mandating any particular design.

b. *Are you concerned that a single patent holder, such as the single patent holder in possession of flesh detection technology for table saws, could demand higher royalties or refuse to license on reasonable and non-discriminatory terms if their patented technology is incorporated into a mandatory standard? Does the CPSC share the FTC's concern about incorporating patented technologies into standards?*

Staff's response

Please see the previous answer.

The Honorable Charles F. Bass

1. *I'm aware that there is a proposed ruling to allow use of X-Ray Fluorescence (XRF) to certify products as lead free. It's my understanding that there are multiple XRF techniques, including handheld XRF and so-called HD XRF. It appears from the proposed rule that both techniques would be acceptable, but can you confirm to the committee that the rule will enable use of both the widely-accepted handheld XRF techniques which are deployed across the supply chain, as well as the emerging HD XRF methods?*

Staff's response

The "Proposed Rule: Requirements Pertaining to Third Party Conformity Assessment Bodies" includes provisions to widen the use of both "HD XRF" (a common shorthand for Energy Dispersive X-Ray Fluorescence Spectrometry Using Multiple Monochromatic Excitation Beams, as described in ASTM F2853-10e1) as well as "handheld" XRF (more generically known as Energy Dispersive X-Ray Fluorescence Spectrometry, as described in ASTM F2617-08) for third-party testing for certification. These provisions would enable the use of either type of XRF, with limitations as described in the proposed rule, for measuring lead in homogeneous metals, glass, crystals and other materials. This proposed rule would not widen the use of "handheld" XRF to include determinations of lead in painted surfaces of consumer products because at present no XRF method is available other than HD XRF (ASTM F2853-10e1) for determining compliance to 16 CFR part 1303 for painted surfaces on children's products with respect to the limit of 0.009 percent lead by weight.

Commissioner Nord's further response

On two occasions—with the passage of the Consumer Product Safety Improvements Act and with Public Law 112-28—Congress has signaled that it wants the Commission to use new and emerging technologies to reduce the costs of the testing mandated by the law. XRF technology, and in particular the advanced forms the staff described above, have the potential for significant cost reductions. The Commission currently has a rulemaking underway that potentially could result in allowing wider use of this technology. I am not convinced that regulatory package currently out for comment presents the proper formula for encouraging deployment of this technology across the supply chain. This is an area where, as we consider the proposed rule and consistent with comments received, the

Commission could provide strong leadership for effectively encouraging the development and use of new technologies for reducing the very considerable costs of testing that the law and our regulations now impose.

2. *Knowing that one of the priorities of the CPSC is to increase public awareness around the dangers of carbon monoxide poisoning, please share with the Committee what activities the Commission is currently undertaking?*

Staff's response

Prevention of carbon monoxide poisoning deaths and injuries caused by consumer products is a key priority for the CPSC. To comprehensively address this hazard, the Commission has taken a two-pronged approach that focuses on both product innovation and consumer outreach and education.

On the product innovation side, CPSC staff has focused a great deal of effort on reducing carbon monoxide poisoning deaths from portable gasoline generators. In just the three year period from 2006 to 2008, there were an estimated 233 non-fire carbon monoxide poisoning deaths to consumers associated with the use of portable gasoline-powered generators in the United States. In September of this year, CPSC staff released a report detailing the development and demonstration of a prototype portable generator that can dramatically reduce carbon monoxide (CO) emissions from certain common portable gasoline-powered generators. When the prototype was tested in the common fatal scenario of a generator operating in the attached garage of a single family home, health effects modeling performed on the results showed that the prototype increased the hypothetical garage occupant's escape time interval to 96 minutes compared to only 8 minutes provided by the original, unmodified unit. A copy of this report may be found on the CPSC website.[2]

CPSC also engages in robust education and outreach using a variety of outlets. The Commission communicates the dangers of carbon monoxide poisoning through the use of earned media, conducting television, radio and print interviews most often as rapid response in conjunction with major, power-disrupting storms such as hurricanes and snow storms, when greater use of generators exposes more people to the hazard. We also use social media outreach, e-publication downloads from the

[2] http://www.cpsc.gov/LIBRARY/FOIA/FOIA12/os/portgen.pdf.

dedicated CO Information Center page on CPSC.gov and the distribution of messages to grassroots partners through our Neighborhood Safety Network. Twice a year CPSC issues reminders to install fresh batteries in CO and smoke alarms in conjunction with daylight savings time.

In addition, CPSC has used its OnSafety blog, YouTube, Twitter and its FireSafety.gov website to promote new developments in technology including making CO alarms more effective and, this year, new developments in reducing CO emissions in generators. These efforts have resulted in an estimated audience impression of more than 100 million people during FY2012. This year, Congressional District offices in areas generally impacted by hurricane season were also provided CO informational safety packets to share with their constituents. This information is also posted to the CPSC's website. Field staff has also provided Congressional offices with informational materials in the wake of severe weather events causing power outages. As the winter season approaches, CPSC will continue to promote CO awareness by warning consumers of dangers associated with home heating equipment. During FY2013, CPSC will also begin staging a second CO Poster contest for school children that became the most popular contest on Challenge.gov when first held.

The Honorable Mike Pompeo

1. *Database/Facebook/§ 6(b)*

    a. *What is the status of the lawsuit brought against the CPSC last year by anonymous companies over the agency's botched interpretation of the database language in the Consumer Product Safety Improvement Act of 2008?*

The CPSC was sued by an anonymous company. Although the case proceeded under seal, the court released a redacted version of its opinion and order on October 22, 2012, in *Doe v. Tenenbaum*.[3] Among other things, the court granted the company's motion for summary judgment against the CPSC with respect to the agency's decision to publish a report about the company's consumer product. The company complained that the report—in several iterations—was materially inaccurate.

The court found that the CPSC acted arbitrarily and capriciously in deciding to publish the report on SaferProducts.gov. Specifically, the court found that the report of harm did not demonstrate that the product was "related to" the harm at issue in the report. The court found that the agency, through multiple revisions of the report, engaged in speculation—and mere speculation was insufficient to demonstrate actual connection between the product at issue and the harm described. The court further found that the agency's decision to publish the report was inconsistent with previous decisions *not* to publish reports wherein the CPSC's judgment, it would be materially inaccurate to publish a report where "the evidence in the report of harm did not show that the product was the source of the problem."[4]

On September 28, 2012, the government filed a notice of appeal at the district court as shown on the publicly available docket for the U.S. Court of Appeals for the Fourth Circuit, docket number 12-2210.

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[3] No. 8:11-cv-02958-AW, 2012 U.S. Dist. LEXIS 153323 (D. Md. Oct. 22, 2012).

[4] *See id.* at *46–47, *quoting* Government Accountability Office, GAO 12-30, Consumer Product Safety Commission: Action Needed to Strengthen Identification of Potentially Unsafe Products 15 (2011), http://www.gao.gov/assets/590/585725.pdf.

b. *Has the court decided whether the agency misinterpreted the statute, as the companies claimed—and as I believe?*

Yes. As described above, the court found that the CPSC misinterpreted the words "relate to" in the database provision of the CPSIA. The court struck down the agency's speculative finding of a connection between the product at issue here and the harm in the report. Further, the court found that the agency deviated from its past practice in deciding to accept this report, though it had rejected others in the past because they did not demonstrate sufficient connection between the product and the harm alleged.

c. *In Chairman Tenenbaum's written testimony she stated: "I think SaferProducts.gov has gained wide approval and acceptance." Do you agree?*

I do not agree. The lawsuit in this case is only the tip of the iceberg relative to complaints about the database. We regularly receive complaints about materially inaccurate information in reports, and must spend significant resources to address those complaints. Following on the court's decision in this case, CPSC staff is reviewing old reports that are already published to determine whether the connection between the product and the harm alleged in each report is sufficiently strong. Indeed, one analysis of the database done by outside parties found that the "the 'reports of harm' language in Section 6A(b)(1)(A) of the Consumer Product Safety Act (CPSA) is not truly applicable to a substantial majority of the cases reported on the database thus far." More than two-thirds of the reports analyzed did not involve any injury at all, and most of the injuries reported required either no medical attention or only first aid.[5]

Further, we have also failed to address a persistent concern of brand name owners: if their brand is listed in a report, they currently have no ability to complain about any material inaccuracy except by going outside the regular database process, and even then they are not permitted to post a response on the database because they are not considered either the manufacturer or the private labeler of the product. The Commission has long been aware of this problem, but has not yet chosen to address it, citing concerns about the amount of resources required to solve the

[5] See Lee Bishop & Steve McGonegal, *How Much "Harm" is Reported in Safer Products Database "Reports of Harm"?*, Product Safety Letter (May 27, 2012), http://www.productsafetyletter.com/Free/209.aspx.

problem. But we have known about the problem from the outset, and it seems duplicitous to fail initially to address the problem and then refuse to fix it by citing resource constraints. We should have done it properly in the first instance, and the amount of resources required to address it should not be cited as a reason not to correct it when we have the chance.

When the CPSC's regulations establishing the database were being promulgated, my colleague, Commissioner Northup, and I offered several proposals which, if adopted, would have addressed the problems now becoming apparent with the operations of the database. For example, we proposed that, consistent with the statute, only those who were actually "consumers" in that they purchased or actually used the product or experienced the harm (or their representatives such as parents or guardians) be able to file reports as "consumers." This was rejected in favor of allowing report filing by virtually anyone including advocates, plaintiff's attorneys, journalists, and others with no relation to or knowledge of the incident. As another example, we offered an amendment that would have established an appeal process so that there would be some discipline, consistency, and due process to decisions regarding materially inaccurate information. Unfortunately, each of the amendments we offered was summarily rejected by a majority of Commissioners on a party-line vote.

d. *How many regulations issued by CPSC in the last 5 years have led to lawsuits?*

The only lawsuit that I am aware of against the CPSC, based on its regulations, issued within the last 5 years is *Doe v. Tenenbaum*. In this case, as described above, while the court did not directly address our regulations establishing the database, it did overturn our decision to post the incident. Had our regulations provided a more transparent and less arbitrary process, our decisions might have been different and, hence the outcome of any case, assuming one was filed, might also have been different.

e. *Doesn't the presence of a lawsuit tend to argue against the idea that the database has gained wide approval and acceptance?*

Yes. The database was launched in March 2011, and this lawsuit was filed a scant 7 months later. We have received many complaints about the database, and continue to do so. What is more, it is not clear *who* is using the reports made available in the database. Indeed, to date, more than

hearing about consumers researching products in the database, we are hearing about professionals—defense and plaintiffs' attorneys, consumer advocates, and statisticians—using the database to analyze CPSC activity. Given its rather difficult design, I would not expect many consumers to turn to it to identify safe or unsafe products. Thus, I do not believe that the database has been approved or accepted by the group it was supposed to benefit—consumers.

f. *In Chairman Tenenbaum's oral testimony, she indicated that if the federal court rules against the CPSC in the pending database lawsuit, the agency will not pledge to immediately take down the database that was constructed in violation of the statute. Why not? Please explain what remedy you believe would be appropriate, what remedy the plaintiffs are seeking, and what remedy the agency's professional staff recommends in the event that the agency loses the lawsuit.*

If a court found that the Commission acted arbitrarily and capriciously in promulgating the rule establishing the database, I believe that the Commission would be required to take the database down, at least until appropriate corrections in the rule were implemented. In this case, however, the court only determined that the agency acted arbitrarily and capriciously in deciding to publish a particular report: The court did not make a larger decision about the legality of the database. Instead, because the plaintiff only sought to enjoin the agency from publishing the report, and the court granted the relief, the agency has complied with the court's order by not publishing the report.

g. *Is the agency still considering starting a Facebook page that would violate the requirements Congress has put in place for any kind of public database?*

The Commission and staff have been considering establishing an organization page for the CPSC on Facebook. Because Facebook's terms of service would require the CPSC to allow members of the public to submit comments on any post without first being approved by the agency, establishing a Facebook page could violate § 6(b) of the CPSA. Specifically, by creating posts on Facebook, the agency would—by operation of Facebook's commenting policy—effectively invite the public to submit comments on subjects related to the post (or, for that matter, on any subject under the sun). And because the CPSC created the page, the Commission would be republishing those comments—again, by operation

of Facebook's commenting policy—without going through the § 6(b) clearance process.

The CPSC's clearance process enables the Commission to comply with its statutory mandate to provide only accurate and meaningful information to the public. Currently, information is not to be released either before staff has verified its accuracy or before the company whose information is implicated has had the chance to verify or contest the accuracy and fairness of the information. Establishing a Facebook page and creating posts would necessarily create violations of § 6(b)—and would degrade the Commission's credibility in the eyes of the public and the regulated community.

h. *I am told that the agency is refusing to accept appeals over material inaccuracies. If true, why?*

When the rules establishing the database were considered, Commissioner Northup and I offered an amendment to establish an appeal process. This amendment was rejected on a party-line 3-to-2 vote. I believe that it is my colleagues' position that no appeal process is necessary or required by the CPSIA to address material inaccuracy claims.

But the CPSA and CPSIA do not exist in a vacuum. Background principles of constitutional and administrative law—and the Administrative Procedure Act—establish the requirement that agencies afford due process of law to affected parties. Indeed, the judge in *Doe v. Tenenbaum* construed the agency's actions regarding the database as inconsistent with the decision in the case, leading to the determination that the decision to publish here was arbitrary and capricious. The failure to establish a regular process has meant that there was no guarantee that the CPSC was making material-inaccuracy determinations consistently. An appeals process would help correct that error.

i. *I am told that the agency does not remove duplicate references on the database to the same underlying incident. If that is true, why not?*

Staff's response

We do not publish two reports that are exactly the same. When we do publish two different reports that are about the same incident we link them. Linked reports are displayed in the database as "associated reports" and count as a single report in search results.

j. *What other problems exist with the database as currently constructed, including problems that may not be resolved by the pending lawsuit?*

As noted above, the Commission currently has no regular process for addressing reports that come in tied to brand names whose owners are neither the manufacturers nor private labelers of the products at issue. Because brand-name owners have legitimate concerns about brand deterioration, they deserve the right to contest claims about products bearing their brand that they believe to be materially inaccurate. Our staff has acknowledged that this is an issue worthy of attention, but a supposed dearth of resources has held the CPSC back from addressing it. That should be corrected.

Further, and more fundamentally, I do not believe that the database, as currently designed, benefits consumers as intended. First, it is difficult to use for consumers who hope to obtain information about products, rather than to submit information about products. The database is more likely to be used by attorneys and advocates to mine for their analytical purposes. Consumers Union has used reports in the database to spur the CPSC to look at kitchen-appliance incidents.[6] More skeptical practitioners before the agency have analyzed the database to suggest that it is does not contain much useful information about actual injuries.[7] Companies that are the subjects of reports on the database are finding it more useful than the people it was intended to serve—they are reaching out to consumers who submit reports to attempt to resolve the consumers' complaints. Thus, while it seems there may be some benefits to the database, those benefits do not appear to be accruing to consumers. If the database were cheap and easy to maintain, there might be an argument for it to continue (with necessary modifications) in some form similar to its present form. But the database is neither cheap nor easy to maintain.

While the information that comes directly from consumers is and always has been useful, the resources required to make and sustain a public-facing database seem ill-used. As noted, the database is difficult to

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[6] *See* Consumers Union, *Appliance fires: Is your home safe?*, Consumer Reports (Mar. 2012), https://consumerreports.org/content/cro/en/consumer-reports-magazine-march-2012/kitchen-fire-safety.print.html.

[7] *See* Lee Bishop & Steve McGonegal, *How Much "Harm" is Reported in Safer Products Database "Reports of Harm"?*, Product Safety Letter (May 27, 2012), http://www.productsafetyletter.com/Free/209.aspx.

use—consumers would more readily turn to and be better served by private sources like Amazon or eBay to find information from other consumers about specific products. But the CPSC still plows resources into editing each consumer report. As I have heard from various staffers throughout the agency, the resources dedicated to maintaining the public-facing aspect of the database would be better spent on monitoring and responding to safety concerns.

2. *Phthalates/testing lab irregularity*

> *We have heard from manufacturers that they frequently experience instances where products pass lead or phthalates tests at one laboratory and fail at another laboratory.*
>
> *Apart from the testing costs themselves, costs of these failures to the manufacturer include, among others: 1) costs of removal from store shelves, 2) costs of destroying failed products, 3) costs of reformulating products, and 4) costs of notifying CPSC because the products are non-compliant.*
>
> *CPSC has been asked repeatedly to issue a clear statement on statistical uncertainty with regard to testing results. Some industry groups have said that addressing statistical uncertainty bands for laboratory test results to deal with the known problem of inter-laboratory variability may be the single most important action CPSC could take to help reduce costs associated with CPSIA testing and certification requirements. When and how does the Commission plan to address this concern? Why has the agency thus far refused to establish statistical variability parameters?*

I agree that dealing with variability of testing results is probably one of the most significant actions the CPSC could take in dealing with the costs and burdens of testing. As the question states, the implications of failing test results go beyond just the costs of testing the product. I believe that it is imperative, if the current testing regime is to remain in place, that the Commission address this problem in a more constructive manner than it has to date.

With respect to both lead and phthalates testing, we are requiring that testing be done for what are, essentially, trace levels. Variable test results may come about because of a lack of homogeneity of the materials being tested or because of differing conditions in the laboratories doing the testing. It is no answer to say that in a controlled setting with controlled materials, test results will be the same but that is what has been our

answer to this question when it has been raised. This answer does not address the problem and, as a result, we have seen excessive and expensive testing. We have also seen phasing out of certain materials such as recycled materials since testing predictability cannot be assumed when these materials are used. Further as we continue to roll out testing requirements and certify more labs, this issue may grow.

Use of statistical uncertainty bands would help address the issue. Since we are testing at the trace level, public health and safety would not be impacted by such a strategy. For example, our staff has already told us that any health impacts of lowering the lead limits were probably already achieved at the 300 ppm level so allowing acceptable ranges at a certain percentage above 100 ppm but below 300 ppm would help reduce costs without impacting safety.

I believe that the Commission has the authority to implement such a suggestion. The Commission has put in place public enforcement policies on any number of occasions. However, public Commission discussions on this topic indicate that the current Commission will not do that without direction from Congress.

3. *Third-Party Testing Relief*
When this Congress passed HR 2715 last year, it gave the CPSC authority to take steps to reduce the costs of complying with the CPSIA—and particularly the costs of third-party testing.

    a. *Did the agency's professional staff recommend issuing the third-party testing rule despite HR 2715? Or did the staff recommend making adjustments to the rule and/or seeking additional public comment before issuing the rule in the wake of HR 2715? If the agency's professional staff recommended that the third-party testing rule be revised to take advantage of the authority given in HR 2715, what recommendations for further relief did the staff offer that the Commission declined to accept?*

The agency's professional staff recommended that, in light of the passage of Public Law 112-28, the Commission delay finalizing the testing rule and instead re-propose it to seek and consider public input about the costs and burdens of the rule. This recommendation was not agreed to, presumably because the term of one of the Democratic members of the Commission was drawing to a close so a Commission majority for controlling the contents and timing of the rule was not assured. Instead

the Commission finalized the testing rule with the rule going into effect in February 2013.

As directed by the Congress, the agency did request input from the public on ways to reduce testing costs. A number of constructive suggestions were made and some of those made their way into the staff recommendations that were considered by the Commission earlier this month. A copy of the staff recommendations is attached.[8] The Commission adopted a minimized version which speaks to just over half of the proposals made by the staff.[9] However, the Commission's final "cost reduction" plan does not address the timing or resources for the staff activity needed to put even this reduced plan into place. Consequently, I believe that it is unlikely that the exercise we have gone through to identify ways to reduce testing costs will result in real cost reductions as Congress envisioned when it passed Public Law 112-28.

b. *In HR 2715 Congress gave you the authority to address the exorbitant cost of third-party testing. Based on our directive and your existing authority, do you have sufficient authority to solve the third-party testing cost problem? Why has more relief not been granted even though Congress acted to enable it? Do you believe the agency is prevented from granting further relief? If so, what legal changes are needed to enable further relief from third-party testing costs? Where exactly are you barred from providing relief?*

In response to the direction given the Commission in Public Law 112-28, Commissioner Northup and I submitted a report outlining statutory changes that would reduce the costs and burdens of testing without impacting safety. That report is attached.[10] To summarize that report, we recommend the following.

- The absolute requirement for third party testing of all children's products should be repealed since the Commission can require such testing in appropriate cases under other provisions of the Act. This would allow the agency and the regulated community to focus testing resources on those products that pose risks

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[8] *See* Attachment A.

[9] *See* Attachment B.

[10] *See* Attachment C.

without burdening products which we do not believe pose a risk.

- The lead limits should be set at 300 ppm rather than 100 ppm. Under this suggestion the Commission would still be able to lower the limit to an appropriate level for particular products based on risk and exposure to more effectively protect public health. This would help address the lab variability issue discussed above. It would also allow greater use of recycled materials, which are effectively prohibited currently. It would give manufacturers of children's products greater flexibility with respect to material choices and result in less costly and more appropriate material choices.
- The definition of "children's product safety rule" should be clarified so that products subject to safety rules of general applicability do not have to be third-party tested. (I believe that the Commission has misread the law in this respect but lacking Commission initiative to correct this error, Congress should act.) There are certain CPSC rules that address general safety issues such as the flammability characteristics of fabrics. It makes no sense to treat a fabric differently because that fabric may at some point find its way into a child's garment rather than an adult garment. Having different testing regimes for the same fabric makes no sense since there is no evidence that third-party testing addresses more effectively any identified safety hazard that was not addressed by the testing regime set out in our regulations which have been on the books for many years and have been working well.

Implementing these three recommendations would allow us to focus our resources on those risks that especially impact children, and would limit the scope of the most expensive and onerous third-party testing requirements to risks that require this attention. Within the category of third party testing, the staff recommended that the Commission request from Congress the authority to equate production plans to third party testing in certain cases. There are other things the Commission could implement now that would minimize testing costs. For example, I believe that the statute does not require that ongoing periodic testing must be done by a third-party testing lab but that is what the rule adopted by the majority requires.

c. *What specific changes did the agency make to its third-party testing rule specifically by taking advantage of the authority given in HR 2715? In other words, what new relief did the agency provide in the rule that it was not going to provide anyway before that statute passed?*

The recommendations the Commission adopted only directed the staff to further investigate certain cost saving ideas.[11] The staff was given no direction as to when these tasks are to be completed. Further I do not anticipate that the FY 2013 operating plan the Commission will soon consider will contain resources for funding this work. I understand that a majority of the Commission believes that by asking for public comments and considering those comments, we have carried out the requirements of Public Law 112-28. In other words no actual work to reduce costs is likely to happen in the foreseeable future. This is not a position that I agree with.

4. *Phthalates/Chronic Hazard Advisory Panel*

a. *The Chronic Hazard Advisory Panel appointed by the CPSC Commissioners is late in submitting its report on phthalates. I am hearing from manufacturers that use phthalates that the CHAP process has not been transparent. Will you pledge to release the results of the peer review done on the CHAP study as well as the charge given to peer reviewers by the CPSC?*

Staff's response

The report of the CHAP is a highly complex scientific document. As such, it has taken the CHAP members longer to complete because of the breadth of the data that needed to be analyzed and the nature of the analysis itself (a cumulative risk assessment involving a variety of different phthalates and exposures). CPSC staff would disagree with the assertion that the CHAP process has not been transparent. In fact, in the two and a half years since the CHAP was convened, virtually every meeting, phone call, piece of correspondence, all data submitted, etc. has been made available to the public on the CPSC website.[12] The CHAP invited prominent research scientists to present their latest results and heard public testimony and written comments from interested parties. The

[11] *See* Attachment B.

[12] http://www.cpsc.gov/about/cpsia/chapmain.html.

CHAP members even agreed to an industry request to submit and discuss additional scientific studies at one of their public meetings, which took additional time.

The CHAP members also encouraged stakeholders to make their actual data (versus summaries of data) publicly available so that the CHAP might consider that data along with all other available public information. Some stakeholders chose not to release the more detailed data, because of concerns about proprietary business information. The CHAP evaluated any and all relevant data made available to it, including information provided by the industry that was made public. However, the lack of publicly available toxicity data on some phthalates that are currently in use limited the CHAP's risk assessment capabilities for those chemicals.

Staff will continue to strongly support and encourage an open and transparent process as the CHAP concludes its work.

b. *Will peer reviewers be given all of the supporting information and not just the risk assessment itself to conduct their peer review?*

Staff's response

Yes, the very nature of a scientific peer review requires that all relevant data and information be made available to the peer reviewers so that they can be as informed as possible in understanding the scientific approaches taken and conclusions reached by the CHAP members. The peer reviewers are highly trained scientists and experts in the same areas as the CHAP members. The CHAP members requested having their scientific peers give them feedback on the report. Peer reviewers will have access to the full public record and will be provided all supporting information including all reference papers cited in the report.

c. *Will CPSC consider the CHAP report a Highly Influential Scientific Assessment (HISA) and treat it accordingly?*

Staff's response

CPSC staff believes the CHAP report is a highly influential scientific assessment and will treat it accordingly.

d. *For example, to the extent that the CHAP's analysis relies on cumulative risk assessment, will the agency ensure that the framework of the cumulative risk assessment is itself peer reviewed?*

Staff's response

Assessing the cumulative risk assessment approach taken by the CHAP will be one of the important elements of the scientific peer review.

e. *Will the CPSC refrain from issuing an interim rule when it issues the CHAP report, instead allowing full opportunity for public comment on any proposed rule that follows the CHAP report?*

Staff's response

Section 108(b)(3) of the Consumer Product Safety Improvement Act (CPSIA) provides that, not later than 180 days after the Commission receives the CHAP's report, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." In accordance with the direction of the CPSIA, after the CHAP issues its report, the Commission plans to propose a rule that would request public comment on its proposal before issuing a final rule

5. *Obama Executive Order*
President Obama issued an Executive Order instructing all federal agencies, including independent agencies like the CPSC to find ways to reduce the costs of regulations already on the books. It is my understanding that the CPSC intends to fulfill that requirement in the upcoming year by taking a look at existing regulations on mid-sized rugs and on animal testing. Is that true? When is the last time the CPSC even performed animal testing? Please ask the professional staff to estimate the percentage of the total cost of complying with all CPSC regulations that is represented by complying with these two regulations. Do you believe that these two regulations are among those whose revision promises to meet the goal of the executive order to reduce the onerous costs of the regulations put out by your agency, or does it make a mockery of the executive order to pick these two relatively minor regulations?

First, it must be said that it is unfortunate but not surprising that the CPSC Commissioners could not agree on a plan to review rules as directed by the President. This was a failure of imagination and leadership.

Despite the Commission's failure to actually adopt any plan, however, the staff still plans to look at rather unimportant rules for "updating," including the flammability of mid-sized carpets and rugs, and labeling requirements under the Federal Caustic Poisons Act. Whatever these rules are, they are not particularly noteworthy and their modification would not reduce or eliminate any notable burden on the economy. Former Commissioner Northup and I proposed a plan that would have focused squarely on the most burdensome rules on the Commission's books.

In reading the President's remarks regarding the relevant executive orders, the heavy emphasis on burden reduction rings through loud and clear. "We know what it will take for America to win the future. . . . We need to make America the best place on earth to do business. . . . [A key] responsibility of government [is] breaking down barriers that stand in the way of your success. . . . [Some of the] barriers we're trying to remove are outdated and unnecessary regulations. . . . [I]f there are rules on the books that are needlessly stifling job creation and economic growth, we will fix them."[13] But the Commission has not followed through on the President's charge. The CPSC squandered this opportunity.

The agency cannot operate without regard to the larger world around us. Rules that impose unwarranted burdens harm consumers by slowing invention and innovation, raising barriers to business and job creation, eliminating safe products and their makers from the market, and raising administrative costs for the businesses that can survive the onslaught of federal mandates. For the Commission's mandates to be taken seriously and followed, they must be well-founded and practical. The plan that Commissioner Northup and I proposed was the opportunity to make sure our rules fit those criteria.

While staff declined to specifically estimate the proportion of the agency's burden on the economy that the rules currently under consideration for "rule review" comprise, allow me to assure you that it is small. There is no question that these reviewing these rules amounts to window-dressing when what is called for—both by the President and by present circumstances—is burden reduction that truly eliminates deadweight regulations.

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[13] President Barack Obama, *Remarks to the U.S. Chamber of Commerce* (Feb. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce.

6. *ROVs (Recreational Off-highway Vehicles)*

Why does the CPSC seem intent on pressing forward for a mandatory standard on ROVs rather than working with industry the way NHTSA does with the automobile companies to devise meaningful safety tests with repeatable results?

Staff's response

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs).[14] The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. Throughout this process, CPSC staff has repeatedly met with industry representatives in open meetings to facilitate an exchange of information and improvements to the voluntary standard. As the CPSC continues with the rulemaking process, one of the considerations will be the adequacy of the voluntary standard. Under section 9(f)(3)(D) of the CPSA, before the Commission can issue a final mandatory consumer product safety rule it must make certain findings about the adequacy of the relevant voluntary standard and the likely level of compliance with the voluntary standard.

7. *Buckyballs*

The CPSC routinely relies on the sufficiency of warning labels to keep children away from other adult products like, say, gasoline cans. Why then does the agency believe that warning labels are not an adequate solution to deal with the safety risk posed by a desk toy marketed to adults like Buckyballs? Has the agency taken steps to ban Buckyballs and similar products as a banned hazardous substance, akin to lawn darts? If not, why not?

On September 4, 2012, the agency published a notice of proposed rulemaking that, if finalized as proposed, would effectively ban powerful magnet sets including Buckyballs and similar magnet products. The rationale for proceeding in this manner is set out in the preamble of the NPR.[15] In brief summary, the agency's staff is of the view that package warnings will not be effective for this product and that an intense

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[14] 74 Fed. Reg. 55,495.

[15] *See* 77 Fed. Reg. 53,781.

educational campaign to warn against this risk will not be effective either. The concern over the effectiveness of warnings balanced against the severity of the injuries to children we are seeing from misuse of this adult product led to the proposal in the NPR.

Banning adult products because they are being misused by children is relatively new territory for the CPSC. Lawn darts do not provide an analogy both because of how that product was used and because that ban was mandated by the Congress.[16] The agency will proceed with this action under sections 7 and 9 of the Consumer Product Safety Act which requires a review of regulatory options. We are also proceeding against the manufacturers of Buckyballs and a similar product to seek a mandatory recall on the basis that these products present a substantial product hazard. We have not gone to court to have these products declared an imminent hazard, an authority we also possess.

My concerns about how the agency is proceeding against powerful magnet sets are discussed in the attached statement.[17]

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[16] *See* Pub. L. 100-61, 102 Stat. 3183 (Nov. 5, 1988).

[17] *See* Attachment D.

The Honorable Pete Olson

1. *I understand that the Commission has spent $566,360.00 on a contractor by the name of SEA Ltd. to conduct testing of ROVs and that SEA issued a report about its initial work in April 2011. Despite multiple requests from the Recreational Off-Highway Vehicle Association and its member companies to meet with SEA and to learn more about its work and despite the fact that industry has initiated several meetings with CPSC to share information and discuss the issues, CPSC waited 15 months to hold a meeting between SEA and industry and that meeting just occurred two weeks ago. Is withholding information and access to CPSC consultants funded at taxpayer expense your idea of government transparency? How do you expect industry to be responsive to CPSC's positions when you withhold critical information from it?*

I do not believe, as a general matter, that it is proper to withhold information developed by a government consultant and to do so is not effective government transparency.

2. *I understand that, while industry was waiting for 15 months to get more information about SEA's work, ROHVA proactively conducted extensive testing on its own to evaluate the testing approach described in the SEA report. During the long overdue meeting, I understand that SEA revealed details regarding its testing methodology that had not been previously disclosed, which may require ROHVA to conduct more testing to effectively evaluate the SEA testing approach. Extensive time and resources were wasted as a result of CPSC's failure to disclose information about its contractor's work. I understand that SEA also has conducted other testing for CPSC that has not been disclosed to ROHVA. Will you commit to providing timely and complete disclosure of all information regarding the work of CPSC contractors with respect to ROVs and to change course and work collaboratively with industry to promote safety?*

Staff's response

In April 2011, CPSC staff published a 494 page report with SEA's test methodology and test results on nine recreational off-highway vehicles (ROVs) of different makes and models. The vehicles were tested between May 3, 2010 and October 12, 2010. The 6 months between the completion of testing and publication of the data involved analysis of the data, drafting a final report, and agency clearance to publish documents. In August 2011, CPSC staff published additional results for a tenth vehicle

that was tested in May 2011. In July 2012, CPSC staff hosted a public meeting to allow SEA to present their data and to answer questions from ROHVA.

CPSC staff has not received any reports with test methodology or test results from ROHVA on any of the testing they have performed. In public meetings with the CPSC, ROHVA has only presented slides with selective data. In addition, the limited data that ROHVA has provided is based on an incorrect formula to calculate a key value. For reasons unknown, ROHVA did not use the correct formula used by the National Highway Traffic Safety Administration (NHTSA), by SEA, and by ROHVA's own voluntary standard (ANSI/ROHVA 1-2011).

CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process.

3. *I assume you would agree that a pass-fail test must be reproducible from one lab to another and that the government cannot mandate that all testing be conducted by a single entity at a single facility. Has CPSC or its contractors conducted any testing to determine whether its pass-fail test methodology and results are reproducible at facilities other than the one SEA used?*

Staff's response

CPSC staff agrees that a pass-fail test must include a protocol that is repeatable and can be performed by any qualified test facility. The ANPR for ROVs began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. As part of the ongoing rulemaking effort on ROVs, CPSC staff has performed standard vehicle dynamics tests that have been developed by NHTSA to gather information on the dynamic characteristics of these vehicles. If and when requirements are finalized, they will include performance requirements that can be tested with a protocol that is repeatable and can be tested by any qualified test facility.

4. *Has the CPSC attempted to establish a correlation between vehicle characteristics that will be dictated by its proposed tests and standards and the incidents that you say you are trying to prevent? What were the results of the correlation analyses? Do you intend to move forward with a mandatory standard in the absence of evidence of such a correlation?*

Staff's response

The CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs) on October 28, 2009.[18] The ANPR began a rulemaking process, one result of which could be a mandatory standard for ROVs. CPSC staff is assessing public comments received in response to the ANPR and is evaluating other relevant data and information to develop a staff briefing package for the Commission. The Commission will consider the staff's briefing package when determining whether to issue a notice of proposed rulemaking (NPR).

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. This analysis will be part of the staff's briefing package for a possible NPR. If the Commission decides to issue an NPR, the public would have another opportunity to comment, staff would prepare a briefing package with all relevant data and information concerning a possible final rule, and at that point the Commission would decide whether to publish a final rule.

[18] 74 Fed. Reg. 55,495.

5. *I understand that in the early 1990s CPSC conducted a multi-disciplinary study of ATV incidents to determine the causes of crashes, but that CPSC has not conducted such a study of ROV incidents. Since CPSC has not conducted such a study, ROHVA again proactively conducted its own multi-disciplinary study of ROV incidents. In November 2011, ROHVA presented its analysis to CPSC staff that concluded the testing standards in dispute would have had absolutely no impact on the occurrence of at least 90% of serious incidents. Does CPSC have any evidence that contradicts ROHVA's finding?*

Staff's response

CPSC staff has completed a multidisciplinary review of more than 400 reported ROV-related incidents where victim, vehicle, and incident characteristics were analyzed. The results indicate significant hazard patterns that include vehicle rollovers, and victims ejected and hit by the vehicle resulting in death or injury. Using the results of this analysis, CPSC staff is working to create standards that would reduce these identified hazard patterns.

6. *Has CPSC done any analyses comparing the relative safety of ROVs that existed when CPSC issued its ANPR in 2009, ROVs that conform to the current voluntary standard, and ROVs that would conform to CPSC staff's proposed mandatory standard?*

Staff's response

On October 28, 2009, the CPSC published an advance notice of proposed rulemaking (ANPR) concerning recreational off-highway vehicles (ROVs).[19] The ANPR began a rulemaking process that could result in a mandatory consumer product safety standard for ROVs. CPSC staff has not completed the rulemaking effort on ROVs and has no current proposed mandatory standard.

The ROVs that existed when CPSC issued its ANPR in 2009 meet almost all the requirements in the current voluntary standard.

7. *I understand that federal law reserves mandatory standards for those products where industry fails to develop voluntary standards to prevent unreasonable risks of injury. If that is the case, why would CPSC move forward with a mandatory ROV standard when industry has been proactive in developing*

[19] 74 Fed. Reg. 55,495.

standards and has tried repeatedly to work with your agency? [If CPSC believes that the current voluntary standard does not adequately address unreasonable risk of injury related to ROV use, what exactly is inadequate about the voluntary standard? What data does CPSC have to support its claim that those aspects of the voluntary standard are inadequate?]

Staff's response

As stated above, the CPSC published an ANPR in 2009 that discussed a voluntary standard, as well as a mandatory standard, as regulatory options. Before the Commission could issue a final mandatory rule in the proceeding it would need to determine that either (1) the voluntary standard is not likely to result in the elimination or adequate reduction in the risk of injury; or (2) it is unlikely there will be substantial compliance with the voluntary standard. At this point, the Commission has only issued an ANPR and has not made any determinations about the adequacy of the voluntary standard.

CPSC staff has worked with ROHVA and continues to work with ROHVA as evidenced by the multiple public meetings and comment letters submitted by CPSC staff during the voluntary standard canvass process. CPSC staff's comment letter to ROHVA dated March 20, 2011, summarizes CPSC staff's concerns with the voluntary standard in the areas of lateral stability, vehicle handling, and occupant protection.

Attachment A

Chairman's Motion

Since the passage of Public Law 112-28, the United States Consumer Product Safety Commission ("CPSC" or "the Commission") has been considering opportunities to reduce third-party testing costs consistent with assuring the compliance of children's products with all applicable safety rules, bans, standards or regulations. Subject to the resources allocated by the Commission to carry them out in subsequent CPSC Operating Plans, the Commission approves the following actions by its Staff:

1. International Standards Equivalency to Children's Product Safety Rules: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register to determine which, if any, tests in international standards are equivalent to tests in comparable CPSC-administered Children's Product Safety Rules. The RFI shall include questions regarding how establishing equivalency between tests in CPSC's regulations and comparable international standards would reduce overall third party testing burdens, while assuring compliance with the applicable children's product safety rules, regulations, standards, or bans. The burden of demonstrating equivalence shall be on the submitter of information. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval prior to formally establishing a list of equivalent tests to those in CPSC-administered Children's Product Safety Rules.

2. Determinations Regarding Heavy Metals: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain higher-than-allowed concentrations of any of the eight heavy elements specified in Section 4.3.5 of ASTM F963-11. (The elements are antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium.) The burden for demonstrating whether any material qualifies for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted.. Staff shall seek Commission approval regarding a determination relating to any of the eight heavy metals specified in Section 4.3.5 of ASTM F963-11.

3. Determinations Regarding Phthalates: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain prohibited phthalates, and thus are not subject to third party testing. The burden

for demonstrating whether any material qualifies for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval regarding a determination relating to materials that do not, and will not, contain prohibited phthalates.

4. Fourier Transform Infrared Spectroscopy (FTIR): The Commission directs staff to investigate whether Fourier Transform Infrared Spectroscopy (FTIR) can be effective as a screening technology for determining that a plastic component part contains no phthalates. A summary of the results of this investigation, including any additional costs expected to complete the investigation, shall be provided to the Commission no later than 1 year after the investigation has commenced.

5. Determinations Regarding Adhesives in Manufactured Woods: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether any adhesives used in manufactured woods can be determined not to contain lead in amounts above 100 ppm. The burden for demonstrating which, if any, adhesives should qualify for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval regarding a determination relating to adhesives used in manufactured woods.

6. Determinations Regarding Synthetic Food Additives: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether the process by which materials are determined not to contain lead in amounts above 100 ppm can be expanded to include synthetic food additives. The burden for demonstrating which, if any, synthetic food additives should qualify for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval prior to formally publishing a determination relating to synthetic food additives.

7. Guidance Regarding Periodic Testing and Periodic Testing Plans: The Commission directs staff to draft a guidance (in the form of a "FAQ" or similar forms of guidance) to clarify that manufacturers who do not engage in ongoing or continued production of a previously third-party certified product, (such as an importer or a manufacturer with short production runs) are not required to conduct periodic testing as defined in Section 1107. This guidance should also make clear

that those manufacturers who do not engage in periodic testing for the reasons described above are not required to create a periodic testing plan. This guidance shall be provided to the Commission for approval no later than December 31, 2012.

8. Accreditation of Certain Certification Bodies: The Commission directs staff to develop a Staff technical report for Commission consideration on the feasibility of CPSC-acceptance of certification bodies to perform third party testing of children's products as a basis for issuing Children's Product Certificates, and to undertake activities to ensure that continuing production maintains compliance with certification requirements as a basis for increasing the maximum periodic testing interval from 1 to 2 years.

Attachment B

Insert:

9. "Staff Findings Regarding Production Volume and Periodic Testing: The Commission directs staff to report back to the Commission whether, and, if so, on what basis staff is able to make the following findings:
(1) including a low volume exemption of fewer than 10,000 units of a product from periodic testing requirements for a maximum of three years is consistent with assuring compliance with all applicable children's product safety rules, regulations, standards or bans;
(2) the selection of the 10,000 unit figure for such an exemption is based on statistically significant and readily available safety, compliance and/or economic data. If so, staff shall provide the data along with its reason(s) for making the finding based on such data;
(3) providing such an exemption is consistent with providing a high degree of assurance of compliance of all children's products, as required under 16 CFR § 1107 ("the testing and certification rule"); and
(4) providing such an exemption is practicable from an enforcement and compliance standpoint, in light of available resources, anticipated future levels of funding and agency safety enforcement and compliance priorities.

Any staff work on this report would not affect the effective date of 16 CFR § 1107."

Attachment C

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD
AND
COMMISSIONER ANNE M. NORTHUP

Report to Congress pursuant to 15 U.S.C. § 2063(d)(3)(C) on opportunities to reduce the cost of third-party testing consistent with assuring compliance

October 26, 2012

The Consumer Product Safety Commission (CPSC) is implementing the Consumer Product Safety Improvement Act (CPSIA) without attention to the costs of its actions. These costs burden the American economy at the wrong time, often without measurably improving safety. As Commissioners who have seen the unintended consequences of the CPSIA first hand, and pursuant to Congress's request for legislative recommendations that would reduce testing and compliance costs for American businesses without impacting product safety,[1] we recommend that Congress consider the following changes.

1. Repeal the requirement for third-party testing.
2. Increase the permissible limit of lead in children's products to 300 parts per million and direct the Commission to set a lower limit for a particular material, product, or component where it is necessary to protect against a real risk of harm.
3. Change the definition of "children's product safety rules" to rules applicable to products intended exclusively for children.

Background

Last year, Congress directed the CPSC to ask the public for suggestions on ways "to reduce the cost of third-party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation."[2] The Commission was directed then to review the public's comments, and given authority to adopt new or revised third-party testing regulations if it determined that modification would reduce third-party testing costs consistent with assuring compliance with

[1] *See* 15 U.S.C. § 2063(d)(3)(B).

[2] 15 U.S.C. § 2063(d)(3)(A).

applicable rules.[3] Finally, Congress asked the Commission to submit a report to Congress if the agency identified opportunities that it lacked authority to adopt.[4] This report is presented by Commissioners Nancy A. Nord and Anne M. Northup in response to that request.

The Commission's work to carry out these statutory requirements continues. After the agency solicited and received from the public many concrete, specific suggestions for the reduction of testing costs, CPSC staff developed a non-exhaustive list of 16 potential changes to third-party testing rules. As described by staff, many have the potential to reduce costs only for narrow industry segments, or would otherwise not make a significant dent in third-party testing costs. The Commission recently voted to direct staff to investigate further 9 of the 16 suggestions, though it conditioned all of the work on future Commission votes to allocate the necessary resources.

Whether the work will actually be funded and whether the Commission will actually prescribe new or revised regulations is doubtful. Not only is it clear that no cost-reduction changes will be implemented this fiscal year, it also does not appear that the Commissioners will be able to agree on legislative recommendations as Congress requested. Therefore, we identify below legislative changes that we believe would reduce the cost of third-party testing while ensuring compliance with regulations currently applicable to children's products.

1. Repeal the requirement for third-party testing.

The CPSC is responsible for ensuring that noncompliant and potentially dangerous children's products do not reach American consumers. The CPSC has new and better tools to enforce our standards and detect violators, including the use of better technology and collaboration with the U.S. Customs and Border Patrol (CBP). But under current law, businesses large and small face the suffocating burden of third-party testing and certification requirements that do not advance the cause of safety.

Imposing third-party testing on every component of every children's product is an overly broad solution to the problems that arose during the flurry of recalls in 2007. But requiring all children's products to be third-party tested has proven to be a business-crushing and job-killing mandate without any commensurate benefit. And *it is a requirement that no other advanced economy—not even the European Union—has adopted.*

The third-party testing requirement is too burdensome.

According to the agency's economists, in response to the "significant increase in their costs due to the final rule," manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit

[3] *See* 15 U.S.C. § 2063(d)(3)(B).

[4] 15 U.S.C. § 2063(d)(3)(C).

the children's product market, or go out of business completely. The costs associated with the new rule will "inhibit[] new firms from entering the children's product market," including those serving a niche market like children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."[5] Some argue that third-party testing before sale will result in fewer recalls. But *most recalled products contain design or manufacturing defects that are unrelated to the Commission's product- and material-specific safety standards.*

Moreover, the continuing third-party testing requirements make the agency micromanage business and manufacturing operations. Specifically, most manufacturers must undertake a complex analysis and prepare either a periodic-testing plan or a production-testing plan for each product manufactured at each manufacturing site. These plans will be subject to extensive *post hoc* review by the CPSC, with no real guidance on what constitutes an adequate testing plan. And manufacturers who make multiple products at a single site or who frequently change the product will continually need to change their testing plans, potentially every day. The threat of "gotcha" compliance activity is real, and is exacerbated by the extensive record-keeping requirements that add nothing to safety.

Manufacturers must "document [(1)] the production testing methods used to ensure continuing compliance and [(2)] the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules."[6] But businesses have told us that documenting their complicated production processes will be costly and burdensome. For some smaller companies, the documentation requirements are simply impossible. This assessment was borne out both by CPSC economists and by the public's comments.

Indeed, for small businesses, the burdens of the testing requirements will often be insurmountable. Testing alone—excluding the costs of destroyed samples, shipping, and administrative activity—could consume over 11% of a small manufacturer's revenue.[7] Since a typical profit is about 5% of revenue, we expect many small businesses to close because of the testing requirements, particularly after the continuing testing

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[5] Robert Franklin, Directorate for Economic Analysis, CPSC, *Final Regulatory Flexibility Analysis for the Final Rule on Testing and Labeling Pertaining to Product Certification*, 134 (Aug. 25, 2011) ("*Regulatory Flexibility Analysis*"), in Staff Briefing Package, CPSC, *Draft Final Rule for Testing and Labeling Pertaining to Product Certification* (Sep. 21, 2011), http://www.cpsc.gov/library/foia/foia11/brief/certification.pdf.

[6] 16 C.F.R. § 1107.21(c)(2).

[7] *Regulatory Flexibility Analysis* at 127–28.

requirements take effect in February 2013. They cannot simply raise their prices and remain competitive. We already have anecdotal evidence that this is happening.

Moreover, the testing rule's burdens fall most heavily not just on small businesses, but also on the good actors that we should want to help and for whom the third-party testing cost is particularly unjustified. More than ever, today's manufacturers have the tools and incentives to produce safe, compliant products. Modern production processes and quality assurance systems enable manufacturers to produce uniform compliant products without the need for confirming third-party tests. And the damage from noncompliance can be devastating: The cost of destroyed products, brand name damage, loss of future contracts, higher penalties, and class-action lawsuits, have already resulted in overseas manufacturers taking aggressive steps to ensure compliance, regardless of prescriptive government mandates.

The third-party testing requirement disadvantages companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, and domestic American companies who have never had a violation but who nonetheless must pay the most for third-party testing. Indeed, there are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety.

Bad actors, on the other hand, can easily escape the costs of the testing rule. Those who wish to make a fast profit without regard for public safety will not comply with third-party testing requirements, thereby achieving an unfair price advantage. Companies with a casual attitude toward safety standards compliance will be casual about maintaining accurate records to support CPSIA-mandated testing. And because the requirements of 16 C.F.R. § 1107 are so complicated and expensive, it is easy to imagine the many shortcuts a manufacturer could take to reduce its costs while projecting the image of compliance. The CPSC does not have the manpower or the expertise to police manufacturers' internal record-keeping controls, as it would take an army of investigators all over the world to accomplish such a task. Instead, the detection method of ensuring compliance has remained and will remain the default method of compliance for companies producing violative products, while those committed to ensuring compliance and already effectively doing so are bearing the unnecessary additional burden of third-party testing.

Detecting and intercepting products is the key component of the CPSC's strategy.

Advocates for third-party testing characterize it as a "prevention" model that is superior to what they view as the Commission's traditional "detection" model, because they believe that it will keep dangerous products out of commerce in the first place. The evidence does not bear this out. Preventing the manufacture and importation of noncompliant children's products has always been and remains the focus of the CPSC's efforts. The policy disagreement is over the most effective means of doing so.

Mandating third-party testing is based on the out-of-date, "command and control" paradigm that government can and should achieve its policy outcomes by dictating the precise decisions and actions of the private sector. The better policy mandates an outcome and—through a strong enforcement mechanism—demands penalties for noncompliance. This allows the market to find the most efficient means of compliance and encourages a stronger commitment to compliance in the regulated community.

Today, thanks to Congress, the Commission also has vastly-improved enforcement tools relative to those available even a few years ago. The Commission has authority to impose significantly higher penalties for violations. And the agency can confiscate violative products at the border and destroy them. Relatedly, with the advent, in early 2008, of our agency's Import Surveillance Division, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with CBP to maximize the number of products screened at all U.S. ports.

Today, the Commission intercepts non-compliant toys and other children's products through these broader border-control efforts, through the use of x-ray technology, and through a data-driven targeting program that searches ship manifests before they reach port and flags previous offenders and first-time shippers for closer inspection. Using this detailed and timely information, and through closer cooperation with CBP, the CPSC seized and denied entry to 49% more shipments of noncompliant products in 2010 than in 2009. These tools are more effective at ensuring compliance with safety standards than policing all children's product manufacturers for certifications to mandatory third-party tests.

These difficult economic times call for a regulatory regime that carefully balances the costs and benefits of executive agency action. And consumer product regulation, in particular, must take into account the desire of American families for a dynamic marketplace with new products that are also safe and affordable. The requirement that all children's product manufacturers repeatedly third-party test every component of their products threatens to increase the cost and drastically reduce the availability of children's products for parents of modest means. Public and private resources could instead be redirected toward the alternative production processes and enforcement methods that can achieve the same goal much more efficiently. *Indeed the CPSC staff suggested that the Commission request from Congress some flexibility in this area.*[8] Therefore, we recommend a regulatory system that encourages implementation of the quality

[8] DeWane Ray & Randy Butturini, Office of Hazard Identification & Reduction, CPSC, *Memorandum: Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products*, 13 (Aug. 29, 2012), in Staff Briefing Package, *Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products* (Aug. 29, 2012), http://www.cpsc.gov/library/foia/foia12/brief/reduce3pt.pdf.

assurance process that best achieves results for a particular company or industry, without a third-party testing requirement.

2. Increase the permissible limit of lead in children's products to 300 parts per million and allow the Commission to set a lower limit for a particular material, product, or component where it is necessary to protect against a real risk of harm.

The CPSIA lowered the permissible amount of lead in children's products to 600 ppm, and then to 300 ppm, over a fixed period. Congress then directed that the limit be lowered to 100 ppm unless the Commission determined that this was not "technologically feasible" for a product or product category. The CPSIA also directed the Commission to consider "the public health protections associated with substantially reducing lead in children's products." Rather than use the discretion that Congress gave us to consider feasibility and public health, the agency took an approach that turned the statute on its head. The agency interpreted the term "technologically feasible" to require the use of a low-lead material if it exists anywhere in any market, regardless of the suitability of the material for a particular use, the cost of the substitute, or its availability to all manufacturers in the quantities needed. In effect, "feasible" was replaced with "imaginable" in the statute.

The analytical approach taken by the Commission completely ignored economic feasibility. As long as "low-lead materials are available, but are available only at higher prices," the Commission assumed technological feasibility, because "there is no economic basis for determining at what point a cost increase would make production not technologically feasible."[9] But it is inconceivable that the Commission could not identify *any* point at which the cost of manufacturing a product would exceed the price at which a market could exist to purchase it. Such questions are asked and answered every day by every business that manufactures a product. Even if it were plausible that economists cannot identify in the *abstract* prohibitively high production costs, the evidence before the Commission clearly demonstrated that such costs would be imposed by the reduction of the lead limit to 100 ppm. Commission staff concluded that the costs associated with a 100 ppm lead limit would be substantial and would drive products and businesses from the market.

A predictable and troubling result of this decision—related to third-party testing—is laboratory and materials variability. When assessing lead content at the trace level of 100 ppm, laboratories are reportedly finding different results. It is difficult to find low-

[9] Robert J. Howell, Office of Hazard Identification & Reduction, CPSC, et al., *Memorandum, CPSC Staff's Reponse to Commissioner Northup's Questions: Technological Feasibility of 100 Parts Per Million Total Lead Content Limit*, 24–25 (July 8, 2011), in Staff Briefing Package, *Staff Responses to Commissioners' Questions* (July 8, 2011), http://www.cpsc.gov/library/foia/foia11/brief/leadquestions.pdf.

lead materials that consistently meet the 100 ppm requirement in the marketplace, and particularly so for recycled materials. Members of the public raised this issue in response to our request for comments under Public Law 112-28. Since a failing test result can have major financial implications, this result should be of great concern to the Commission. But there has been no inclination to address the problem. Test-result variability drives up costs needlessly—when it comes to public health, the difference between 100 ppm and 300 ppm of lead is virtually nonexistent.

We do not believe that returning to a 300 ppm lead limit would harm children's health. The Commission's staff examined the health impact of the decision to reduce the lead limit to 100 ppm and concluded that "the contribution of products containing between 100 ppm and 300 ppm lead to the overall lead exposure in children is minimal." Claims to the contrary—that swallowing objects containing 300 ppm or less of lead reduces children's I.Q.—are based on an "incorrect characterization of a CPSC staff analysis first released in 2005."[10]

In short, this was a classic example of a regulation being imposed without the scientific data to support it. Because of the significant harm to the economy, consumer choice, businesses and the workers they employ—and in the absence of any public-health justification—the 100 ppm lead limit should be repealed. Congress should instead give the Commission the discretion to set the appropriate lead level for a material, product, or component where the health benefits and scientific evidence justify such a level.

3. Change the definition of "children's product safety rules" to cover only products intended exclusively for children.

The Commission's definition of "children's product safety rule" is a similarly non-risk-based imposition of the costly third-party testing requirement. The CPSIA requires third-party testing for compliance with all "*children's* product safety rules." Prior to the CPSIA, the Commission promulgated numerous "*consumer* product safety rules," such as those governing carpets and rugs, vinyl, clothing textiles, and mattresses. The Commission's majority interpreted the term "children's product safety rule" to include such rules.

Thus, any product made for a child is subject to a "product safety rule," compliance with which must be tested under the third-party testing rule. This means that, for example, a rug with the image of a children's cartoon character must be tested not only

[10] Dominique J. Williams & Kristina M. Hatelid, Directorate for Health Sciences, CPSC, *Memorandum: Response to Public Comments: Technological Feasibility of 100 ppm Total Lead Content in Children's Products*, 38 (May 11, 2011), in Staff Briefing Package, *Technological Feasibility of 100 ppm for Lead Content* (June 22, 2011), http://www.cpsc.gov/library/foia/foia11/brief/lead100tech.pdf.

for lead and phthalates (rules that clearly are focused on children's safety), but also for flammability (a requirement that covers general safety, not just children's safety). A blue rug that is made of the same material and located in the living room does not, however, have to be subjected to the same tests. This makes no sense.

A clear distinction can and should be made between "children's product safety rules" and more general "consumer product safety rules." Fundamentally, no safety improvement is gained by requiring the third-party testing of a lamp or rug merely because its design makes it suitable for children, when there is a greater risk that a rug will encounter a fire hazard in a kitchen or adjacent to the living room fireplace than in a child's room.

Indeed, the CPSIA defined children's products as those primarily designed or intended for children under 13. To make treatment of products and testing requirements consistent, "children's product safety rules" should be clearly defined by statute to mean safety rules that relate exclusively to children's products, and not to products intended for general use and governed by longstanding consumer product safety rules. There is no risk associated with these products that necessitates *new* third-party testing requirements.

Conclusion

All of us at the CPSC appreciate very much Congress's effort to reform the CPSIA by asking the Commission to consider ways to reduce needless burdens that are destroying jobs and undermining the nation's economic recovery. This report identifies and discusses briefly only a few of the recommendations that we believe would significantly decrease the costs of third-party testing without impacting safety. We would welcome the opportunity to elaborate upon the ideas presented here, and to share additional opportunities we have identified.

Attachment D

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

Statement on the Commission's decision to publish the Notice of Proposed Rulemaking on a Safety Standard for Magnet Sets

August 27, 2012

I voted to publish the Notice of Proposed Rulemaking on a Safety Standard for Magnet Sets because I believe that rulemaking is the appropriate way to address hazards that may be posed by this product. The hazard pattern described in the NPR deserves the attention and study of the Commission and the public through the rulemaking process. My vote was not without reservations, however, because I am not convinced that the proposal before us—which amounts to a ban on all magnet sets sold today—best reduces or eliminates the hazard while minimizing disruption to manufacturing and commerce as required under our statute.[1]

In particular, the proposed standard proceeds on the belief that warnings do not work for this relatively new product because (it is assumed) warnings are and will be ignored or otherwise not communicated effectively. But in the absence of a robust and comprehensive program to educate and warn about this hazard, it is unclear that warnings will be ineffective and our conclusion that such is the case is speculative. And applying this principle broadly would eviscerate many of the safety standards that the Commission (and Congress) have deemed acceptable. The long-term policy implications stemming from the rationale for the proposed ban on other products subject to warnings have not been explored but are presented by this rulemaking.

I am also concerned that the proposed ban may be overly broad. There are two hazard patterns here: one involving young children and the other involving older children and teenagers. A tailored approach might adequately reduce the risk associated with magnet sets but not eliminate the product from the marketplace. In addition, the proposed standard—particularly as amended by the majority—includes products that have not been demonstrated to pose the same risk. Overinclusive rules needlessly strangle commerce and innovation, and should be avoided. I hope that the comments in response to this NPR will help resolve these concerns, particularly by proposing less-

[1] *See* Consumer Product Safety Act § 9(f)(1)(D), 15 U.S.C. § 2058(f)(1)(D).

burdensome alternatives and by providing data that sheds light on how best to address the different hazard patterns before us.

Despite my concerns about the proposed standard, I voted for this to be put to the public because this is the right way to pursue the regulatory process when a significant hazard involving a class of products is brought to the attention of the Commission. When the Commission believes that a hazard is so imminent that it cannot wait for the results of rulemaking, we have statutory authority to act. In this case, however, instead of using that authority, we have brought compliance actions against certain companies and asked others to withdraw the products from the market in an attempt to reach the entire market. This amounts to back-door rulemaking. Approaching the hazard through the front door—that is, through the rulemaking process—is more appropriate. In this way, we do not take formal or informal actions that reach conclusions about a potential hazard before the Commission has all the relevant evidence and all affected stakeholders have the opportunity to be heard.

Congress created the Commission's regulatory procedures to allow for open and transparent rulemaking, and to ensure that the Commission has the right scientific, medical, and economic analysis before making decisions. That process must not be short-circuited. Thus, I look forward to examining this matter further—and as quickly as possible—once the public has weighed in and we have more data.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

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Majority (202) 225-2927
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October 5, 2012

The Honorable Anne Northup
Commissioner
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Commissioner Northup,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade hearing entitled "Oversight of the Consumer Product Safety Commission," held on Thursday, August 2, 2012.

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Friday, October 19, 2012. Your responses should be e-mailed to the Legislative Clerk, in Word or PDF format, at Kirby.Howard@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Mary Bono Mack

Mary Bono Mack
Chairman
Subcommittee on Commerce,
Manufacturing, and Trade

cc: G.K. Butterfield, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade

Attachment

Subcommittee on Commerce, Manufacturing and Trade
"Oversight of the Consumer Product Safety Commission"

Questions for the Record Submitted by Chairwoman Mary Bono Mack

1. **Based on your experience as a Commissioner, how do you believe the Commission could both better ensure consumer product safety and do so more economically and efficiently?**

My three years as a Commissioner have opened my eyes to the incredible costs this agency imposes on the regulated community and to the substantial taxpayer resources the agency expends, often with little or no commensurate safety benefit.

In some cases, the two are closely linked. For instance, the third-party testing requirement is an extremely burdensome and ineffective means of ensuring compliance with our safety standards, and has cost the agency an enormous amount of resources to implement. Similarly, the public database requires product manufacturers to focus resources on protecting against inaccurate public reports, and conducting public relations damage control when the CPSC's minimal safeguards do not prevent the publication of false or misleading information harmful to a business's reputation. At the same time, enormous CPSC staff time is dedicated to vetting reports for posting on the public database, despite the existence of far more useful private sector aggregators of product safety information.

Other aspects of the CPSC's operations are costly only to taxpayers, but are no less in need of reform. The overhead associated with maintaining a five member Commission when a single administrator would be more effective and efficient is one example.

Based on these and other observations I have made during my tenure, I have identified a number of reforms to the CPSC that I believe would greatly improve its efficiency while reducing burdens on the regulated community and better protecting the public from unsafe products. Explained in detail below, I recommend the following changes, some of which would require new legislation to accomplish: (1) Repeal the requirement that all children's products be third-party tested irrespective of risk and instead let the Commission exercise its authority to require third-party testing by a manufacturer, or of a children's product or component part, only as it is deemed appropriate based on reasonable risk based guidelines; (2) replace the 5-member Commission with a single administrator; (3) shut down the public facing database at *saferproducts.gov*; (4) reform the CPSIA to allow the agency to focus on risk; (5) remove impediments to the Commission's working toward the international harmonization of safety standards; (6) require that all CPSC rules be justified by a cost-benefit analysis; (7) require products that do not meet an applicable voluntary standard to bear a mark so stating; and, (8) moderate our role in voluntary standards development to not pressure standards bodies to include requirements that would not survive the cost-benefit analysis required for mandatory standards setting.

Repeal the Requirement That All Children's Products Be Third-Party Tested Irrespective of Risk And Instead Let the Commission Exercise Its Authority to Require Third-Party Testing By a Manufacturer, Or of a Children's Product or Component Part, Only As It Is Deemed Appropriate Based on Reasonable Risk Based Guidelines.

Imposition of the third-party testing requirement on every component of every children's product in response to "the year of the recall" was a classic example of legislative overreach. There may be appropriate circumstances for requiring particular manufacturers of particular products to bear the cost of third-party testing and certification in order to protect against the risk of consumer injury, and the Commission has the authority to make that call. But requiring all children's products to be third-party tested has proven to be a business crushing and job killing mandate without a justifying benefit. Through the use of better technology and collaboration with the U.S. Customs and Border Patrol (CBP), the CPSC has new and better tools to enforce our standards without the suffocating burden of the law's new mandates.

The CPSIA was enacted in 2008 in response to a media storm over a large number of Chinese manufactured children's toys that were recalled due to lead in paint that exceeded a standard in place since 1970. No child was injured by lead paint in the toys, and the offending manufacturers were soundly rebuked under existing law, through mandatory recalls, the imposition of the largest penalty in the history of the CPSC, and a thirty million dollar class action lawsuit settlement for one manufacturer.

The news of the recalls created a political climate suited to fulfill a long held goal of consumer advocates: the reduction in the lead content of children's products virtually to zero, the elimination of phthalates without any known risk to children, and the requirement that all children's products be tested by third party laboratories to ensure compliance with these and all other applicable safety standards. Thus, the CPSIA requires, with limited exceptions, that before a children's product enters commerce, sufficient samples of every component must be individually tested by a third-party laboratory and certified as free from lead and phthalates, and compliant with all other applicable product safety rules. Furthermore, the related tracking labels and record keeping are such a complicated morass that only the most sophisticated manufacturers can comply.

The CPSIA also required the Commission to establish protocols and standards for ensuring that after the initial third-party testing, children's products are subject to additional testing during production. The Commission carried out this mandate through the promulgation of 16 C.F.R. § 1107, which requires the additional third-party testing of a certified children's product to ensure continued compliance with all applicable safety standards, both when there is a material change to the product, and periodically during production even in the absence of a reason to believe a certified product is no longer compliant. The rule's prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

Specifically, unless a manufacturer is one of the few large businesses with a ISO/IEC 17025:2005 accredited in-house laboratory, the rule requires it to undertake a complex analysis and formulate either a periodic testing plan or a production testing plan for each product manufactured at each manufacturing site. Manufacturers who make multiple products at a single site or who frequently change the product manufactured at a site will need to continually formulate and update their periodic testing and production testing plans, potentially as often as every day. They also must "document the production testing methods used to ensure continuing compliance and the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules." Businesses have told us that documenting their complicated production processes will be costly, burdensome and simply impossible for some smaller scale companies.

The CPSC is responsible for ensuring that noncompliant and potentially dangerous children's products do not reach American shores. Advocates for third-party testing characterize it as a "prevention" model that is superior to what they view as the Commission's traditional "detection" model, because they believe that it will keep dangerous products out of commerce in the first place. The evidence does not bear this out.

Preventing the manufacture and importation of noncompliant children's products has always been and remains the focus of the CPSC's efforts. The policy disagreement is over the most effective means of doing so. Mandating third-party testing is based on the out-of-date, "command and control" paradigm that government can and should achieve its policy outcomes by dictating the precise decisions and actions of the private sector, rather than mandating an outcome with penalties for noncompliance, implementing a strong enforcement mechanism, and allowing the market to find the most efficient means of compliance.

The more forward thinking and effective approach to ensuring the compliance of manufacturers to consumer product safety law is therefore to create within that community, through a "carrot and stick" approach, a commitment to compliance, enhance the CPSC's partnership with CPB and our use of emerging risk assessment management technology at ports to better target potentially noncompliant products for inspection and prevent them from entering the stream of commerce. Recent technological and organizational advances have markedly improved the efficacy of these enforcement tools, increasing substantially the likelihood that noncompliant products will be detected and destroyed. In addition, modern production processes and quality assurance systems enable manufacturers to produce uniform compliant products without the need for confirming third-party tests. The cost of destroyed products, name brand approval, loss of future contracts, higher penalties, and class-action lawsuits, have already resulted in overseas manufacturers taking aggressive steps internally to ensure compliance, irrespective of prescriptive government mandates regarding the proper means for doing so.

Third-party testing is very expensive for all manufacturers and importers, but its cost burden is insurmountable for many small businesses. According to the CPSC's economists, the costs of testing alone -- excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity – is expected to consume over 11% of

a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement, particularly after the obligation to conduct periodic and material change tests takes effect in February 2013. They cannot simply raise their prices and remain competitive.

Commission economists predict that in response to the "significant increase in their costs due to the final rule", manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product market", including, in particular, ones serving a niche market, such as products for children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

The requirement that all children's products be tested at a third-party lab, regardless of risk, also disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation, but who nonetheless must pay the most for third-party testing. In the latter regard, there are entire industries that have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. And, of course, those without a commitment to an ongoing enterprise who wish to make a fast profit without regard for public safety will not comply with third-party testing requirements in any event, thereby achieving an unfair price advantage.

While the crippling costs of third-party testing are unquestionable, its benefits are speculative and overstated. Some argue that third-party testing before sale will result in fewer recalls. But most recalled products contain design or manufacturing defects that are unrelated to the Commission's product and material specific safety standards. Moreover, given the Commission's decision to reduce the lead in the substrate of children's products well below a level presenting any risk to health, recalls of products violating the new standard do not even necessarily protect against a real risk of injury.

Additionally, the manufacturers most likely to honor the third-party testing requirement are also the least likely to produce noncompliant products. Good corporate citizens wishing to maintain their market reputation have already improved their internal mechanisms to ensure compliance regardless of third-party testing requirements, but will also incur the cost of third-party testing consistent with their commitment to follow the law. Indeed, the CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. For instance, we have learned that since the discovery in 2007 that the lead paint in certain violative products was introduced through inadequately supervised component suppliers, manufacturers have reduced their number of suppliers, and now

undertake more frequent internal testing. Component suppliers, in turn, take more care to ensure compliance because they are aware that manufacturers will not risk continuing to use a supplier who fails even once to provide compliant components.

In contrast, a "bad actor" with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications. Because the requirements of 16 C.F.R. § 1107 are so complicated and expensive, it is easy to imagine all of the shortcuts a manufacturer could take to reduce its cost, creating the impression of compliance. The CPSC does not have the manpower or the expertise to police manufacturers' internal record keeping controls, as it would take an army of investigators all over the world to accomplish such a task. Even now, when the CPSC seizes a noncompliant product at the port through our more sophisticated targeting, we do not investigate the certificate or prosecute the paperwork failure. Thus, the detection method of ensuring compliance has remained and will remain the default method of compliance for companies producing violative products, while those committed to ensuring compliance and already effectively doing so are bearing the unnecessary additional burden of third-party testing.

Today, the Commission also has enforcement tools vastly improved over those available even a few years ago. These are a more effective use of taxpayer dollars to ensure compliance with safety standards than is policing all children's product manufacturers for certifications to mandatory third-party tests. The Commission now has authority to confiscate and destroy at the border products that violate federal safety standards. Since the advent in 2008 of our agency's Import Surveillance Division, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with CBP to maximize the number of products screened at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts; application of x-ray technology; and, computer databases that search ship manifests before they reach port, flagging for inspection previous offenders and first-time shippers. Using this more detailed and timely information, and through closer cooperation with CBP, the CPSC seized and denied entry to 49% more shipments of noncompliant products in 2010 than in 2009. Clearly then, there is no evidence that the CPSIA reduced the numbers of noncompliant products being made, and the third party tests, certifications and attendant mandates did nothing to contribute to the CPSC's ability to catch them.

The CPSIA also increased the incentive for compliance by increasing the maximum civil penalty amounts from $8,000 to $100,000 for each "knowing" violation and from $1.825 million to $15 million for any related series of violations. As a result, the average out of court settlement reached by the CPSC for violations of its statutes increased 61% between 2008 and 2009, and another 43% in 2010 over the amounts collected in 2009. The CPSC also can now more easily seek criminal penalties, and can require a company recalling a product to give a refund, replacement and/or repair, rather than allowing companies to select the remedy they prefer.

It is well recognized that these difficult economic times call for a regulatory regime that carefully balances the costs and benefits of executive agency action. And consumer product regulation, in particular, must take into account the desire of American families for a dynamic marketplace with new and more interesting products that are also safe and affordable. The requirement that all children's product manufacturers repeatedly third-party test every component of their products is a tremendously costly and not very effective means to prevent violative products from entering commerce. It also threatens to increase the cost and drastically reduce the availability of children's products for parents of modest means. Public and private resources should therefore instead be redirected toward the alternative production processes and enforcement methods that can achieve the same goal much more efficiently.

Replace the 5-member Commission with a Single Administrator

I believe the CPSC could be run more efficiently by a single Administrator, than by a Commission of five or even three. In fact, similar proposals have been considered in the past: http://www.gao.gov/products/T-HRD-87-14. Managing a small agency simply does not require more than an Administrator. Additionally, I have confidence that Chairman Tenenbaum (or a future Administrator) would be able to run the agency much more efficiently without the pressures from her Democrat and Republican colleagues, who wish constantly to influence her actions in one direction or another. Reducing from five Commissioners to an administrator would save the substantial costs of office space, Commissioner and staff salaries, travel costs and all other expenses associated with a Commissioner's office.

The Chairman is already solely accountable for all of the agency's core functions, including setting the rulemaking agenda, public relations, human resources duties, and budgeting. The other four Commissioners may be asked to sign off on these things from time to time as a formality or to provide input, but ultimately all accountability lies with the Chair.

Rulemaking involves the participation of five Commissioners. However, I would argue that this "participation" rarely involves more than duplicative analytical efforts—all of which usually result in a 3-2, party-line vote. This also means five different Commissioners, all their staffs (12 people), plus dozens of technical staff and lawyers are reviewing, editing and analyzing the exact same rule-making documents.

Despite my efforts, I was unable to meaningfully influence the major rulemakings we considered when all five Commission seats were filled. In fact, divided along party lines, the Chair was often pushed to align her position with one or both of the other two Democrat Commissioners. For example, the Commission issued a Notice of Proposed Rulemaking on the Definition of Children's Product that was so ambiguous we might just as well not have defined the term at all. In response, the Commission received many excellent comments from manufacturers and retailers illustrating how the parameters of the definition provided very little, if any, certainty for products that fell around the outer edges of the law's age limit. Then, after weeks of review by technical staff, the Office of

General Counsel, and all Commissioners' staffs, the final rule approved by the Majority was *worse* than the proposed rule, in that it unjustifiably broadened the parameters so that even more products fell under the purview of the CPSIA. Without four other Commissioners pulling her in opposite directions, one Administrator would be solely responsible for fair, well-thought-out rulemaking decisions.

Having five Commissioners also means that many day-to-day activities of the Commission must happen five different times, which can drain staff time. Moreover, each Commissioner needs his/her own weekly briefings with various professional staff to remain current on the status of rulemakings, compliance issues, legal matters, public relations, administrative and staffing problems, and other issues. Unfortunately, it is not useful to combine most meetings with other Commissioners, who may have different agendas. Nor is it even legal under the Sunshine Act for more than two Commissioners to meet privately to discuss substantive matters. As a result, professional staff spend much of each week in repetitive "update" meetings with each Commissioner and away from their core duties. They also spend five times more time than necessary answering Commissioner and Commissioner staff questions, when they could be doing so for one Administrator.

During the course of these meetings and through other Commissioner and Commissioner staff initiated contact, CPSC Commissioners seek to influence the agency's professional staff to take or forego actions based on the Commissioner's policy preferences. These conflicting directions can sow confusion and dissention in the ranks of CPSC's career staff. I have learned from CPSC staff that the work environment created by being pulled in opposite directions can be difficult and stressful. A single administrator guiding the staff to advance the presidential administration's agenda would foster a more productive and satisfied workforce.

The CPSC still remains a relatively small agency, despite the new rules it has promulgated and its responsibility to enforce those rules. Other regulatory agencies, such as NHTSA and FDA are run by Administrators that are accountable to Cabinet secretaries and the White House. I could imagine a similar arrangement for the CPSC.

The Public Facing Database at *saferproducts.gov* Should Be Shut Down

Over the last three years, I have worked without success to improve the public facing database authorized by § 6A of the CPSA (§ 212(b) of the CPSIA), so that it would provide reliable and accurate product safety information to inform consumer choice and reduce the risk of injury. Instead, and over my objections, *saferproducts.gov* has become a public website bearing the imprimatur of the Federal Government that is badly designed and hard to navigate, provides incomplete information, and is populated by unverifiable reports of dubious accuracy. Furthermore, it is absorbing a disproportionate share of this agency's time, talent and budget.

In past testimony before Congress, I have advocated for reforms to the law that would improve the database. Specifically, I have proposed that the Commission only publish

reports of harm that are received from individuals with firsthand knowledge of the product, individual or incident giving rise to the alleged risk of harm. I have also asked that reports be required to identify to the CPSC (but not necessarily publicly) the victim or product owner, so that the Commission can conduct an investigation to verify the accuracy of a claim. I have also urged that sufficient information be included to specifically identify the exact product at issue before a report is published. Such information could include the model number, model name and date of manufacture, or other information necessary to prevent consumer confusion. However, even had these reforms been adopted, the data base today would be of little use to American consumers.

Out of all of my suggestions, the single one even addressed by Congress was the need for specific model information. But H.R. 2715 amended the CPSIA to require only that the Commission *try* to obtain product model information; the Commission is still permitted to and does post reports of harm not specifically identifying the subject product. Such reports continue to mislead consumers, potentially doing more harm than would no report at all.

Today, I strongly recommend that the public facing portion of the Commission's new database be shut down. There is simply no safety benefit in making all of our incident reports public, and doing so diverts resources that would be better spent advancing the Commission's safety mission.

This Commission should have a public database funded by taxpayers only if it is different and better than any source of information that already exists in the public domain, such as websites like *Amazon.com* or *Yelp.com*. Unfortunately, our public database is less useful than similar sites that are already available to the public, and is, in fact, more likely to mislead the public. This is because our inability to routinely verify reports leads to the publication of inaccurate information. It is also because we do not permit satisfied customers to comment in response to a report that a product presents a risk of injury, thereby providing a one-sided picture without the balance and sense of proportionality that consumers need in order to choose among competing products.

The contrast between *Amazon.com* and *saferproducts.gov* is illustrative. *Amazon.com* has a much more user-friendly and informative design, giving consumers an intuitive and easy to navigate interface that shows, at the point of purchase, the most popular models of a product, the degree of customer satisfaction (on a five star scale), complaints and comments about the product, and responses to complaints and comments from other consumers that provides a balanced perspective. Consumers contemplating a purchase want to learn about the safety experiences of others who already own the product; such useful information is unavailable on our website. *Amazon.com*'s aggregation of far more comments – both positive and negative – also provides a more accurate view of a product's safety. For instance, on *Amazon.com*, when a product that has sold a million units has a handful of purchasers that question its safety, a potential consumer has enough information to put the complaints in perspective. In contrast, the same number of complaints about a product on *saferproducts.gov*, where there is no way to determine how many products have been sold or the experience of the vast majority of purchasers,

could well lead a consumer to avoid the product. Worse yet, that consumer might instead purchase another product that actually is dangerous, but because of its smaller volume of sales, is the subject of fewer or no reports. *Amazon.com* has the added advantage of sending a hyperlink to everyone who buys a particular product, thereby ensuring both that a broader perspective is provided, and that there is no confusion regarding what exact product is the subject of a comment. A consumer searching the CPSC website for product information, on the other hand, has no way of targeting a particular model, and to the extent he or she finds information that appears to correspond to a particular product, without the actual model number, the product could very well be something else. In fact, we know that consumers posting reports to *saferproducts.gov* occasionally even misidentify the manufacturer, and sometimes this is done with so little specificity that the manufacturer does not realize the mistake.

Today consumers are used to navigating through websites and databases with hyperlinks that are intuitive and do not require the ability to sort data and cull information using very exact terms. The CPSC database is difficult to use and is missing many of the basic programming that is so common today. And that problem is only going to get worse. We are not equipped to maintain, upgrade and build on our public database. It is expensive to contract outside of the agency, and continuity is difficult to maintain, because of budget issues and limitations for contracting through multiple fiscal years. An organization like *Amazon.com* can afford to spend millions of dollars every year to take advantage of emerging technology, build their institutional capacity for programing within their company and stay current with fast changing customer expectations. The CPSC cannot hope to match this investment, and dedicating more resources in an attempt to meet consumers' expectations would just send good money after bad.

Further, the Commission has limited resources for enforcement, and the public database diverts Commission staff time, appropriated funds and product safety focus from addressing genuine risks to screening and preparing the reports for public disclosure. Every report that is entered into our database requires the personal attention of multiple members of our staff to: review and edit for clarity, determine that the report meets the criteria for inclusion (about 40% do not reach this threshold), send the report to the manufacturer for review and possible comment, and make a determination of inaccuracy if the manufacturer so requests. Manufacturer claims of inaccuracy can lead to lengthy and complicated negotations over whether the report can be posted at all, and, if so, how it must be edited to ensure its accuracy.

These time consuming tasks by staff are unrelated to the most important part of our mission, which is to identify unsafe products on the market and to take appropriate action to protect consumers. The agency has yet to estimate the number of new FTEs we may need, year after year, to administer the public database. However, one conservative estimate is that it will take twenty-two new FTEs to handle the case work generated by these requirements, and that does not include complicated cases requiring the investigation and resolution of a material inaccuracy charge by a manufacturer. But there is no question that as more staff has been hired and assigned to process database reports rather than to perform the more important work of watching for trends and catching new serious risks,

our agency has failed both to identify significant emerging risks that have been reported, and to take timely action to prevent severe injuries to additional consumers.

Additionally, because inaccurate database reports are indistinguishable from accurate ones, the media's attention can focus on either inaccurate reports or less serious risks, pressuring the agency to prioritize its efforts based on publicity rather than risk level. Because the reputation of the agency is involved, a single press story can drive our resources to costly and complicated investigations of incidents, even when there has been no serious injury and Commission staff has a high level confidence either that the company has addressed the risk or that human error was at fault.

Shutting down the public database will by no means result in the waste of the substantial appropriations already dedicated to the Commission's IT initiative of the last several years. That initiative involved combining the numerous "silos" of data sources and data management into a single integrated system. That new integrated data system will continue to permit all of the product safety incident data, irrespective of source, as well as the software used to manage investigations of potentially risky products, to share a single format and "talk to each other", so to speak. Staff will retain their new capacity to monitor seamlessly every aspect of an incident and stage of an investigation, whether at the port, in the laboratory, in the office of compliance or in the legal department. These new features will continue to enhance the overall efficiency of the Commission.

Reform the CPSIA to Allow the Agency to Focus on Risk

The best way to allow the agency to perform its core functions—to assess and reduce risk—would be to reform the CPSIA's non-risk based mandates. In addition to the reforms addressed separately in response to this question (including repealing the requirement for the third party testing of all children's products), such reforms should include: repealing the 100 ppm lead content standard; defining children's products for purposes of the heavy metal and phthalate limits as products intended for children 6 and under, rather than for all children under 13; and, defining children's product safety rules as rules applicable to products intended exclusively for children, not general use products with incidental children's themes. Such reforms would free up agency resources to focus on known hazards and to better prioritize our regulatory agenda. It would also free up business resources to expand, build new products and stay competitive with what the marketplace is demanding in the future.

My objections to the 100 ppm lead limit are discussed in detail in response to Question 2, below. With respect to the age-based definition of children's product, the CPSIA defines a "children's product" as any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the products used by different age groups, CPSC staff has suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be

one of the most efficient ways to amend the law in order to exclude those products which many believe should be outside its scope.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that the products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (*e.g.*, certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children age six and under, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose a "substantial product hazard" under the Federal Hazardous Substances Act.

The Commission's definition of "children's product safety rules" is a similarly non-risk based imposition of the costly third-party testing requirement. The CPSIA requires third-party testing for compliance with all "*children's* product safety rules." Prior to the CPSIA, the Commission promulgated numerous "*consumer* product safety rules", such as those governing carpets and rugs, vinyl, clothing textiles and mattresses. Over my objection, the Commission's Majority has required any such products intended for use in a children's room to be third party tested to those general consumer product safety rules. For instance, a rug with the image of a Disney character and intended for a child's room that the CPSIA clearly required to be third-party tested to lead and phthalates limits must, because of this interpretation, now also be third party tested to the rug flammability standard; but, a blue rug that is made of the same material and located in the living room does not.

I believe a clear distinction can and should be made between "children's product safety rules" and more general "consumer product safety rules." Fundamentally, no safety improvement is gained by requiring the third-party testing of a lamp or rug based on its design, when there is a greater risk that a rug will encounter a fire hazard in a kitchen or adjacent to the living room fireplace than in a child's room. And children play throughout the house. The CPSIA defined children's products as those primarily designed or intended for children under 13. "Children's product safety rules" should be consistently construed to mean safety rules that relate exclusively to children's products, and not to products intended for general use and governed by a longstanding consumer product safety rule. The Commission did not have to adopt a contrary view, but it did, even though there is no risk associated with these products that necessitates *new* third-party testing requirements. Congress could clarify this.

Remove Impediments to the Commission's Working Toward the International Harmonization of Safety Standards

Congress's imposition of statutorily set mandatory standards for lead and phthalates and its requirement that the Commission make mandatory the ASTM F-963 toy safety standard and standards for durable nursery products, has markedly diminished the Commission's ability to harmonize United States and other international safety standards. We have no flexibility to modify our standards to find common ground, and because our standards are often not risk based and cannot be justified on the basis of a cost-benefit analysis, other jurisdictions are unwilling to adopt our standards. This has resulted in a large number of European and other foreign manufacturers abandoning the American market for children's products and reducing the choice of our consumers. It also erects barriers to entry in foreign markets for American manufacturers, who must incur the cost of compliance and testing to multiple standards.

For example, the ASTM toy safety subcommittee recently established a work group to consider aligning the U.S. and international standards for accessible soluble heavy metals in toys. If adopted by the ASTM toy subcommittee, the new standards would then need to be approved by Commission vote, because the CPSIA made the ATSM F-963 standard mandatory, effective 2009. That the Commission could be an impediment to the ATSM's efforts to harmonize its standards with international norms illustrates how mandatory, government imposed, standards can inhibit the harmonization of international product safety standards. ASTM-F-963 had been a voluntary standard before the CPSIA made it mandatory in early 2009, and it is quite complex. In theory, the greater efficiencies achieved through harmonization should benefit manufacturers and consumers.

When I was in China in 2010 visiting factories and American companies, I saw that they perform three or four different "small parts" tests, all from different heights, simply because of the requirements of different countries. Harmonization would reduce that burden, but the CPSIA's requirement that toys sold in the United States satisfy ASTM F-963 has tied the Commission's hands in its negotiations to "harmonize" with the Europeans. Overall, locking in the ATSM-F-963 standard has severely limited the potential for improvements to safety and efficacy that would otherwise be achievable by learning from and adopting where appropriate the toy safety standards of other countries.

I can recommend several statutory changes that could spur greater global harmonization without compromising product safety. First, Congress could permit the Commission to recognize an exception to a statutory or other mandatory standard in cases where compliance with the analogous foreign standard would not increase the risk of injury. Second, to account for cases where an analogous foreign standard does not provide adequate protection, Congress could authorize the Commission to accept the foreign standard as a baseline, with supplemental requirements as necessary to address risk. In that way, compliance with both jurisdictions' standards could be achieved with the investment necessary to satisfy one, and the marginal additional cost necessary to satisfy the additional requirements of ours. While still more costly than complete

harmonization, the costs of complying with the standards of two jurisdictions under those circumstances would be substantially less than were the two standards completely different. Finally, Congress itself could make a finding that particular European standards provide sufficient protection from injury, and permit manufacturers selling in the United States to satisfy either standard.

Congress Should Require That All CPSC Rules Be Justified By a Cost-Benefit Analysis.

Under existing law, the CPSC cannot promulgate a consumer product safety rule until it has performed an analysis of the potential benefits and costs of the rule. That analysis must then show that the benefits expected from the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirement to reduce the risk of injury. 15 U.S.C. § 2058. However, the CPSIA expressly excepted the CPSC from its existing statutory mandate to perform cost-benefit analyses of its legislative rulemaking under the statute. Cost-benefit analysis was not prohibited, but the majority of Commissioners opposed the exercise and as a result, no cost-benefit analysis was performed of the CPSC's Testing and Certification rule, or the law's new mandatory standards requirements. Nonetheless, the Commission did examine the costs to small businesses of these regulations under the Regulatory Flexibility Act, and determined that they would be crippling. Of course, the RFA requires no consideration of a rule's benefits, and is not an impediment to rulemaking, no matter how economically destructive the cost.

Having had the freedom to regulate without the need for a rational justification, the Chair now seeks to expand those powers. In her July 17, 2012, testimony before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, Chairman Tenenbaum urged the Subcommittee to amend the Flammable Fabrics Act to permit "this type of flexibility for rules regarding flammability of upholstered furniture" because it "would be very helpful and may allow for expedited consideration of the proposed rules."

The Commission has been studying means to address the risk of the flammability of upholstered furniture and contemplating potential rulemaking *for over twenty years*. Action has yet to be taken because it is such a complicated issue, both in terms of demonstrating the efficacy of risk reduction alternatives, and ensuring that they do not have unintended and more harmful consequences, such as has occurred with the introduction of potentially hazardous flame retardant chemicals in California.

There is no doubt that a proposed rule addressing the flammability of fabrics could be "expedited" if there was no need to establish the efficacy of the rule, or that its quantitative and qualitative costs are justified. But such rulemaking would likely close businesses, increase the cost to American consumers, and reduce choices and options in the market, all for unproven benefits. This is exactly what both Congress and the President recognize is undermining the country's economic recovery.

Given the Chair's public posture, and based on my experience as a Commissioner in the political minority, unable to persuade the Democrat majority voluntarily to undertake cost-benefit analyses of its significant rulemaking, it is essential that Congress mandate that a cost-benefit analysis establish that the benefits of a regulation are proportionate to its costs before it is promulgated. This should apply to all economically significant regulatory actions, not only legislative rules.[1] In addition, such analyses should be performed by an independent entity.

Cost-Benefit Analyses of Regulatory Actions Should Be Performed by an Independent Entity.

A federal agency that is required or willing to undertake a cost-benefit analysis of a significant regulatory action is not always equipped to do so. The CPSC, for instance, lacks the expertise and resources to perform thorough economic analyses of all of its rules. Indeed, to my knowledge, the CPSC has only performed one full cost-benefit analysis in its history.[2] For example, if the CPSC had been required to perform a cost-benefit analysis of CPSIA's main testing and certification rule, it would have had to outsource the study, given the sheer scope of the rule and number of different industries impacted.

I do not believe that the CPSC employs professional staff with the expertise to evaluate or identify complex private markets dependent upon each other, the effects of the regulation on international competitiveness, or any of the other factors relevant to a thorough cost-benefit analysis. It is likely that many other Federal regulatory agencies also would be unable to do so.

Even if Commission staff had the knowledge, experience and resources to perform cost-benefit analyses of the CPSC's major regulatory actions, our Economics department is constrained by its lack of independence. The Economics staff must report to the political leadership of the agency whose bias toward a particular outcome is often well-known. As the staff is forced to make basic assumptions in connection with their analysis, they can tilt those assumptions to avoid undeserved but recurring criticism. Furthermore, political leadership is often setting an unrealistic schedule for final rulemaking. Such time contraints preclude the performance of thorough cost benefit analyses of complex regulatory actions.

Finally, cost benefit analysis is not the prime consideration of an agency with a mission unrelated to cost. Fundamentally, regulatory agencies do not view their primary job to be assessing the economics of decisions. Rather, regulatory agencies focus on regulating—

[1] For certain rules, such as "Notices of Requirements" under the CPSIA, where the "Notice" itself may not have costs associated with it, but the act of issuing the "Notice" triggers an underlying statutory requirement to test and certify (imposing huge costs), I would recommend requiring that the agency perform a cost-benefit analysis of ***both*** the rule itself and the underlying statutory requirement that is associated with it/triggered by it.

[2] The Commission's 2006 final mattress rule on flammability (16 CFR Part 1633) contained a cost-benefit analysis.

with the natural tendency to regulate more. In other words, the more "tweaks" or requirements that can be added in the name of safety, the better—and the costs of such decisions, even when considered, are always secondary.

An expert independent entity with its sole purpose to conduct cost-benefit analyses of all economically significant rules taken by any federal regulatory agency would be an effective way to address agencies' lack of expertise, resources and independence. This is similar to the responsibilities of the Congressional Budget Office (CBO) prior to the passage of House Bills and, in fact, a new office could be created within CBO to provide this analysis for regulatory agencies as they implement laws.

I recognize the costs associated with creating a new office within CBO responsible for performing cost-benefit analyses for other federal agencies. But that cost would be partially offset by the fact that "regulatory flexibility analyses" performed under the RFA would no longer be needed. Moreover, a single office performing all cost-benefit analyses would gain efficiency and expertise that would allow the analyses to be done more quickly, more correctly and more independently.

> All Significant Regulatory Actions Should Require a Cost-Benefit Analysis, Not Just Legislative Rules Subject to Notice and Comment Rulemaking Under 5 U.S.C. § 553(b).

Many of the regulatory mechanisms employed by the CPSC that imposed considerable costs on manufacturers were not legislative rules. Indeed, much of the Commission's regulatory activity under the CPSIA has not been through the 5 U.S.C. § 553(b) notice and comment rulemaking applicable to legislative rules. As a result, neither full cost-benefit analyses nor other forms of economic review were required. In fact, some of the most costly (and unnecessary) decisions made by the agency have come through party-line votes on interpretive rules[3], Notices of Requirements[4], and petition decisions. Thus, in considering a requirement that agencies conduct cost-benefit analyses to justify regulatory action, Congress should take into account the full scope of regulatory decisions that an agency makes – not simply the most obvious regulatory vehicle, legislative rules.

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[3] For instance, the Commission voted 4-1 to interpret the word "any" in CPSIA § 101(b)(1)(A) to mean "zero," rendering the absorbability exclusion of the original statute meaningless, and resulting in the rejection of a petition from a manufacturer to exclude the brass axle of a toy car that had *less absorbable lead* than the FDA permits in a piece of candy.

[4] Notices of Requirements (NOR) are ostensibly procedural regulations that provide notice to testing laboratories on how to become CPSC-recognized labs for the purposes of third-party testing under the CPSIA. However, their issuance triggers the underlying statutory requirement that all children's products be third-party tested to the particular standard listed in the NOR—a huge, new, non-risk-based requirement of the statute with sweeping economic impact. The Majority has used them to require manufacturers to third-party test to many general consumer product safety standards that I believe should not have been construed as "children's products safety rules" subject to third-party testing under the CPSIA.

Make It More Difficult for Congress to Suspend the Requirement For a Cost Analysis Before a Bill Becomes Law.

The CBO is charged with the important task of performing cost analyses of proposed legislation. However, in the past, that required analysis has been suspended by a majority vote in the House. CPSIA was such a statute, and its unintended economic consequences attest to the need for the required thorough examination of economic impact before passage. This could be avoided through a requirement that a statutorily required cost-benefit analysis could be waived only by a super majority of Congress.

Products That Do Not meet an Applicable Voluntary Standard Should Be Required to Bear a Mark So Stating.

The CPSC cannot set a mandatory standard where there is "substantial compliance" with a voluntary standard that eliminates or adequately addresses the risk of injury associated with the product. 15 U.S.C. § 2058(f)(3)(D). Consequently, there will always be the potential for some manufacturers not to comply with an applicable voluntary standard, under circumstances where the CPSC cannot impose a mandatory standard.

This lack of universal compliance with voluntary standards creates an unfair trading environment that puts consumers at risk of harm. Compliance with voluntary standards can be a substantial cost component of a product, and manufacturers who do not follow them can therefore charge a lower price for the product. This harms the good corporate citizens who are at a competitive disadvantage because they care about consumer safety, and it harms consumers who are unlikely to be aware that a voluntary safety standard even applies to the product they opt to purchase because it is cheaper.

But making all voluntary standards mandatory is not feasible either. There are thousands of voluntary standards and they evolve as products change in an ever changing market. The voluntary standards committees and the CPSC collaboratively monitor products for emerging hazards and product advancements and develop revisions to the voluntary standards. Mandatory standards lock in product and testing requirements that may not meet future risks. It would be impossible to imagine the CPSC having the resources to undertake continuous rulemaking to revise each and every voluntary standard that is developed and/or revised.

The solution to this problem is a more informed public. Voluntary standards bodies often adopt a mark of compliance that allows those manufacturers who follow the standard to inform the public that the product is compliant. But manufacturers that do not comply with a voluntary standard are not now required to mark their product as not in compliance with an applicable voluntary standard. Requiring them to do so would permit the public to make an informed decision between a cheaper, potentially less safe product, and a product that may cost more, but is compliant with a voluntary standard intended to protect the public from harm.

The Commission Should Not Encourage Voluntary Standards Bodies to Adopt Requirements That Would Not Survive the Cost-Benefit Analysis Required for Mandatory Standards Setting.

A corollary to the need for cost-benefit analysis in all CPSC rulemaking is the prevention of CPSC pressure in voluntary standards setting that can result in unjustifiably costly voluntary standards. Over the last three years, I have heard with increasing frequency and urgency complaints from businesses participating in voluntary standard setting that the CPSC plays with a heavy hand. In particular, CPSC staff are said to use the pressure of threatened mandatory standards and other regulatory and public relations pressure to influence the voluntary standard setting process. The problem with that approach is that it allows the CPSC to dictate "voluntary" outcomes that might not survive the cost-benefit analysis and least burdensome alternative requirements for the establishment of a mandatory standard.

The CPSC can play an important role by sharing its data and the expertise of its scientists and engineers, but it should allow voluntary standard setting bodies to make their own decisions, free from coercive influence. Section 9 of the CPSA authorizes the CPSC to impose more stringent standards than those established by industry consensus when it is in the public interest to do so. And the agency should impose a mandatory standard only after making the findings required by Section 9, including that "the benefits expected from the rule bear a reasonable relationship to its costs" and that "the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated." 15 U.S.C. §2058(f)(3)(E) and (F). Seeking to instead set standards through pressure on voluntary standards bodies improperly circumvents that statutory requirement.

2. Why did you oppose lowering the lead limit for children's products from 300ppm to 100 ppm?

The CPSIA mandated that the permissible amount of lead in children's products be reduced to 600 ppm, and then 300 ppm, over a fixed time period. Congress then gave the Commission discretion to determine whether a further reduction of the lead limit to 100 ppm was "technologically feasible." Specifically, Congress required the Commission to reduce the permissible amount of lead in children's products from 300 ppm to 100 ppm, *unless* the Commission determined that it was not "technologically feasible" to do so for a product or product category. The CPSIA also directed the Commission to consider "the public health protections associated with substantially reducing lead in children's products." I voted against reducing the lead limit to 100 ppm, because I concluded, based on the information presented by the CPSC's expert staff following the required statutory notice and a public hearing, that doing so was not technologically feasible, it would result in no measurable health benefit, and it would have devastating economic consequences.

The Commission majority concluded the reduction to 100 ppm was technologically feasible by erroneously interpreting Congress' direction in CPSIA § 101(d)(1) that it consider whether a "product" complying with the 100 ppm limit is available in "the product category" as referring to raw materials, not children's products. Based on this

incorrect reading of the statute, the Commission was able to rely on raw materials tests with no link to any identifiable children's product as its basis for concluding that "most" children's products on the market today already satisfy the 100 ppm standard.

Although the commercial availability of substitute low-lead raw materials appropriate for use in children's products is a consideration in determining the technological feasibility of 100 ppm children's products under CPSIA § 101(d)(2), the fact that it merely exists is simply not enough. A common sense reading of "technological feasibility", as well as judicial constructions of analogous statutes, confirm that Congress intended the Commission to consider not just the physical possibility of manufacturing a product with 100 ppm of lead, but whether it is economically feasible to produce and market the product.

But the analytical approach taken by the Commission completely ignored economic feasibility. As long as "low-lead materials are available, but are available only at higher prices" the Commission assumed technological feasibility, because "there is no economic basis for determining at what point a cost increase would make production not technologically feasible."[5] Even if it were plausible that economists cannot identify in the abstract prohibitively high production costs, this Commission should at least know it when it sees it. And the Commission had before it evidence, explicit in the published Briefing Package, that the costs associated with a 100 ppm lead limit will be substantial and will drive products and businesses from the market.

According to the Commission's own staff, the significant adverse economic impacts likely to result from setting a 100 ppm lead limit, include: the need to use more expensive low-lead materials rather than the nonconforming materials used today; the costs associated with reengineering products to make use of new materials; the costs of making leaded components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility of products due to the substitution of materials; reduction in the durability of products due to the substitution of materials; and, the loss of the value of all inventory not satisfying the new standard.

Even without considering economic feasibility, the Commission's conclusion that low-lead materials are available as substitutes for the materials currently used in children's products was inconsistent with the record. The conclusion was supported only by evidence that some suppliers expressed a willingness to provide some quantity of the materials. There is no evidence that the materials offered reliably contain the low-lead level specified, or that they are accessible to the manufacturers that would be required to use them to meet a 100 ppm standard. To the contrary, evidence obtained by the Commission demonstrated that suppliers were unable to provide materials that consistently met the specified low-lead standard, and that materials specified as low-lead were not accessible to many manufacturers.

[5] Staff Responses to Commissioner Questions, July 8 2011 ("Staff Responses") at 24-25 (Response to Northup Question 15).

The Majority wholly fails to account for the fact that an unavoidable 15% variability in test results at the 100 ppm level causes fully compliant products to fail tests. As a result, a product must have no more than 87 ppm in order to reliably and consistently test at no higher than 100 ppm. And that in turn means that an 87 ppm lead limit must be both technologically possible *and* economically feasible before the 100 ppm limit could be found to be technologically feasible. Neither conclusion was supported by the evidence before the Commission.

The Commission's staff also examined the health impact of the decision and concluded that "the contribution of products containing between 100 ppm and 300 ppm lead to the overall lead exposure in children is minimal." In so concluding, the staff specifically debunked claims made by the American Academy of Pediatricians (AAP) that exposure to children's products containing less than 300 ppm of lead is harmful and, in particular, that swallowing objects containing 300 ppm of lead or less measurably reduces a child's IQ. According to Commission staff, these conclusions by AAP were based on an "incorrect characterization of a CPSC staff analysis first released in 2005." Indeed, the Commission "does not have data showing that children's products containing up to 300 ppm will result in excess exposures to lead." And per the Commission's experts, "no information or studies were presented by [AAP] concerning exposure estimates for children who use specific products containing relatively low concentrations of lead (i.e., up to 300 ppm)."

Because of the significant harm to the economy, consumer choice, businesses and the workers' they employ, I concluded that the reduction in lead from 300 ppm to 100 ppm was not technologically feasible. Further, given the "minimal" lead exposure from products containing between 100 and 300 ppm of lead, and the absence of any scientific basis for concluding that children can be exposed to excess levels of lead from products containing 300 ppm of lead, the evidence before the Commission established that reducing the lead level produced no health benefits. In short, this was a classic example of the costs of a regulation far exceeding the benefits, and for that reason, I could not support it.[6]

a. Why did the Commission grant Joseph L. Ertl Inc.'s petition to permit it to manufacture its children's ride on tractor models using metal containing 300 ppm of lead, given that the Commission adopted without exception the statutory limit of 100ppm?

H.R. 2715 gave the CPSC authority to except from the 100 ppm lead content limit a product, class of product, material, or component part that: (1) requires the inclusion of lead because it is not *practicable* or not technologically feasible to manufacture it by removing excessive lead or by making the lead inaccessible; (2) is not likely to be placed in the mouth or ingested; and (3) will have no adverse effect on public health or safety, taking into account normal and reasonably foreseeable use and abuse. 15 U.S.C. § 1278a(b)(1)(A)(i)-(iii).

[6] A more detailed explanation of my vote not to reduce the lead limit to 100 ppm is available at: http://www.cpsc.gov/pr/northup07202011.pdf.

In April 2012, the Commission concluded that certain children's ride-on pedal tractor component parts made with aluminum alloys by Joseph L. Ertl, Inc. (Ertl) and other manufacturers satisfied the three statutory criteria, and in so doing, belied the conclusions reached by the majority that reduced the lead limit for all children's products to 100 ppm in August 2011. The vote demonstrated bipartisan acceptance, based on the expert advice of CPSC's professional staff, of the principles that (1) lead in children's products presents a risk of harm only to the extent that children can absorb the lead to which they are exposed; and (2) metal substrate containing 300 ppm of lead that is not likely to be placed in the mouth, ingested, or *extensively* contacted by children does not present a health risk, because it does not measurably increase blood lead levels.

Staff's determination that no measurable increase in blood lead level would result from a child's exposure to certain aluminum alloy components of a ride on tractor containing 300 ppm of lead was not a close call. Staff has conducted extensive wipe-testing of metal jewelry items and vinyl bibs containing far more lead – up to 100,000 ppm (equivalent to 10 percent lead), and these tests resulted in average lead transfers per wipe of less than 0.02 micrograms of lead. *See* Staff Briefing Package: Request for Exception from CPSIA Section 101(a) lead content limit for Pedal Tractors from Joseph L. Ertl, Inc., Scale Models of Dyersville Die Cast Divisions (March 21, 2001) ("Ertl Briefing Package") at 30. Based on "[e]xtensive scientific literature and several physiologic models" describing the relationship between exposure and blood lead level, staff estimated that even exposure to as much as 1.2 micrograms per day, in *addition* to default inputs for lead from sources such as diet and soil, does not result in a measurable increase in the blood lead level of children ages 3-7 years. *Id.* at 31. Staff further estimated that a child could have between no contacts and several contacts with a ride on pedal tractor on any given day. *Id.* at 31-32. Thus, even using an average per wipe exposure of materials having far more lead than the component parts at issue here, and the relatively high number of 60 contacts per day (1.2/.02 = 60), there would still be no measurable increase in blood lead levels, and therefore no adverse impact on public health or safety.

Notably, Ertl also satisfied the other two criteria for the grant of an exception to the 100 ppm lead content limit, based on circumstances that are likely present in connection with many other products containing lead in metal substrate. With respect to practicability, the Commission concluded that Ertl could not practicably manufacture the pedal tractor components using aluminum alloy with 100 ppm of lead in part because the minimum quantity available for purchase represented a seven year supply at Ertl's rate of manufacture, and would require about 15% of the company's yearly sales to purchase it. Ertl Briefing Package at 13. Other materials, such as plastic, zinc or steel were determined not to be practicable, because they would either change the "appearance" of the product, result in a much heavier product, or require Ertl to invest in new metal stamping technology and training, which would increase the per unit production cost. Ertl Briefing Package at 3. Staff had a choice between recommending that Ertl be required to use aluminum alloy containing 200 ppm or 300 ppm of lead, both of which were equally attainable in the quantities needed. Staff concluded that 300 ppm was practicable, because the 200 ppm alloy would increase manufacturing costs by 1% over that of the

300 ppm alloy. *Id.* Making the aluminum alloy inaccessible by introducing a covering was deemed not practicable because it "would represent a change in [the] current manufacturing process." *Id.*

While practicability must be assessed on a case-by-case basis, several important principals can be gleaned from staff's approach to the Ertl petition. First, a petitioner may be entitled to retain the current appearance of a product for "aesthetic" reasons, i.e., metal vs. plastic, if its customers prefer it. *Id.* Indeed, significant differences in "general appeal to consumers" can support considering a model made with a different material to be a "different product." *Id.* at 20. In addition, a petitioner need not undermine the functionality of the product in order to reduce its lead content, by, for instance, increasing its weight to an extent that impedes maneuverability. The Ertl case also highlights the importance of cost differentials. The fact that introduction of a new material would increase the cost of manufacture by necessitating a change in the manufacturing process was a factor in favor of granting the petition. Indeed, even a 1% increase in total manufacturing cost justified favoring aluminum alloy with 300 ppm of lead over aluminum alloy with 200 ppm of lead. The accessibility of an alternative with less lead is also key, and in that regard, the mere fact that a market exists does not warrant a finding of practicability. As the Ertl case demonstrates, the need to warehouse amounts in excess of that needed for ongoing manufacturing purposes also weighs against a finding of practicability.

With regard to the likelihood that a component will be placed in the mouth or ingested, the size and location of the component are central considerations. So long as the component is too large to be ingested or placed in the mouth, the only route of lead exposure is through hand to mouth activity. And as staff's health sciences experts concluded, a child's blood lead level is not measurably increased merely through hand to mouth contact with a component containing 300 ppm of lead in metal substrate that the child does not extensively contact. *See* Draft *Federal Register* Notice – Petition Requesting Exception from Lead Content Limits; Notice Granting Exception (as amended March 30, 2012) at 5. Notably, in the case of the Ertl ride on tractor, this included the main body casting, which CPSC's human factors experts determined was the component most likely to be touched by a child playing on the tractor. Ertl Briefing Package at 26.

The Ertl decision highlighted the potential utility of the functional purpose exception included with the 2011 amendments to the Consumer Product Safety Improvement Act, but recognition of the principles underlying the decision comes too late and at far greater cost than was necessary. As originally enacted, the CPSIA permitted the Commission to exclude from the reduced lead limits products that would neither "result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child," nor have any other adverse impact on health or safety. CPSIA § 101(b)(1). It is clear from staff's conclusion in the Ertl case that many product components containing 300 ppm – or even 600 ppm -- of lead in metal substrate that are too large to be ingested or placed in the mouth would not result in the *measurable* absorption of any lead. Yet the Commission determined in 2009 that no material, product

or component qualified for the absorbability exclusion in the law. During the succeeding three years, many businesses that might satisfy the criteria applied in Ertl under the new functional purpose exception have closed, substantially reduced their product line, or compromised the durability or functionality of their products, because they could not practicably reduce the lead in their products, despite the fact that the products presented no risk of meaningful lead exposure.

The Ertl petition vote similarly exposes the nnnecessary economic harm caused by the Commission's party-line vote to reduce the lead standard to 100 ppm based on the questionable conclusion that there is no product, class of products, materials or components for which it is not "technologically feasible" to do so. Most obviously, the conclusion was reached for alnminum alloy, which we now know does not present a risk of harm to children at 300 ppm of lead when used in larger component parts. The testing that underlies staff's conclusion that such aluminum alloy is not a health risk could support the same finding for other metal substrate containing 300 ppm of lead when used in a component that is not ingestible or able to be placed in the mouth. But instead of adopting a blanket exception, the Commission has left it to individual manufacturers to bear the expense and delay of petitioning the Commission for relief.[7]

h. The European Union has adopted a standard of 90 ppm? Is that a tougher standard than the US?

No. Although the target ppm number is lower, their standard refers to the amount of lead that can be **released** (as opposed to its content). This measure is referred to as the migration rate, or the leachable level. Thus, the European standard correlates with the actual risk of injury presented by an object containing lead. Our standard limits the total lead content in snbstrate, regardless of how much of that is or is not bioavailable – i.e., the risk it presents – when touched or consumed. In addition, the European Union does not require the third party testing of children's products to ensure compliance. Manufacturers and distributors selling products within the EU may rely on less costly first party testing to ensure compliance. Notably, I am aware of no evidence that there is any greater prevalence of children's products violating the respective jurisdiction's lead content limits in the EU, where third party testing is not required, than in the U.S., where it is.

Because the American standard requires in practice much lower levels of lead and a certification of compliance based on costly third party tests, it is significantly more expensive to manufacture children's products for the United States market. This puts small American manufacturers, in particular, at a competitive disadvantage. A small European manufacturer can afford the relatively modest compliance costs of selling exclusively in the E.U., until it has grown large enough to reach the economies of scale necessary to profitably absorb the additional cost of selling to the American market. A small American manufacturer, on the other hand, must incur our high compliance costs

[7] A more detailed explanation of my vote on the Ertl petition is available at: http://www.cpsc.gov/pr/northup04052012.pdf.

from the beginning, and as we have learned over the last several years, many will go out of business before growing to a size sufficient to amortize testing costs over a large enough number of products to realize an economically viable profit margin. For the same reason, an entrepreneur contemplating where to locate a new children's product business is now more likely to choose the EU over the United States, due to the formidable barriers to entry created by our much higher compliance costs.

> Since the advent of our 100 ppm lead limit and third party testing requirement, a substantial proportion of European children's product manufacturers have abandoned the United States market. In addition to reducing choices for American consumers, this has resulted in the loss of numerous businesses and jobs that depended on the distribution in the United States of European products. In particular, we have learned from the Hand Made Toy Alliance that a large number of their members who were Mom and Pop retailers specializing in the sale of imported wooden and other specialty European manufactured toys have closed due to the unavailability of stock.

c. How did establishing a statutory lead standard affect our ability to move toward "world standards" through increased harmonization?

Mandating a statutory lead limit, rather than permitting the CPSC to set a limit based on the risk presented by lead in various products and materials as measured by the best available science, has tied the agency's hands in its harmonization efforts. Other countries may not be similarly willing to hamstring their economies with unnecessary regulation, and we are statutorily unable to change our position to reach a consensus around a rational science based standard.

3. The President's Executive Orders 13563 and 13579 requested that Agencies conduct Retrospective Rule Review. This was part of a broader exhortation that rule-making bodies seek to reduce unnecessary and unjustified regulatory burdens by: a) selecting for review and modifying where appropriate significant rules that have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; b) using "notice and comment" rulemaking to ensure stakeholder participation and fully informed regulatory bodies; c) performing cost benefit analyses both before rulemaking and in connection with reviewing rules already in place; and d) choosing the least costly requirements to achieve regulatory goals. What has the CPSC done to implement these Executive Orders?

The four Commissioners were unable to reach a majority consensus on a plan for the retrospective review of existing regulations, instead splitting 2-2 along party lines in support of two very different plans.

The Plan for Retrospective Review of Existing Rules supported by the Commission Democrats does not adhere to the President's regulatory principles. Their plan ignores the repeated admonitions by the President and his spokesman that retrospective rule review target the most burdensome rules in order to yield the greatest potential cost savings. Instead, the plan takes credit for cost reduction measures that the Commission is already statutorily obligated under H.R. 2715 to consider, and initiates the review of insignificant additional rules.

Specifically, H.R. 2715 requires the Commission to seek public comment on opportunities to reduce the cost of third-party testing requirements and to prescribe new or revised third-party testing regulations if doing so will reduce third party testing costs consistent with assuring compliance with the applicable consumer product safety rules. H.R. 2715 also requires the Commission to consider alternative third-party testing requirements for manufacturers who meet the statutory definition of "small batch manufacturers." The Commission is obligated to carry out those statutory mandates in 2012 and 2013, and would do so irrespective of the President's Executive Orders.

Once these mandatory measures are stripped away from the rules proposed by the Democrats to be reviewed in FY2102 and 2013, their narrow view of regulatory review becomes apparent. In 2012, they would include as part of the Rule Review Plan the Commission's reconsideration of its Toy Caps Rule and Animal Testing Rules. The Toy Caps Rule was revoked because its requirements were superseded by the Commission's adoption of the more stringent toy caps standard contained in ASTM F 963. In other words, no manufacturer was testing to the standard contained in our Toy Caps Rule, and it therefore imposed no burden whatsoever. Similarly, the Commission's recent revisions to the Animal Testing Rules resulted in very minor changes that had negligible, if any, impact on the economic burden of testing to the rules. The change to Federal Caustic Poison Act regulations promulgated under the Federal Hazardous Substances Act proposed to be undertaken pursuant to the rule review plan in 2013 also amounts to nothing more than a housekeeping measure that will not meaningfully reduce the costs of compliance. Including each of those initiatives among the rules selected for review is incompatible with the intent of E.O. 13579, and would set the precedent that the Commission does not share the President's goal of reforms "with the potential to have significant economic impact."

Even worse, the fourth and final new initiative – contained in the plan supported by the Democrats among the rules to be reviewed in fiscal year 2013 – is intended to strengthen existing rules and would *increase not decrease* the regulation's compliance costs. Specifically, the plan calls for a review of the carpet and rug flammability standards in order to fill a gap in coverage that has permitted some rugs and carpets to avoid testing. While I support the extension of existing rules where necessary to ensure product safety, rule review in response to the President's Executive Order is not the place to do that. Our core mission is to protect product safety, and we should always be on the lookout for opportunities to address product hazards. Rule review, in contrast, is a separate initiative intended to reduce nnnecessary economic burdens.

Consistent with the inconsequential rules the Democrats would select for the Commission's first two fiscal years of rule review, their plan sets in place a framework and selection criteria that is unlikely ever to result in meaningful cost reduction. This is because their plan does not explain how the selection of rules for review will be prioritized. This omission would be less important if the Democrats had not also opted to "broaden" the scope of rules potentially subject to review beyond the "significant" rules identified by the President. E.O. 13579 asks independent regulatory agencies to review existing "significant" regulations, defined as those that have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety.[8] Rather than focus on such significant regulations, the Democrats would include as potential candidates for review all of the agency's existing regulations, guidance documents, and unfinished proposed rules, and would even use the regulatory review process to perform clean up on the regulatory agenda – the list of regulatory actions the Commission proposes undertaking in the future. The President asked that agencies "give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork." The plan supported by the Democrats does no such thing, and, by lumping in every action the Commission ever has or ever will take, ensures that the regulatory actions selected for review are unlikely to result in meaningful cost reductions.

Equally damning, no cost benefit analyses would inform the Commission's review of the regulations selected under the plan supported by the Commission Democrats. Without such an analysis, there is no way to ensure that the benefits of a rule justify its costs, or to take appropriate action when they do not. This is a far cry from the Obama administration's vision of "chang[ing] the regulatory culture of Washington by constantly asking what's working and what isn't" based on "real-world evidence and data." Cass Sunstein, *21st-Century Regulation: An Update on the President's Reforms*, Wall Street Journal, May 25, 2011. Where is the "insistence on pragmatic, evidence-based, cost-effective rules" that Cass Sunstein claims has "informed [the Obama administration's] regulatory approach"? *Id.*

The alternative plan supported by the Commission's Republicans would honor the President's request by creating a framework that could lead to real cost reductions while maintaining public health and safety. It would have done so without straining the Commission's resources or substituting housekeeping measures for real regulatory reform.

The Republican Plan recognizes that in both 2012 and 2013, substantial resources will be devoted to carrying out the cost reduction mandates of H.R. 2715. As a result, it does not call for any additional resources to be dedicated to Rule Review in 2012 or 2013. More importantly, it also does not undermine the long term goal of real burden reduction by characterizing housekeeping measures such as revision of the Toy Caps Rule, Animal Testing Rules and Federal Caustic Poison Act Regulations as retrospective rule review. I

[8] 58 Federal Register 190 (October 4, 1993).

do not object to revising those rules, and the Republican Plan expressly acknowledges the importance of such work, so long as it does not substitute for meaningful rule review.

The Republican Plan also ensures that rules selected for review in future years will have the potential to significantly reduce the unnecessary economic burdens of compliance with the Commission's regulations. This is achieved first by requiring, consistent with the President's request, that the Commission's selection of rules for review give priority to "those requirements imposing the highest burden and cost of compliance."

In addition, unlike the plan supported by the Commission's Democrats, our plan requires that cost-benefit analyses be performed during the course of rule review so that rational, informed decisions can be made regarding whether the benefits of a regulation justify its costs. This exercise is particularly important for regulations promulgated under the Consumer Product Safety Improvement Act over the last several years, none of which were required to be justified by cost-benefit analyses. I understand that Congress intended the expedition of certain rules due to a perceived need for immediate action, and that cost-benefit analyses could therefore not be performed. For instance, we could not have issued mandatory standards for two durable nursery and toddler products every six months if such standards needed to be justified based on a cost-benefit analysis. But I do not believe that the President intended the Commission to exclude such rules from a cost-benefit analysis during retrospective review, nor do I think Congress would object. Now that the rules are in place and enforceable, there is no issue of delay impacting safety. And if a cost-benefit analysis of an existing rule reveals that a toddler product safety standard or test has no safety benefit but imposes substantial costs, the rule should be changed.

On the other hand, we could and should have performed cost-benefit analyses before issuing other rules governing the periodic third-party testing of children's products to ensure continued compliance. We were not precluded by statute from doing so, and there was ample time. Retrospective rule review would be our first opportunity to determine whether all of the requirements of those rules can be justified under a cost-benefit analysis, and the Republican Plan would have allowed for that.

Other differences between the Republican and Democrat Rule Review Plans also illustrate our commitment to, and the Democrats' rejection of, meaningful rule review. For instance, their plan repeatedly emphasizes the need for a rule to be in place for a substantial time period before retrospective review is undertaken. Whether intentional or not, such an approach would ensure that our rules that impose the greatest burden – those promulgated over the last several years and which were never justified by a cost-benefit analysis – would not be subject to review. The Republican Plan instead recognizes that retrospective review of even a relatively new rule is warranted where "its burdens quickly prove to be more substantial than anticipated or out of proportion with the benefits realized or because the burden and/or cost of the regulation were never given the consideration required by the EOs in the rulemaking process."

The plan supported by the Democrats is also replete with references to the review of rules whose burdens can only be characterized as trivial compared to our most costly rules. For instance their plan touts minor changes to address manufacturer confusion over our durable infant and toddler product registration program. In discussing the consideration of "technological advances" as a factor in the selection of rules for review, their plan focuses on past revisions of rules "to remove requirements for obsolete testing equipment that is no longer available." But removing requirements for testing that cannot possibly still be performed does not reduce anyone's compliance burden. Such requirements should be removed as a housekeeping measure, not a burden reduction exercise. The Republican Plan correctly focuses consideration of technological advances on the way in which new technology can make a rule less burdensome.

Finally, the plan supported by the Democrats gives equal, if not greater, weight to selecting rules for review in order to strengthen them. Thus, they view the Plan's review processes as "intended to facilitate the identification of rules that warrant repeal or modification, including those that require strengthening, complimenting, or modernizing." While I agree that the Commission could properly conclude after selecting and analyzing a rule that it should be strengthened or complimented, I believe it is inconsistent with the President's intent to target rules in order to strengthen them, rather than to reduce their unnecessary burdens.[9]

a. Before the CPSIA, Section 9 of the CPSA required the Commission to conduct a cost benefit analysis before promulgating a mandatory safety standard for any consumer product. The CPSIA excepted durable nursery products from that requirement, and also empowered the Commission to issue broad regulations governing third party testing, all without any cost benefit analysis. But the requirement that the Commission conduct an analysis of the economic impact of the rules on small businesses under the Regulatory Flexibility Act remained in place. What have you learned from your experience participating in the promulgation of those rules where a cost benefit analysis was neither required nor performed?

I have learned that in the absence of a mandatory cost benefit analysis, this Commission as currently configured will promulgate rules whose costs most likely exceed their benefits, and the Regulatory Flexibility Act (RFA) is no impediment to its doing so. For example, neither the staff packages that came before the Commission proposing mandatory standards for durable nursery products, nor the rules establishing the framework for third party testing of children's products, contained cost-benefit analyses. All of them did, however, contain cost analyses performed under the RFA to determine the rules' impact on small businesses, not the entire market. These economic analyses, although always based on a highly speculative and cursory look at a rule's effects,

[9] A more detailed explanation of my vote on Commission's plan for retrospective review of existing rules is available at: http://www.cpsc.gov/pr/northup08152012.pdf; and http://www.cpsc.gov/pr/northup09192012.pdf.

invariably concluded that the costs to many small businesses would rise significantly, resulting in a large number of business closures and attendant job losses. But unlike traditional cost-benefit analyses, as contemplated by the President in E.O.s 13563 and 13579, and as required under Section 9 of the CPSA, the RFA does not require that the benefits of a rule ever be found to justify its costs. As a result, the RFA does not require agencies to forgo or modify any rulemaking as a consequence of that analysis, and in my experience, the CPSC has never done so, no matter how economically disastrous the impact of a regulatory action was projected to be. Nor have the results ever caused any of my Democrat colleagues to vote against or request a change in a rule.

b. Do you believe the CPSC, as presently configured, would voluntarily perform cost benefit analyses in the absence of a statutory requirement to do so?

No. And the public pronouncements by the Democrat Commissioners confirm the fact. Mr. Adler has stated publicly that the Commission would perform the cost-benefit analysis of CPCS Section 9 when not statutorily obligated to do so, only "over [his] dead body." Chairman Tenenbaum, for her part, is advocating for the exclusion of additional classes of products from the CPSC Section 9 requirement that mandatory standards be justified under a cost-benefit analysis. For instance, she has asked Congress to exempt from Section 9 mandatory standards for upholstered furniture flammability. Notably, this request comes on the heels of mounting evidence that the existing proposals for addressing the problem of upholstered furniture flammability cannot be scientifically proven to do so. Thus, without any proven benefit to be derived from the rule, the Chair would now like to impose the cost anyway. The statutory requirement that a cost benefit analysis is performed to establish the justification for a rulemaking before massive economic disruption is needlessly imposed, is intended precisely to combat that regulatory mindset.

c. At a recent hearing in the Senate on the flammability of upholstered furniture, Chairman Tenenbaum testified that a suspension of the cost benefit requirement of the FFA similar to what Congress provided in the CPSIA for durable nursery products would facilitate rule-making in this area. Do you agree with her position?

No. As discussed immediately above, I believe the suspension of cost-benefit analysis requirement for upholstered furniture would likely lead to a costly rule with no proven benefits.

4. In March 2010, the Commission voted to allow "unblockable drain covers" to qualify a single main drain as an "unblockable drain" under the Virginia Graeme Baker Pool and Spa Safety Act, so as not to require the use of a backup system. In September 2012, the Commission reversed itself and now requires all pools with single main drains to install a backup system. Why did you oppose that change, given the claim by its proponents that a backup system provides an additional layer of protection?

The Virginia Graeme Baker Pool and Spa Safety Act is intended to protect against the deadly consequences of excessive spa and pool drain suction, including evisceration when a pool drain is completely blocked by a person sitting or lying on it, and drowning when a person's hair, limb or jewelry becomes ensnared in a drain. VGB Act § 1404(c)(1)(A)(ii) requires public pools and spas with a single main drain of a size small enough to create a life-threatening suction by being completely covered by a human body (known as a "blockable drain"), to be equipped with a device or system to prevent entrapment. These systems are often referred to as "backup systems". "Unblockable drains" were exempt from the requirement to have one of these back-up systems because their size and/or configuration prevented a deadly suction from ever occurring. Although five systems/devices are enumerated in the Act as permissible backup systems, the Commission has long recognized the safety vacuum release system (SVRS) to be the most commercially viable and therefore most likely to be used by pool owners.

In April 2010, following extensive input from the public, the Commission issued a final interpretive rule that defined "unblockable drain" as a suction outlet *and all of its components*, including a cover/grate, that cannot be shadowed by a "Body Blocking Element" intended as a proxy for a human body. As a result, pools and spas with a single main drain equipped with an appropriately sized "unblockable drain cover" were not required also to be equipped with an SVRS or other back-up system.

The Commission adopted this definition based on the recommendation of its staff of career technical experts. In their opinion, an unblockable drain cover is superior to an SVRS because it *prevents* entrapment. An SVRS, in contrast, *stops* an entrapment incident after it has already occurred, and does so only after a delay of up to 4 seconds. As a consequence, once an incident resulting of entrapment, or evisceration takes place, it is already too late for an SVRS to save a child.

SVRS also have a well-deserved reputation for unreliability. Despite the majority's rush to make this change without public input, the Commission received unsolicited letters from pool maintenance companies, many of whom stood to benefit financially by this change, attesting to problems with SVRS and predicting that most of these systems would soon be disabled by pool owners because of the problems they create. Directors of parks and recreation departments from all over the country also wrote advising us that unblockable drain covers are superior to SVRS, from a safety perspective. As these letters explain and Commission staff has confirmed, SVRS are electro-mechanical devices prone to malfunction by stopping pool pumps without cause or simply shutting down completely. The former problem interferes with the essential mixing of sanitation

chemicals in pool water, leading to potentially life threatening bacterial outbreaks. When an SVRS ceases operating completely, a blockable drain once again becomes an inescapable death trap.

In April 2010, the Commission followed the expert advice of its technical staff. This was done only after also considering the contrary views presented by SVRS and other back-up system manufacturers who wanted the Commission to mandate the use of their product, pool safety advocates, many of whom were influenced and mobilized by SVRS manufacturers, and a few members of Congress who had been lobbied by the back-up system industry. In particular, the Pool Safety Council (PSC), made up largely of the vacuum release industry, spent $100,000 on lobbying expenses in 2009. PSC is led by Paul Pennington, President and primary owner of Vac-Alert, one of the least expensive and, according to letters to the Commission, least reliable backup systems. In fact, Paul Pennington testified before the Commission on April 5, 2011, that he helped Representative Debbie Wasserman Schultz draft the original legislation that became the VGB Act. These parties argued that an unblockable drain cover provides unreliable protection due to the risk of dislodgment and does not provide the "layers of protection" required by the VGB Act. Nonetheless, a majority of Commissioners recognized that the VGB Act's overriding intent to prevent child drowning was best served by reasonably and lawfully interpreting "unblockable drain" to include these newly invented systems that cover a blockable drain and convert it to an unblockable drain. The wisdom of their judgment is confirmed by the fact that, since that time, there has not been a single entrapment incident in a pool equipped with a compliant unblockable drain cover.[10]

a. What reasons did the Democrat Majority give for supporting the change, and do you believe those reasons had merit?

Commissioner Adler claims that his mind was changed by letters from interested citizens and members of Congress, and by private meetings he held with Representative Debbie Wasserman Schultz. But in none of these letters or meetings was any *new* evidence or argument presented that was not already considered and rejected by Commission staff as outweighed by paramount safety considerations. And while I am heartbroken for parents who lost their children to drain entrapment incidents, this Commission should not make decisions based on the *ex parte* views of a single interest group or the self-serving *post hoc* rationales of a handful of the hundreds of members of Congress whose votes pass a bill. Our job is to consider all of the relevant evidence in light of the expert advice of the career professionals who have dedicated their lives to consumer safety, not to swing haphazardly in the strongest blowing emotional breeze of the moment.

Representative Debbie Wasserman Schultz's view of what the legislation means is irrelevant after its passage. No court would give weight to her preferred interpretation of a bill that was passed by 435 Members of the House and 100 Members of the Senate and signed by the President. No small group, even the authors, can unilaterally decide that

[10] A more detailed explanation of my vote to oppose the revocation of the Commission's prior interpretation of "unblockable drain" is available at: http://www.cpsc.gov/pr/northup10042011.pdf.

the legislation means only what they intended when they voted for it. Once it is in the hands of the Executive agency, Members of Congress can again influence it only by further refinements of the law passed by all the Members of Congress. Representative Wasserman Schultz's effort to protect children in swimming pools is admirable, but it is the CPSC's responsibility to interpret and administer the law based on our technical expertise and experience in safety. It is doubtful the Rep. Wasserman Shultz heard from the wide array of safety experts that contacted the Commission, or has the technical expertise of our staff. Rather, she appears to have been swayed by the lobbying of the SVRS manufacturer, and Mr. Adler was the conduit for her granting of a political gift.

To the extent any substantive reason was given, none had merit. Particular emphasis has been placed on the possibility that unblockable drain covers can be removed or damaged. But Commission experts were aware of this characteristic of unblockable drain covers and still judged them to provide greater protection than SVRS. Their view of the relative safety of the two alternatives has not changed. Moreover, as the Commission learned from the many unsolicited letters responding to the *Federal Register* notice announcing the revocation vote, advances in drain cover design, construction and installation have substantially reduced, and could completely eliminate, the risk of cover dislodgment. It is in order to consider such new and unknown evidence that notice and comment are required before the promulgation of regulations changing enforceable obligations.

Another red herring is the claim that requiring an SVRS or other entrapment prevention device will ensure the "layers of protection" required by the VGB Act. Revoking the interpretation of "unblockable drain" that permitted the use of an unblockable drain cover did not *add* any protection. Public pools are *not* now required to have an unblockable drain cover *and* a back-up system. With the new interpretation, they are instead likely to have a "blockable drain" with an unreliable SVRS or other back-up system. The sophisticated unblockable drain covers are expensive and their availability may disappear altogether. That means a superior form of protection has been exchanged for an inferior one, not that a new layer of protection has been added.

b. Did the Commission seek and consider public comment before changing its definition of "unblockable drain" to not permit the use of an unblockable drain cover?

No. And the Commission's failure to provide an opportunity for notice and public comment before revoking its prior interpretation of "unblockable drain" almost certainly violates the APA, and without doubt will entitle the Commission's new construction to no deference in court.

Under the APA, a legislative rule must proceed through notice and comment rulemaking; an interpretive rule need not. Although the majority styles its action as the mere revocation of an interpretive rule, much more is at stake for the pool and spa owners impacted by its decision. The revocation eliminates the exemption from the back-up system requirement granted to single unblockable drains equipped with an unblockable drain cover. Moreover, the Commission's *Federal Register* notice announcing the

change clearly signals its intent to enforce the new rule against pool and spa owners who have installed unblockable drain covers but do not also have an additional entrapment prevention device/system enumerated in the Act. Under these circumstances, a court could well deem the revocation a legislative rule and find that the failure to undertake notice and comment violated the APA. *See Jerri's Ceramic Arts, Inc. v. CPSC*, 874 F.2d 205, 208 (1989).[11] At the very least, the revocation is a reinterpretation of statutory language without a rational justification that would be entitled to little, if any, deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981) (holding that an agency interpretation that conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view). The fact that extensive public comment was received and considered before the original interpretation was adopted confirms that the Commission also recognized its importance.

Mr. Adler argued that no public input was necessary because his reversal was neither policy nor evidence based, but merely a change in his interpretation of the legislation. There is a word for statutory language that is so susceptible to alternate construction that even a single lawyer cannot make-up his mind about its meaning. And when statutory language is ambiguous, it should be informed by the underlying intent of the law. The VGB Act was passed in order to reduce the risk of children drowning due to entrapment in pool drains. The Commission's reconstruction of "unblockable drain" makes that tragic outcome more likely.

Moreover, Mr. Adler's claimed disavowal of the need for public input or consideration of factors beyond his personal legal views is belied by his own statement on the revocation. After recounting the unsolicited letters, almost all of which are identical form letters, and private meetings that lead him to reconsider his views, Mr. Adler proclaimed that "as a policy maker sworn to uphold the law, I believe it is my duty to listen to all points of view and when a persuasive case is made to reconsider my position. So in response to these requests, I took it upon myself to reexamine both the safety considerations associated with 'unblockable drain covers' and the legislative history of the VGBA."

But of course, by refusing public comment, Mr. Adler ensures that "all points of view" will not be heard – only those of the activists whose form letters he reads and the well placed politicians with whom he holds private meetings. And as for "safety considerations", Mr. Adler's position is incomprehensible. He refused to obtain data showing the safety impact of the original interpretation, or input from knowledgeable

[11] In *Jerri's Ceramic Arts*, the court held that a "Statement of Interpretation" expanding the small parts prohibition to cover fabrics in addition to hard components was actually a substantive rule change that required notice and comment rulemaking. The court explained that interpretive rules simply state what the administrative agency thinks a statute means, and only "reminds" affected parties of existing duties, whereas substantive rules impose new rights or duties. It concluded that adding fabric to the small parts prohibition was substantive because it had "the clear intent of eliminating a former exemption and providing the Commission with the power to enforce violations of a new rule." 874 F.2d at 208. Similarly, removal of the option to use a drain cover to create an unblockable drain eliminates an exemption from the back-up system requirement, and the *Federal Register* notice announcing the change informs pool owners that pools with only an unblockable drain cover and no back-up system will henceforth be considered to be in violation of the VGB Act.

sources about the current safety features of unblockable drain covers. Instead, he appears to have relied on information obtained through public input solicited in 2009 and the one-sided viewpoints presented to him since. Mr. Adler is entitled to change his position for any reason he likes, but the closed procedure leading to this change dispels any pretense of open mindedness.

c. Did the CPSC General Counsel recommend a "Notice and Comment" process?

I am not at liberty to discuss the CPSC General Counsel's privileged communications with Commissioners. However, Congress is entitled to review the written opinion, and I suggest they obtain it in full to learn the GC's advice on the subject.

d. What unsolicited input did the CPSC receive from pool and spa professionals?

The Commission received a large number of unsolicited letters from pool and spa professionals, many of whom stood to gain financially from the Commission's reversal. They overwhelmingly opposed the change as costly and less safe. Here are a few examples:

- David Distad (Environmental Health Specialist, Renwood, MN) stated that SVRS is a large unnecessary expense that may be more than some of his municipalities can handle;
- Linda Bruer (Director of Parks and Recreation for City of Ballwin, MO) estimates $30,000 to comply with SVRS;
- Terrence LeBeau (GM – Halogen Supply Company) states: "My staff of technical support specialists have a good deal of hands on experience with these (SVRS). They are unreliable, inaccurate, and operationally problematic…All of these devices carry some form of cautionary verbiage that states: will not prevent disembowelment";
- Justin DeWitt (Chief of General Engineering, IL Dept. of Health) states: "The Department's experience has been that the majority of SVRS installed fail to operate properly due to lack of testing, maintenance, incorrect installation, disabling or adjustment to avoid nuisance trips";
- James Bastian (Chairman, Westport Pools in MO) states: "We have seen dozens (SVRS) disabled by the pool owner's maintenance personnel because of the unreliability of the systems";
- Susan Campbell (Oklahoma City Health Department) states: "[It is a] sad fact that devices (SVRS) are not maintained and are difficult for us to test";
- Thomas Diven (City of Fenton – Parks and Recreation) states: "[W]hat is being proposed [by the CPSC] may actually increase the risk of drowning…these proposed changes have not been sufficiently researched and are not required";
- Bill Soukup (President, Commercial Pool, Inc.) states: "I can assure you that SVRS will not work as manufacturers have indicated. Many will be disabled shortly after being installed because they are very, very problematic";

- Justin DeWitt (Chief of General Engineer, IL Dept. of Health) states: "The Department's experience has been that the majority of SVRS installed fail to operate properly due to lack of testing, maintenance, incorrect installation, disabling or adjustment to avoid nuisance trips."

e. What is the risk of entrapment and how does that compare with other risks associated with swimming.

There have been no entrapment injuries associated with compliant pool drains since 2008. But there were over 1500 drownings just between May 1 and August 26, 2011. Even counting potentially non-compliant pool drains, three persons of all ages were injured and none died in circulation entrapment incidents in 2010. By contrast, in 2010, 5600 children under 15 were treated in emergency rooms for pool and spa submersion injuries (i.e., those unrelated to drain suction), and between 2007 and 2009, an average of 390 children under 15 died each year due to pool and spa submersion incidents.

We have learned from numerous municipal park and recreation departments, as well as nonprofit groups created to promote aquatic recreation safety, that many state, municipal and other public pool operators will be unable to afford this new and expensive mandate coming shortly on the heels of the expensive work required to come into compliance with the Commission's original interpretation. As a result, many public pools will open late or close, with the brunt of the losses suffered by economically-disadvantaged regions. Children cannot learn to swim in closed pools, and economically disadvantaged children are at the greatest risk of drowning.

5. Section 6(b) of the CPSA prohibits the Commission from releasing to the public information about a consumer product when the manufacturer of the product can be readily ascertained, without first ensuring that the information is accurate and fair, and giving the manufacturer a chance to include comments or other information with the disclosure. The public database authorized by the CPSIA suspended these protections for manufacturers, but put in their place other detailed requirements that provided similar protection to the manufacturers of products that are the subject of database reports. What is your opinion of whether the Commission could host a Facebook account without violating CPSA § 6(b)?

By way of background, *Facebook* is a social media site which is hosted by Facebook, Inc. Account holders manage and control the content of their page, but they cannot prevent the public from uploading comments in real time, and cannot control the information that an individual may submit in a comment other than to remove it after it has been posted. A CPSC *Facebook* page would be part of the agency's overall media strategy, with the goal of attracting as much traffic to the site as possible in order to more widely disseminate product safety information.

I do not believe the Commission could host a *Facebook* account without violating CPSA § 6(b). Section 6(b)(1) prohibits the agency from publicly disclosing any product specific information that is "obtained, generated or received by the agency" and from which the manufacturer or private labeler (hereinafter "manufacturer") of the product can be readily ascertained, without first providing the manufacturer the opportunity to challenge the accuracy of the information and to include with the disclosure any comments or other information it wishes to provide. 15 U.S.C. § 2055(b)(1); 16 C.F.R. § 1101.11(a). In the event the Commission rejects a challenge to the accuracy of the information proposed to be published, it must notify the manufacturer and give it five days to sue to enjoin the publication before the Commission releases the information. 15 U.S.C. § 2055(b)(2) & (3).

These protections could not be afforded manufacturers whose products became the subject of comments posted by the public on the CPSC's *Facebook* page. There would be no opportunity to object to the publication of inaccurate information *before* its publication, either initially to the CPSC, or through an action to enjoin the publication in court. There would also be no opportunity to include a manufacturer's comments with the publication, including after publication. *Facebook* streams comments in the order they are received, so even if a manufacturer wished to add its own comment to a previously posted item, the comment would likely not appear anywhere near the item to which it relates. In addition, even if the CPSC were to commit the immense resources necessary to monitor and remove from its *Facebook* page all product specific public comments, such removal would not cure the § 6(b) violation. Once published, a comment could be copied, forwarded or otherwise preserved and republished in ways over which the Commission could not exert control. And in any event, the initial publication is a violation of the law, regardless of what follows.

Given that §6(b) clearly could not be followed in connection with public comments posted on a CPSC *Facebook* page, the only remaining question is whether such comments fall within the protections of §6(b). Section 6(b) as interpreted by the Commission applies only to information that is "obtained, generated or received by the agency", and then "published" by the agency. I believe comments posted by the public to a CPSC *Facebook* page would meet both of these criteria.

The first condition is easily met, as comments posted to a *Facebook* page hosted and monitored by the agency would necessarily be "obtained" and "received" by the agency.

I also believe, under the circumstances, that comments posted to the website by third parties must be considered to be "published" by the Commission, rather than by Facebook, Inc. Although the site is owned and operated by Facebook, Inc., the Commission would need to affirmatively establish its own page and would exercise control over what it posts to the site and what it chooses to remove from the site. Moreover, the Commission is aware that its *Facebook* page would invite the posting by the public of product safety related information, and that the Commission would encourage the public to view the website to obtain product safety information. Having knowingly created such a forum, the Commission could not reasonably claim that

comments posted to its *Facebook* page by the public should be deemed to be "published" by Facebook, Inc., rather than the Commission.

It would also be unreasonable to deem content posted to the site to be "published" by the commenter. Congress addressed that scenario in the CPSIA when it authorized the Commission to publish on the public facing database *saferproducts.gov* product specific information submitted by the public. It recognized that § 6(b) applied, and waived its requirements provided the Commission afforded other protections against the publication of inaccurate information. In the absence of those protections, *saferproducts.gov* would function very much like a *Facebook* page: product specific information posted by the public would be simultaneously received and disclosed by the Commission. Congress clearly understood that comments posted by the public on a site sponsored by the Commission are "published" by the Commission under § 6(b). Otherwise, the §6(b) waiver Congress provided for *saferproducts.gov* would not have been necessary.

Moreover, because a CPSC sponsored *Facebook* page would not screen postings based on the criteria required for *saferproducts.gov* under the CPSIA, the Commission could not prevent comments that would not be eligible for publication on the database from being posted on its *Facebook* page, in blatant contravention of the will of Congress.

a. Has your General Counsel been asked to provide an opinion as to whether the Commission could host a *Facebook* page consistent with the requirements of the law?

Yes, but I am not at liberty to discuss the CPSC General Counsel's privileged communications with Commissioners. However, Congress is entitled to review the written opinion, and I suggest they obtain it in full to learn the GC's advice on the subject. At an August 2, 2012, hearing before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, Chairman Tennenbaum promised to provide the General Counsel's legal memorandum to the Committee if and when the Commission decides to launch a *Facebook* page. The Subcommittee may wish to consider asking to see it before a decision is made.

b. What is the status of the agency's plan to launch a *Facebook* page?

I have not been updated on the status of the CPSC's *Facebook* initiative in several months. Generally speaking, the Chair does not keep me informed of her deliberations over decisions she deems "administrative", even when, as in this case, I have made clear that I consider a decision to raise policy issues that require a majority vote by the Commission before being implemented. The two Democrat Commissioners have taken the position that a majority is required before a decision can even be characterized as "policy", and therefore have avoided votes on a number of decisions I do not believe were within the administrative authority of the Chair to implement without majority support.

6. H.R. 2715 (codified as P.L 112-28) was passed in an effort to address some of the unforeseen adverse consequences of the CPSIA. In your opinion, has the CPSC taken appropriate advantage of the new law to ameliorate the problems caused by the CPSIA?

Certain provisions of H.R. 2715 *required* the Commission to take action, and being legally bound, the Commission followed the law. For instance, it has exempted "covered products" made by "small batch manufacturers" from third party testing pending its adoption of alternative testing rules or the granting of a permanent exemption. The Commission has also granted an exception to the 100 ppm lead limit to a manufacturer clearly entitled to it under the criteria established by Congress. But with respect to those provisions where the Commission was authorized to exercise discretion in ameliorating the CPSIA's adverse consequences, it has either minimized the opportunity or affirmatively acted to thwart the spirit of H.R. 2715.

The Democrat majority's intent to do so became clear shortly after the passage of H.R. 2715, when they ignored the advice of the Commission's expert staff to repropose the final third-party testing and component parts rules based on the statutory changes, and instead rushed the packages to a vote. The Commission later ignored the will of Congress again when it was unable to promulgate a rule on "representative" samples because the Democrats insisted on unjustifiably burdensome recordkeeping requirements. Finally, the Commission was able to muster majority support to consider further only half of the measures recommended by its staff to reduce the burdens of third party testing.

Signed into law in August 2011, H.R. 2715 gave the Commission one year to seek public comment on opportunities to reduce the cost of third party testing requirements, and, based on the public comments, to consider issuing new or revised third party testing regulations if doing so would reduce third party testing costs while still assuring compliance with applicable standards. Congress even invited the Commission to propose changes to the law to provide it with additional authority to address the costs of third-party testing, if necessary. H.R. 2715 also substituted "representative samples" for "random samples" as the basis for selecting samples for periodic continued testing, and required the Commission to undertake notice and comment rulemaking to define the new statutory phrase.

Draft Final Rule 16 C.F.R. 1107.26(a)(4).

At the time H.R. 2715 became law, the Commission had yet to promulgate a final rule under 15 U.S.C. § 2063(i)(2)(B)(i) establishing protocols and standards "for ensuring that a children's product tested for compliance to an applicable children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts."

Because of the obvious impact on § 2063(i)(2)(B)(i) rulemaking of Congress's mandate that the Commission seek public comment on ways to reduce the cost of third-party

testing, our CPSC career staff recommended that the final third-party testing rule and a rule to permit the testing and certification of component parts be reproposed along with the NPRs on cost reduction and representative samples, so that a final comprehensive rule could emerge that addresses Congress's H.R. 2715 mandate and protects regulated industries from detrimental reliance on a tentative "final" rule. The Commission also received letters from members of Congress urging the Commission to consider ways to reduce the costs of third-party testing *before* implementing the rule.

The Majority instead insisted on a vote and passed the rule governing periodic and material change testing, and the component parts rule, by a 3-2 party line margin. Given the advice of Commission staff and common sense, it is apparent that the Majority's precipitous action resulted from their desire to dictate the content of the rules before they lost their majority upon the then impending retirement of Commissioner Moore. But as a result, the Commission irrationally complicated compliance by the regulated community.[12]

Representative Sample

The Commission was also unable to take advantage of Congress's amendment permitting "representative" rather than "random" samples to be selected for periodic testing. Notwithstanding Congress's intent that the change be part of an overall plan to reduce the unnecessary costs of third party testing, the Democrats insisted on an unjustifiably costly rule that the Commission's Republicans' could not support.

Commission staff prepared a final rule that properly recognized Congress' intent to define "representative" according to its common meaning. The draft final rule would have reasonably afforded manufacturers the flexibility to select samples for periodic testing according to the methodology that best suited their product and production process, so long it provided a basis for inferring the compliance of the untested samples. As staff explained in the preamble to the draft final rule, "various methods can be used to determine that the selected samples are representative, depending upon the rule, ban standard, or regulation being evaluated." Draft Final Rule at 5.

Had the draft final rule stopped there, it would have had my support. Instead, it included costly new record keeping requirements not mandated by law and without adequate justification. The draft final rule would have required the creation and maintenance of:

> Records documenting the testing of representative samples, as set forth in 1107(21)(f), including the number of representative samples selected and the procedure used to select representative samples. Records must also include the basis for inferring compliance of the product manufactured during the periodic testing interval form the results of the tested samples.

[12] A statement explaining my opposition to the periodic testing and component parts rules is available at: http://www.cpsc.gov/pr/northup10262011.pdf.

Draft Final Rule 16 C.F.R. 1107.26(a)(4).

CPSC's economists estimate the aggregate manufacturers' cost of compliance with this additional record-keeping to be $32.3 million for the first year alone, and another $1.3 million to $6.5 million every year thereafter. And this cost is in addition to the enormous burden of the record keeping already required by 16 C.F.R. part 1107 – Testing and Labeling Pertaining to Product Certification. 16 C.F.R. § 1107.21 gives manufacturers three options for satisfying the requirement that, after initial certification, a third party lab conduct periodic tests of every component of every children's product to ensure continued compliance with all applicable children's product safety rules. Each of these options requires the creation and maintenance for five years of extensive records.

These extensive record keeping requirements already far exceed what is necessary to ensure continued compliance under the CPSIA and to facilitate enforcement. Yet the Democrats would have imposed even more, requiring a written record of the procedure used to select the samples and a narrative explaining the basis for inferring compliance of the product manufactured during the periodic testing interval from the results of the tested samples. I am unable to identify any benefit to imposing that additional recordkeeping burden that would justify the tens of millions of dollars it would cost. Given the number of products we regulate and the numbers coming in at the ports that are noncompliant and still result in no enforcement action, the odds of any manufacturer ever having to produce such documents is very slim. Imposing the high record keeping cost on all manufacturers so that a miniscule percentage could be reviewed during an investigation is unjustified. Moreover, the reasons offered by others are unpersuasive.

Proponents of the representative sample record keeping requirement argued that the act of creating these records will encourage manufacturers to think more carefully about sampling issues. However, it is not the Commission's responsibility to regulate good business practices, nor does it have the experience or expertise to gauge what is best for any particular business. And businesses creating such records would need to anticipate what CPSC investigators – with no business experience, let alone with respect to the particular product or manufacturing process -- might look for in the context of a defect investigation or enforcement action, rather than making decisions based on their own experience and expertise.

It was also claimed that the Commission needs the records for enforcement purposes, so that it can learn the sampling procedure and basis for it while investigating noncompliant product. But that information is available to the Commission even without the added burden of the recordkeeping requirement. The CPSC can learn the information orally or through written documents prepared by the target business when and if they are subject to an investigation.

Finally, it has been argued that the CPSC needs records of the representative sampling procedure and basis in order to determine whether the entry into commerce of noncompliant product was caused by nonrepresentative sampling or inaccurate third party testing. But regardless of whether the CPSC were satisfied with a manufacturer's

explanation of its sampling procedure and basis, and irrespective of whether the manufacture maintained the records sought to be required by the Final Rule, laboratory error as a contributing cause could not be ruled out. There will therefore always be the need to investigate laboratories that tested samples from a batch or lot later determined to contain noncompliant product.[13]

Proposals to Reduce the Burden of Third-Party Testing

As required by H.R. 2715, over the past year, the Commission solicited and Commission staff analyzed public comments addressing ways to reduce the costs of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. Commission staff then submitted to the Commissioners a briefing package recommending that the Commission direct the further study of 16 ways to reduce third party testing costs. After extensive negotiations among the Commissioners, there was majority support for the continued consideration of only 9 of the 16.

As a result, a lot of good ideas with the potential to reduce testing costs while continuing to protect consumers from the risk of harm were not supported by a majority of the Commissioners. Chief among these were establishing an exception from testing for a *de minimis* amount of paint or plasticized material, modifying the maximum periodic testing interval based on the risk of noncompliance to a regulation or portion of a regulation, and seeking Congressional authorization to permit manufacturers to use production process certification in lieu of third party testing as a basis for certifying compliance.

I do not know whether any of these ideas could successfully reduce third-party testing costs while assuring compliance, but the Commission was not called upon to make that determination through this vote. We needed only to decide whether these ideas should be abandoned forever, or explored further. Based on staff's recommendation, and in light of Congress's intent that we make every effort to reduce the costs of testing where possible consistent with assuring compliance, I can see no justification for ruling them out at this early stage.

Our narrowing the scope of potential cost reduction measures was not warranted by resource constraints. As the language of the ballot makes clear, the Commission has not committed any resources to the actions it has approved. Rather, it has merely identified a list of projects that may someday be undertaken "[s]ubject to the resources allocated by the Commission to carry them out in subsequent CPSC Operating Plans." The Commission's safety priorities as defined by future Commission majorities will always take precedence over the cost reduction projects in the allocation of future resources. And future Commissions will be able to select among the list of cost reduction projects in order to prioritize their completion in whatever order they deem advisable. Under these

[13] A statement explaining in greater detail my opposition to the rule establishing protocols and standards for the testing of representative samples to assure compliance is available at: http://www.cpsc.gov/pr/northup07232012.pdf.

circumstances, current and future resource limitations do not justify refusing even to consider these additional staff recommended ideas.

Finally, we need to step back and recognize the statutory impediments staff faced in formulating their proposals, and the very limited nature of the ideas that resulted. Many of the proposals put forth by staff are caveated with admissions that their applicability may be limited to a very few products or manufacturers, or might turn out to result in only a modest reduction in testing costs, if any. Thus, while the Commission should make the most of the opportunity presented by this exercise and staff's hard work in brainstorming cost saving measures, it is clear that real cost reduction for third party testing, certification and labeling will only be possible through much more substantial changes in the law.[14]

The Future of H.R. 2715

The Commission has undertaken much of the work H.R. 2715 directed the Commission to do to ameliorate the unforeseen negative consequences of the CPSIA. But important work remains to be done, and I am concerned that, once the Democrat majority is restored with my departure, the chance for meaningful reform will have passed.

With respect to the Representative Sample rule, the Democrats were unable to impose unjustifiably burdensome recordkeeping requirements. I expect that they will soon revisit the rulemaking and pass 2-1 those same unnecessary and costly requirements.

I am also not optimistic that the Commission will move forward as aggressively as it should to explore even the fraction of third-party testing cost reduction ideas it has approved. The resources to do so still remain to be allocated, and without a tie vote to provide balance to the Democrats lack of enthusiasm for cost reduction, I expect very little will be done.

7. **Initial third party testing and certification have now been required since January 1, 2012. How is the Commission using this to ensure that all products comply with the lead standard, phthalate standard and the toy standards, to name a few of the new requirements.**

To my knowledge, the Commission has undertaken no enforcement action related to the requirement that all children's products be certified as third party tested before entering commerce. The vast majority of products subject to third-party testing are manufactured abroad and enter the United States via cargo container ship. The Commission uses a sophisticated risk assessment methodology to focus its border enforcement efforts on those imported products that are most likely to violate CPSC safety standards or otherwise present a risk of harm. Products are not stopped at the border to check their certifications, the validity of which would be impossible to spot check in any event. And

[14] A more detailed explanation of my vote on the consideration of opportunities to reduce third party testing costs is available at: http://www.cpsc.gov/pr/northup10112012.pdf.

no enforcement actions based on certificate violations have been taken when products stopped for other reasons have either lacked or had a noncompliant certificate. Nor am I aware of the Commission ever using the information on a certificate that accompanied a noncompliant product to investigate a finished product or component manufacturer, or the lab that purportedly performed the third party tests that certified as compliant the violative product. Furthermore, such investigations would be an enormous waste of resources. In short, to date, third party testing has amounted to a massively expensive exercise borne only by those manufacturers and distributors with the business ethics to comply with the law, while bad actors that continue to sell untested products either at lower prices or with better profit margins face no enforcement.

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Responses to Questions for the Record
Nomination of Mr. Elliot Kaye to be
Chairman, Consumer Product Safety Commission
Senate Committee on Commerce, Science and Transportation
Hearing on April 8, 2014

Questions from Senator Mark Pryor

1) **When we met, you and I discussed some of the burden relief efforts at the CPSC, in particular, making determinations that certain materials don't include lead, heavy metals, or other toxic substances. Could you please state for the record your commitment to ensuring these determinations are made in a timely manner?**

   If confirmed, I assure you that I will continue to work with the U.S. Consumer Product Safety Commission's (CPSC) Commissioners and staff to try to expand our list of determinations as quickly as resources, actionable data, and consumer product safety priorities permit.

   a. **Based on your experience as Executive Director, what yon think Congress can or should do to expedite these determinations?**

      Congress could assist CPSC in overcoming two related challenges with this process.

      First, to date the Commission unfortunately has yet to receive actionable data to expand our list of determinations. Though, I am hopeful that recent events will assist with this effort. On April 3, 2014, CPSC staff hosted a public workshop on potential ways to reduce third-party testing costs through determinations consistent with assuring compliance. Staff invited interested parties to participate in or attend the workshop and to submit written comments. I attended this workshop, and found the information provided by the participants to be incredibly informative. However, CPSC staff noted throughout the workshop that we will need more specific data to provide the requested relief. It would certainly assist our efforts if Members of Congress would also encourage stakeholders to submit any actionable information and data they might possess.

      Second, staff time associated with these efforts does compete with time allocated to pressing and meaningful safety work. At our funding levels, the Commission has struggled to strike the right balance in ensuring that botb our consumer product safety work and our determinations process can proceed in a timely fashion. Additional funding would allow us to work on a greater number of important activities.

2) **We also discussed imports, and the need for the CPSC to go after bad actors who willing and repeatedly skirt U.S. regulations. How do you tbink tbe current**

importation program is working, and how would the modifications to that program you mention in your testimony function?

As directed by Congress in Section 222 of the CPSIA, CPSC began a risk assessment methodology (RAM) to enhance our targeting capabilities at the ports. Because of existing funding levels, CPSC employs a pilot scale version of the RAM. It allows us to better target certain high risk products at U.S. ports of entry, thus focusing our efforts more on those companies who choose not to follow the rules. CPSC developed the program in very close collaboration with U.S. Customs and Border Protection (CBP). The pilot scale RAM Surveillance System integrates with and analyzes a limited set of existing CBP data to identify certain targeted imports with high violation risk.

To date, we view the pilot as a success for consumers, the trade, and CPSC. As mentioned, we are focusing better on those companies that chose not to follow the rules. We believe, however, that Section 222 called for CPSC to run more than a pilot-scale version of the RAM program. For this reason, CPSC requested a $5 million start-up appropriation, as well as a longer term funding mechanism in our FY 2015 Budget Request to begin building out the RAM to full-scale. To address violative consumer products more comprehensively, the CPSC would like to scale the import surveillance program to a national program, capable of analyzing 100 percent of the consumer product-related import entry lines by FY 2020.

This approach would not only fulfill the mandate from the CPSIA, but also it would be consistent with the goals articulated in President Obama's Executive Order 13659, Streamlining the Export/Import Process for America's Businesses. We believe a full-scale RAM program would significantly enhance consumer product safety and consumer confidence, while also providing tremendous benefits to compliant trade. If I am confirmed, this will continue to be a top priority for me.

a. **How has the CPSC been working with importers who have been following the current rules and procedures?**

   During the last few years, as we have developed an even closer and more efficient working relationship with CBP, we have been able to create more opportunities to work with and assist compliant trade. For instance, CPSC has worked closely with CBP to conduct the Importer Self-Assessment – Product Safety (ISA-PS) pilot program. The ISA-PS pilot program is a voluntary approach to product safety compliance and provides recognition and support to participating companies that ensure product safety compliance for products regulated by the CPSC. We believe that as we continue to enhance our working relationship with CBP, especially consistent with Executive Order 13659, compliant trade will continue to benefit significantly.

Questions from Senator Roger Wicker

1) **Upholstered furniture flammability is an issue of importance to my constituents, due to the number of people who are employed in this sector in Mississippi. State regulators in California, after years of deliberation and research, have developed a furniture flammability standard that focuses on smolder ignition. Do you agree or disagree with the California approach, and what are your views on the ueed for a national furniture flammability standard?**

To the extent that California's new standard, Technical Bulletin 117-2013, addresses a portion of the risk associated with upholstered furniture fires while also discouraging the use of harmful chemicals to do so, that is a very positive step forward. However, I believe consumers and other stakeholders nationally would be well-served by a national standard. Particularly, I believe this would he the case if the standard can achieve the aims of TB117-2013, hut in a fashion that addresses an even larger percentage of associated fires. I helieve the Commission should work toward a feasihle standard that could mitigate the most deaths and injuries possible.

Presently, CPSC staff is considering all of the information in the public record along with additional materials and availahle scientific studies and relevant data, such as analyses of fire hazard data, death and injury data, and the technical and economic feasibility of an approach. Taking all of this information into account, staff will recommend a proposed rule to the Commission for consideration. If confirmed, and subject to available resources, I would encourage CPSC staff to move as expeditiously as possihle with this effort.

2) **It is my understanding that the Commission is considering adopting a mandatory rulemaking that would call for use of a specific flesh-sensing technology by certain bench-top table saw manufacturers. Conld the adoption of such a rulemaking stifle competition in the marketplace for tahletop saws or make such saws prohibitively expensive for some consumers to purchase? What is your view on the need for such a mandatory regulation?**

About 11 people per day suffer an amputation because of incidents involving table saws. Based on data reflecting the patterns and prevalence of life-altering injuries associated with these products, on Octoher 11, 2011, the Commission voted unanimously (5-0) to approve an Advance Notice of Proposed Rulemaking (ANPR) on table saws. However, the Commission has also directed CPSC staff to remain very involved in the development of an improved voluntary standard that might potentially address the hazard. Ideally, the voluntary standards process will produce, in a timely fashion, a revised standard that effectively addresses the hazard patterns CPSC staff has identified.

Please know that, if confirmed, I will carefully review all of the comments and feedback we receive from stakeholders on this issue, as well as continue to monitor the progress of the voluntary standards process. The Commission's aim is to address this hazard, ideally through a strong voluntary standard.

Question from Senator Tim Scott

1) **In carrying out its mission of protecting the public against unreasonable risks of injury, the Commission often relies on voluntary standards in partnership with the involved industries. It is my understanding that even though an important industry in my state has worked to develop enhanced table saw safety standards, which are currently working to significantly reduce user injuries, the Commission is considering proposing a mandatory standard that could essentially eliminate the most portable and affordable saws from the market. Can you assure me that you will give full and fair consideration to existing voluntary standards and their relative impact on consumers when considering the imposition of new mandatory standards?**

   Yes. This is the approach I have taken to date while serving at the Commission, and, if confirmed, I would continue this approach.

   About 11 people per day suffer an amputation because of incidents involving table saws. Based on data reflecting the patterns and prevalence of life-altering injuries associated with these products, on October 11, 2011, the Commission voted unanimously (5-0) to approve an Advance Notice of Proposed Rulemaking (ANPR) on table saws. However, the Commission has also directed CPSC staff to remain very involved in the development of an improved voluntary standard that might potentially address the hazard. Ideally, the voluntary standards process will produce, in a timely fashion, a revised standard that effectively addresses the hazard patterns CPSC staff has identified.

   Please know that, if confirmed, I will carefully review all of the comments and feedback we receive from stakeholders on this issue, as well as continue to monitor the progress of the voluntary standards process. The Commission's aim is to address this hazard, ideally through a strong voluntary standard.

Questions from Senator Ron Johnson

1) **Mr. Kaye, if you are confirmed, when you are considering a mandatory standards are you willing to take into account not only consumer safety but also:**

   a. **A consumer's rights to afford products, access products, and assume a reasonable amount of risk?**

      Yes, because many of our statutes require that associated rulemakings consider concerns such as these.

   b. **A company's ability to survive and the number of jobs that will be lost if your standard is put in place?**

      Again, yes, because many of our statutes require that associated rulemakings consider concerns such as these.

2) **Mr. Kaye, if you are confirmed, will you consider closing open rulemakings that threaten to impose mandatory standards on companies that are successfully operating under voluntary standards? Coming in as a new chairman and closing outdated dockets will provide the agency with a clean slate.**

The Consumer Product Safety Act (15 U.S.C. 2056(b)), the Federal Hazardous Substances Act (15 U.S.C. 1262(g)(2)), and the Flammable Fabrics Act (15 U.S.C. 1193 (b)(2)) require the CPSC to rely on voluntary standards rather than promulgate mandatory standards, provided that the voluntary standards would eliminate or adequately reduce the risk of injury or death addressed, and it is likely that there will be adequate compliance with the voluntary standard by industry. If during the course of mandatory rulemaking activities an adequate voluntary standard is adopted and there is substantial compliance, the Commission must, by statute, terminate its rulemaking activities. If confirmed, I would abide by this statutory framework.

a. **For example, CPSC currently has a mandatory rulemaking on Recreational Off-Highway Vehicles (ROVs) that has been open for more than four years, imposing an atmosphere of uncertainty on the industry. During your nomination hearing there was a bipartisan call to eliminate this uncertainty. Would you consider closing this rulemaking to provide business certainty?**

CPSC's end goal is to reduce the death and injury hazards associated with ROVs. ROV-related deaths are on the rise—jumping 65 percent from 2011 to 2012. Between January 2003 and April 2011, the CPSC knows of at least 428 reported ROV incidents—231 of which involved fatalities and 388 of which involved injuries (including serious injuries such as de-gloving, fractures, and crushed hands, feet, and arms). The Commission directed staff as part of the CPSC's Fiscal Year 2014 Operating Plan to draft for Commission consideration a Notice of Proposed Rulemaking (NPR) on ROVs. Absent the Commission directing otherwise, CPSC staff plans to provide the Commission with the draft NPR by the end of the current fiscal year.

Importantly, though, CPSC staff continues to work with the voluntary standards body to revise its standard in a manner that adequately addresses the deaths and injuries associated with these vehicles. CPSC staff has exchanged a number of letters with the voluntary standards body on the technical aspects of the standard and has also accepted an invitation to participate in the next meeting regarding possible revisions. These are positive signs that this issue might be addressed as part of this process. If a voluntary standard adequately addressees the death and injury hazards and industry substantially complies, CPSC will abide by the statute and defer to the voluntary standard.

I am sensitive to the desire to come to a speedy resolution on an effective performance standard for ROVs. If confirmed, I assure you that I will actively

listen to all stakeholders and continue to diligently work with the Commission and its staff to achieve a meaningful solution, as quickly as possible.

b. **The CPSC is also considering a proposed mandatory rule on tabletop saws that would, in essence, eliminate the most popular category of table saws from the market: bench top table saws. However, there are already existing and effective voluntary standards in place. Since the current voluntary standards are working to significantly reduce the nnmher of blade contact injuries and the mandatory standards under consideration will result in serious unintended consequences to consumers and businesses, will you assure me that you will avoid finalizing this rulemaking?**

About 11 people per day suffer an amputation because of incidents involving table saws. Based on data reflecting the patterns and prevalence of life-altering injuries associated with these products, on October 11, 2011, the Commission voted unanimously (5-0) to approve an Advance Notice of Proposed Rulemaking (ANPR) on table saws. However, the Commission has also directed CPSC staff to remain very involved in the development of an improved voluntary standard that might potentially address the hazards. Ideally, the voluntary standards process will produce, in a timely fashion, a revised standard that effectively addresses the hazard patterns CPSC staff has identified.

Please know that, if confirmed, I will carefully review all of the comments and feedback we receive from stakeholders on this issue, as well as continue to monitor the progress of the voluntary standards process. The Commission's aim is to address this hazard, ideally through a strong voluntary standard.

c. **I also nnderstand that the Underwriters Lab is specifically looking into the adoption of a voluntary standard relating to the incorporation of flesh sensing technology into table saws. While the Underwriters Lab considers this issue do you agree that you should take this draft rule/mandatory standard regarding this same issne off the table?**

Section 7 of the CPSA (15 U.S.C. 2056(b)) requires the CPSC to rely on voluntary standards rather than promulgate mandatory standards provided that the voluntary standards would eliminate or adequately reduce the risk of injury or death addressed and adequate compliance with the voluntary standard by industry is likely. If during the course of mandatory rulemaking activity an adequate voluntary standard is adopted and there is substantial compliance, the Commission must, by statute, terminate its rulemaking activity. If confirmed, I would abide by this statutory framework.

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
NOMINATIONS HEARING
APRIL 8, 2014

QUESTIONS FOR THE RECORD
SENATOR CLAIRE MCCASKILL

QUESTIONS FOR MR. ELLIOT F. KAYE:

Question 1. **What do you believe is the CPSC's core mission?**

I believe the U.S. Consumer Product Safety Commission's (CPSC) core mission is to protect consumers from the unreasonable risk of injury associated with the use of consumer products within the CPSC's jurisdiction.

Question 2. **Do you think the CPSC's budget is adequate to achieve this mission?**

Long-term historical funding trends, in conjunction with the effects of sequestration, make it very difficult to believe the CPSC's budget is adequate to achieve its mission. The legacy of lower funding levels has been either in unattended or significantly delayed product safety work. Given the current climate of tight budgetary constraints, the most recent funding trends, beginning with the appropriated amount for the current fiscal year, give reason for optimism that one day the agency may be funded at levels that more closely resemble its authorization levels. Higher funding levels would allow the CPSC first and foremost to address additional consumer product hazards more quickly while also providing more certainty for consumers and industry.

Question 3. **Where do you find the greatest need for more resources or more focus by the Commission?**

As I mentioned in my opening statement, I believe more resources are needed to expand our import surveillance program. The CPSC faces great challenges in identifying noncompliant products at the ports. In the CPSIA, Congress directed the CPSC to begin a risk assessment methodology to better target hazardous and violative imports. The agency has been running a successful pilot of that program and is now requesting a funding mechanism to run a full scale version. I believe consumers are better served by CPSC catching these products before they enter U.S. markets, and compliant trade is better served by CPSC staff focusing on those companies not following the rules.

I also believe greater attention should be placed on addressing certain chronic, hidden hazards. These hidden risks can come from long-term exposure to toxic chemicals or hazardous metals contained in consumer products. I am particularly concerned with how vulnerable populations might be affected by these hidden hazards. I believe Congress recognized and addressed the risk of some hidden hazards in the CPSIA, setting new chemical and element limits as well as providing the agency with enhanced authorities to try to address those hazards in the marketplace—and even before they enter the marketplace. With more resources, the agency could expand on Congress' success and potentially address more hazards in the marketplace.

Question 4. **Now that the CPSC is nearly done with its rulemaking work as mandated nnder the Consnmer Product Safety Improvement Act of 2008, what other priorities shonld the Commission focus on?**

Although CPSC has fulfilled many of the rulemaking requirements mandated by the CPSIA, some required work remains, particularly with regard to durable infant products, ATVs, and the Chronic Hazard Advisory Panel work associated with phthalates. Beyond this work, I believe the Commission should continue its focus on expanding the agency's import surveillance program. Additionally, I helieve the Commission should focus more on addressing hidden, chronic hazards, as well as hidden mechanical hazards, such as those associated with window blind cords.

Question 5. **The Consumer Prodnct Safety Improvement Act of 2008 empowered the Commission with stronger enforcement authorities. Some of these inclnde: 1) the ability to determine the type and form of a corrective action a manufacturer must take; 2) an increase in maximum civil penalties; 3) the authority to immediately remove particularly hazardons products from store shelves without judicial approval; and 4) the ability to quickly destroy non-compliant products at the ports. Much of the power of the CPSC rests with the Chairman of the Commission. Will yon nse these authorities aggressively to protect the public?**

Yes. If confirmed, I would use all of the tools at the agency's disposal to protect the public.

Question 6. **If you are confirmed as Chairman, how do you see the agency changing under your leadership?**

If confirmed, I would hope to build on the successes of Chairman Inez Tenenbaum and Acting Chairman Robert Adler. Chairman Tenenbaum particularly deserves great credit for seeing the agency through the implementation of the major provisions of CPSIA. The agency now has a chance to address persistently deadly product hazards that were not a focus of the CPSIA, such as window blind cords. As we move beyond CPSIA implementation, the CPSC could focus more on consumer product hazards associated with seniors—a group of great concern given its rapidly expanding numbers.

With all of these efforts, if confirmed, I would hope to continue my work in building a wide coalition of stakeholders to try to find meaningful safety solutions through collaboration. Although tbis approach does not fit every situation, my experience at the agency has been tbat more often than not, collaboration leads to meaningful results. I would also hope to further engage our sister agencies. The CSPSC has a very productive working relationship with Customs and Border Protection at the ports and with the Centers for Disease Control and Prevention on brain safety in youth sports. I would like to find even more ways to have CPSC and other agencies pool resources and expertise to address safety issues in a more efficient and effective manner.

I would also like to see CPSC take better advantage of digital communications. The agency has some work to do to be more on the leading edge of using all available communications tools to keep the public better informed.

Finally, I am optimistic that, if confirmed, the new composition of the Commission would be conducive to very meaningful collaborative work among the Commissioners. The Chairman is responsible for setting a tone and leading by example. If confirmed, I would take this responsibility very seriously.

Question 7. **Some businesses still have legitimate concerns about some of the unintended impact of new regulations on their operations. Will you commit to working through the implementation of this law in a commonsense manner that recognizes the inherent flexibility of the Act?**

Yes. My approach while at the CPSC has been to reach out to a wide coalition of stakeholders to try to find meaningful solutions through collaboration. If confirmed, I would continue this approach.

Question 8. **Any agency, no matter its size, would have difficulty protecting the public from all potentially unsafe products.**

> ***Question 8a.*** **How will you reach the millions of consumers who have probably never heard of the CPSC to notify them of recalls and warn them about the unforeseen risks in their homes? How will you reach rural communities?**
>
> I believe that all consumers, no matter where they live and no matter what their circumstances, deserve to be informed about consumer product dangers. I believe the CPSC could work more effectively with the regulated community to find ways to reach consumers in more creative ways. While many consumers may not have heard of CPSC, they certainly are familiar with large retailers, for example. If confirmed, I would like to work more with retailers on improving ways to reach consumers regarding product safety hazards across many different communities. I would certainly appreciate the opportunity to work with you and your staff on ways to enhance our efforts in this regard.
>
> As mentioned, I would also like to see CPSC take better advantage of digital communications as part of this effort. Although print and broadcast media might work well with certain segments of the population, the CPSC could enhance its ability to also connect with the public through their smartphones.
>
> I would also like to see an expansion of CPSC's Neighborhood Safety Network (NSN) program, which delivers product hazard and recall information to more than 9,000 community leaders and organizations serving underserved communities nationwide. These community contacts, including tribal leaders, fire departments, and health clinics, share our materials widely with their constituents.

Question 8b. **Related to this, recall participation rates remain low. What are your recommendations to improve those rates?**

I definitely share your concern about the distressingly low response rate that many recalling firms experience in carrying out a voluntary recall. Although low recall participation rates unfortunately plague many agencies including the CPSC, I believe one potential avenue for improvement is more direct communication with affected consumers. Manufacturers that have email addresses and/or phone numbers of their customers, either through club membership, catalogue purchases, or product registration cards, are able to generate greater awareness of product recalls. CPSC staff, in their proposed voluntary recall notice rule, encourages retailers to make a greater effort to assist manufacturers in identifying and contacting potentially affected consumers. CPSC staff also is proposing to launch a study in the coming year that explores the question of why some consumers hear about recalls, but decide not to respond while others do. If confirmed, I would continue to work with agency staff and industry to address this issue. I would also engage our sister agencies, as well as interested stakeholders, to see if we could identify better and more creative ways to improve recall rates.

Questions for the Record
Nomination of Mr. Joseph Mohorovic
to be Commissioner, Consumer Product Safety Commission
Senate Committee on Commerce, Science and Trausportation
Hearing on April 8, 2014

Chairman Rockefeller

1) Intertek's Faulty Testing of Chinese-Manufactured Gas Heaters

Mr. Mohorovic, several weeks ago, a federal jury in the Western District of Pennsylvania awarded a $6 million verdict against the company where you are currently employed, Intertek. This verdict and judgment included $5 million of punitive damages. The name of this case was Brand Marketing Group v. Intertek (12cv1572).

The facts of this case are the following: a U.S. company called Brand Marketing Group contracted to supply the Ace Hardware store chain with "Thermablaster" vent-free gas room heaters.

Brand Marketing Group hired a Chinese company, Reecon M&E, to manufacture the heaters. Reecon hired Intertek's Chinese subsidiary, Intertek Shenzhen, to test the heaters and certify that they complied with American National Standards Institute (ANSI) safety standards.

According the facts established during the trial, Intertek's Chinese testers did not have the proper training or experience to test the heaters. They had never tested heaters before and they misunderstood the ANSI standards, partly due to their poor command of English. They mistakenly applied the standard for outdoor grills to the Thermablaster heaters. As a result, Intertek falsely certified that the heaters met the ANSI Z.21.11.2b standard for room space heaters.

Relying on Intertek's certification, Brand Marketing Group shipped thousands of potentially unsafe heaters to Ace Hardware. When it became aware that the heaters did not comply with the standard, Ace sued Brand Marketing and won a $611,000 judgment. Brand Marketing then sued Intertek, which resulted in the $6 million jury award.

Q: Mr. Mohorovic, did you have any involvement in the testing of the Thermablaster heaters that were at issue in this case?

A: No.

Q: Are you involved in the safety testing of consumer gas heaters (also known as "hearth products")? If yes, please explain your role.

A: No.

Q: In your current position as a Senior Vice President at Intertek responsible for "global performance, growth and strategic management," what role do you play in making sure that your company properly applies U.S. standards to products manufactured in China? What responsibility do you have for certifying that products made in China and other countries are safe for U.S. consumers?

A: I am not directly involved in our engineering or certification activities, but Intertek has multiple systems in place to ensure that the testing and certification of products is conducted in compliance with applicable standards, in China and around the world.

Q: Is it common for Intertek to outsource the safety testing of products manufactured in China to Chinese testers?

A: Intertek does not outsource safety testing. Just like other Nationally Recognized Testing Laboratories approved by OSHA, Intertek operates a global system of laboratories and inspectors that support manufacturers who elect to have their products tested and certified. Intertek laboratories are accredited by accreditation bodies, meaning that they must qualify their sites as having the equipment, trained personnel, and quality system necessary to operate. In addition to being accredited, the Intertek laboratory in issue in this litigation is an OSHA approved and audited site.

Q: How many products have testers employed by Intertek's Chinese subsidiary certified as safe for the U.S. market?

A: Intertek does not maintain records of active certifications by country of origin. However, Intertek currently has over 80,000 products authorized for the use of the ETL certification mark, indicating compliance with recognized national standards. The plaintiff in this case was not an Intertek customer and was never authorized to use an Intertek mark and did so without Intertek's knowledge or consent.

Q: Is it common for Intertek to employ safety testers in other countries where products are manufactured, rather than U.S. testers?

A: All Nationally Recognized Testing Laboratories, including Intertek, serve the globalized supply chain and in doing so, operate laboratories where the product manufacturers are located. For this reason, Intertek and its competitors, maintain extensive operational quality systems, together with internal audits and external audits by accreditation bodies and OSHA. Contrary to the misinformation generated in this lawsuit, engineers working in product conformity are trained and use the English language on a daily basis, as almost all product standards are maintained in English.

Q: Why does Intertek rely on foreign testers to determine whether products comply with U.S. standards?

A: It is important to recognize that Intertek serves the global commercial market. The supply chain for the United States is built in part on manufacturers located in other countries. Requiring that testing for the United States market he completed only in the United States would entail a dramatic change in the process and cost related to bringing products to market, and might also constitute a restraint of trade. To be clear, Intertek, and its competitors, do not (and cannot) dictate where testing must be completed, hut serve the market as it exists.

Q: Does Intertek regularly claim that these testers are "expert" in U.S. standards such as the ANSI standards?

A: Intertek engineers apply product standards to products on a daily basis. Intertek engineers receive extensive and ongoing training in the relevant product categories they work within, regardless of the country. The United States sites are subject to the same requirements and supervision as the foreign laboratories. As a general rule, Intertek personnel are highly knowledgeable on the product standards and their application to products.

Q: When Intertek outsources testing to foreign testers, how does Intertek make sure that the testers are properly applying U.S. standards and that the testers actually understand the U.S. standards?

A: As the global system of product standards is almost entirely in English, command of the language is a job requirement for all Intertek engineers. In conducting testing and evaluation of products, Intertek engineers have access to supervising engineers and, ultimately, a Chief Engineer for each product category to ask questions and obtain support. Intertek conducts internal audits of all of its sites and undergoes external audits by its accreditors and OSHA. After a product is certified it is subject to ongoing factory inspections to check on continuing compliance with the relevant standard.

Q: Why should consumers and the CPSC rely on Intertek's certification that a product is safe and meets that standards of the U.S. market?

A: The ETL mark is used on more than 80,000 different products. Intertek maintains processes to investigate and address all reports of non-compliances. On an annual hasis, Intertek receives reports on well less than one percent of the products it lists. Of these reports, the large majority involve manufacturing defects, component changes, end of life failures, misuse of the product, competitor complaints, or mismarking. All reports are investigated and if it is determined that a dangerous condition exists, Intertek will work with the product owner to report the issue to the CPSC. In the case at issue, Intertek suspended the manufacturer and then forced the plaintiff, over his strenuous objections, to report the problem to the CPSC and to remove the product from the market. Intertek

stopped this product from being sold on the United States market. Intertek works every day to improve the compliance of products with recognized standards and is proud of its role in supporting the voluntary testing and certification activities of manufacturers in the United States and around the world.

2) GAO Report on "Burrowing" in the Federal Workforce

On May 1, 2006, the Government Accountability Office (GAO) issued a report with the title, "Conversions of Employees from Noncareer to Career Positions, May 2001-April 2005" (GAO-06-381). This report examined 144 federal employment cases in which employees working at agencies through political appointments converted to career federal positions (a practice known as "burrowing").

The report found that in most of the 144 cases, the agencies and employees followed the proper procedures for political-to-career conversions. But in 18 cases, the report found that the agencies and employees did not follow the proper procedures.

One of these 18 cases involved the conversion of a Schedule C Special Assistant to the then-CPSC Chairman Hal Stratton to a Senior Executive Service (SES) position in the agency with the job title, "Director, Office of International Programs and Intergovernmental Affairs, Office of the Executive Director." GAO did not name this employee, but described the employee's "previous experience in the private sector, and as an elected official to the New Mexico State Legislature." (p. 68)

The resume you submitted to the Committee in the course of your nomination shows that you held the same positions at the same time as the person described in this GAO report.

Q: Mr. Mohorovic, are you the CPSC employee described in the GAO report I have cited in the paragraph above?

A: Yes. I had discussed this matter with CPSC human resources staff previously and am happy to now fully explain what I understand to have occurred.

According to GAO, when CPSC submitted your name to a Qualifications Review Board (QRB) convened by the Office of Personnel Management (OPM), the Board determined that you did not have the executive experience required for an SES position in the federal government. Although your appointment was eventually approved by a second QRB, GAO notes that you did not provide sufficient evidence to support your claim that you were a "senior manager and leader."

Q: Mr. Mohorovic, can you describe in detail what your qualifications for this SES position were in November, 2003?

A: The QRB did not determine that I did not possess the necessary executive experience required for an SES position in the federal government. Instead, the QRB initially determined that my SES application did not sufficiently document my

management experience and suggested I provide additional evidence of my leadership credentials. Therefore, I believe it is important to focus on these qualifications. Prior to my experience at CPSC, I had extensive and direct line management experience as a State Legislator, in my role as the Chief of Staff to the New Mexico Senate Minority Staff, and as Finance Director of both the Republican Party of New Mexico and the campaign to Reelect Governor Gary Johnson. As for my leadership credentials, I point to the "2001 Leader Award" presented to me by the Greater Albuquerque Chamber of Commerce and my inclusion in the New Mexico Business Weekly's "Top Forty Under 40" issue identifying those forty leaders under the age of forty "dedicated to changing the status quo in New Mexico." While a more exhaustive list is contained within my actual SES application, I believe these examples provide meaningful insight into the management and leadership qualifications the QRB ultimately deemed sufficient in this specific area.

Q: Can you explain how you were more qualified than the 23 other people who applied for this job?

A: By my understanding, GAO reports that twenty-four candidates applied for the position. An independent CPSC Executive Resource Board comprised of non-political, career, SES senior executives reviewed the applications, according to, as I understand, all relevant statutes and regulations governing such decisions. The GAO report cites that I was the highest rated candidate among the total applicant pool. I do not know and was not allowed to know who from the CPSC comprised the ERB, nor do I know of any other applicants so I cannot speak to their qualifications relative to my own.

Q: How did you respond when the QRB determined that you did not have the senior management experience for this SES job?

A: The QRB did not determine that I did not have the senior management experience necessary for the position. Instead, the QRB initially determined that my SES application did not sufficiently document my management experience and suggested I provide additional evidence of my leadership credentials. OPM's QRB forwarded the written rationale for its decision to me via the CPSC Office of Human Resources. The QRB clearly anticipated a revised application, inviting the agency to "present other examples of his experience." I revised the application to address the QRB concerns. The revised application was approved by a second QRB at OPM comprised of entirely different career-SES participants. Although the second QRB did not make any specific comment on the application, it is apparent that they believed that the comments of the first QRB were successfully addressed in the revised application.

Throughout the process, the CPSC followed standard SES procedure. There is nothing unusual about the re-submission of applications to the QRB. CPSC has followed this procedure before in the case of other applicants for a career SES position. In these cases, after the candidate was initially asked to amend their application by the QRB, the candidate made revisions and re-submitted their application. And second QRBs

approved those candidates. Such outcomes are identical to what transpired with my application.

Q: How did you respond to the charge that you were not qualified for this job, and that you won the job through political influence rather than through a fair application process?

A: I would take strong issue with any such allegation or comment. At the time of my application, the QRB, composed of non-political, career SES managers from other federal agencies, ultimately agreed that I had the skills and experience necessary to lead the CPSC Office of International Programs and Intergovernmental Affairs. The applicants were also rated internally at the CPSC by non-political, career SES senior managers. The selection process was in no way subject to political influence. The GAO did not conclude that it was nor has there ever been an allegation of the same to my knowledge.

Q: How do you respond today to the charge that you were not qualified for this job, and that you won the job through political influence rather than through a fair application process?

A: I would likewise take issue with any such comment. I stand behind my solid record of public service as testament to my qualifications for the job. For two years, I directed and led the groundbreaking work of the CPSC Office of International Programs, work that directly established and led to the foundation for the direct international cooperation the CPSC experiences today with a number of countries with regard to the sharing of product safety information and expertise. The International Programs efforts I led aimed at taking the U.S. safety message directly to the source– clearly articulating the standards and expectations of the U.S. government to international consumer product manufacturers.

The Senate Commerce Committee found this episode troubling. In its report on S. 2045, the "Consumer Product Safety Commission Reform Act of 2007" (Report # 110-265), the Committee specifically discusses the GAO report I describe above and criticizes the CPSC for "promoting a nonqualified appointee working for then Chairman Stratton to a Senior Executive Service (SES) position." (p. 3) The Committee strongly encouraged the CPSC "to develop a human resource selection protocol to ensure that non-political Commission staff have clear opportunities for development and promotion, and that candidates for SES position be technically qualified for the demands of that position." (p. 4)

Q: Mr. Mohorovic, given these allegations of political favoritism, how can you assure me that you are not going to inappropriately politicize the CPSC?

A: I do not believe these allegations have merit so there should be no such concern. You can be assured tbat, if confirmed, I will do everything in my power to ensure that the CPSC continues to adhere to merit system principles of fair and open competition.

Q: Can you please discuss how you would, in the words of the Committee report, "ensure that non-political Commission staff have clear opportunities for development and promotion"?

A: Ensuring that the CPSC has an effective human resources development plan for the qualified promotion of non-political staff is primarily within the sphere of the CPSC Chairman. However, to extent proper, I will work with the Chairman and the Director of Human Resources to ensure a process by which defined personnel and activity goals are set for staff with clear delineation of career-laddering opportunities within CPSC and externally within the Federal workforce.

Senator Nelson

1) In your committee questionnaire you noted that one of your priorities if confirmed as a Commissioner will be pursuing the harmonization of standards.

Q: Can you provide additional information about what types of activities you plan to pursue in that area?

A: Thank you for the question. I was not able to fully elucidate this in my oral and written testimony, hut I believe it is a critical issue going forward for the CPSC. The US and international regulatory landscape for consumer products is evolving extremely rapidly. As these new standards and requirements evolve, there is ample room for the CPSC to engage on an international basis to ensure that if the same objective is being sought (e.g., 100 parts per million of lead in children's products), that the same or similar testing, certification and enforcement will occur. In my experience, such is not generally the case today. I will work as a commissioner to ensure that harmonization does not in any way reduce the protection of American consumers that U.S. standards provide but instead encourages similar standards ahroad and reductions in redundancies and inefficiencies.

Q: Since standards vary substantially from jurisdiction to jurisdiction, how do you harmonize without potentially impacting safety? Do you harmonize up to the highest standard – or look for something else?

A: There a number of ways to accomplish harmonization without any reduction in consumer safety. Having spent the last 10 years in the consumer safety testing industry, I helieve this to indeed be the case. For example, there exists a "drop test" to determine the presence or absence of small parts that could cause a choking hazard in young children's products. As it turns out, however, the drop test is almost identical for the US and European markets, with only slight variations in the height of the drop and the

flooring underneath. This, in my mind, is a prime example of where standards can and should be harmonized to ensure both safety and efficiencies for international commerce. I would look for approaches consistent with President Obama's Executive Order 13609. The end goal might not be harmonization of a standard in all cases. CPSC and other jurisdictions may explore ways to reduce unnecessary differences in regulatory requirements through mutual recognition agreements or other vehicles to reduce regulatory trade burdens without subjecting American consumers to increased consumer product safety risk. Many international differences in standards are not based on differences in risk assessment and stringency of protection but local and parochial practices which will benefit from dialogue and scrutiny to avoid unnecessary nontariff trade barriers.

2) In your written testimony, you stated that you would like to further consult members of the international safety community for ideas and information that could further inform CPSC decision making.

Q: To that end, do you support efforts by CPSC staff to enter into further information sharing agreements with foreign product safety regulators?

A: Generally speaking, yes, I do. As the former Director of International Programs at the CPSC, I have seen first-hand how important it is for the CPSC and its cohort agencies internationally to share product safety information, and sometimes on an urgent basis. If there are unnecessary barriers to that sharing of information, and barriers that can be reduced or eliminated by the CPSC, consistent with its laws and regulations, then I would generally support such efforts.

3) Section 6(b) of the Consumer Product Safety Act generally prohibits Commission disclosure of information obtained about a consumer product if that information names or otherwise identifies the manufacturer or the name of such consumer product, unless the manufacturer consents to release of the information.

This is true even where the consumer product is linked to a serious injury or death.

Q: Do you support the current version of section 6(h), or do you think it should he changed to provide additional flexibility?

A: It would be premature for me to comment on this matter, which is of course the subject of a pending regulatory action by the CPSC. However, I would opine that any effort to make what I know to be a currently paper- and mail-based notice system more modern and efficient would likely be a desirable outcome from both the agency and its stakeholders.

Senator Wicker

1) Upholstered furniture flammability is an issue of importance to my constituents, due to the number of people who are employed in this sector in Mississippi. State regulators in

California, after years of deliberation and research, have developed a furniture flammability standard that focuses on smolder ignition. Do you agree or disagree with the California approach, and what are your views on the need for a national furniture flammability standard?

A: Thank you Senator. Because the issue you raise is the subject of an open and ongoing rulemaking before the CPSC, I am unable to comment on the specifics of your question. However, I am generally familiar with this issue and its implications to both the US and international furniture industry, and assure you that, if confirmed, I will make every effort to ensure that the Commission's actions are consistent with hoth consumer safety and US and international harmonization of standards and requirements. . .

2) It is my understanding that the Commission is considering adopting a mandatory rulemaking that would call for use of a specific flesh-sensing technology by certain bench-top table saw manufacturers. Could the adoption of such a rulemaking stifle competition in the marketplace for tabletop saws or make such saws prohibitively expensive for some consumers to purchase? What is your view on the need for such a mandatory regulation?

A: As with the previous question, and with all due respect, because this is the subject of an open rulemaking before the agency, I am unable to opine on that specific matter. This is no doubt an important issue and all aspects of a possible standard should be carefully considered, and I assure you that, if confirmed, I will do so.

Senator Scott

1) In carrying out its mission of protecting the public against unreasonable risks of injury, the Commission often relies on voluntary standards in partnership with the involved industries. It is my understanding that even though an important industry in my state has worked to develop enhanced table saw safety standards, which are currently working to significantly reduce user injuries, the Commission is considering proposing a mandatory standard that could essentially eliminate the most portable and affordable saws from the market. Can you assure me that you will give full and fair consideration to existing voluntary standards and their relative impact on consumers when considering the imposition of new mandatory standards?

A: I fully agree that voluntary standards are incredibly important to ensuring the safety of products for American consumers. While I am not fully knowledgeable of all of the details and current status of the particular issue of table saws (which is undergoing active regulatory consideration by the CPSC) I can assure you that I will give this important issue my full and immediate consideration should I be confirmed.

Senator Mark Pryor

Question for Mr. Joseph Mohorovic

Question 1. When we met, I asked you if there would be any controversy surrounding your nomination. While you said there was none, I have been reminded of a GAO report that focused

on a potential impropriety of your transition from a noncareer, political appointee at the Commission, to a career position. Please explain what happened, and whether or not this should factor into your nomination?

Answer: Thank you for the question, Senator. First, I do not believe this issue to be a controversy and am surprised to see it raised in relation to my confirmation. That said, I do appreciate the opportunity to set the record straight on this matter. Having reviewed the GAO report and all relevant information it addresses in detail, it is clear to me that the CPSC used proper appointing authorities and adhered to merit system principles of fair and open competition in selecting a candidate who successfully competed to fill the career SES vacancy. CPSC staff followed all applicable procedures and reviewed all applicants without bias before choosing a candidate to submit to the Qualification Review Board (QRB).

CPSC advertised the position vacancy as CPSC-001-04, in accordance with the procedures set forth at 5 C.F.R. §317.501(b)(2). Next, the CPSC Executive Resource Board (ERB), composed of career SES managers, conducted the merit staffing process as required by subsection (c) of the regulation. The independent CPSC ERB comprised of non-political, career, SES senior executives reviewed the twenty four applications. The GAO report cites that I was the highest rated candidate among the total applicant pool as scored exclusively by non-political, career, CPSC SES managers. None of these managers were political appointees. This process was performed according to all OPM merit-based hiring procedures.

The CPSC then submitted me as the best qualified applicant to a QRB at OPM, in accordance with 5 C.F.R. §317.502. The review is conducted by OPM completely independent of CPSC.

OPM initially determined that my SES application did not sufficiently document my management experience and suggested I provide additional evidence of my leadership credentials. OPM's QRB forwarded the written rationale for its decision to me via the CPSC Office of Human Resources. The QRB clearly anticipated a revised application, inviting the agency to "present other examples of his experience." I revised the application to address the QRB concerns. The revised application was approved by a second QRB at OPM comprised of entirely different career-SES participants. Although the second QRB did not make any specific comment on the application, it is apparent that they believed that the comments of the first QRB were successfully addressed in the revised application.

Throughout the process, the CPSC followed standard SES procedure. There is nothing unusual about the re-submission of applications to the QRB. CPSC has followed this procedure before in the case of other applicants for a career SES position. In these cases, after the candidate was initially asked to amend their application by the QRB, the candidate made revisions and re-submitted their application. And second QRBs approved those candidates. Such outcomes are identical to what transpired with my application.

Reviewing the GAO report and all relevant information, it is clear that the CPSC used proper appointing authorities and adhered to merit system principles of fair and open competition in selecting me as a candidate who successfully competed to fill the SES vacancy. CPSC staff followed all applicable procedures and reviewed all applicants without bias before choosing a

candidate to submit to the QRB. CPSC did not engage in any prohibited personnel practices, nor does GAO allege otherwise. For these reasons, I do not believe this to be an issue that should factor into my confirmation.

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
NOMINATIONS HEARING
APRIL 8, 2014

QUESTIONS FOR THE RECORD
SENATOR CLAIRE MCCASKILL

QUESTIONS FOR MR. JOSEPH P. MOHOROVIC:

Question 1. What do you believe is the CPSC's core mission?

Answer: I believe the CPSC's core mission is well-defined in the 2011-2016 Strategic Plan. CPSC's mission is to protect the public against unreasonable risks of injury from consumer products through education, safety standards activities, regulation and enforcement.

Question 2. Do you think the CPSC's budget is adequate to achieve this mission?

Answer: Of course I would need to review the resourcing recommendations of the staff, but I haven't seen any reason to believe that current funding levels are inadequate. In fact, I note that the CPSC is operating under a budget surplus and the Commission is making adjustments accordingly to the FY 2014 Operating Plan.

Question 3. Where do you find the greatest need for more resources or more focus by the Commission?

Answer: From 1998 to 2007, the amount of consumer products under CPSC's jurisdiction imported from China alone quadrupled. With almost one million importers and over three hundred ports of entry, it is indisputable that the challenge of ensuring compliant imports is daunting. CPSIA doubled funding levels for CPSC. But that funding came with significant new mandates to enforce as well. I believe that modernization of CPSC's import compliance program presents the greatest need for more resources and focus by the Commission.

Question 4. Now that the CPSC is nearly done with its rulemaking work as mandated under the Consumer Product Safety Improvement Act of 2008, what other priorities should the Commission focus on?

Answer: I believe the CPSC should focus on addressing the compliance of imports. The vast majority of products under CPSC jurisdiction are imported. And a disproportionate share of recalled products comes from imported products. I can think of no better way of assuring consumer safety than by ensuring the compliance of imports to U.S. safety expectations. To accomplish this, I believe a two-prong strategy is necessary.
First, foreign suppliers must understand the safety expectations of consumer products bound for the United States. I believe success will be had by better leveraging existing

communication networks including international consumer groups, retail networks, the testing community, manufacturing and standard developing organization networks. Second, CPSC must conduct a robust and effective import surveillance program. I would like to see CPSC work with Customs & Border Protection to develop public-private partnerships that facilitate the fast flow of low-risk, legitimate, compliant cargo. I would also like to see CPSC's import screening methods incorporate the most sophisticated techniques and the best data to leverage resources and intercept non-compliant cargo at higher rates.

Question 5. You have worked for Intertek – a company whose business is to conduct third-party testing – for many years. What will you bring from this job that will inform your work as a Commissioner?

Answer: After having spent almost a decade working for one of the largest international providers of quality assurance and safety services to the consumer goods industry, I understand intimately the challenges faced by manufacturers and retailers operating in global supply chains. With an enduring commitment to public service, I'd like to offer my risk management skillset to help modernize the CPSC and effectively regulate for safety in the 21st Century.

Ranking Member John Thune
Questions for the Record
Nomination of Robert Adler to be
Commissioner, Consumer Product Safety Commission (Reappointment)
Senate Committee on Commerce, Science, and Transportation
Hearing on June 11, 2014

1) **In January and July 2011, President Obama issued Executive Orders 13563 and 13579 calling on regulatory agencies to "afford the public a meaningful opportunity to comment" during the rule-making process, "use the best, most innovative, and least burdensome tools for achieving regulatory ends" and to "take into account benefits and costs [of regulation], both quantitative and qualitative." The President also asked independent regulatory agencies to formulate plans for the retrospective review of existing regulations in order to "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regnlatory objectives."**

Please provide a detailed explanation of what steps the CPSC has taken to comply with these Executive Orders.

Although as an independent agency, the Consumer Product Safety Commission is not legally obligated to comply with Executive Orders, we always strive within the framework of our governing statutes to follow the spirit of Presidential Executive Orders. With respect to Executive Orders 13563 and 13579, in order for me to respond adequately, I need to briefly review the history of the CPSC's rulemaking. I do so to make the point that we have undertaken both the promulgation of regulations and their retrospective review in the full spirit of the policies incorporated in the Executive Orders. So, I hegin with several observations:

1. Since 1981, the CPSC has been required under amendments to the Consumer Product Safety Act (and the other acts it enforces) to conduct an extensive cost-benefit analysis when we promulgate safety rules. Under these amendments, our cost-benefit approach is as comprehensive, if not more so, as that set forth in any Executive Order issued by the Office of the President.

2. Over the years, the CPSC has promulgated extremely few mandatory safety rules requiring cost-benefit analyses, a grand total of nine in thirty three years – or about one every 3.5 years – opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.

3. Under the Regulatory Flexibility Act of 1980, the CPSC chose to undertake a retrospective review of every safety rule under its jurisdiction from its beginning, not just those identified as having a "substantial impact on a number of small entities" (and, therefore, requiring a mandatory review).

4. In addition to the retrospective review of agency regulations mandated by the Regulatory Flexibility Act, the CPSC has voluntarily undertaken a comprehensive review of its regulations in recent years in a spirit consistent with Executive Order 13563 and anticipates continuing to do so in the future.

Least Burdensome Tools: With respect to our utilization of the least burdensome tools for achieving our regulatory ends, in 1981, Congress added a broad and comprehensive set of cost-benefit requirements to the Consumer Product Safety Act (and the other acts enforced by the CPSC) for consumer product safety rules promulgated hy the CPSC. These provisions, contained in section 9 of the CPSA, easily match, if not surpass, in their stringency and scope the cost-benefit provisions of the various Executive Orders on cost-benefit analysis recommended by the Office of Management and Budget. Among other things, they require the CPSC, prior to promulgating almost every safety rule, to:

- Make findings with respect to the degree and nature of the risk of injury the rule is designed to eliminate or reduce; the approximate number of consumer products, or types or classes thereof, subject to such rule; the need of the public for the consumer products subject to such rule, and the probable effect of such rule on the utility, cost, or availability of such products to meet such need; and any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

- Prepare a final regulatory analysis of the rule containing the following information: a description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the henefits and hear the costs; a description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen; a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

- Find that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the promulgation of the rule is in the public interest; in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under the CPSA would adequately protect the public from the unreasonable risk of injury associated with the product; in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard that compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or it is unlikely

that there will be substantial compliance with such voluntary consumer product safety standard.

- Find that the benefits expected from the rule bear a reasonable relation to its costs and that rule imposes the least burdensome requirement, which prevents or adequately reduces the risk of injury for which the rule is being promulgated.

- Give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions.

Speaking from personal experience, I note that the analysis and findings contained in section 9 of the CPSA (and similar provisions in other acts the agency enforces) have resulted in rulemaking proceedings that span years of effort and cost the agency millions of dollars. I do not believe that one could reasonably expect any more analysis by a regulatory agency, especially one with such limited resources that is directed to save the lives of young children.

Making The Agency's Regulatory Program More Effective or Less Burdensome in Achieving Regulatory Objectives: Both in response to the extremely detailed, time-consuming requirements in section 9 of the CPSA and because of its success in working with the voluntary standards sector, the CPSC has opted, wherever possible, to look to the promulgation and strengthening of voluntary standards as an alternative to developing mandatory standards. The Commission, of course, has always retained the option to undertake mandatory rulemaking where voluntary standards have proven to be inadequate. As I noted, the burdens of mandatory rulemaking have resulted in the Commission's promulgation of only nine standards in the 33 years since the 1981 amendments. In sharp contrast, the Commission has actively participated in the development or enhancement of hundreds of voluntary standards in that same time period. As I shall mention, the Commission's infrequent promulgation of mandatory rules and reliance on voluntary standards has not gone without criticism in Congress, especially when it comes to protecting the lives and safety of young children.

There are limits on the use of voluntary standards in protecting American consumers, but they have, of necessity, become important tools in CPSC's approach to product safety.

CPSC and the Regulatory Flexihility Act (RFA): Section 610 of the RFA requires agencies to periodically review rules that have a significant impact on a substantial number of small entities. Each agency is required to publish a plan demonstrating its approach to its review. Accordingly, as far back as September 1981, the CPSC published its plan for reviewing existing rules under the RFA, as well as subsequent rules within 10 years of their publication.

The CPSC has gone far beyond the requirements of the RFA in its plan. In fact, the agency not only has solicited and reviewed comments for rules that we have determined would have a significant economic impact on a substantial number of small entities, we have actually conducted a review of every safety rule under our jurisdiction. In addition

to soliciting comments from the general public in the Federal Register, we have directly contacted affected parties and their trade associations through appropriate trade publications. Moreover, the Commission has made an effort personally to contact those persons who submitted comments during the earlier rulemaking proceedings. Based on the information received in the comments, as well as other information available to the Commission, CPSC staff has then conducted an assessment of the degree of economic impact on small entities and sought to identify appropriate actions required to minimize the impact on those entities consistent with the objective of the statute under which the regulations were issued.

Under section 610(b) of the RFA, the Commission has sought comments on, and reviewed its rules according to, the following factors: (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlapped, duplicated, or conflicted with other federal rules (and the Commission also considered, to the extent feasible, the extent to which the rule overlapped, duplicated, or conflicted with state and local government rules); and (5) the length of time since the rule had been evaluated or the degree to which technology, economic conditions, or other factors had changed in the area affected by the rule.

Since 1981 and the passage of the RFA, our agency has carefully reviewed its regulations. This effort has continued over the last 30-plus years. On the whole, I believe these reviews have been good both for consumers and the regulated community. Under the RFA (and other provisions of the CPSA requiring rule reviews), the Commission has issued reports involving 17 rules under the CPSA, as well as nine rules promulgated under the Federal Hazardous Substances Act (FHSA), eight rules under the Flammable Fabrics Act (FFA), and four rules under the Poison Prevention Packaging Act (PPPA).

Voluntary Regulatory Review Efforts: In addition to the rule reviews required by the RFA, the Commission also has recently voluntarily undertaken efforts to review its regulations in a manner consistent with the spirit of Executive Order 13563 and similar Executive Orders. Specifically, almost ten years ago, the Commission published a notice in the Federal Register announcing a pilot rule review program. In the notice, the agency committed itself to using OMB's Program Assessment Rating Tool (PART) to help provide a consistent approach to rating programs across the federal government.

In the notice, the Commission listed four rules for review, and asked for public comment on each regulation. Specifically, the notice asked: 1) whether the regulation is consistent with CPSC program goals, 2) whether the regulation is consistent with other CPSC regulations, 3) whether the regulation is current with respect to technology, economic or market conditions, and other mandatory or voluntary standards, and 4) whether the regulation could be streamlined to minimize regulatory burdens, particularly those affecting small businesses.

Out of this pilot program, the Commission then conducted annual reviews that looked at four to six rules per year in 2005, 2006, and 2007. From this review, the CPSC clarified its rules regarding standards for carpets, rugs and bicycles. In addition, the Commission also recently established projects to examine amendments to the electrical toy and cigarette and multi-purpose lighter rules.

We continue the review process today. In the coming years, staff will be looking at ways to maximize openness and public participation, as well as ways to most effectively target rules that may require revision, repeal, or strengthening to protect the public against the risk of unreasonable danger from consumer products. If re-confirmed, I assure you that I will follow this process closely.

In addition, specifically please:

2) **Identify existing CPSC regulations that you believe to be outmoded, ineffective, or excessively burdensome.**

As I have noted above, CPSC staff is currently engaged in a comprehensive review of all existing agency rules pursuant to the mandate in the Regulatory Flexibility Act. I am comfortable with the staff approach, which is a methodical and thorough review of agency rules.

a. **List all of what you believe to be outdated or obsolete reporting requirements for the CPSC.**

Like all other federal agencies and departments, the CPSC faces a multitude of requirements for filing reports with the Congress and OMB. I believe that most of these reporting requirements provide those who oversee us with the necessary information to maintain accountability over the agency. To the extent that our reports are carefully scrutinized, I believe that they serve a useful purpose.

I support periodic review of required reports to identify outdated, obsolete, or duplicative reporting requirements. I know the Government Performance and Results Modernization Act directed the Office of Management and Budget to provide to Congress a list of Congressionally-mandated reports that agencies believe require Congressional modification. In compiling a list of reports, OMB sought the advice of agencies and departments including the CPSC. CPSC staff identified two reports. Specifically, the CPSC Inspector General recommended the consolidation of two duplicative annual reports regarding Inspector General reviews of improvements and employee complaints concerning the CPSC. This recommendation was also included in S. 2109, the Government Reports Elimination Act of 2014, introduced on March 11, 2014 by Senator Mark Warner, and cosponsored by Senators Claire McCaskill and Kelly Ayotte.

b. **Provide a plan to this Committee within 60 days outlining specific actions you plan to take to ensure that the CPSC aggressively implements burden reduction opportunities and a timetable for when those actions will occur.**

During my time as Acting Chairman I have taken specific actions to attempt to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. These actions have included holding an all-day forum, on April 3, 2014, on burden reduction open to all stakeholders. At this forum, we heard numerous thoughtful nominations of ideas from our stakeholders for product determinations. Unfortunately, because of the highly technical nature of many of these suggestions, CPSC scientific staff must carefully test the claims made by the participants. As I mentioned at my re-nomination hearing, one of the most promising suggestions for exempting phthalate testing based on the hardness of plastics has been shown not to be accurate. Following the forum, several stakeholders asked the Commission to reopen the record so they could submit more information to our staff for consideration in making the scientific case for determinations. The record will remain open until July 16, 2014, and I look forward to reviewing the comments and ideas we receive.

In addition, last month, I introduced an amendment to the Commission's 2014 Mid-Year Review and Proposed Operating Plan Adjustments to examine potential ways to reduce third party testing costs through determinations consistent with assuring compliance with underlying requirements. The amendment was adopted. It provides funds for a study to assist the Commission in determining whether untreated wood or other natural materials are materials that do not, and will not, contain any of the eight specific heavy metals in levels that exceed allowable limits listed in the mandatory Toy Standard, ASTM F-963. Because wood was on the list of determinations for lead first published in August 2009 in the Federal Register, and currently found at 16 CFR § 1500.91, that identify those products or product components that will never contain violative amounts of lead, I am hopeful that this study will find similar results for the eight heavy metals listed in ASTM F-963.

In terms of steps I would take upon re-confirmation as a Commissioner, I look forward to working with my colleagues, particularly Chairman-nominee, Elliot Kaye, to continue to seek ways to reduce third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. During his nomination hearing, he agreed to provide such a plan 60 days from his confirmation as Chairman on this topic, and I assure the Committee I will work closely with Mr. Kaye on this plan.

c. Provide detailed recommendations on how you would propose to increase public participation in CPSC's rulemaking process, and how you would propose to reduce uncertainty in the CPSC's rulemaking process.

I believe that the CPSC's approach to public participation is among the most comprehensive in the federal government. Since the agency was first established,

we have stressed the importance of promoting public participation. Here are some examples of the ways that the agency has addressed this important issue:

- Open Meetings Policy: Unlike most other agencies, whenever CPSC employees meet with outside parties on matters of substantial interest, we require that the meetings be announced in advance in our public calendar and provide that any member of the public, including the press, who wishes to can attend the meeting. See 16 CFR§ 1012, et seq.
- Freedom of Information Act: CPSC has one of the most liberal FOIA policies in the federal government. As part of that policy, the agency states that even records that may be exempted from disclosure will be made available as a matter of discretion when disclosure is not prohibited by law or is not against the public interest. See 16 CFR § 1015, et seq.
- Oral Presentations in Regulatory Proceedings: Unlike most other regulatory agencies, rulemaking under Section 9 of the Consumer Product Safety Act (15 U.S.C. 2058(d)(2)) and Section 4 of the Flammable Fabrics Act (15 U.S.C. 1193(d)) require the agency to provide interested persons an opportunity for the oral presentation of data, views, or arguments in addition to the opportunity to make written submissions. See 16 CFR § 1052.
- Publicly Available Database: Pursuant to section 6A of the Consumer Product Safety Improvement Act of 2008, the Commission, in March 2011, established a user-friendly product safety database in which members of the public can report and read about risks of harm associated with consumer products. See 16 CFR § 1102, et seq.
- Annual Priorities Public Hearing: Section 4(j) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2053(j)) requires the Commission to establish an agenda for action under the laws it administers and, to the extent feasible, to select priorities for action at least 30 days before the beginning of each fiscal year. Section 4(j) of the CPSA provides further that before establishing its agenda and priorities, the Commission must conduct a public hearing and provide an opportunity for the submission of comments.
- Contributions to Costs of Participants in Development of Consumer Product Safety Rules: In appropriate cases, tbe Commission will contrihute to the costs of those who participate in its rulemaking proceedings, particularly where consumer participants need to acquire technical expertise. See 16 CFR § 1105.

With respect to reducing uncertainty, I believe that the agency maintains an effective, open line of communication to the regulated community, both in communicating its intentions and in listening to feedback from this community. I do not see that our approach to the regulatory process promotes substantial uncertainty. One specific approach that I believe Congress could take to reduce uncertainty in our processes would be to provide greater flexihility for CPSC rulemaking. At the moment, whenever we follow the burdensome procedures in the various acts we enforce, years may pass before we enact a rule, and that, no doubt, leaves many stakeholders in a state of uncertainty.

d. Provide detailed recommendations on how yon would propose to improve coordination with other federal agencies to eliminate redundant, inconsistent, and overlapping regulations.

The CPSC on a regular basis enters into Memoranda of Understanding (MOUs) with fellow agencies such as the Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and Customs and Border Protection, to coordinate our regulatory approaches to the extent permitted by our respective laws. On the whole, I think these agreements have been quite successful in eliminating redundant, inconsistent, and overlapping regulations.

3) **Through passage of H.R. 2715 in Angust 2011, Congress mandated that the CPSC issue regulations to reduce third party testing costs consistent with assuring compliance with rules, bans, standards and regulations. The deadline for issuing those Congressionally-mandated regnlations was August 2012. H.R. 2715 clearly directs the agency to reduce unnecessary testing burdens that are killing small businesses and have prevented small businesses from entering into the children's product market. This should be an agency priority.**

At a recent hearing on the CPSC midyear review of the hudget, your colleague Commissioner Buerkle proposed an amendment to develop a plan to reduce third party testing burdens. Each of these proposed rules would amend well-functioning regulations that have been in place for years and would advance safety. She stated that she was extremely disappointed in the agency's progress to fnlfill H.R. 2715's mandate to provide meaningful relief to reduce third party testing burdens. You have stated time and again that the Commission does not have the resources to reduce testing burdens, and yet the Commission has recently proposed three regnlations that are not congressionally mandated.

Why has the Commission failed to responsibly respond to a Congressional mandate that it reduce the third party testing burden?

To the best of my knowledge, I have never stated that the Commission does not have the resources to reduce testing burdens. I have also stated that burden reduction is and remains a high priority item for me. Further, I have said that we are a very small agency with limited resources for the many worthy projects, including burden reduction, before us.

As I stated before the Committee during my June 11 re-nomination hearing, Congress, in section 2(a)(3) of P.L. 112-28, did not simply direct CPSC to address third party testing burden reduction. Instead, the mandate in that law was, within a year, to seek public comment on opportunities "to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation." We have done that and have dedicated many staff months to assessing the various approaches suggested in the law and in the many comments we

received in response to our Requests for Information (RFI) published in the Federal Register.

A solid consensus has emerged from the many commenters who have responded to our requests for information. Most see little potential burden reduction in Commission initiatives that retain third party testing costs. Instead, they seek to have the Commission expand on a list of determinations for lead first published in August 2009 in the Federal Register and currently found at 16 CFR § 1500.91. This list identifies those products or product components that will never contain violative amounts of lead. Once a determination is made, such products or product components need not be subject to third party testing. Ideally, based on technical and scientific data, we will be able to expand this list both to include more materials and to also find materials that are used in the manufacture of children's products that will never contain violative amounts of phthalates or the eight heavy metals found in ASTM F-963.

The Commission, on April 3, 2014, held an all-day forum on burden reduction and heard numerous thoughtful nominations from our stakeholders for product determinations. Unfortunately, because of the highly technical nature of many of these suggestions, CPSC scientific staff must carefully test the claims made by the participants. As I mentioned at my re-nomination hearing, one of the most promising suggestions for exempting phthalate testing based on the hardness of plastics has been shown not to be accurate. Nevertheless, the Commission and its staff are proceeding with our work and we hope to provide testing relief as we confirm the scientific validity of the various suggestions.

In addition, last month, I introduced an amendment to the Commission's 2014 Mid-Year Review and Proposed Operating Plan Adjustments to examine potential ways to reduce third party testing costs through determinations consistent with assuring compliance with underlying requirements. The amendment was adopted. It provides funds for a study to assist the Commission in determining whether untreated wood or other natural materials are materials that do not, and will not, contain any of the eight specific heavy metals in levels that exceed allowable limits listed in the mandatory Toy Standard, ASTM F-963. Because wood was on the list of determinations for lead first published in August 2009 in the Federal Register, and currently found at 16 CFR § 1500.91, that identify those products or product components that will never contain violative amounts of lead, I am hopeful that this study will find similar results for the eight heavy metals listed in ASTM F-963.

4) **In 2010 the agency issued an interpretation of *unblockable drain* (in the VGB Pool & Spa Safety Act) which was revoked 17 months later because you decided to change your vote on that matter. The change in interpretation was counter to the advice of the agency technical and legal staff and was done without notifying the public or seeking input from those who had relied on and expended resources complying with the earlier interpretation. I am deeply troubled that this shows disregard for process and does not allow those impacted by a decision to have a chance to weigh**

in. Pool owners spent their limited, and in many cases public funds, complying with the federal mandate only to have their efforts negated by the reversal and without explanation or process.

a. Are there other examples that you can give me where one commissioner can effect so drastic a reversal in policy?

On December 19, 2007, Congress enacted the Virginia Graeme Baker Pool and Spa Safety Act (VGBA" or "the Act"). The purpose of the Act was to prevent child drowning and entrapment in swimming pools and spas. Among other things, the Act imposed requirements for secondary anti-entrapment devices on most public pools and spas. On April 2, 2010, I cast a vote interpreting the term "unblockable drain" as permitting public pools and spas with an "unblockable drain cover" to comply with the Act without the necessity of installing a secondary anti-entrapment device. After long and painful consideration – and after many meetings with numerous stakeholders, including trade associations, pool manufacturers, pool installers, drain cover manufacturers, and Safety Vacuum Release System (SVRS) manufacturers – I decided to join my colleagues in withdrawing the previous interpretation and establishing a new interpretation of the term "unblockable drain." Under this new interpretation, the Commission would not allow a removable unblockable drain cover to render a drain unblockable.

Under the VGBA, an "unblockable drain" is defined as a "drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard." However, in preparation for the vote on April 2, 2010, I could not find additional guidance in the VGBA or its legislative history indicating whether Congress intended that that drains with unblockable drain covers could be considered "unblockable drains." So, when I attempted to interpret the term, I found myself drawn to the definition that made the most sense to me at the time – a definition that allowed the use of an unblockable drain cover to render a drain unblockable.

After the April 2010 vote, however, I received over 140 letters from citizens and members of Congress, including those who were intimately involved in drafting the statute, who disagreed with my interpretation of the statute. The members of Congress insisted that they did not intend that drains with unblockable drain covers be considered unblockable drains. In addition, I met twice with Representative Debbie Wassermann Schultz, unquestionably one of the members of Congress most involved in writing VGBA, who reiterated this position.

I understand that consumers and industry alike need stability in the marketplace. They look to the decisions of regulators and rely on those decisions when purchasing, using, and manufacturing consumer products. Although I was hesitant at first to reexamine my previous vote, as a policy maker, I believe it is my duty to listen to all points of view, analyze all relevant data, and, if

appropriate, reconsider my vote. So I took it upon myself to reexamine both the safety considerations associated with unblockable drain covers and the legislative history of the VGBA.

I spent considerable amount of time comparing the safety of large unblockable drain covers to the safety of smaller, perhaps less sturdy, drain covers with a secondary anti-entrapment device. When I cast my vote in April 2010, I believed that large unblockable drain covers seemed to provide a greater measure of safety than smaller drain covers with secondary anti-entrapment systems. I reached that conclusion based on my understanding that a properly installed unblockable drain cover protects swimmers from a wide variety of entrapment hazards.

In addition, I believed, if required to install a secondary system, the vast majority of public pools would opt for an anti-entrapment device called a Safety Vacuum Release System, or SVRS, and a small drain cover. The reason was simple: an SVRS, at the time, seemed the cheapest secondary anti-entrapment system on the market. I had safety concerns regarding the use of an SVRS. Unfortunately, an SVRS will not engage if a swimmer's hair becomes entangled in a drain nor will it trigger quickly enough in some instances to prevent a swimmer having his or her organs eviscerated from sitting on a drain. In other words, the usefulness of an SVRS is essentially limited to those instances in which a swimmer's body fully blocks a drain. By contrast, an unblockable drain cover carefully and properly installed would prevent any form of entrapment that a drain might cause.

What made the policy call so difficult, however, was the fact that an unblockable drain cover can operate only if it is properly installed and stays on the drain. In other words, if a drain cover is removed and there is no secondary system like an SVRS then swimmers would be at risk of entrapment in the drain below. Unfortunately, we did not have any significant data regarding the likelihood of drain covers coming off or staying on. But, as critics of my previous vote stated, all drain covers come off from time to time for seasonal maintenance – a point I freely concede.

Based on the communications I received and the discussions I had with many stakeholders, I became persuaded that my interpretation was not what many Members intended when they wrote the law. Given the close call between the safety implications and/or benefits of the two interpretations and my belief that my previous interpretation was contrary to Congressional intent, I cast my vote to reinterpret the term "unblockable drain."

I am aware that some pool owners purchased and installed unblockable drain covers in reliance on the Commission's previous interpretation. It is my understanding, however, that the number who did so was quite limited because compliant unblockable drain covers turned out to be as expensive – or more expensive – as the SVRS systems. I should add, that in order to give these individuals sufficient time to come into compliance with our new interpretation, I

recommended, and the Commission agreed, to stay enforcement of our new interpretation until the start of the pool season the following year.

b. Are you concerned by the precedent you have set that allows for one commissioner moving from minority to majority to change the outcome of a statutory interpretation months or even years after the issue has been decided, and do it without public notice and comment?

Although interpretive rules, under the Administrative Procedure Act, do not require notice-and-comment procedures, I believe that my many open meetings over the course of months leading up to the vote provided most stakeholders with ample notice that I was re-considering my vote. The prospect of a Commissioner changing his or her mind during the course of service on the Commission is a real one. For example, at about the same time I changed my vote on unblockable drain covers, Chairman Tenenbaum changed her vote on whether vacation rental homes with pools could fall within VGBA's jurisdiction. Obviously, such changes should be approached with great care and thought. I regret any disruption my changed vote caused in the market and repeat my apology to anyone adversely affected.

5) Did you speak with one or more members of Congress on the issue of unblockable drains, as defined by the VGB Pool & Spa Safety Act, before you decided to reverse your decision? If so, please describe such conversations.

As stated in my answer above, I received many letters from members of Congress urging me to re-consider my vote on unblockable drain covers. In addition, as described above, I met twice with Congresswoman Debbie Wasserman Schultz, one of the primary authors of the Virginia Graeme Baker Pool and Spa Safety Act. Congresswoman Wasserman Schultz provided me with an extensive narrative about events leading up to passage of the VGBA. As one of the original co-sponsors of the law and a member from Florida with deep concerns about drownings in her district, she had a clear understanding about the legislative intent behind the law.

6) There is a perception by many that CPSC has become too political in its approach to product issues. How will you ensure that the CPSC appropriately considers science-based information in the Commission's decision-making process?

One of best features about the CPSC is its outstanding staff of technical experts, including engineers, epidemiologists, chemists, physicists, communications experts and attorneys. This enables the agency to maintain a scientific and data-based approach to addressing product safety issues. I do not believe product safety should ever be based on partisan politics. In fact, most of the decisions at the agency – roughly 85 percent – are unanimous votes in accordance with staff recommendations. Of course, reasonable minds can disagree regarding policy options for regulation. Different policy makers can look at the same injury and fatality data and reach opposite conclusions about whether

those data demonstrate that an unreasonable risk of injury exists. That is a normal aspect of how collegial bodies with Commissioners having different policy perspectives operate.

7) **Mr. Adler, as I noted at the hearing, we all want to ensure the safety of products in the marketplace. Still, the Consumer Product Safety Act is a carefully crafted statute that balances public safety and the rights of individuals engaged in lawful commerce. In the Buckyballs case, when the company did not agree to a voluntary recall, the agency sued to mandate a recall. Yet, rather than going to court to seek an injunction against the sale of the product during the litigation, as the law allows, the agency contacted retailers and asked them to remove the product from shelves, thereby nearly guaranteeing the bankruptcy of the company. If the CPSC was concerned about the dangers of the product during the litigation, why did the agency not follow the law and go to court to seek a court approved injunction?**

The law allows the Commission a variety of regulatory options that we weigh whenever we discover serious hazards in the marketplace. As alleged by CPSC staff, Buckyballs present an extremely serious hazard when someone, often a young child, ingests two or more magnets. The magnets attract each other through the walls of the intestines resulting in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation or fistula formation. Such conditions can lead to infection, sepsis, and death. At the time of filing an administrative complaint, CPSC staff had learned of more than two dozen high-power magnet ingestion incidents, with at least one dozen involving Buckyballs. Surgery was required in many of the incidents and ingestion of high-power magnets is alleged to have resulted in at least one death.

What made these incidents so compelling, aside from the destructiveness of the ingestions, is the fact that the magnets, by themselves, look benign and the harm from ingesting them does not occur immediately or obviously. In fact, as alleged in the Commission's complaint, doctors examining patients with ingested magnets could find it difficult to give an immediate or accurate diagnosis because the symptoms mimic other less serious digestive disorders, which could lead to the erroneous belief that no treatment was necessary or a delay in a surgical intervention that could exacerbate life-threatening internal injuries.

All of these high-risk elements led staff to consider a variety of options, including going to various retailers to ask them voluntarily to remove these dangerous products. Section 15 (c) and (d) of the Consumer Product Safety Act [15 USC § 2064(c) and (d)] authorize the Commission to seek remedial action not only from manufacturers, but also from distributors and retailers. Accordingly, in weighing options, CPSC Compliance staff concluded that one effective and expeditious step would be to work with the retailer community in addressing the hazard. I note that, in addition, to working with retailers, staff also took the rare step of filing an administrative complaint against the respondents, signaling their strong concerns about the hazard.

8) **In the Buckyballs case, CPSC then sought to extend the "responsible corporate officer" doctrine to establish personal liability for the costs of the recall on Craig Zucker, one of the priucipals of the bankrupt company that sold Buckyballs.**

   a. **Did the Commission vote to amend its complaint to seek personal liability in this case? If not, why not?**

      On July 25, 2012, as authorized by the Commission, CPSC staff filed an Administrative Complaint against Maxfield and Oberton seeking a recall of the magnet products sold by the company. Subsequently, staff filed an amended complaint seeking to add Craig Zucker, individually and as an officer of Maxfield and Oberton, after he dissolved Maxfield and Oberton Holdings as an additional respondent. The Administrative Law Judge preliminarily granted CPSC staff's request to add Mr. Zucker individually as a respondent. Because the Commission negotiated a Consent Agreement with Mr. Zucker that supersedes the judge's ruling, the Commission did not rule on this issue. My own view is that, in an appropriate case, the Commission has the authority to include individuals as respondents, but I have made no determination whether this was such a case.

   b. **With regard to the Buckyballs case, if the decision to name the former president of the company as an individual respondent in an administrative complaint was done without the approval of the commissioners, why did Commission staff claim in a pleading that the Commission approved the decision?**

      The staff decision to name Mr. Zucker as an individual respondent was done with the broad authority granted to staff to file an administrative case pursuant to section 15 of the Consumer Product Safety Act. Because the Administrative Procedure Act (APA) requires that members of the Commission hear appeals from decisions by administrative law judges once we have authorized the filing of a case, we take great precautions to avoid involvement in administrative trial strategy because of our need to avoid even the appearance of bias that might affect our ability to serve as an appellate body. I believe that staff's decision to name Mr. Zucker as an individual respondent was well within the authority granted them to pursue the case. Whether the Commission, as a matter of policy, should be involved in such a decision is something that I am currently contemplating.

   c. **Do you believe the CPSC's Rules of Practice for Adjudications require a vote of the Commission to amend a complaint previously authorized by the Commission to add a new party or to add a different legal theory of liability?**

      In this case, no. In other cases, depending on what the new legal theory of liability or who the new party is, my answer might differ. The Rules of Practice are designed to empower the Presiding Officer with broad discretion in hearing

cases. In this case, I note the Presiding Officer did issue a preliminary ruling permitting the addition of Mr. Zucker as a respondent.

d. Were you involved in the decision to amend CPSC's complaint against Maxfield and Oherton to name Craig Zucker in his individual capacity?

As I have noted, the decision to amend the complaint was made by CPSC staff pursuant to authority granted them by the Commission to file an administrative case in accordance with section 15 of the CPSA.

e. Should commission staff, withont the approval of the Commission, proceed with snch a significant move as naming an individnal as a respondent?

The decision to name Mr. Zucker was made by CPSC staff pursuant to the broad authority granted by the Commission to file the administrative case. I believe that staff's decision to name Mr. Zucker as an individual respondent was well within the authority granted them to pursue the case. Whether the Commission, as a matter of policy, should be involved in such decisions is something that I am currently contemplating.

9) Do you believe that companies, and individuals managing those companies, have a legal right to challenge a CPSC determination that a product recall is warranted based on legitimate, but different, interpretations of applicable statutes as applied to specific facts?

Yes.

10) There have been snggestions that the CPSC pursued Mr. Zucker personally in response to his aggressive response in fighting the CPSC. Did that happen?

No. As someone who has worked in two branches of government, I know we are constantly subject to criticism, sometimes in very harsh terms. I believe that one of the greatest freedoms that American citizens have is the right to criticize their government. As far as I can tell, CPSC staff also believes that and does not take such criticism personally.

11) **When, and under what circumstances do yon believe it is appropriate to pierce the corporate veil and hold a principal of a company personally liahle for a product recall? Wouldn't you agree that this step is ordinarily only used when there is criminal condnct alleged? Yet the commission took this extraordinary step in the Buckeyballs case by adding Mr. Zncker individually, why?**

This is not an area of law that I have researched thoroughly. According to various authorities, the law varies from state to state and from jurisdiction to jurisdiction. Because I continue to research the issue, I cannot provide a definitive answer regarding

when such an action is warranted. I note that adding an individual like Mr. Zucker in an administrative case is rare.

12) Section 6(b) of the Consumer Product Safety Act requires the CPSC to "take reasonable steps to assure" that any disclosure of information relating to a consumer product safety incident is accurate and fair. You have not been shy about expressing your opinion about section 6(b). Congress, however, has had several opportunities—including passage of the Consumer Product Safety Improvement Act—to amend the statute, but chose to preserve the regulatory authority and protections of section 6b.

Under your leadership, the Commissiou recently proposed au interpretative rule that would, among other things, significantly narrow the information subject to section 6(b) protections, exempt information that is "publicly available," permits commission staff to *not* notify firms when it releases information "substantially the same as" information previously disclosed and especially troubling, eliminates protections from disclosure of information subject to attorney-client privilege.

What is your definition of "publicly available" because, based on the proposed rule, information posted on a blog would be "publicly available?" How will the Commission substantiate its reliability and factual accuracy before inclusiou in communications or investigations of the CPSC? If information about an investigation, whether or not it is accurate, somehow is posted on the Internet, will that information then be exempt from section 6(b)?

As a starting point, I note that the proposed revisions to section 6(b) of the CPSA are still under review, so I am keeping an open mind regarding the comments filed in response to the Commission's Federal Register Notice of Proposed Rulemaking.

It is no secret that I have a general dislike for some of the provisions of 6(b), especially when they impose substantial costs in time and money on the Commission's Freedom of Information Act staff. I see no useful purpose in compelling the Commission to follow these cumbersome procedures – which apply only to CPSC and no other health and safety agency – when we are acting as a repository of information in similar fashion to a public library. Further, in some instances, safety information delayed is consumer safety denied. However, it is my duty to uphold all of CPSC's statutes as written and, if re-confirmed, I pledge to continue do so.

With respect to the language regarding "publicly available" information in the NPR, in my judgment, this is clarifying what has generally been the practice of the Commission over the years more than anything new. As noted in the Commission's Notice of Proposed Rulemaking, 79 Fed. Reg. 10712, 10714 (February 26, 2014), neither the statute nor the CPSA's legislative history suggest that information that is readily available to the public is, or should be, subject to section 6(b). I believe that the NPR gives a good description regarding what "publicly available" information is, namely, information that has been disseminated in a manner intended to reach the public in

general, such as news reports; articles in academic and scientific journals; press releases distributed through news of wire services; or information that is available on the Internet.

I cannot speak generally regarding information posted on the Internet about a company under investigation because the statute treats such information in different ways depending on its status. Information submitted to the Commission pursuant to section 15(b) reports that might trigger an investigation must be treated as confidential by the agency unless the Commission has reasonable cause to believe a product is in violation of a safety rule or other provision of the law, or the product is the subject of a legal proceeding or the manufacturer has consented to its release. Nothing in the proposed modification to the agency's 6(b) rule will change that.

13) What problem is the Commission looking to fix with the proposed rule on information disclosures under section 6(b)? What kind of data was used by the Commission in determining that a change was needed?

The proposed rule is intended to update the Commission's 6(b) rule, which has not been revised since its promulgation in 1983 – a time when the Internet did not exist. The proposed rule is intended to modernize and streamline the Commission's processing of information disclosure under section 6(b). Among the pieces of information that the Commission relied on in proposing the changes were its assessments of the ongoing 6(b) costs and time delays in processing FOIA requests, which total in the hundreds of thousands of dollars and in days, sometimes months, in releasing information to the public.

14) Congress recognizes the importance of ensuring the accuracy and fairness of information disclosed by the Commission. What responsibility does the Commission have to prevent release of unreasonable and unsubstantiated information that could cause harm to businesses or brands as well as ill-serve the public we seek to protect?

The Commission has the same responsibility that any federal health and safety agency has to ensure accuracy and fairness of information that it discloses. It is a critical responsibility that the CPSC takes very serious. Why the extra restrictions in 6(b) that extend to no other health and safety agency need to apply to a resource-limited agency like CPSC remains unclear to me. However, it is my duty to uphold all of CPSC's statutes as written and, if re-confirmed, I pledge to continue do so.

15) Mr. Adler, will you commit to me that, if reconfirmed, you will follow not only the letter of the law when it comes to disclosure laws applicable to the Commission, but also the spirit of these rules, which are designed to prevent inaccurate, misleading and incomplete information that could hurt both consumers and manufacturers?

Yes.

16) The CPSC has, in recent years, been increasingly looking to retailers and manufacturers to undertake voluntary product safety recalls and other corrective

actions, as well as holding them accountable for failure to report and other penalty investigations. However, there has been more than a 20 percent decline in voluntary recalls between 2010 and 2013, and it appears this decline will continue through the current year. What do you think of this recent trend, and do you think it is something that should be publicly explored by the Commission? If reconfirmed, will you in fact explore this issue?

I read no particular message in the decline in voluntary recalls because it could be the result of any number of factors, including safer products in the marketplace, more targeted CPSC actions against repeat offenders, CPSC's increased work with Customs and Border Protection at our nation's ports, or a more diffuse marketplace because of the Internet. If re-confirmed, I will look into the issue, and work on this issue with my fellow Commissioners, particularly the Chairman, who is the individual responsible for the administrative and management direction of the agency.

Senator Dean Heller
Questions for the Record
Nomination of Robert Adler to be
Commissioner, Consumer Product Safety Commission (Reappointment)
Senate Committee on Commerce, Science, and Transportation
Hearing on June 11, 2014

17) The CPSC's voluntary recall system—especially the agency's "fast-track " recall system—provides a quick and effective means of getting potentially dangerous products off the market and out of consumers' hands. However, the agency has come under growing criticism for a slowdown in the pace that recalls are being negotiated, as such delays could ultimately harm consumers. In the past four years, the agency has had three directors of compliance and I understand the position is now empty again. This raises concerns about the effect of such turnover on management of the agency. Please provide the Committee with information detailing how long it generally takes the Commission to negotiate fast track recalls, and whether that time has increased over the past several years?

I strongly support the agency's Fast Track Program and, as Acting Chairman, have taken steps to ensure that it continues to be effective. I have requested that CPSC staff undertake a review of the program that I have dubbed "Fast Track 2.0." Among other things, I have asked for a review of the types of hazards that should be included in the program and which should not. I have also asked for a review of the types of information that companies should provide when they seek Fast Track status and a review of how these recalls generally should proceed.

Under the guidelines for Fast Track, a product recall must begin within twenty days of a report to the Commission. In practice, according to staff, it currently takes roughly 60 days from the moment that a firm notifies the Commission of a problem until its Corrective Action Plan is agreed upon. The discrepancy in time frames, according to staff, is that firms often report a potential issue prior to presenting all of the required information to begin an official "fast track" recall. This first contact with the Commission is included in that 60-day figure. Further, according to staff, "fast track" recall negotiations do not begin in earnest until the firm presents the Commission with:

- a full report as defined by 16 C.F.R. § 1115.13(d) (which includes 15 detailed items of information, including when and where a product was manufactured, how many items need to be recalled, the nature of defect, and other important pieces of information),
- a fully developed action plan for recall, including types of media to be used, and
- a fully drafted press release explaining the nature and details of recall.

Over the past three fiscal years, the average time from the moment that a firm notifies the Commission of a potential problem until the completion of that firm's Corrective Action Plan has ranged between 55 and 60 days. Encouragingly, the time it takes for negotiating and issuing press releases (a significant portion of the time that it takes to conduct voluntary

recalls) has shown a steady decrease in Fiscal 2014, including an almost 10% decrease to just over 20 days.

All of this said, I continue to believe that Fast Track is a worthy program that needs to be improved.

18) Can you assure the Committee that you will work to make sure the fast track system continnes to be as effective as it has been in the past?

Yes.

19) Are you aware of the letter dated May 30, 2014, that former CPSC Chairman Ann Brown sent to Representatives Fred Upton and Henry Waxman expressing concerns with the proposed voluntary recall rule?

Yes.

Are you aware of the comments to the docket suhmitted by Senators Casey and Toomey and a separate letter by Senator King expressing similar concerns with the proposed rule?

Yes.

Do you agree with former Chairman Brown and the Senators that the proposed Voluntary Recall Rule could threaten the history of collaboration that the CPSC has with its stakeholders?

I have read former Chairman Brown's letter, and the Senators' letter. I have also reviewed many of the stakeholder comments we have received about our proposed rule. I continue to review those comments and to pay special attention to those that raise concerns about the impact of the proposed rule on the Fast Track program. Needless to say, I greatly respect and admire Ms. Brown, and I agree with her that Fast Track is an excellent program.

The CPSC has always and should always continue to work collaboratively with its stakeholders on behalf of the American public. I see nothing in the proposed rule that would threaten that relationship. That said, the Voluntary Recall Notice Rule is only a proposed rule, and, in light of its controversial nature, I am carefully reviewing the comments from all stakeholders. I retain an open mind as to what the final version of the rule might look like.

20) Regarding the CPSC's recently proposed rule that would expand staff's role on voluntary standards setting bodies, are you concerned that an individual at the CPSC—whether that person is a Commissioner or a staff member who is not the voting member—could influence the standards development process?

The rule to which you refer grew out of a report from May 2012 by the U.S. Government Accounting Office (GAO), "Consumer Product Safety Commission: A More Active Role in Voluntary Standards Development Should be Considered." (See http://www.gao.gov/assets/600/590990.pdf.)

The GAO Report recommended that the Commission review its policy for staff participation in voluntary standards development activities and determine the feasibility of the agency's staff assuming a more active role in developing voluntary standards. Specifically, the GAO Report recommended that CPSC staff be allowed – not required – in appropriate cases to vote on balloted provisions of voluntary standards. The Report also suggested that staff be allowed to hold leadership positions at various levels of standards development organizations, including task groups, subcommittees, or committees. GAO concluded that changing the CPSC's regulations to allow staff to participate more actively in voluntary standards activities could result in stronger voluntary standards without compromising the CPSC's or the voluntary standards groups' independence.

As a result of this GAO Report, Commission staff proposed conforming amendments to 16 CFR 1031, the Commission's regulation on participation in voluntary standards activities. These amendments followed GAO's recommendations to allow staff, on an optional basis, to vote on voluntary standards or take a leadership role on voluntary standards group committees.

The proposed rule noted that such activity might result in a more effective voluntary standards process and accelerate standards development and implementation. Further, such participation could gain CPSC staff greater access to and familiarity with the latest technologies, and would provide an opportunity for staff to help establish standards to advance CPSC's safety goals. In addition, "full" federal government participation in standards development increases the likelihood that the standards can meet both public and private sector needs. 141 Cong. Rec. H14334 (daily ed. December 12, 1995) (Statement of Rep. Morella). A single standard that satisfies both industry and the CPSC would benefit both by simplifying applicable requirements – only a single set of standards would apply.

Finally, optional staff participation in voluntary standards development groups by voting and taking leadership roles would be consistent with the guidance reflected in OMB Circular A-119 Revised, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (February 10, 1998). Among other things, OMB Circular A-119 encourages agency representatives serving as members of voluntary consensus standards bodies to "participate actively and on an equal basis with other members," and to "vote . . . at each stage of the standards development process unless prohibited from doing so by law of their agencies."

The role voluntary standards play in the safety of American consumers and the ability of the CPSC to do its job cannot be overemphasized. I have long believed that we must work in concert with voluntary standards organizations to help those organizations create

the best standards they can. This is why I am so delighted by the progress I have seen in the voluntary standards community over the past forty years. Groups such as ASTM, ANSI, and UL have dramatically improved their technical skills, their efficiency in drafting standards, their openness and transparency, and their outreach to all stakeholders – especially consumers – affected by their work. I am pleased to see CPSC work so closely with these groups, and I have little doubt that our partnership with them will only grow and deepen in the years to come in the interest of better standards for consumers and product manufacturers alike. That said, it is only a proposed rule and I am still reviewing all comments from all stakeholders and retain an open mind as to what the final version of the rule might look like.

21) **Given your nnderstanding of the voluntary standards process, how can staff's role help henefit or potentially hurt the process?**

Because of the disclaimers required of Commission staff in the proposed rule, I see no indication that the proposed rule's approach to staff involvement would suggest the Commission will play other than a constructive role. The law is fairly clear regarding CPSC's approach to voluntary standards. If the Commission, in the course developing a mandatory standard, determines that an existing voluntary standard adequately addresses a risk of injury and is substantially complied with, the Commission must stop its work and defer to the voluntary standard. Nothing in this proposed rule changes that.

I appreciate your concern and will be sure to pay particular attention to this issue when the final rule is presented to the Commission. I continue to review all the comments from all stakeholders of the proposed rule and retain an open mind as to what the final version of the rule might look like.

22) **Many are concerned that partisanship at the Commission has increased, as demonstrated hy the many party-line votes the Commission has taken since 2008, when the Consumer Product Safety Improvement Act was enacted. While the Commissioners have been able to find consensus on routine business items before the Commission, on more substantive matters such as rulemakings and establishing hudget and enforcement priorities, a partisan division is all too often evident. Why do you think the atmosphere at CPSC has become so partisan?**

I do not consider consumer product safety to be a partisan issue. I believe people serve as CPSC Commissioners with the same goal–to fulfill the mission of the CPSC and reduce the risk of injury or death to consumers from hazardous consumer products. Sometimes we may disagree on the path we should take to achieve this goal, but that does make the Commission a partisan body.

I have always worked to establish a good relationship – both personal and professional – with my fellow Commissioners, particularly with the current Commissioners. I greatly value these relationships. I believe we have worked tirelessly and respectfully to achieve common ground. If re-confirmed, I would continue these efforts.

23) Mr. Adler, if you're reconfirmed to the CPSC, you will become the most senior Commissioner, and will continue to occupy a role with significant influence on the culture of the Commission. Will you commit to work to bring about a culture change at the agency, for instance, by working with the minority Commissioners to achieve consensus – including working with Commissioner Buerkle and Mr. Mohorovic, should he be confirmed?

Yes. If re-confirmed, I assure you that I will continue to work with all of my fellow Commissioners to achieve consensus.

24) As you know, the position of General Counsel at the CPSC had been a non-political career position designed to ensure a mechanism of checks and balances. Though this has not always been the case, it seems to me that the General Counsel's office should provide independent and credible opinions to the Commissioners and be free from political influences. After all, each Commissioner is not short of staff to provide political counsel. Please explain whether or not yon believe that the General Counsel's office should provide independent and objective views of matters considered by the Commission?

I believe a General Counsel, regardless of his or her employment status, should provide independent, objective advice. Federal employees, career and non-career, are bound by a code of ethics, requiring them to be loyal to the law and ethical principles, and attorneys are further bound by their own code of ethics. Further, the position of General Counsel is one that is filled by a member of the Senior Executive Service. Based on my years of working at and monitoring the Commission, I have no reason to believe that a non-career General Counsel would act any differently than a career General Counsel in terms of the advice he or she gives to the Commission.

25) In 2008, by approving the Consumer Product Safety Improvement Act, Congress mandated under Section 108 that the CPSC establish a Chronic Hazard Advisory Panel (CHAP) to review specific phthalates used in children's toys and childcare articles. I am concerned that Section 108 of the CPSIA is not being carried ont in a transparent manner. During the CHAP's review process, the Commission decided to conduct a peer review of the CHAP's draft report on phthalates and phthalate alternatives completely behind closed doors. There have been no public meetings or conference calls over the past two years, which is rare for a process under the guidance of the CPSC. Because the report is over 24 months late and the process has not been transparent to the public – with no public meetings since February 2012 – 1 want to know what the Commission will do to ensure a full and transparent implementation of this Congressional mandate. Will you implement an open and transparent process that allows for public input on the Panel's report prior to the start of the CPSC's rulemaking process?

Not later than 180 days after the Commission's receipt of the final CHAP report, as mandated by the statute, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." This

rulemaking procedure, as contemplated by the Administrative Procedure Act (APA), includes an open and transparent process that allows for public input during the course of promulgating the mandated rule. The rulemaking process under section 553 of the APA will give stakeholders and the public generally the opportunity to submit information and comments, all of which will be publicly available.

In addition, as former Chairman Inez Tenenbaum previously announced, upon receipt of the final CHAP report, the Commission intends to publicly release the following additional documents:

- CHAP draft Final Report;
- Peer reviewers' Report which includes comments on the draft final report submitted to the CHAP, and charge questions submitted to the peer reviewers;
- Identities and affiliations of the peer reviewers;
- Any other data acquired by the CHAP that has not been previously cleared for public release by the CHAP.

Also, currently on the CPSC's CHAP web page is every meeting, phone call, piece of correspondence, and all data submitted by the public since the CHAP was convened, with certain exceptions. For copyrighted material, such as journal articles, CPSC staff generally post the transmittal letter and the journal citation only. If the article is open access, CPSC staff has included a link to the article. For government reports available online, the staff has posted the transmittal letter, citation, and Web link. All of this information is publicly available at: http://www.cpsc.gov/about/cpsia/chapmain.html.

26) With regard to the Chronic Hazard Advisory Panel, how should the CPSC ensure that all alternatives are subjected to the same level of scrutiny as the chemicals in question, in order to clearly justify which chemical is safer, before issuing a final decision?

It is difficult to answer this question without having received the CHAP report at this time. However, I am committed to following both the letter and the spirit of the direction given to the Commission in Section 108 of the CPSIA. I look forward to receiving the report and having the Commission commence the rulemaking contemplated in the law.

27) With regard to the Chronic Hazard Advisory Panel, how will you ensure that thoroughly tested chemicals in the market place today will not be penalized when compared against a less tested alternative?

It is difficult to answer this question without having received the CHAP report at this time. However, I am committed to following both the letter and the spirit of the direction given to the Commission in Section 108 of the CPSIA. I look forward to receiving the report and having the Commission commence the rulemaking contemplated in the law.

28) Please provide the Committee with the full list of scientific studies that were evaluated by the Chronic Hazard Advisory Panel and then made available to the

peer reviewers. Please also submit to the Committee a timeline for the release of the report and the issuance of a draft rule.

Because of the statutory mandate that the CHAP operate as an independent panel, and in the interest of scientific integrity, the submission to the Commission of the final CHAP report is not in the control of the Commission, nor does the Commission have knowledge of the scientific studies that the CHAP may have chosen to evaluate. All studies submitted by the public for consideration by the CHAP have been conveyed to the CHAP.

Not later than 180 days after the Commission's receipt of the final CHAP report, as mandated by the statute, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." This rulemaking procedure, as contemplated by the Administrative Procedure Act (APA), includes an open and transparent process that allows for public input during the course of promulgating the mandated rule. The rulemaking process under section 553 of the APA will give stakeholders and the public generally the opportunity to submit information and comments, all of which will be publicly available.

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29) **Given that the CHAP report meets a number of the requirements for a "highly influential" assessment, and that the Commission must comply with the standards established by the Office of Management and Budget's Final Information Quality Bulletin (OMB Bulletin) for Peer Review, can you assure the Committee that the CHAP report peer review will be completed in full conformauce with the Bulletin?**

It is my understanding that OMB was consulted with respect to its Peer Review Bulletin. Further, CPSC understands the scientific importance of the CHAP report and will comply

with the requirements regarding the report and the ensuing rulemaking set forth in section 108 of the CPSIA.

30) **With regard to the Chronic Hazards Advisory Panel, Chairman Tenenbaum assured Congress that the CPSC was fully committed to an open and transparent process. The OMB Guidelines, on page 40, outline public participation in line with a transparent process by stating: "the agency shall make the draft scientific assessment available to the public for comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public." When will the draft assessment be made available for public comment, and when will the public meeting take place to allow for oral presentations on scientific issues?**

Not later than 180 days after the Commission's receipt of the final CHAP report, as mandated by the statute, "the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule [related to the findings of the CHAP]." This rulemaking procedure, as contemplated by the Administrative Procedure Act (APA), includes an open and transparent process that allows for public input during the course of promulgating the mandated rule. The rulemaking process under section 553 of the APA will give stakeholders and the public generally the opportunity to submit information and comments, all of which will be publicly available.

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31) **The CPSC issued several proposed rules that could fundamentally change the process for how the Commission works with regulated entities. For the most controversial proposals, many comments have urged the CPSC to work with stakeholders to help the agency in meeting its policy objectives. The first of the most controversial proposals was a potential change to the 1110 Rule on certificates of**

compliance, and the CPSC wisely took a step back and announced its intent to hold a meeting with stakeholders to rethink the proposal. Did the CPSC learn that it is more effective to engage with the broad range of stakeholders before issuing a proposed rule, perhaps in the form of holding a public meeting with stakeholders, an Advance Notice of Proposed Rulemaking (ANPR) or both?

I believe that stakeholder input plays an integral role in the rulemaking process. With respect to the 1110 Rule on Certificates of Compliance, I carefully reviewed the issues raised by commenters during the comment period, as well as requests from stakeholders. Many commenters had very detailed, practical implementation concerns that deserved further exploration that I had not seen during the Commission's briefing and subsequent public meeting. This is why I voted to reopen the comment period and conduct a public workshop with stakeholders to gain a better understanding of how to more effectively enhance the 1110 Rule.

32) Do you believe that warnings are an effective tool in communicating hazards to the public?

I think the best way to answer this question would be to put it into the larger context of how CPSC staff works to address and mitigate hazards. CPSC staff follows the standard "safety hierarchy" method when trying to reduce the risk of injury: (1) eliminate the hazard, (2) guard against the hazard, and (3) warn of the hazard.

In certain situations, a warning can be an effective tool. We have seen this in the case of button cell batteries and strollers. But, warnings are sometimes less effective in reducing risk than either eliminating or guarding against the hazard. There are lots of details that can make a warning effective: large font, bright colors, simple language, multiple languages, prominent placement, or conspicuous graphics. But, warnings cannot be relied upon in all situations to reduce unreasonable risks of death and injuries. In some cases, a warning may not adequately express the severity of the risk of harm presented to the consumer. In other cases, a warning may not be effective because the product presents a poor medium for written information. For example, the product may be too small. Also, warnings are not very effective on products where the consumer at risk cannot understand the warning, for example with infants – which explains why Congress enacted the Poison Prevention Packaging Act authorizing the agency to issue rules that require child-resistant closures on dangerous household chemicals.

33) Do you believe there are certain hazards that cannot, under any circumstance, be warned or educated against?

Yes. Some hazards are so hidden or occur so unexpectedly that warnings cannot prevent serious injuries or fatalities.

34) Procedurally, how do you believe those hazards, which cannot be warned or educated against, should be determined by the agency?

As stated above, CPSC staff follows the standard "safety hierarchy" method when trying to reduce the risk of injury: (1) eliminate the hazard, (2) guard against the hazard, and (3) warn of the hazard.

In determining the effectiveness of product and/or public warnings, CPSC staff analyzes the use and utility of the product, the hazard, the pattern of injury, changes in reported injuries following design or labeling adjustments, and whether the risk is foreseeable.

35) **Section 104 of the Consumer Prodnct Safety Improvement Act mandated that the CPSC adopt two mandatory rules on durable infant goods rules every 6 mouths. Given tbe nature and diversity of durable infant products, do you feel as though this mandate by Congress is too mnch? If so, how do you propose working with staff to ensure that industry leaders have the resources and time necessary to thoroughly vet their concerns through the ASTM process?**

Section 104 of the CPSIA, is also known as the "Danny Keysar Child Product Safety Notification Act." The Act was named after Danny because he was entrapped and died in a twice-recalled portable crib. I have gotten to know Danny's parents, Linda Ginzel and Boaz Keysar, very well and their efforts to keep other infants from suffering the same tragedy that happened to Danny make them true American heroes in my book.

It is true that Section 104 mandates a significant amount of work to the Commission in the area of durable infant and toddler products. However, I helieve the work has allowed the Commission to promulgate some of the most stringent safety standards in the world for our most vulnerable and involuntary risk takers – small children. And while the statutorily mandated time frames are short, I believe that the Commission has successfully worked with ASTM and the durable infant products industry to make sure that all voices can be appropriately heard when promulgating these standards. Given the proper resources, I believe the "104 model" of rulemaking could serve as a template for all Commission rulemakings.

Senator Roy Blunt
Questions for the Record
Nomination of Robert Adler to be
Commissioner, Consumer Product Safety Commission (Reappointment)
Senate Committee on Commerce, Science, and Transportation
Hearing on June 11, 2014

Harmonization of Standards

The public identified the need to comply with different standards all addressing the same type of hazard as a problem and Congress asked the agency to address this as a potential burden reduction opportunity in PL 112-28. The agency has done little to investigate whether compliance with a standard in another jurisdiction would provide an equivalent level of safety or try to harmonize safety standards with those in other jurisdictions.

- **Does the agency need new authorities to accomplish this effort?**

- **If not, why has more not been done to address this problem?**

Although no other international standard is identical to a CPSC-administered children's product safety rule, there are many tests within certain other international standards that are the same, or more stringent than, their equivalent test within the CPSC-administered children's product safety rule. For example, the toy abuse tests in the European standard EN71, part 1,1 and the International Standard ISO 8124-12 are the same, or more stringent than, their corresponding tests in ASTM F963-11.3.

Although CPSC could explore harmonization more, this would not change the statutory requirement for third party testing of children's products. What we have been told by members of the regulated community is that they would prefer the agency focus its attention on ways to reduce burdens that would release them from testing entirely. As I stated before the Committee during my June 11 re-nomination hearing, Congress, in section 2(a)(3) of P.L. 112-28, did not simply direct CPSC to address third party testing burden reduction. Instead, the mandate in that law was, within a year, to seek public comment on opportunities "to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation." We have done that and have dedicated many staff months to assessing the various approaches suggested in the law and in the many comments we received in response to our Requests for Information (RFI) published in the Federal Register.

A solid consensus has emerged from the many commenters that have responded to our requests for information. Most see little burden reduction potential in Commission initiatives that retain third party testing costs. Instead, they seek to have the Commission expand on a list of determinations for lead first published in August 2009 in the Federal Register and currently found at 16 CFR § 1500.91. This list identifies those products or product components that will never contain violative amounts of lead. Once such a determination is made, such products or product components need not be subject to third party testing. Ideally, based on technical and

scientific data, we will be able to expand this list both to include more materials and to find materials that are used in the manufacture of children's products that will never contain violative amounts of phthalates or the eight heavy metals found in ASTM F-963. Once such a determination is made, such products or product components need not be subject to third party testing.

The Commission, on April 3, 2014, held an all-day forum on burden reduction and heard numerous thoughtful nominations from our stakeholders for product determinations. Unfortunately, because of the highly technical nature of many of these suggestions, CPSC scientific staff must carefully test the claims made by the participants. As I mentioned at my re-nomination hearing one of the most promising suggestions for exempting phthalate testing based on the hardness of plastics has been shown not to be accurate. Nevertheless, the Commission and its staff are proceeding with our work and we hope to provide testing relief as we confirm the scientific validity of the various suggestions.

In addition, last month, I introduced an amendment to the Commission's 2014 Mid-Year Review and Proposed Operating Plan Adjustments to examine potential ways to reduce third party testing costs through determinations consistent with assuring compliance with underlying requirements. The amendment was adopted. It provides funds for a study to assist the Commission in determining whether untreated wood or other natural materials are materials that do not, and will not, contain any of the eight specific heavy metals in levels that exceed allowable limits listed in the Toy Standard, ASTM F-963. Because wood was on the list of determinations for lead first published in August 2009 in the Federal Register, and currently found at 16 CFR § 1500.91, that identify those products or product components that will never contain violative amounts of lead, I am hopeful that this study will find similar results where the eight heavy metals listed in ASTM F-963 are concerned.

Partisanship at CPSC

I hope you will agree that the Commission should hold its safety mission above partisan politics. Many are concerned that partisanship at the Commission has increased, as demonstrated by the many party-line votes the Commission has taken since 2008, when the Consumer Product Safety Improvement Act was passed. While the Commissioners have been able to find consensus on routine business items before the Commission, on more substantive matters such as rulemakings and establishing budget and enforcement priorities, a partisan division is all too often evident.

- **Why do you think the atmosphere at CPSC has become so partisan?**

  I do not consider consumer product safety to be a partisan issue. I believe people serve as CPSC Commissioners with the same goal–to fulfill the mission of the CPSC and reduce the risk of injury or death to consumers from hazardous consumer products. Sometimes we may disagree on the path we should take to achieve this goal, but that does make the Commission a partisan body.

I have always worked to establish a good relationship – both personal and professional – with my fellow Commissioners, particularly with the current Commissioners. I greatly value these relationships. I believe we have worked tirelessly and respectfully to achieve common ground. If re-confirmed, I would continue these efforts.

- **Mr. Adler, if you're reconfirmed to the CPSC, you will become the most senior Commissioner, and will continue to occupy a role with significant influence on the culture of the Commission. Will you commit to me today to work to bring about a culture change at the agency, for instance, by working with the minority Commissioners to achieve consensus – including working with Commissioner Buerkle and Mr. Mohorovic, if he is also confirmed?**

  Yes. If re-confirmed, I assure you that I will continue to work with all of my fellow Commissioners to achieve consensus.

Independence of CPSC General Counsel

As you know, the position of General Counsel at the CPSC had been a non-political career position designed to ensure a mechanism of checks and balances. Though this has not always been the case, it seems to me that the General Counsel's office should provide independent and credible opinions to the Commissioners and be free from political influences. After all, each Commissioner is not short of staff to provide political counsel.

- **What is your opinion? Do you think that the General Counsel's office should provide independent and objective views of matters considered by the Commission?**

  I believe a General Counsel, regardless of his or her employment status, should provide independent, objective advice. Federal employees, career and non-career, are bound by a code of ethics, requiring them to be loyal to the law and ethical principles, and attorneys are further bound by their own code of ethics. Further, the position of General Counsel is one that is filled by a member of the Senior Executive Service. Based on my years of working at and monitoring the Commission, I have no reason to believe that a non-career General Counsel would act any differently than a career General Counsel in terms of the advice he or she gives to the Commission.

Working with stakeholders

The Commission issued several proposed rules that could fundamentally change the process for how the Commission works with regulated entities. For the most controversial proposals, many comments have urged the CPSC to work with stakeholders to help the agency in meeting its policy objectives. The first of the most controversial proposals was a potential change to the 1110 Rule on certificates of compliance, and the CPSC wisely took a step back and announced its intent to hold a meeting with stakeholders to rethink the proposal.

- **Did the CPSC learn that it is more effective to engage with the broad range of stakeholders before issuing a proposed rule, perhaps in the form of holding a public meeting with stakeholders, an Advance Notice of Proposed Rulemaking (ANPR) or both?**

  I believe that stakeholder input plays an integral role in the rulemaking process. With respect to the 1110 Rule on Certificates of Compliance, I carefully reviewed the issues raised by commenters during the comment period, as well as requests from stakeholders. Many commenters had very detailed, practical implementation concerns that deserved further exploration that I had not seen during the Commission's briefing and subsequent public meeting. This is why I voted to reopen the comment period and conduct a public workshop with stakeholders to gain a better understanding of how to more effectively enhance the 1110 Rule.

- **Would you support greater use of stakeholder working groups and requests for information as the CPSC examines ways to improve the effectiveness of its programs?**

  Yes. I always welcome the input of stakeholders. If re-confirmed, I promise to carefully consider the views of all interested parties.

Public Outreach

The digital age provides new opportunities for more direct contact to consumers for distributing important information and education.

- **How important are public/private partnerships in the strategies for outreach to consumers and please explain how the agency can engage and utilize the private sector in furthering its mission, one that is shared by manufacturers.**

  Very important. The CPSC is a small agency with a very large safety mandate. In order to inform and educate the public, the CPSC often relies on our non-governmental partners in the private sector and the not-for-profit sector to help us amplify our outreach. Whether through the use of social media, media interviews, or in-store messaging, CPSC has a rich history of collaborating with associations and companies on campaigns such as safe sleep for babies, drowning prevention, poison prevention, and window blind safety, to name only a few. A number of companies and organizations have effectively used social media platforms to inform their customers and constituents of product hazards. Because of the significant positive results for consumers that often come from these relationships, it is my hope that CPSC will continue to explore opportunities to work with industry and other groups on information and education campaigns.

- **How would you handle situations when consumers are being injured by using products incorrectly or contrary to label instructions?**

At the outset, let me say that every accident involves three factors: the product, the consumer, and the surrounding environment. Depending on the circumstances, it is often hard to pin down precisely what role each factor plays in an accident. That is why the Commission employs an extensive epidemiological and human factors staff to assist us in our approach to protecting consumers. I find it hard to generalize about the cause of some injuries by pointing to consumers' ignoring label instructions if the labels warn of hazards that consumers should not expect to exist. For example, the Commission entered into a civil penalty agreement with a manufacturer of infant flotation seats that failed without warning, plunging young children into water over their heads. The manufacturer had a warning label that parents should not leave children unattended in pools with the flotation device. That, however, did not address the fact that the seats were defective and failed without warning, placing infants in life-threatening situations.

That said, the Commission has a group of talented technical experts who often provide advice and guidance to outside groups regarding the efficacy of their warning labels. I believe that the market is a better informed, safer arena because of CPSC staff's technical input, and, if re-confirmed, I will continue to support their efforts.

- **What role would the CPSC play in such situations?**

CPSC's response would be dependent upon the product, the hazard, the pattern of injury, and whether the risk is foreseeable.

- **Do you believe that warnings are an effective tool in communicating hazards to the public?**

I think the best way to answer this question would be to put it into the larger context of how CPSC staff works to address and mitigate hazards. CPSC staff follows the standard "safety hierarchy" method when trying to reduce the risk of injury: (1) eliminate the hazard, (2) guard against the hazard, and (3) warn of the hazard.

In certain situations, a warning can be an effective tool. We have seen this in the case of button cell batteries and strollers. But, warnings are sometimes less effective in reducing risk than either eliminating or guarding against the hazard. There are lots of details that can make a warning effective: large font, bright colors, simple language, multiple languages, prominent placement, or conspicuous graphics. But, warnings cannot be relied upon in all situations to reduce unreasonable risks of death and injuries. In some cases, a warning may not adequately express the severity of the risk of harm presented to the consumer. In other cases, a warning may not be effective because the product presents a poor medium for written information. For example, the product may be too small. Also, warnings are not very effective on products where the consumer at risk cannot understand the warning, for example, with infants – which explains why Congress enacted the Poison Prevention Packaging Act authorizing the agency to issue rules that require child-resistant closures on dangerous household chemicals.

- **Do you believe there are certain hazards that cannot, under any circumstance, be warned or educated against?**

  Yes. Some hazards are so hidden or occur so unexpectedly that warnings could not avoid serious injuries or fatalities.

- **Procedurally, how do you believe those hazards, which cannot be warned or educated against, should be determined by the agency?**

  As stated above, CPSC staff follows the standard "safety hierarchy" method when trying to reduce the risk of injury: (1) eliminate the hazard, (2) guard against the hazard, and (3) warn of the hazard.

  In determining the effectiveness of product and/or public warnings, CPSC staff analyzes the use and utility of the product, the hazard, the pattern of injury, changes in reported injuries following design or labeling adjustments, and whether the risk is foreseeable.

Senator Ron Johnson
Questions for the Record
Nomination of Robert Adler to be
Commissioner, Consumer Product Safety Commission (Reappointment)
Senate Committee on Commerce, Science, and Transportation
Hearing on June 11, 2014

1) **Mr. Adler, if you are re-nominated, when you are considering a mandatory standard, are you willing to take into account not only consumer safety but also:**
   a. **A consumer's right to afford products, access products, and assume a reasonable amount of risk?**

      Yes. Our statutes and regulations require that the Commission focus its efforts on unreasonable risks of serious injuries or death associated with consumer products when undertaking mandatory rulemaking, not all risks. We are required by our statutes and regulations to factor the effect on a product's cost, availability and utility that would result from a mandatory rulemaking.

   b. **A company's ability to survive and the number of jobs that will be lost if your standard is put in place?**

      Yes.

2) **A number of questions have been raised about the CPSC's proposed rulemaking to revise the voluntary recall rule. There is concern that the revised rule, if finalized, may actually delay recalls and make the process more adversarial and legalistic. Such a result would be unfortunate and not in consumers' best interests, and so I wanted to make you aware of my concerns about what has been proposed. Recalls are most effectively and efficiently done when they are voluntary. Do you agree that changing the rules in a way that is likely to make negotiations more adversarial and legalistic could result in significant delays, which are ultimately not in the best interest of consumers?**

I am in full agreement that effective recalls are in the best interest of consumers. It is for this reason that I voted to publish a Notice of Proposed Rulemaking for a proposed Voluntary Recall Notice Rule last year. The intent of the proposed rule, as I read it, is to improve the quality of recalls to protect consumers.

While I recognize that some have suggested that the changes proposed in the rule may, in some instances, slow the process of voluntary recall negotiations, I do not at this point have any evidence to that effect. Nothing proposed in our rule will require firms to take any actions beyond those they currently do. They will still have to provide the same information, propose the same recall plans and the same methods of publicizing them – and no more. For example, the current Voluntary Recall rule requires that recalling firms sign their Corrective Action Plans. See 115.20(a)(1)(ix). The proposed rule contemplates only that recalling firms actually uphold the agreement they have voluntarily entered into. That said, it is only a

proposed rule and I am still reviewing all comments from all stakeholders and retain an open mind as to what the final version of the rule might look like.

3) **The Commission's proposed rulemaking has been justified by advocates on grounds that legally binding corrective action plans (CAPs) will ensure parties adhere to the terms of the plan. Others have described this proposal as "a rule in search of a problem," arguing that parties usually adhere to the terms of their agreements. Please provide a detailed accounting of instances where parties have violated the agreed-npon terms of a CAP.**

Although it is true that the overwhelming majority of firms that conduct voluntary recalls in cooperation with the CPSC do so in good faith and live up to the terms of their Corrective Action Plans, from time to time some firms fail to do so. In that respect, one may liken it to firms insisting on entering into binding contracts even with companies they trust and have done business with for years. Notwithstanding the small number of non-cooperators, prudence still dictates that one take protective measures – especially where the lives and limbs of American consumers are involved. In the product safety context, even a small number of non-cooperators may still leave consumers exposed to millions of individual hazardous product units.

The changes in the proposed rule are designed to help address the small number of recalcitrant firms that "slow walk" their agreed upon activities, whether they he with respect to setting up a consumer recall hotline, undertaking education efforts, or fulfilling a repair remedy. Unfortunately, the Commission staff does not maintain a database of "slow walkers." Moreover, due to the restrictions of confidentiality associated with enforcement activities as well as the information disclosure restrictions of 15 USC §2055(b), I would be unable to name these firms even if CPSC staff maintained such a list.

I believe that the proposed rule will change very little, if anything, for the vast majority of firms that engage in voluntary recalls with the Commission. Most firms take their responsibilities very seriously and should generally be unaffected by the rule change.

Finally, it is important to note that this is a proposed rule. In view of the controversial nature of the proposal, I am carefully reviewing all comments from our stakeholders with particular care, and I retain an open mind as to what the final version of the rule might look like.

4) **If a party were to violate the terms of a corrective action plan, what recourses are currently available to the Commission to affect a recall?**

Under existing CPSC rules, voluntary recall plans cannot be legally binding. See 16 CFR § 1115.20(a) ("A corrective action plan is a document signed by a subject firm...which has no legally binding effect.") Accordingly, the options available to the Commission where a firm fails to live up the terms of a Corrective Action Plan are somewhat limited. Aside from criticism and cajolery, the primary legal alternative for the CPSC would be to file a lawsuit, either in federal district court for injunctive relief or with an administrative law judge seeking

to have a product declared a substantial product hazard. These are resource-intensive, time-consuming actions that do not speed safety for consumers.

Perhaps the most significant remedy available to the Commission would arise if the non-cooperating firm were to engage in the sale, resale, or attempted sale of a product subject to a voluntary recall. In such a case, section 19 of the CPSA, 15 USC § 2068(a)(2)(B), would permit the agency to seek civil penalties for these acts. However, any other violative activity by a firm, including its failing to repair a product for consumers or fulfilling its commitment to remove a product from the stream of commerce is not a term of an agreement that the Commission can currently enforce as part of a voluntary recall action plan.

5) **Serious concerns have been raised about the legal basis for the Voluntary Recall Rule, with two important substantive changes being a requirement that voluntary recalls be made legally binding and empowering staff to require compliance program elements within a corrective action plan. What legal authority has Congress given the CPSC to make voluntary recalls legally binding? I am not aware of any.**

If a firm chooses to enter into a binding Corrective Action Plan with the Commission, the decision to do so is a voluntary act. This is no different from any other contract that millions of parties voluntarily enter into. Section 27(g) of the CPSA, 15 USC § 2076(g), specifically authorizes the Commission "to enter into contracts with governmental entities, private organizations, or individuals for the conduct of activities authorized by this Act."

That said, I again note that this is a proposed rule. I am carefully reviewing all comments from all stakeholders and retain an open mind as to what the final version of the rule might look like.

6) **What legal authority has Congress given the CPSC to impose and regulate internal compliance programs in voluntary recall agreements?**

If a firm chooses to enter into a binding agreement with the Commission, the decision to do so is a voluntary act.

7) **I understand that a recent revision to the monthly report that companies undertaking volnntary recalls file with the CPSC added without notice or explanation a new reqnirement for snch companies to monitor resale or anction sites. As Acting Chairman, were you aware of the new reqnirements as they were being developed?**

Since becoming Acting Chairman on December 1, 2013, I have received regular briefings from our Compliance staff. Shortly before a public announcement regarding the new form, I learned of the desire by CPSC staff to update our online "CPSC Monthly Progress Report for Recalls" to include the existence of, and importance of, electronic media and retailers.

8) **What authority does the commission have to reqnire companies to monitor sites where products they no longer own or control are being resold?**

As I understand it, when a firm enters into a voluntary agreement to conduct a recall in cooperation with the CPSC, the agency has always requested that firms work with the third-party sellers of their product to ensure that the recall is effective. This could include both "brick and mortar" retailers as well as online sellers of products. Regardless of whether an individual Corrective Action Plan includes an agreement for a recalling firm to monitor sites where their product is sold, the CPSC has always encouraged recalling firms to do so. The updated "CPSC Monthly Progress Report for Recalls" simply provides an easier way for firms to document what they have found, if they have found anything.

9) **Will companies be required to monitor third-party websites where products they no longer own or control are being resold even if such activity is not included in a corrective action plan?**

As I understand it, the Commission has always encouraged firms to monitor the sales of their products wherever they are sold.

10) **Isn't the commission responsible for ensuring that resale and auctions sites are not selling the affected product?**

Once a voluntary recall has been conducted with a firm, CPSC staff will monitor the marketplace for the sale, or resale, of any recalled product – acts that constitute a violation of the Consumer Product Safety Act. When we find such sales, or resales, we work to address the issue. Currently CPSC is monitoring more than 400 previous recalls. With jurisdiction over as many as 15,000 different product categories, in the interest of consumer safety, the Commission has also looked to its partners in the consumer product community, particularly industry, to assist in monitoring the sale, or resale, of products they have voluntarily recalled.

11) **How practically are thousands of companies, particularly smaller businesses, to undertake monitoring of third-party website where products such companies no longer own or control are being resold and what are such companies supposed to do if they find a product that has been recalled is being resold?**

Given the Commission's extremely limited resources, we certainly understand the challenges facing small businesses in monitoring the marketplace. Businesses often do so for reasons of competitiveness, patent protection, and brand loyalty. I hope that a company discovering the sale of its recalled products would notify both those engaged in such illegal and dangerous behavior and the staff of the Consumer Product Safety Commission.

12) **Will companies engaged in voluntary recall be liable for the actions of third-party websites?**

It is difficult to answer categorically questions that may be very fact specific and involve issues of contract agreements, legal interpretation, and enforcement discretion, but, generally speaking, recalling firms are not likely to be held liable for the actions of third-party websites over whom they have no legal or other relationship. That said, in the interest of consumer

safety, the Commission has always looked to its partners in the consumer product community to assist in monitoring the sale, or resale, of products they have voluntarily recalled.

13) Is it your view that a recalling company is legally responsible for the actions of third parties?

It is difficult to answer categorically questions that may be very fact specific and involve issues of contract agreements, legal interpretation, and enforcement discretion, but, generally speaking, recalling firms are not likely to be held legally responsible for the actions of third parties over whom they have no legal or other relationship. That said, in the interest of consumer safety, the Commission has always looked to its partners in the consumer product community to assist in monitoring the sale, or resale, of products they have voluntarily recalled.

14) Is it the intent of the CPSC to require companies engaged in a voluntary recall to monitor third-party websites?

It is my understanding that the CPSC, in the interest of consumer safety, has always encouraged recalling firms to monitor the potential sales, or resale, of products they have voluntarily recalled, regardless of where the sale, or resale, may occur. In 2014, a large percentage of consumer sales of all products, including many non-consumer products, take place online. The Commission has always looked to its partners in the consumer product community to assist in monitoring the sale, or resale, of products they have voluntarily recalled, and is likely to continue to do so.

15) Why was this new requirement for companies undertaking voluntary recalls to mouitor resale or auction sites not part of your proposed voluntary corrective action rule?

The Commission's request, in the interest of consumer safety, for recalling firms to monitor the sale, or resale, of its products wherever that sale, or resale, may take place is not new and is not a requirement for all firms. When a firm enters into a voluntary agreement to conduct a recall in cooperation with the CPSC, the agency has always requested that firms work with all third-party sellers of their product to ensure that the recall is effective. This could include both "brick and mortar" retailers as well as online sellers of produets. Regardless of whether an individual Corrective Action Plan includes an agreement for a recalling firm to monitor sites where their product is sold, the CPSC has always encouraged recalling firms to do so. The updated "CPSC Monthly Progress Report for Recalls" simply provides an easier way for firms to document what they have found, if they have found anything.

That said, I again note that this is a proposed rule. I am carefully reviewing all comments from all stakeholders and retain an open mind as to what the final version of the rule might look like.

16) The CPSC recently proposed a rule that would expand staff's role on voluntary standards setting bodies. Among the proposed changes, CPSC staff could participate as voting members of a voluntary standard developmeut group. As a commissioner, how do you view the agency's role in the voluntary standards setting process?

The rule to which you refer grew out of a report from May 2012 by the U.S. Government Accounting Office (GAO), "Consumer Product Safety Commission: A More Active Role in Voluntary Standards Development Should be Considered." (See http://www.gao.gov/assets/600/590990.pdf.)

The GAO Report recommended that the Commission review its policy for staff participation in voluntary standards development activities and determine the feasibility of the agency's staff assuming a more active role in developing voluntary standards. Specifically, the GAO Report recommended that CPSC staff be allowed – not required – in appropriate cases to vote on balloted provisions of voluntary standards. The Report also suggested that staff be allowed to hold leadership positions at various levels of standards development organizations, including task groups, subcommittees, or committees. GAO concluded that changing the CPSC's regulations to allow staff to participate more actively in voluntary standards activities could result in stronger voluntary standards without compromising the CPSC's or the voluntary standards groups' independence.

As a result of this GAO Report, Commission staff proposed conforming amendments to 16 CFR 1031, the Commission's regulation on participation in voluntary standards activities. These amendments followed GAO's recommendations to allow staff, on an optional basis, to vote on voluntary standard's or take a leadership role on voluntary standards group committees.

The proposed rule noted that such activity might result in a more effective voluntary standards process and accelerate standards development and implementation. Further, such participation could gain CPSC staff greater access to and familiarity with the latest technologies, and would provide an opportunity for staff to help establish standards to advance CPSC's safety goals. In addition, "full" federal government participation in standards development increases the likelihood that the standards can meet both public and private sector needs. 141 Cong. Rec. H14334 (daily ed. Decemher 12, 1995) (Statement of Rep. Morella). A single standard that satisfies both industry and the CPSC would benefit both by simplifying applicable requirements – only a single set of standards would apply.

Finally, optional staff participation in voluntary standards development groups by voting and taking leadership roles would be consistent with the guidance reflected in OMB Circular A-119 Revised, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (February 10, 1998). Among other things, OMB Circular A-119 encourages agency representatives serving as members of voluntary consensus standards bodies to "participate actively and on an equal basis with other members," and to "vote . . . at each stage of the standards development process unless prohibited from doing so by law of their agencies."

The role voluntary standards play in the safety of American consumers, and the ability of the CPSC to do its job cannot be overemphasized. I have long believed that we must work in concert with the voluntary standards organizations to help those organizations create the best standards they can. This is why I am so delighted by the progress I have seen in the

voluntary standards community over the past forty years. Groups such as ASTM, ANSI, and UL have dramatically improved their technical skills, their efficiency in drafting standards, their openness and transparency, and their outreach to all stakeholders. I'm pleased to see CPSC work so closely with these groups, and I have little doubt that our partnership with them will only grow and deepen in the years to come in the interest of better standards for consumers and product manufacturers alike. That said, it is only a proposed rule and I am still reviewing all comments from all stakeholders and retain an open mind as to what the final version of the rule might look like.

17) The statute is very clear in stressing the importance of relying on industry-developed volnntary standards. How do we ensnre that the Commission wonld not tnrn the standards development process into a de facto mandatory rulemaking by demanding standards tbat might not he fully supported by the industry?

I see no indication that the proposed rule would turn the voluntary standards development process into de facto mandatory rulemaking. I believe that CPSC involvement, especially by highly skilled and knowledgeable technical staff, often helps improve the quality of voluntary standards. Additionally, CPSC staff participation in the standards process does not automatically mean that the standards body will adopt CPSC staff's view or that the Commission will adopt the resulting voluntary standard. I appreciate your concern and will be sure to pay particular attention to this issue when the final rule is presented to the Commission. I continue to review all the comments from all stakeholders of the proposed rule and retain an open mind as to what the final version of the rule might look like.

18) If CPSC staff takes a leadership role, or even simply votes in support of a voluntary standards, isn't that an endorsement standard?

Because of the disclaimers required of Commission staff in the proposed rule, including that CPSC staff participation in the standards process does not automatically mean that the Commission will adopt the resulting voluntary standard, I see no indication that the proposed rule's approach to staff involvement would suggest the Commission has officially endorsed a particular standard. The law is fairly clear regarding CPSC's approach to voluntary standards. If the Commission, in the course developing a mandatory standard determines that an existing voluntary standard adequately addresses a risk of injury and is substantially complied with, the Commission must stop its work and defer to the voluntary standard. Nothing in this proposed rule changes that.

I appreciate your concern and will be sure to pay particular attention to this issue when the final rule is presented to the Commission. I continue to review all the comments from all stakeholders of the proposed rule and retain an open mind as to what the final version of the rule might look like

19) The Consumer Product Safety Commission sits at the intersection of science and consumer protection. It has come to the Committee's attention that there is an important distinction between scientific reviews conducted in other countries, such as the E.U., versus the scientific standards that we apply in the United States. As you

know, U.S. agencies apply the "reasonable risk" assessment that the CPSC must apply based on the legal standards, criteria and guidelines under the Federal Hazardous Advisory Act (FHSA) for conducting risk assessments and determining what factors to consider in those evaluations.

Specifically, the FHSA identifies safety factors, and mandates their application, in order to meet the 'banned hazardous substance' criteria. This is done by calculating the "acceptable daily intake" from the No Observed Adverse Effect Level (NOAEL) and the Low Observed Adverse Effect Level (LOAEL) to determine acceptable risk for developmental/reproductive toxicants. The U.S. standard provides a higher degree of safety than the current European regulatory system, which is skewed to implement a precautionary approach towards regulation that focuses primarily on a potential hazard and does not apply the same degree of risk assessment criteria in considering the actual use of the chemical.

How will you ensure that the CPSC strictly follows U.S. safety standards as defined by the FHSA and is not influenced by standards, such as the precautionary approach, outside the jurisdiction of the CPSC and the U.S. regulatory system?

My duty is to uphold and enforce the laws and regulations that apply to the CPSC, and if re-confirmed, I look forward to doing so.

20) Would you support greater use of stakeholder working groups and requests for information as the CPSC examines ways to improve the effectiveness of its programs?

Yes, with a caveat. One must keep in mind that stakeholder groups can easily fall within the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, §§ 1-16, which brings an array of procedural requirements and high costs for agencies. Many years ago, Congress abolished the three advisory committees administered by the CPSC because of the enormous costs they imposed on our resource-strapped agency.

That said, I have always been a strong advocate for the involvement of all CPSC stakeholders from large manufacturers and retailers to small businesses and inventors, to consumer advocates and individual members of the public. Since becoming a Commissioner, I have had an open door policy to all stakeholders and have sought to honor every request to meet with me. Further, I have always believed in reading every comment that is submitted to the agency on an issue that will come before me as a Commissioner. If re-confirmed, I look forward to finding more ways to improve the effectiveness of our feedback mechanisms with all of our stakeholder groups.

21) The digital age provides new opportunities for more direct contact to consumers for distributing important information and education. How important are public/private partnerships in the strategies for outreach to consumers?

Very important. The CPSC is a small agency with a very large safety mandate. In order to inform and educate the public, the CPSC often relies on our non-governmental partners in the

private sector and the not-for-profit sector to help us amplify our outreach. Whether through the use of social media, media interviews, or in-store messaging, CPSC has a rich history of collaborating with associations and companies on campaigns such as safe sleep for babies, drowning prevention, poison prevention, and window blind safety, to name only a few. A number of companies and organizations have effectively used social media platforms to inform their customers and constituents of product hazards. Because of the significant positive results for consumers that often come from these relationships, it is my hope that CPSC will continue to explore opportunities to work with industry and other groups on information and education campaigns.

22) How can the CPSC engage and ntilize the private sector in fnrthering its mission?

It is my hope that CPSC can continue to explore opportunities to conduct social media dialogues such as Twitter chats, participate in webinars, speak and exhibit at industry conferences, produce videos, and use the Neighborhood Safety Network to build on our progress in collaborating with the private sector to save lives, prevent injuries, and advance the cause of product safety.

In addition, almost every voluntary standards committee in which the Commission participates is made up, in part, of members from the private sector. The role voluntary standards play in the safety of American consumers, and the ability of the CPSC to do its job cannot he emphasized enough. I have long believed that we must work in concert with the voluntary standards organizations to help those organizations create the best standards they can. This is why I am so delighted by the tremendous progress I have seen in the voluntary standards community over the past forty years. Groups such as ASTM, ANSI, and UL have dramatically improved their technical skills, their efficiency in drafting standards, their openness and transparency, and their outreach to all stakeholders – especially consumers – affected by their work. I'm pleased to see CPSC work so closely with these groups, and I have little doubt that our partnership with them will only grow and deepen in the years to come in the interest of hetter standards for consumers and product manufacturers alike.

23) How would you handle situations when consumers are heing injured by using prodncts incorrectly or contrary to lahel instructions, and what role would the CPSC play in such situations?

At the outset, let me say that every accident involves three factors: the product, the consumer, and the surrounding environment. Depending on the circumstances, it is often hard to pin down precisely what role each factor plays in an accident. That is why the Commission employs an extensive epidemiological and human factors staff to assist us in our approach to protecting consumers. I find it hard to generalize about the cause of some injuries by pointing to consumers' ignoring label instructions if the labels warn of hazards that consumers should not expect to exist. For example, the Commission entered into a civil penalty agreement with a manufacturer of infant flotation seats that failed without warning, plunging young children into water over their heads. The manufacturer had a warning label that parents should not leave children unattended in pools with the flotation device. That,

however, did not address the fact that the seats were defective and failed without warning, placing infants in life-threatening situations.

That said, the Commission has a group of talented technical experts who often provide advice and guidance to outside groups regarding the efficacy of their warning labels. I believe that the market is a better informed, safer arena because of CPSC staff's technical input, and, if reconfirmed, I will continue to support their efforts.